THE PROCEDURAL JUSTICE OF PERSONAL JURISDICTION

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From the rigid territoriality of Pennoyer *to the amorphous fairness test of* International Shoe *to the relation-based holding of* Ford*, the Supreme Court has evaluated personal jurisdiction as a Fourteenth Amendment due process concern and a state sovereignty issue, creating a host of sometimes contradictory rules and tests which often confuse both commentators and lower courts. In the meantime, a robust literature in psychology has drawn together tremendous evidence in support of the conclusion that individuals' perceptions of procedural justice—whether they are afforded fair process—shape their satisfaction and compliance with decision-making systems, and most importantly, their belief in those systems' legitimacy. Four key factors contribute to individuals' assessments of procedural justice: how much voice participants have in the process, whether they are treated with dignity and respect, whether the decision-maker is bias-free, and whether the decision-maker is trustworthy. Considering personal jurisdiction through the lens of procedural justice, I argue that one way to make sense of the tangled personal jurisdiction doctrine is by examining how courts have implicitly reflected psychological procedural justice factors, both from the perspective of litigants and from the perspective of state courts themselves. The procedural justice framework not only illuminates individual decisions but also helps to unify competing strands of sovereignty and individual liberty by revealing their shared common ground. I conclude that courts and litigants would benefit from making explicit the implicit dimensions of procedural justice inherent in personal jurisdiction disputes, thereby surfacing the role of human psychology in perceptions of fairness.*

TABLE OF CONTENTS

INTRODUCTION 644

I. THE PSYCHOLOGY OF PROCEDURAL JUSTICE 646
A. Procedural Justice Research 646
B. Procedural Justice Factors Applied to Personal Jurisdiction 650

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II. PROCEDURAL JUSTICE FACTORS IN PERSONAL JURISDICTION DOCTRINE.....653
A. Historical Personal Jurisdiction Doctrine.....655
B. Specific Jurisdiction's Development: "*International Shoe* and Its Progeny" 657
C. Revisiting (Some of) *Pennoyer*'s Traditional Rules 668
D. The (Largely) Moribund Path of General Jurisdiction.....671
E. The Past Decade of Personal Jurisdiction Doctrine.....672

III. THE *FORD* CASE AND WHAT COMES NEXT.....677
A. *Ford*'s Recalibration 677
B. The Ghost of Consent Returns: *Mallory v. Norfolk Southern*.....681
1. The Role of Fairness in Consent-Based Jurisdiction.....682
2. Broader Fairness Concerns.....688

IV. TOWARDS A PROCEDURALLY JUST PERSONAL JURISDICTION JURISPRUDENCE 690

CONCLUSION 693

INTRODUCTION

Personal jurisdiction doctrine offers one of the most salient and vivid instantiations of due process in the American legal system.[1] Applying equally to federal and state fora,[2] the question of the court's power over specific defendants is central to the shape and scope of how plaintiffs can seek redress through the courts. For 150 years, courts have considered personal jurisdiction as a concern with constitutional dimension, grappling with new technologies and new modes of interaction and trying to incorporate them into a fundamental analysis of what is fair to litigating parties and respectful to state sovereignty. But a general notion of fairness has always been amorphous, hard to understand, and subject to fierce dispute: courts have wrestled with how to operationalize a standard of fairness or "fair play and substantial justice"[3] in a way that makes sense across cases and contexts.

In this Article, I offer a different perspective on how to interpret the development of personal jurisdiction doctrine over time by considering the doctrine

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1. Both courts and commentators have agreed that due process forms a key piece of personal jurisdiction jurisprudence, although the exact contours of the due process in question are debatable. *See, e.g.*, Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 680–82 (2019) ("Academics who have considered the constitutional source of the contacts requirement have come to differing conclusions, with the majority favoring substantive due process, a few others favoring procedural due process, while other scholars throw up their hands and call it 'jurisdictional due process' or something beyond either procedural or substantive due process. Not surprisingly, given the silence of the Supreme Court on the issue of substantive versus procedural due process . . . many academics fail to discuss this issue at all.") (footnotes omitted).

2. FED. R. CIV. P. 4(k)(1)(A).

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

through the lens of the psychology of procedural justice. A large and multi-faceted body of psychological research over the past fifty years has illuminated that, irrespective of outcome, individuals strongly value the opportunity to engage in a fair process for decision-making.[4] The impact of fair processes on people's assessments of outcomes and satisfaction going forward is meaningful separate and apart from the influence of a fair outcome (also called distributive justice) or a favorable outcome.[5] And even more importantly, assessments about fair process in turn play a critical role in how people adjudge the legitimacy of the system responsible for the decision-making process.[6]

Research in psychology has demonstrated that individuals have a reliable way of assessing fair process that provides a more concrete focus than a mere generalized and amorphous notion of fairness. Individuals consistently use four factors to make judgments about whether a process was fair or unfair: whether they had a voice and opportunity to be heard; whether they trusted the motives of the decision-maker; whether the process was neutral and unbiased; and whether they were treated with courtesy, respect, and dignity during the process.[7]

While almost no courts have self-consciously referred to the psychology of procedural justice to assess whether a process is fair,[8] I argue in this Article that courts have often implicitly relied on the core elements that form the basis of individuals' judgments about fair process according to psychology research. A close reading of the core doctrinal cases from a procedural justice perspective will reveal that many decisions appear to reflect an implicit understanding of the subjective way that individuals decide whether a process is fair. Yet in trying to respond to procedural justice concerns in specific cases, I argue here that the Supreme Court's jurisprudence ironically built an analytical framework that ultimately strayed too far from the underlying procedural justice elements. As the Court navigated new landscapes of human interaction, doctrine that appeared initially to respond to procedural justice concerns went too far in its scope. Personal jurisdiction doctrine became more defendant-friendly, less protective of plaintiff's rights, less respectful of state sovereignty, and ultimately logically incoherent. This logical incoherence led to potentially grave concerns about procedural *in*justice, as manifested in the Court's recent 2021 case *Ford Motor Co. v. Montana Eighth Judicial District Court*.[9] The Court's unanimous decision in *Ford* can be seen as an effort to reclaim the procedural justice of personal jurisdiction doctrine.

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4. *See, e.g.*, Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 118–20 (2000) [hereinafter Tyler, *Social Justice*]; Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005) [hereinafter MacCoun, *Procedural Fairness*].

5. Tyler, *Social Justice*, *supra* note 4, at 118–19.

6. *Id.* at 120.

7. *Id.* at 121.

8. *But see* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1910 (2018) (citing Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132–34 (2011) [hereinafter Hollander-Blumoff, *Procedural Justice in Federal Courts*]). For more discussion of this case, see *infra* text accompanying notes 264–67.

9. 141 S. Ct. 1017 (2021).

This Article moors the Court's personal jurisdiction doctrine in the psychology of procedural justice. Part I provides an overview of procedural justice and its antecedent factors. Part II then explores how the elements of procedural justice have animated the Court's historical personal jurisdiction doctrine and the more recent cases of the last decade. Part III examines *Ford* and its potential progeny, including the recently decided case of *Mallory v. Norfolk Southern Railway Co.*,[10] through the perspective of reclaiming procedural justice in personal jurisdiction. Finally, Part IV provides a path forward, suggesting that courts could and should do more to incorporate the psychology of procedural justice concretely and explicitly in the personal jurisdiction arena.

I. THE PSYCHOLOGY OF PROCEDURAL JUSTICE

A. Procedural Justice Research

While legitimacy and fairness have been contemplated by jurists and philosophers for thousands of years,[11] social psychologists began making significant inroads into the study of how individuals understand and think about fairness roughly a half-century ago.[12] Using empirical methods, and motivated in part by a desire to increase compliance with judicial decisions, researchers studied what types of dispute resolution processes were most likely to seem fair to parties and lead to long-term compliance and adherence with legal decisions.[13] Over time, this research developed into a robust body of evidence supporting the conclusion that people care quite strongly about whether the processes by which decisions are reached are fair.[14] It is important to note at the outset that this research does not suggest that outcomes do not matter; rather, the research suggests that outcomes do matter, but that fair process *also* matters, separately and independently from assessments of how fair or how favorable an outcome is.[15]

In contrast to discussions of procedural fairness in the philosophical vein,[16] psychologists have not tried to isolate idealized or normative principles of fairness. Instead, psychology focuses on the features of *perceived* fairness of processes by

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

11. There are too many scholars who have engaged in this enterprise since ancient times to even begin to offer a comprehensive account, but to name a few of the most prominent: PLATO, THE REPUBLIC (Benjamin Jowett trans., E. India Publ'g Co. 2022) (c. 375 B.C.E.); ARISTOTLE, NICOMACHEAN ETHICS (Joe Sachs trans., Hackett Publ'g Co. 2002) (n.d.); CONFUCIUS, THE ANALECTS (Raymond Dawson ed. & trans., Oxford Univ. Press reissued 2008) (n.d.); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (Robert Horwitz et al. eds. & trans., Cornell Univ. Press 1990) (1664); JOHN STUART MILL, UTILITARIANISM (John Gray ed., 1991) (1863); JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 2020).

12. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

13. *See* MacCoun, *Procedural Fairness*, *supra* note 4.

14. *Id.*

15. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 71 (Joseph Sanders & V. Lee Hamilton eds., 2001).

16. *See, e.g.*, Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1016 (2010); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004); David Resnick, *Due Process and Procedural Justice*, *in* DUE PROCESS: NOMOS XVIII 206 (J. Ronald Pennock & John W. Chapman eds., 1977).

individuals. This perception is necessarily subjective, but this is a feature, not a bug.[17] Social psychologists are focused on the interaction between human behavior and social systems, and thus the subjective perception of procedural justice is deeply important because individuals' felt experiences of fairness or unfairness of the legal system directly influence their overall perception of societal legitimacy. In contrast to more abstract examinations of the fairness and legitimacy of the legal system, psychologists bring an understanding that human behavior and human perception are central to the small-scale success (in terms of securing adherence and compliance) and large-scale success (in terms of bolstering system legitimacy) of any set of legal rules.

Over time, evidence has emerged that four key factors reliably shape individuals' determinations about the procedural fairness of any particular process.[18] These factors are: first, the parties' experience of having a voice and an opportunity to be heard; second, the neutrality (lack of bias) of the forum; third, the decision-maker's trustworthiness; and fourth, the dignity and respect provided to parties.[19] Again, parties to a particular process may also care very much about other factors, such as how fair the outcome is (distributive justice) or how favorable an outcome is. But reliably, the outcome-centered factors do not play a significant role in shaping assessments of process fairness, and assessments of process fairness play a separate and independent role from outcomes in shaping reactions to decision-making systems.

While the first studies involving the psychology of procedural justice took place in controlled laboratory settings,[20] the vast array of subsequent studies provided additional support for the importance of perceptions of procedural justice

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17. As Tyler has noted:

> The especially striking thing about social justice is that it is a social concept that exists only in the minds of the members of an ongoing interaction, a group, an organization, or a society. Hence justice is a socially created concept that . . . has no physical reality. It exists and is useful to the degree that it is shared among a group of people.

Tyler, *Social Justice*, *supra* note 4, at 117–18.

18. *Id.* at 121.

19. While dignity, courtesy, and respect were originally conceptualized as the interpersonal or social component of procedural justice, some psychologists have suggested that dignity and respect are more properly considered in the context of "interactional justice," conceptually distinct from "procedural justice." *See, e.g.*, Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 85, 92–94 (Jerald Greenberg & Jason A. Colquitt eds., 2005); Robert J. Bies, *Interactional (In)justice: The Sacred and the Profane*, *in* ADVANCES IN ORGANIZATIONAL JUSTICE 89, 97, 99 (Jerald Greenberg & Russell Cropanzano eds., 2001). In my analysis, I keep dignity, courtesy, and respect as a component of procedural justice analysis, consistent with the work of Tyler and others. In choosing between dignity and courtesy as a word choice, I most often use dignity to capture this dimension, although courtesy is also used in the literature. Either one is meant to capture a dignitary concern with being treated with respect; the use of the word courtesy does not mean to suggest mere politeness in form.

20. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 41–46 (1988).

in broadly distinct contexts.[21] For individuals resolving legal disputes, procedural justice matters, whether considering litigants in civil court disputes,[22] criminal defendants,[23] or parties engaged in arbitration,[24] mediation,[25] and negotiation.[26] And outside the legal dispute resolution context, procedural justice matters for people as they assess their treatment by police officers,[27] work supervisors,[28] health care administrators,[29] family members,[30] and even in markets.[31] The research is also robust across methodologies: procedural justice effects are pronounced in field

21. MacCoun, *Procedural Fairness*, *supra* note 4, at 173 (noting that "[f]ew if any socio-legal topics . . . have received as much attention using as many different research methods").

22. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104–06 (2006 ed. 1990).

23. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 483 (1988); Robert MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 333 (1988). For a more theoretical examination of how procedural justice may play a role in plea bargaining, see Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008).

24. *See* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235–36 (1993).

25. *See* Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993); Jennie J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139, 142 (2003).

26. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478–79 (2008).

27. Tom R. Tyler & Cheryl J. Wakslak, *Profiling Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 253 (2004); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 513 (2003); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCH. 281, 281 (1980).

28. Robert Folger, *Distributive and Procedural Justice in the Workplace*, 1 SOC. JUST. RSCH. 143, 143 (1987); Robert Folger & Mary A. Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 115 (1989); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1288 (2005).

29. Virginia Murphy-Berman et al., *Fairness and Health Care Decision Making: Testing the Group Value Model of Procedural Justice*, 12 SOC. JUST. RSCH. 117, 117 (1999).

30. Mark R. Fondacaro et al., *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 114–15 (1998); Shelly Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 LAW & POL'Y 101, 118–19 (1999).

31. Harris Sondak & Tom R. Tyler, *How Does Procedural Justice Shape the Desirability of Markets?*, 28 J. ECON. PSYCH. 79 (2007).

studies[32] and simulations/experimental settings,[33] and regardless of whether stakes are high[34] or low.[35]

Procedural justice plays an important role in shaping individuals' judgments about whether to comply with the law and legal rules and decisions, but it also goes further in shaping individuals' determinations about system legitimacy. That is, individuals who believe that outcomes are produced via a procedurally just process are not only more likely to adhere to, accept, and feel satisfied by a legal decision, they are also more likely to believe that the entire system is legitimate.[36] Three distinct theories have emerged to explain the importance of procedural justice. First, the instrumental theory posits that good procedure leads to good outcomes, and thus procedural justice is ultimately valued for its bottom-line effect on decision quality.[37] Second, the group value model suggests that procedural justice is an assessment of relational treatment by authority figures that sends important signals to individuals about their status and role in society, which directly affects their sense of group belonging.[38] Third, fairness heuristic theory explains procedural justice as a proxy for outcome assessment: because parties may have difficulty assessing how fair or favorable their outcomes are, they fall back on the degree to which they felt

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32. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 192 (1997) (showing procedural justice effects in a study in which the data was collected based on actual offenders' experiences).

33. *See, e.g.*, THIBAUT & WALKER, *supra* note 12, at 30 (showing procedural justice effects in a study in which first year law students participated in a simulation in which they acted as attorneys).

34. *See, e.g.*, Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 63–68 (1984) (finding that defendants sentenced to steep prison terms are more satisfied and more positive in their views of decision-making authorities when the defendants perceive the authorities as being honest and unbiased, and when the legal process itself seems fair); Paternoster et al., *supra* note 32 (finding that procedural justice effects can help deter spousal assault recidivism); E. ALLAN LIND, ARBITRATING HIGH STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT (1990) (finding that litigants in high-stakes arbitration cases evaluate procedural fairness similarly to litigants in low-stakes ADR studies).

35. *See, e.g.*, Hollander-Blumoff & Tyler, *supra* note 26, at 479–81 (study involving student performance on in-class negotiation exercise); TYLER, *supra* note 22, at 19 ("This book examines the general level of noncompliance with everyday laws regulating behavior. Its concern is with the degree to which people generally follow the law in their daily lives.").

36. *See* TYLER, *supra* note 22, at 162.

37. *See* MacCoun, *Procedural Fairness*, *supra* note 4, at 182.

38. Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCH. 115, 139–41 (1992); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model*, 57 J. PERSONALITY & SOC. PSYCH. 830, 830–32 (1989).

fairly treated in the decision-making process to form judgments about the entire experience.[39]

In the context of personal jurisdiction, all three of these theories may help fuel the importance of procedural justice. But especially in light of the role that being a resident or citizen of a forum state can play in shaping reactions to the fairness of a personal jurisdiction decision, the relational element of the group value model may be particularly critical. The state's decision about whether to allow a case to proceed or not within a particular community may send strong messages to litigants about their value, status, and affiliation with the state forum.[40] In addition, depending on the nature of the litigation, such group-level effects may even be felt by other community members who are not litigants but feel some connection to the parties or the subject matter.

B. Procedural Justice Factors Applied to Personal Jurisdiction

Each of the procedural justice factors has both explicit and implicit connections to personal jurisdiction. Understanding personal jurisdiction doctrine not solely as about the power of a court over a defendant but also as an ultimate decision about choice of forum helps illuminate these connections. First, in considering the role played by voice, it is helpful to understand that the focus in procedural justice on voice and opportunity to be heard grows out of research that focused on when individuals were most likely to believe that they had a degree of control over the dispute resolution process. That is, process control was first identified as a key component of procedural justice judgments,[41] and further studies determined that participation—voice and opportunity to be heard—was a critical element of process control.[42] But those studies typically held constant (or did not even identify) the specific geographical location of the dispute resolution forum, focusing instead on assessing participants' responses to different types of processes. At a higher level of abstraction, by understanding that voice and opportunity to be heard are meant to capture some degree of autonomy, participation, and self-determination in a dispute resolution process, one can then easily widen the lens of process control to embrace choice of forum as a dimension related to voice and opportunity to be heard. Allowing a party to choose the forum where their action will be heard, then, may serve as a powerful indicator of process control.[43] On the

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39. Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCH. 1034, 1035–36 (1997). For the purpose of this Article, I need not argue for the primacy of one of these theories over another.

40. More focus on the role of litigation in a particular community from a fairness perspective has been given to criminal matters. *See, e.g.*, Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1418 (2017) ("American normative theories of democracy and democratic deliberation have always included the participation of the community as part of our system of criminal justice.").

41. *See* THIBAUT & WALKER, *supra* note 12, at 119–20.

42. *See* Tyler & Lind, *supra* note 38, at 147.

43. Participation is one of the most studied elements of procedural justice. *See, e.g.*, JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION:

flip side, allowing defendants a veto may also increase the degree of voice that they feel.

That said, the simple choice of forum is not the only dimension through which one might evaluate degree of voice or opportunity to be heard. For parties who must struggle to bring suit in a distant forum, whether because of travel costs, additional time, unfamiliarity,[44] or other reasons, the diminished access to justice

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AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM (1988); Casper, Tyler & Fisher, *supra* note 23; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1978–1979); Pauline Houlden, *Impact of Procedural Modifications on Evaluations of Plea Bargaining*, 15 LAW & SOC'Y REV. 267 (1980–1981); Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolutions*, 17 LAW & HUM. BEHAV. 553 (1993). Interestingly, participation and voice matter to parties when they have an effect on the decision, *see, e.g.*, Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCH. 1167 (1993), and when they do not. *See, e.g.*, E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952 (1990); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCH. 333 (1987).

44. Choice of law issues may also present another challenge. While a full meditation on the procedural justice aspects of choice of law (which are many) is outside the scope of this Article, it is worth noting that the doctrines of personal jurisdiction and choice of law are often intertwined. For example, in *Burger King Corp. v. Rudzewicz*, the Supreme Court noted that choice of law and personal jurisdiction were separate inquiries, saying that "choice-of-law analysis—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum." 471 U.S. 462, 481–82 (1985). But the Court went on to explain, "Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes," thus highlighting that key aspects of each inquiry might affect the other. *Id.* at 482. Numerous commentators have also considered the relationship between the doctrines. Notably, Linda Silberman remarked on the oddity of having a potentially higher constitutional standard for personal jurisdiction than for choice of law:

> Yet if the comparative importance of the two issues were truly evaluated, one might be inclined to reshape the rules of adjudicatory jurisdiction to require the defendant to litigate in the plaintiff's home forum, while resolutely resisting a plaintiff-oriented choice of law analysis. The former, after all, concerns matters of convenience-of where the defendant must appear; the latter crucially and dispositively affects the rights and liabilities of the parties before the court. To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.

Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 87–88 (1978).

may significantly lessen the perceived voice and opportunity to be heard.[45] Although a focus only on choice of forum may suggest a "zero-sum" procedural justice game—whoever's choice of forum is honored has it and whoever's choice of forum is denied doesn't[46]—voice and opportunity to be heard may also include the degree of ease of pursuing a case in a particular forum, which suggests that fora may exist where both parties' procedural justice voice needs can be mutually satisfied.

With regard to dignity and respect in personal jurisdiction determinations, it is relatively obvious that leaving undisturbed the plaintiff's choice of forum may be most likely to engender feelings of respect and courteous treatment from the plaintiff's side. Similarly, permitting defendants' objections to the forum to carry the day might seem most courteous and respectful to the defendant. But this is a simplistic viewpoint that merely collapses agreement with parties' desires into dignity and respect. A more nuanced perspective might suggest instead that the totality of the circumstances of the case must be considered before deciding whether permitting a case to go forward in a particular jurisdiction manifests respect and courtesy, or conversely disrespect and discourtesy, towards any one litigant. For example, forcing an in-state citizen acting in-state and harmed in-state to proceed for recovery in an out-of-state forum may appear disrespectful to that party; similarly, forcing an out-of-state citizen to answer in-state for actions that occurred out of state may also appear discourteous and disrespectful to that party's dignity. Although cost alone has not been found to be a significant determinant of procedural justice,[47] forcing a party to disproportionately bear the burden of litigating in a more distant forum with which they have not taken any steps to volitionally associate may be seen as a dignitary harm.

The neutrality and trustworthiness factors are interrelated but distinct. Neutrality of decision-makers signifies that they are impartial and objective and that they do not allow bias to influence their decision-making process but instead rely on rules and facts.[48] The element of trust relates to perceptions of the decision-maker's motive as someone who "is benevolent and caring, is concerned about [the parties'] situation and their concerns and needs, considers their arguments, tries to do what is right for them, and tries to be fair."[49] These factors may impact each other: a biased decision-maker will not engender trust; a decision-maker motivated by fairness concerns will be more likely to rely on rules and facts than on bias. Nonetheless,

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45. For a deeper discussion of personal jurisdiction as an access to justice issue, see Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1434 (2018) (identifying three scenarios where a lack of personal jurisdiction can undermine access to justice).

46. *See* Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 331 (2016) ("In some respects, then, procedural justice can lead to a zero-sum analysis: increasing control and participation for plaintiffs by allowing them to remain in their chosen fora might decrease defendants' justice perceptions. Yet, this need not always be the case . . . . Likewise, providing plaintiffs with increased participation rights need not detract from defendants' voice opportunities.").

47. *See id.* at 351. For further discussion of respect and procedural justice, see Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1302–03 (2021).

48. Tyler, *Social Justice*, *supra* note 4, at 122.

49. *Id.*

neutrality focuses more on the rules a decision-maker uses and trust focuses more on motives.

With respect to personal jurisdiction, cases of interest typically do not involve two citizens of the same state—because those are easy cases that never get to court. Instead, most litigated personal jurisdiction cases involve at least one party who is technically an out-of-state citizen. In such cases, concerns about neutrality and trust may be heightened. Indeed, concerns about state courts' neutrality and trustworthiness motivated the constitutional endowment for diversity jurisdiction. Worries that one court might favor its own citizens over out-of-state citizens prompted the founders to grant federal courts the power to hear cases between citizens of different states in the Constitution[50] in order to provide a more neutral forum because federal judges were thought to be more motivated to provide a fair decision unrelated to state affiliation or identity.[51]

II. PROCEDURAL JUSTICE FACTORS IN PERSONAL JURISDICTION DOCTRINE

In this Part, I examine historical and contemporary personal jurisdiction doctrine through the lens of the four factors discussed above—voice, neutrality, trust, and dignity/respect. In doing so, I show that thinking about the courts' decisions along a procedural justice perspective helps more clearly illuminate concerns about due process and sovereignty, explains some of the shifts in the courts' doctrine, and ultimately provides a useful dimension through which to evaluate the effectiveness of particular personal jurisdiction rules. I am not suggesting that the courts have consciously engaged in an analysis that relied on procedural justice understandings, especially in light of the fact that procedural

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50. U.S. CONST. art. III, § 2. In addition, diversity jurisdiction was granted to the newly created lower federal courts by the first Judiciary Act, 1 Stat. 73 (1789), further demonstrating how important the early Americans believed such jurisdiction to be to ensure a fair federalist system.

51. Both courts and commentators have noted this motivation. For courts, *see, e.g.*, Martin v. Hunter's Lessee, 14 U.S. 304, 347 (1816) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."). For scholars, *see, e.g.*, Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 268–69 (2019) ("Most jurists accept that the primary and traditional justification for diversity jurisdiction is to provide a neutral federal forum in cases presenting a risk that the state forum would be biased—or be perceived to be biased—against an out-of-state litigant."); Tammy A. Sarver, *Resolution of Bias: Tort Diversity Cases in the United States Courts of Appeals*, 28 JUST. SYS. J. 183, 183 (2007) (explaining diversity jurisdiction in federal court as stemming from "the belief . . . that the parochial biases of state courts could, in effect, be sidestepped, while at the same time principles of federalism remained safeguarded through proper application of the relevant state law"); Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 123–24 (2003) ("Two major theories occupy the consensus positions as to the historical purpose of diversity jurisdiction, both originating with the same general concept-that of local bias or prejudice. The theory most often articulated is that the intent of diversity jurisdiction was to protect out-of-state litigants from bias by state courts. The second theory, merely a variant on the first, is that state legislatures, rather than state courts, were biased against commercial interests.").

justice research in psychology emerged long after many of these decisions—although the "folk" or "lay perspective" of human behavior may have been an animating feature. Nonetheless, the insights from more recent psychology research can help make sense of some of the courts' choices and also highlight some of the weaknesses in the development of the doctrine.

My analysis examines the procedural justice perspective of plaintiffs, defendants, and perhaps most uniquely, state fora themselves. Although state courts are not individuals with individual psychology, states also do not exist except through their employees, agents, and actors, and thus a consideration of the psychology of "the state" is not wholly unreasonable to contemplate. In addition, state sovereigns are also agents for the interests of their own citizens. Given the focus in the doctrine on the role of the state qua state as a sovereign entity, some slight anthropomorphism is worthwhile in this setting.[52] Indeed, in the context of sovereign immunity, some significant attention has been given to the notion of a sovereign's dignity, which of course forms one prong of the procedural justice antecedents discussed above.[53] Judith Resnik and Julie Suk have posited that "as a legal matter, dignity ought not to be reserved exclusively to individuals," but that "legal recognition of institutional role dignity ought to have a narrower ambit than legal recognition of individual dignity."[54] The consideration of the sovereign as an anthropomorphic entity for whom dignity matters, then, has significant scholarly precedent. But only rarely has that dignity been considered, as this Article does below, as one piece of the sovereign's ultimate assessment of procedural justice.[55]

In addition, with respect to concerns for the procedural justice of the state qua state, procedural justice perceptions of ordinary citizens may be shaped by their observations of how cases are handled, even when they are not parties to any particular litigation. While jurors and other participants in the legal system may experience heightened effects,[56] even regular inhabitants of a state may feel the effects of procedural justice when some cases are, or are not, heard within their state.[57]

A consideration of the procedural justice felt not just by litigants but by states themselves offers a unique angle on a widely discussed issue in personal jurisdiction scholarship: whether the doctrine is grounded in fairness or in

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52. For further discussion of the idea of applying procedural justice principles to entities, not just individuals, see Hollander-Blumoff, *Procedural Justice in Federal Courts*, *supra* note 8, at 147–49.

53. *See, e.g.*, Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 782 (2003); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000).

54. Resnik & Suk, *supra* note 53, at 1927.

55. *See, e.g.*, Hollander-Blumoff, *Procedural Justice in Federal Courts*, *supra* note 8, at 147–49.

56. *See, e.g.*, Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damages Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361 (2005) (arguing that jury members, as citizens, may experience procedural justice effects).

57. *See, e.g.*, Appleman, *supra* note 40.

sovereignty.[58] By exploring the procedural justice of the sovereigns themselves, a unifying feature emerges across both dimensions. Rather than trying to neatly fit courts' analyses into a box of either sovereign power or litigant liberty, conceptualizing the question as one of procedural justice offers a big-tent paradigm that can encompass both of these concerns. Indeed, understanding procedural justice as an animating feature of the doctrine helps explain why so many factors that courts examine through the liberty lens duplicate factors that they examine under the sovereignty prong. Uncovering this collective motivation helps to surface the fact that courts are variably choosing *whose* procedural justice to focus on in their holdings, rather than truly choosing vastly different frameworks.

A. Historical Personal Jurisdiction Doctrine

Pennoyer v. Neff[59] is a paradigmatic "old-school" case in almost every law school curriculum. In the horse-and-buggy world of *Pennoyer*, unpaid legal fees formed the center of a sprawling dispute that unfolded over more than a decade. When Marcus Neff hired J.H. Mitchell to perform legal work and then allegedly left the state before paying, Mitchell was left empty-handed and (as befits a smart lawyer) sought redress in the courts.[60] After the court issued a default judgment in 1866 against Neff, the sheriff seized land owned by Neff and used the land to satisfy the judgment.[61] Years later, Neff sued Pennoyer, the new owner of the land, claiming that Pennoyer lacked title to the land because the default judgment had been issued by a court without jurisdiction over Neff, rendering the land sale void.[62]

The case is classically understood as one about state sovereignty.[63] Using the relatively newly ratified Fourteenth Amendment, the Supreme Court held in 1877 that Oregon had reached out beyond its borders in a constitutionally impermissible fashion by exerting jurisdiction over Neff when he was neither physically present in the state nor the owner of property within the state at the time of the original assertion of Oregon's jurisdiction.[64] While scholars have disagreed about *Pennoyer*'s soundness over time,[65] most agree that the case centers on the scope of the power of a particular state to assert authority over certain persons and property. As one of the central passages of the case announces, "every State possesses exclusive jurisdiction and sovereignty over persons and property within

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58. *See infra* note 89.

59. 95 U.S. 714 (1877).

60. For an illuminating discussion of the facts of *Pennoyer*, see Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987).

61. *Pennoyer*, 95 U.S. at 716.

62. *Id.* at 715–16.

63. Perdue, *supra* note 60, at 504 (explaining that the case really has significant due process underpinnings, despite the fact that Justice Field's "focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments").

64. *Pennoyer*, 95 U.S. at 733–36.

65. *See, e.g.*, Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017) (arguing that *Pennoyer* was correctly decided); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981) (asserting that *Pennoyer*'s holding was unsupported).

its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory."[66]

Yet procedural justice also plays an important role. Beginning with the procedural justice perspective of the original plaintiff, one can understand how Oregon courts may have reached the original decision to assert jurisdiction over Neff. He had entered the state, engaged the services of a state citizen, failed to honor his payment obligations, and left the state. Mitchell's voice—his capacity to have his side of this dispute heard by the courts—was honored by Oregon's assertion of jurisdiction. Had Oregon not asserted jurisdiction, Mitchell would have been required to find Neff in a foreign state. The burden on Mitchell's capacity to have his case heard would have been quite severe, especially in a world where travel was difficult, slow, and uncertain, and Neff's whereabouts were potentially difficult to ascertain. Additionally, concerns about the neutrality and trustworthiness of a different state's court may been worrisome to Mitchell.[67] Finally, allowing the case to be heard in Oregon afforded Mitchell dignity and respect by providing him a convenient forum to air his grievance.

The perspective from the defendant's side differs greatly. For Neff, who was not in the state (and whose notice was afforded only by publication in a small specialty newspaper[68] that he could not read, even if he had seen it[69]), his voice was not present in any way during the litigation. A default proceeding against him resulting in the seizure of his land did not appear to afford him with dignity and respect; in addition, the same concerns about trust and neutrality that could alarm Mitchell about a non-Oregon forum could trouble Neff about a suit in Oregon, particularly one brought by an Oregon citizen against a non-Oregon resident. The Supreme Court's decision emphasized that a particular defendant must have been served within the state or have appeared voluntarily—or, in the special case presented in *Pennoyer*, at least have owned property within the state at the time the suit was commenced, because "[t]he law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him [of the proceedings against him]."[70]

Although the court does not focus on these elements and, indeed, the perspectives of the litigants are largely omitted from discussion, the ultimate outcome of the case demonstrates that the procedural justice needs of the defendant in this instance outweighed the procedural justice needs of the plaintiff. Asserting jurisdiction over a non-resident, non-citizen, non-land-owning person went too far in rendering that person subject to a decision-making process in which they had no voice or dignity and that might not be neutral or trustworthy with respect to their concerns.

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66. *Pennoyer*, 95 U.S. at 722.

67. *See* Collins Perdue, *supra* note 60, at 483 (describing the colorful and unsavory background of Mitchell).

68. *See id.* at 484–85.

69. *Id.* at 479. For more on the concept of procedural justice in notice, see Hollander-Blumoff, *Procedural Justice in the Federal Courts*, *supra* note 8.

70. *Pennoyer*, 95 U.S. at 727.

The latter elements, however, are perhaps implicitly addressed more in the next consideration: what procedural justice might Oregon or its sister states experience by virtue of the exertion of Oregon's power in this instance? The Court takes specific aim at the nature of the relationship between the states through, I argue, a procedural justice lens. The sovereignty concerns addressed by the Court can be understood as procedural justice concerns. When the Court says that "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others,"[71] one can see that the dignity and respect element of procedural justice vis-à-vis the states is front and center in its jurisprudence. Sovereignty, while couched as power, is ultimately about comity between states and the dignity and respect each state affords its peer states by virtue of containing its power within its own boundaries, rather than reaching across borders and into another forum's business. A sovereignty perspective also allows states greater voice by virtue of allowing their own court systems to make legal pronouncements on matters that occur within their own boundaries; it insulates in-state citizens from potential out-of-state bias; and it highlights a concern about the level of trust that one state may have for another state making determinations about the first state's own citizens or matters that occurred in its own borders.[72]

B. Specific Jurisdiction's Development: "International Shoe *and Its Progeny*"[73]

The clash between the procedural justice needs of plaintiffs and defendants, as well as the procedural justice needs of sovereign states, only became more acute in the post-*Pennoyer* world. Although the post-Civil War United States of *Pennoyer* looked dramatically different than the colonial period of the founding, the twentieth-century landscape began to strain personal jurisdictional principles even further, well beyond what the territorial framework of *Pennoyer*, coupled with individual concerns about fairness, could bear.[74]

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71. *Id.* at 722.

72. In addition, considerations of choice of law may be related here; jurisdiction in a forum *may* tilt a court towards also using that state's substantive law. *See supra* note 44.

73. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

74. While the railways themselves had already radically changed the travel landscape, the arrival of the car and the subsequent development of interstate highways made interstate travel far more common than ever before. *See, e.g.*, *American Railroads in the 20th Century*, SMITHSONIAN, https://americanhistory.si.edu/america-on-the-move/essays/american-railroads [https://perma.cc/W82P-D3V5] (last visited Aug. 6, 2023) ("Personal mobility radically expanded; one could travel across the country in a week in the 1870s instead of taking several months just a decade before."). Even in the twentieth century, modes of travel expanded rapidly: from 1960 to 1991, the number of passenger cars and taxis on the road grew from almost 62 million to almost 143 million; today the number stands at over 290 million. *See* DEP'T TRANSP., NAT. TRANS. STAT. ANN. REP. 23 (Sept. 1993) https://rosap.ntl.bts.gov/view/dot/10761/dot_10761_DS1.pdf [https://perma.cc/7FQU-SMLT]; Ashlee Tilford, *Car Ownership Statistics 2023*, FORBES (May 8, 2023, 9:26 AM), https://www.forbes.com/advisor/car-insurance/car-ownership-statistics/ [https://perma.cc/86QV-CHRR]. In addition, the advent of air travel only increased the capacity for interstate behavior that could form the basis of a lawsuit that might involve multiple potential fora or citizens of different states. In 1954, approximately 100,000 passengers traveled by air in the United States per day; by 2023, the average number was up

While the balance of procedural justice concerns favored an out-of-state defendant in the ultimate *Pennoyer* decision, the sheer volume of interstate travel—and the potential harm incident not just to the presence of out-of-state actors in a state but the harm inherent in the means of travel itself—meant that states increasingly were the physical site of harms for which it was difficult to seek redress in that state's own courts if the harm involved was perpetrated by an out-of-state citizen. From a procedural justice perspective, this made concerns about voice, as well as dignity and respect, especially troubling—state citizens, harmed while in-state, could not have an opportunity for their cases to be heard without traveling to a different (potentially far-flung) state. Concerns regarding whether another state could be neutral and trustworthy when adjudicating a matter that almost completely revolved around the interests of another state and of that other state's citizens were also heightened.[75] The burdens this exclusion placed on in-state citizens were serious, and also impacted the capacity of states themselves to have a voice in adjudicating matters that occurred within their territory (on roads, for example). And the discourtesy and disrespect felt by a state unable to provide a forum for harm occurring within its borders, especially to its own citizens, was a blow as well. Again, so-called sovereignty concerns can be understood more fully through the procedural justice frame, which reveals its shared underpinning with concerns about individual liberty.

In response to these concerns, states began working harder to reach out-of-state defendants in order to exert jurisdiction over them for harms committed within state boundaries. Early twentieth-century efforts often took the form of formalistic rules that honored state territoriality and boundaries by requiring explicit or implicit appointment of an in-state agent, upon whom process could be served in-state before a person could, for example, use state roadways[76] or do business within a state.[77] Understood from a procedural justice perspective, this would make sense from all parties' perspectives. Harmed plaintiffs had an opportunity to be heard in the place

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to approximately 2 million passengers per day. David Koenig, *US Seeing Fewest Airline Passengers Since 1950s as Coronavirus Halts Travel*, CHI. TRIB. (Apr. 9, 2020, 3:42 PM), https://www.chicagotribune.com/coronavirus/ct-nw-coronavirus-airline-tsa-travelers-20200409-ylrq2ztctbe4fh35cfhbgrxczy-story.html [https://perma.cc/C2PZ-7NQ4]; *TSA Passenger Volumes*, TRANSP. SEC. ADMIN., https://www.tsa.gov/travel/passenger-volumes [https://perma.cc/KT69-27TR] (last visited March 6, 2023).

75. In light of choice of law rules, such a court might also be applying the law of a different state, potentially giving rise to additional concerns about fairness and ability to trust the result.

76. As many first-year law students will note, the distinction between public and private roadways, and tortious acts that occurred on and off such roadways, could play a key role in case outcomes as this doctrine developed. *See, e.g.*, Tickle v. Barton, 95 S.E.2d 427 (W. Va. 1956); Hess v. Pawloski, 274 U.S. 352 (1927); Kane v. New Jersey, 242 U.S. 160 (1916).

77. For more in-depth discussion of state statutes on registration and consent, especially those that purport to require appointment of an agent for service of process if registering to do business in the state, see Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in A Twenty-First Century World*, 64 FLA. L. REV. 387, 393–94 (2012). *See also* Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 SAN DIEGO L. REV. 309 (2021).

where they were injured, defendants had an opportunity to be heard in a place where it was already clear that it was not burdensome for them to be (which was known because they had already been there, at the time of the harm), and the state where the harm occurred had the opportunity to exert its voice in adjudicating the dispute. From a dignity and respect viewpoint, the appointment of an in-state agent also made sense because it allowed for plaintiffs to be treated with courtesy in honoring their capacity to bring suit where they were harmed; provided defendants with full awareness of their exposure to jurisdiction and ensured notice; and respected state fora by creating power over an in-state agent while honoring the limits of the power vis-à-vis sister states and maintaining an understanding that one state's power ended where another state's began.

Yet this fiction had its own illogic and inconsistencies. Could implied consent by use of a state's roadways be revoked? What if a party refused to consent? Could that party be barred from use of the state's resources, whether they be roads, water, or airspace? And was implied consent via the use of roadways a concept that could be applicable beyond such a context?[78] The structure of a system in which consent was implied or even mandated had its own procedural justice problems. Implied consent might be no consent at all; forced consent, too, might also be rendered void. Implying or forcing consent might dishonor both true voice and respectful treatment.[79] Under the weight of this problem, in the paradigm-shifting case of *International Shoe*, the Court took a different tack—one that still largely guides the doctrine today—and elucidated a test that dovetails with the fairness

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78. In the later case of *Shaffer v. Heitner*, Justice Marshall described this moment in the development of personal jurisdiction doctrine:

> The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of a legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered. The fiction used was that the out-of-state motorist, who it was assumed could be excluded altogether from the State's highways, had, by using those highways, appointed a designated state official as his agent to accept process. Since the motorist's "agent" could be personally served within the State, the state courts could obtain *in personam* jurisdiction over the nonresident driver.
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> The motorists' consent theory was easy to administer, since it required only a finding that the out-of-state driver had used the State's roads. By contrast, both the fictions of implied consent to service on the part of a foreign corporation and of corporate presence required a finding that the corporation was "doing business" in the forum State. Defining the criteria for making that finding and deciding whether they were met absorbed much judicial energy.

433 U.S. 186, 202 (1977) (citations omitted).

79. Questions remain today about the lingering presence of consent as a basis for jurisdiction. *See infra* Section III.B (discussing the return of consent in modern personal jurisdiction debate).

concerns inherent in procedural justice.[80] In articulating a standard that calls for a non-resident defendant to have "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'"[81] the Supreme Court explicitly teed up the idea of fairness and justice to parties per se as central to the personal jurisdiction landscape.[82]

Commentators have noted that *Shoe* developed a four part "typology" of personal jurisdiction that could be plotted in a two-by-two matrix.[83] Along one axis, the court considered the degree of contact that a defendant had with a state, from "continuous and systematic" to "casual . . . and isolated."[84] Along the other axis was the concept of related or unrelated contacts. This resulted in four potential scenarios: one where defendants had so many contacts with a state that jurisdiction could clearly be exerted even when the litigation had no relationship to the contacts the defendant had with the forum; one where defendants had these continuous and systematic contacts and the litigation was related to those contacts; one where the defendants had casual and isolated contacts and the litigation was related to those contacts; and finally, one where defendants had casual and isolated contact that did not relate to the litigation.[85]

Generations of law students have learned from the language in *Shoe* that these four scenarios create two categories of personal jurisdiction: general and specific. In this neat(ish) dichotomy, general jurisdiction applied when defendants were so ubiquitous in a forum that they could be held to account there, and specific jurisdiction applied when defendants directed their activities towards a forum and thereby incurred a responsibility to answer for those activities when they caused harm.[86] And these categories were largely consonant with procedural justice elements for both parties, balancing concerns of both plaintiffs and defendants that they were in a forum that allowed them an opportunity to be heard, treated them with respect, and provided them with an unbiased and trustworthy decision-maker. The discussion below shows how procedural justice concerns for parties and for the

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80. Int'l Shoe v. Washington, 326 U.S. 310 (1945).

81. *Id.* at 316.

82. The *Shoe* case, with its explicit focus on fairness, impliedly acknowledged that corporations, not just individuals, had a right to and an expectation of fair treatment. Considering litigation from the perspective of procedural justice necessitates expanding the procedural justice assessment out from just an individual experience to the experience of an entity; namely, the corporation. As discussed above in the context of procedural justice perceptions and a state sovereign, see text accompanying notes 52–55, some anthropomorphism may be both required and warranted here. In addition, though, corporations are nothing more than the individuals who make up the legal entity; certainly, while an inanimate corporation does not have the capacity to "feel" treated fairly or unfairly, its leaders, owners, managers, employees, and shareholders are all capable of such an assessment.

83. *See, e.g.*, Donald L. Doernberg, *Resoling* International Shoe, 2 TEX. A&M L. REV. 247, 249 (2014).

84. *Id.*; *Int'l Shoe*, 326 U.S. at 317.

85. Doernberg, *supra* note 83, at 249.

86. *See, e.g.*, *id.* at 249–50.

state fora themselves played a role in shaping the Court's response to the question of whether personal jurisdiction can be asserted in each of these categories.

In the easiest case of specific jurisdiction, where a defendant has many contacts with a forum and the litigation stems from those contacts, we can easily see why asserting personal jurisdiction satisfies procedural justice for all parties. Plaintiffs harmed in the forum have an appropriate opportunity to be heard, and requiring them to travel outside their state for redress, when the defendant is so ubiquitous in-state, would likely increase a perception of disrespect or discourtesy. For defendants, it is hard to imagine how, if they are so involved in in-state activity already, there could be a concern that they would not have an adequate voice and opportunity to be heard within the state and that it would be disrespectful to require them to answer to the state's legal system for their conduct. The forum's neutrality and bias are not likely to be of concern in either case when a defendant has been so connected with activities in the state already.

In the general jurisdiction category, when these contacts remain so strong, but the litigation does not stem from the particular contacts a defendant has with the forum, the heightened degree of connection required between the defendant and the state also seems to help procedural justice perceptions rise to an appropriate level—again, defendants so deeply involved in a particular state as to meet this standard would be hard pressed to argue that appearing in that state's court deprived them of voice, treated them with disrespect, or subjected them to bias or an untrustworthy decision-maker. And of course, for the plaintiff, concerns about the procedural justice factors are not relevant since the plaintiff chose the forum.

But when the contact is much less—the "casual and isolated" situation—and where that contact has no connection to the litigation so that general jurisdiction would still be the required category, *Shoe* and subsequent cases make clear that personal jurisdiction will not be permitted; this outcome also comports with procedural justice concerns. In a forum where a defendant has barely spent any time and in which the subject matter of the litigation did not occur, the plaintiff's opportunity for voice has no special connection with the chosen forum—that voice could easily be heard in a different forum with little apparent diminishment. And because the subject matter of litigation did not occur within the state, we already know that the plaintiff is likely capable of appearing in another jurisdiction. The disrespect that might inure in a situation where a plaintiff was harmed in the state but cannot seek redress there would not be present here, and plaintiffs would have no particular expectation of bias or distrust in a different forum. In contrast, defendants might feel that requiring them to appear in court in a state in which they barely have a connection and where no harm occurred would tilt towards depriving them of a voice, treating them disrespectfully, and ensuring a biased forum that might be untrustworthy, as it has no connection to the litigation or to the defendant and its relationship to the case stems solely from the plaintiff's choice of forum.

Where some lesser degree of contact between the defendant and the state exists but the contact is related to the plaintiff's cause of action, litigants again find themselves in the category of specific jurisdiction. This type of specific jurisdiction has historically been the most important and interesting category of personal jurisdiction; litigation occurs when there is disagreement about whether the degree

of contact rises to "continuous and systematic." In this category, a fairly elaborate set of factors has emerged through which courts determine whether *enough* contacts exist between the defendant and the state to rise to what "fair play and substantial justice" require. A discussion of this final category will form the basis of the rest of this Section.

As the minimum contacts test for specific jurisdiction developed, two strands of analysis emerged, each important to courts' determinations. Although the elements ultimately overlap and intertwine, on one hand is the idea of "minimum contacts" involving a certain degree of territorial connection such that the state sovereign could appropriately exert power, and on the other hand is a relatively holistic test assessing the reasonableness of the forum, the convenience of and burden on the parties, and the state's regulatory interest.[87] The two prongs are meant to reflect the dual concerns of personal jurisdiction: state sovereignty and individual liberty.[88] The Court has at times considered personal jurisdiction's limits through the lens of federalism and at times through the Due Process Clause, but it has never definitively established that either one or both of these provide the solid footing on which its analysis is based.[89]

Yet these tests also were not static: the world continued to change, creating new challenges for each of these dimensions. The Supreme Court consistently took note of the way in which the changing landscape affected the analysis of minimum contacts. For example, in one case it explained that "[a]s technological process has

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87. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980); *see also* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 565 (2012).

88. In *World-Wide Volkswagen*, the Court noted:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

444 U.S. at 291–92.

89. For example, in the later case of *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, discussing this same point, the Court explained that:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. 694, 703 n.10 (1982). *See also* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769, 770, 775 (2016) (noting that "the Justices have been unable to agree on whether the doctrine is based, even in part, on state sovereignty," and that "[t]o this day, the Court has never presented a coherent account of whether or how state sovereignty informs the law of personal jurisdiction").

increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome."[90]

In the many different ways that this two-prong test has been operationalized in diverse cases, one can see how procedural justice perceptions of the parties and the forum may play an important role. The degree to which the defendant reached volitionally into the state, for example, could help determine how comfortable and involved the defendant already was in the state when later called upon to present a case to a court. The more the defendant was already enmeshed in the state, the more this would ensure that the defendant would have an adequate voice and opportunity to be heard in that forum. So, too, the greater the defendant's contacts with the state, the less a defendant could feel aggrieved or disrespected by being haled into court there, and the more plaintiffs might believe that being denied use of that forum would diminish their voice and constitute disrespectful treatment. And the more defendants were engaged in in-state activities on a regular basis, the more they could expect courts not to discriminate against them in their decision-making, and the more a forum state could be assured of having its own voice in regulating the activities of a party whose actions took place in-state.

Perhaps even more interestingly, a procedural justice focus helps to unite the two strands of thought that have co-existed uneasily in personal jurisdiction's doctrine since *Pennoyer*. Is personal jurisdiction a doctrine of personal and individual liberty that can be waived or one that is primarily structural and dependent on the limits of sovereignty?[91] When one considers procedural justice concerns of both litigants and the forum, this distinction becomes less acute and less relevant. Focusing on the procedural justice dimensions that underpin both the personal and the forum concerns offers a through-line for both theories that helps tie together their importance to the doctrine.

Considering some of the cases in the personal jurisdiction canon helps illustrate more clearly the role of procedural justice. For example, in two notable post-*Shoe* cases decided the same term (October 1957), the Court focused its attention on the volitional nature of contact with a state by a defendant and came to different conclusions. For a company that reached out into a state to do business with a single customer, like the insurance company in *McGee v. International Life Insurance*,[92] the Court believed jurisdiction was appropriate, but for a company like

90. Hanson v. Denckla, 357 U.S. 235, 250–51 (1958).

91. *See supra* notes 88–89.

92. 355 U.S. 220 (1957). In *McGee*, a Texas-based insurance company denied a beneficiary's claim for the life insurance benefits after the insured died in California. When the California beneficiary obtained a judgment in California over the insurance company, a Texas court refused to enforce the judgment on the grounds that there was never personal jurisdiction over the insurance company and thus the California judgment was void for due process reasons. The United States Supreme Court found that the insurance company, by contracting with a party in-state, had sufficient contact to permit the exertion of personal jurisdiction in California consistent with the limits of constitutional due process.

the Delaware bank in *Hanson v. Denckla*[93] that never made any deliberate effort to reach out to the state of Florida but was, instead, unilaterally "taken" there by a customer, jurisdiction was not valid.[94]

In each of these cases, the degree to which the defendant directed activity toward the state could be understood as a proxy for the threshold question about voice in a forum. Could a party who never meant to engage in activity within a state feel that it had a real opportunity to be heard in that forum? A party who never intended to act "in-state" might not have a valid voice in the state by virtue of expense or incapacity; conversely, one who acts "in-state" already knows how to be—and obviously can be—present within the state. In *McGee*, as the Court noted:

> With [the] increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[95]

The crux of the Court's argument had to do with the way in which the defendant could have its case heard in California, arguing that "there may be inconvenience" but noting in the same breath that California was "where [the defendant] had this contract" and that there was "no contention that [the defendant] did not have adequate notice of the suit or sufficient time to prepare its defenses and appear."[96] By explicitly tying the jurisdictional question to concerns about voice and appearance in court, the Supreme Court makes clear that the determination of whether *International Life* had "voice" in California was critical and that, in fact, it did.

Similarly, the direction of activity towards a state helps flesh out the concern regarding dignitary harm. The volitional nature of the engagement helps put a party on notice that it could be subject to the state's authority. Notions of quid pro quo that the Court has explicitly endorsed in personal jurisdiction further suggest that no dignitary harm would result from the reciprocity of allowing a state to exert jurisdiction over a party that was already using the benefits of the state structure. [97] That is, being subject to the drawbacks of the state (i.e., jurisdiction over one in the state's courts) inherently accompanied the benefits from the state; this is a reasonable exchange that honors the dignity and autonomy of the party and its choices. Conversely, a party who had not received these benefits, but only suffered the drawbacks, might take dignitary offense at this one-sided relationship. As the

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93. 357 U.S. 235 (1958). In *Hanson*, the Supreme Court considered dueling judgments from the Supreme Courts of Florida and Delaware about the disposition of a trust when an elderly woman died. Because Florida law required the bank who was the trustee to be a party to the action, respondent made the argument that the Florida judgment was void because personal jurisdiction over the trustee violated due process. The Court found that the trustee had never purposefully availed itself of the state of Florida and that personal jurisdiction was thus lacking there.

94. *Id.* at 252.

95. *McGee*, 355 U.S. at 223.

96. *Id.* at 224.

97. *Hanson*, 357 U.S. at 253 (defendant must take steps that demonstrate purposeful availment of the state, "thus invoking the benefits and protections of its laws").

Court stated in *McGee*, "[California] residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable."[98]

These cases also considered the issue of personal jurisdiction from the state sovereignty perspective. In *McGee*, the Court worried about the capacity of California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[99] This concern presents a classic focus on the state having voice over disputes involving its inhabitants and also implicates issues regarding respect for state authority. In *Hanson*, the Court's majority approached the issue from a different angle, implicitly suggesting that the sovereignty of the state of Florida was unharmed by the decision not to permit jurisdiction. The Court highlighted the respondents' argument that Florida should be able to resolve the case "because the settlor and most of the appointees and beneficiaries were domiciled in Florida" but called it a "non sequitur."[100] This, the Court concluded, was because Florida could *still* adjudicate "concerning the respective rights and liabilities of those parties" without the presence of the Delaware bank in the case—"[b]ut Florida has not chosen to do so."[101] It was because *Florida itself* insisted on bringing in the bank as an "indispensable party"[102] that the case raised a jurisdictional question. Thus, the Court's decision that Florida did not have jurisdiction over the bank was, in a backhanded way, actually honoring Florida's choices made as a sovereign. This somewhat convoluted sovereignty point implies that Florida's voice was not being harmed in the denial of jurisdiction—and that the denial did no dignitary harm either—because it was Florida's own choices that produced the result. Additionally, the focus on volitional contact helped provide a way to understand whether the state would provide a neutral forum and a trustworthy decision-maker. Presumably, parties who acted in-state were already less "foreign" to the court, and thus less likely to incur bias, than complete strangers. And parties who believed the forum to be untrustworthy could determine that before reaching into the state and could then make the decision to take their activity elsewhere.

These same themes were echoed in other cases that considered whether particular defendants had directed their activity into a state volitionally to such a degree that personal jurisdiction was warranted. For example, in *World-Wide Volkswagen v. Woodson*,[103] the Court, in holding that a New York State car dealer and local distributor were not subject to jurisdiction when a customer drove a car they had sold into Oklahoma, focused on the idea of foreseeability as a proxy for volitional conduct, explaining that while one might imagine that a car *could* end up in a distant state, it was the foreseeability that one might be expected to answer for one's conduct there that was truly relevant.[104] The Court's concern for the distant defendants who would face inconvenience in having their case adequately presented

98. *McGee*, 355 U.S. at 223.
99. *Id.*
100. *Hanson*, 357 U.S. at 254.
101. *Id.*
102. *Id.*
103. 444 U.S. 286 (1980).
104. *Id.* at 287.

in such a far-off forum, and their concern for the kind of dignitary harm that might be visited on someone who would be so surprised and affronted by the idea of jurisdiction, carried clear procedural justice implications.

No such worry was devoted to the harms that the original plaintiffs, the Robinsons, recovering in the hospital for months in Oklahoma, might suffer.[105] But the Robinsons, while injured in Oklahoma, were not Oklahomans, lessening their need or expectation for voice in that forum and lessening the worries about the disrespect that might be shown to them by denying them that forum. (So, too, the presence of other defendants who *were* going to answer for their conduct in an Oklahoma court may have influenced the Court's decision.)[106] Finally, from the perspective of the neutrality or trustworthiness of the forum, both the Robinsons and the out-of-state defendants were foreign to Oklahoma, so neither one had an argument that the Oklahoma court would be problematic. But neither had a strong claim that the Oklahoma forum would be more fair than the obvious alternative forum, New York: the dealer and distributor were located in New York, where the Robinsons were still domiciled.[107] Thus, New York would also be an unbiased forum where the motives of the decision-maker could likely be trusted. One might argue that either state has sovereign interests and that procedural justice for the state would be honored either way; in Oklahoma, the state has an interest in providing a forum for relief regarding what happens on its roads, but New York has an interest in opening its doors to its own citizens for resolution of disputes.

In later cases that continued to home in on the reciprocal relationship between a state and a defendant, the language of submission to the authority of a state helps highlight even further the core concern for dignity and respect that accompanies the personal jurisdiction analysis. For example, in *J. McIntyre Machinery, Ltd. v. Nicastro*,[108] the Supreme Court considered the case of a United Kingdom manufacturer whose scrap-metal machine, purchased by a New Jersey company through a distributor, sheared off several fingers of the company's employee.[109] In that case, finding that the U.K. manufacturer did not direct its activities towards New Jersey in a sufficient manner to warrant jurisdiction, the Court relied heavily on the notion that the U.K. company had not taken any steps to benefit from New Jersey as a forum. Explaining its holding in *Hanson* in greater detail, the Court in *Nicastro* said:

> Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In

105. For a detailed and gripping account of the facts of the case, see Charles W. Adams, World-Wide Volkswagen v. Woodson*: The Rest of the Story*, 72 NEB. L. REV. 1122, 1122–26 (1993).

106. *Id.* at 1128.

107. *World-Wide Volkswagen*, 444 U.S. at 288–89.

108. 564 U.S. 873 (2011).

109. *Id.* at 878.

> other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction . . . .[110]

Just a paragraph later, the Court reiterates: "The principal inquiry in cases of this sort is whether the defendants' activities manifest an intention to submit to the power of a sovereign."[111] Requiring "submission" to authority without a concomitant benefit would potentially humiliate, dishonor, and disrespect a litigant; the idea that valid submission to authority must come about due to an exchange of benefits and burdens grants the prospective litigant dignitary autonomy.

The plurality opinion in *Nicastro* framed its concern about the assertion of personal jurisdiction over the defendant in procedural justice terms almost despite itself. The majority took pains to insist that it was not foregrounding fairness, saying, "jurisdiction is in the first instance a question of authority rather than fairness" and specifically indicating that "general fairness considerations" are not "the touchstone of jurisdiction."[112] That said, the Court then addressed the concern (inapposite here, with a foreign defendant)[113] that one state asserting jurisdiction in an "inappropriate case" over a "domestic domiciliary" of another state would "upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."[114] The plurality opinion here protested its lack of focus on fairness too much; the underlying procedural justice concerns inherent in respecting state sovereignty are, in fact, the fairness dimension that the Court's decision prioritized. Nonetheless, the Court was selective in its vision of whose procedural justice matters. The plurality opinion largely ignored the procedural justice concerns of the plaintiff and dismissed the procedural justice aspects of state sovereignty that related to the state's capacity to hear cases involving its own citizens who are harmed within its borders.

The dissent, in contrast, took up both these points in great detail, explaining that the "modern approach to jurisdiction . . . gave prime place to reason and fairness."[115] When Justice Ginsberg compared the defendant to Pontius Pilate,[116] she was invoking in visceral terms what she saw as the defendant's ability to evade jurisdiction in the court in a way geared to offer deep offense to the plaintiff (and the state of New Jersey). She described the defendant's goal to "sell [their] products in the [United] States—and get paid!" and offered a vivid picture of the plaintiff's grave workplace injury at "Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey." She described the depth and breadth of scrap metal work in New Jersey and mentioned the "burden on Nicastro to go to Nottingham, England to gain

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110. *Id.* at 881 (citation omitted).

111. *Id.* at 882.

112. *Id.* at 883.

113. In the plurality opinion, Justice Kennedy noted that even though this case involved a foreign defendant, the undesirable consequences of a fairness-based rather than a sovereignty-based approach would be felt just as much by domestic parties. *Id.* at 885.

114. *Id.* at 884.

115. *Id.* at 903.

116. *Id.* at 894 (Ginsburg, J., dissenting) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)). Pilate was a Roman governor who famously washed his hands of responsibility for the decision to mete out capital punishment upon Jesus of Nazareth. *Matthew* 27:1-26 (New English Bible).

recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey."[117] Her repeated focus on the New Jersey town where the accident occurred demonstrated the way in which the plaintiff was embedded in his local community. This description works to highlight the unfairness of denying Nicastro his opportunity to be heard in his home court, as well as the disrespect that closing the doors of his home court to redress a harm that befell him in-state showed him. In addition, the dissent directly addressed the sovereignty concerns of the plurality and called out the fact that:

> [N]o issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any other State.[118]

What is notable here is how both sides use rhetoric that tracks procedural justice: they just use it for different parties. A more holistic and transparent approach to procedural justice that ensures that all parties' fairness concerns are adequately considered would be preferable. The very essence of procedural justice research is that procedure matters even when an outcome is unfavorable; ensuring that the fairness considerations of both parties are taken into account, even when one side is the loser and one side the winner, is central to an effective and procedurally just process.

C. Revisiting (Some of) Pennoyer*'s Traditional Rules*

Some of the Court's more groundbreaking moves in the half-century after *Shoe* involved grappling with several leftover vestiges of the bygone *Pennoyer* era. In particular, two places where the traditional rules of territoriality-based personal jurisdiction butted up against the minimum contacts test were in the context of jurisdiction based on property within the state and jurisdiction based on physical presence within the state. These cases, *Shaffer v. Heitner*[119] and *Burnham v. Superior Court of California*,[120] respectively, were decided in opposite directions, with the divided *Shaffer* Court eliminating jurisdiction based solely on property ownership within the state in favor of the minimum contacts test set out in *Shoe*,[121] while the *Burnham* Court unanimously permitted jurisdiction based solely on physical presence, albeit with some uncertainty as to the legal justification.[122]

Each of these results reflects procedural justice concerns. In *Shaffer*, the Court found itself preoccupied by the worry that property ownership, without more, would not be sufficient to offer the proper degree of protection to defendants.[123] The particular property at issue in *Shaffer*, stock certificates deemed by Delaware law to be located in Delaware, was not the kind of property that, as discussed above in

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117. *Nicastro*, 664 U.S. at 895, 897, 904 (Ginsburg, J., dissenting).
118. *Id.* at 899.
119. 433 U.S.186 (1977).
120. 495 U.S. 604 (1990) (plurality opinion).
121. *Shaffer*, 433 U.S. at 216.
122. *See Burnham*, 495 U.S. at 622; *id.* at 638 (Brennan, J., concurring).
123. *Shaffer*, 433 U.S. at 209.

Pennoyer, the Court assumed was "always in the possession of its owner, in person or by agent," such that "its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."[124] Rather than dealing with acreage, chattel, or other real or personal property, the case involved intangible shares in a corporation whose so-called "seizure" merely involved alienation of the shares from saleability.[125] And this type of property, being neither the direct subject of the litigation itself nor somehow related to the subject matter of the litigation, was at issue *only* as a method of gaining jurisdiction over a person.[126] The Court, in concluding that the minimum contacts test should govern "all assertions of state-court jurisdiction,"[127] specifically noted that cases involving *rights in* property would meet the test because of the reciprocal relationship between a property owner and the state in which the property owner "expected to benefit from the State's protection of his interest,"[128] which, as discussed above, relies on notions of autonomy and respect for defendants. In addition, the state sovereignty interest was cast in procedural justice terms for the voice of the state forum: the state had a "strong interest[] . . . in providing a procedure for peaceful resolution of disputes about the possession of that property."[129] Such elements, the Court concluded, would also extend to cases involving injury *on* such property as well.[130]

Using unrelated property solely to gain jurisdiction was inextricably intertwined with concerns about notice and opportunity to be heard. Even though the *Shaffer* defendants did have actual notice,[131] there remained a broader concern about the potential for individuals (or other entities) to be unaware that they were engaging in any way at all with a state that would be sufficient to allow assertion of jurisdiction without violating due process. As Justice Stevens noted in concurrence, "One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction."[132] The volitional nature of the connection with the state, so important to procedural justice factors of voice and dignity and respect, was critical to the Court's holding: "Appellants," the Court concluded, "have simply had nothing to do with the State of Delaware."[133] And further, "it strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself" to jurisdiction in Delaware.[134] The Court's opinion suggested that it defied belief to find that ownership of stock "within" a state

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124. Pennoyer v. Neff, 95 U.S. 714, 727 (1877).
125. *Shaffer*, 433 U.S. at 192.
126. *Id.* at 208–09.
127. *Id.* at 212 (holding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny").
128. *Id.* at 208.
129. *Id.*
130. *Id.*
131. *Id.* at 213 n.40.
132. *Id.* at 218 (Stevens, J., concurring).
133. *Id.* at 216 (majority opinion).
134. *Id.*

was volitional contact bringing about the reciprocal relationship that would enable a conclusion that the defendant had adequate voice and dignity in the process.

By contrast, in *Burnham*,[135] the Court found that the historical basis of jurisdiction based on physical presence was sufficient to maintain personal jurisdiction, irrespective of a *Shoe* minimum contacts analysis.[136] The plurality opinion by Justice Scalia centered on the historical pedigree of the practice rather than considering fairness issues per se. Justice Scalia concluded that what validated the rule in question was "its pedigree," and offered a long examination of the historical practice.[137] The widespread nature of the historical pedigree, in the eyes of the plurality, puts all defendants on notice that their physical presence in state is enough to trigger personal jurisdiction; this is a "most firmly established principle,"[138] a "continuing tradition[]" that is "firmly approved by tradition and still favored."[139] The tradition qua tradition was enough for Justice Scalia, who was opaque on exactly *why* history must dictate the outcome, but did provide at least one nod towards why reliance on history is, in fact, correct through a fairness lens:

> The only reason for charging [Defendant] with the reasonable expectation of being subject to suit is that the States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for [Defendant], who voluntarily entered California, to be sued there . . . .[140]

The historical pedigree of the rule, in sum, provides unassailable proof that no one could be surprised by this exertion of jurisdiction—a conclusion that does comport with procedural justice ideas of voice and respect.

While a full examination of the way that an originalist or historical approach to jurisprudence does or does not reflect procedural justice principles is beyond the scope of this project,[141] it is illustrative to imagine why Justice Scalia believed that it was only "[f]or new procedures, hitherto unknown, [that] the Due Process clause requires analysis to determine whether 'traditional notions of fair play and substantial justice' have been offended."[142] This analysis implicates

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135. Burnham v. Superior Ct. of California, 495 U.S. 604 (1990).
136. *Id.* at 619, 628.
137. *Id.* at 621–22.
138. *Id.* at 610.
139. *Id.* at 622.
140. *Id.* at 624–25.
141. For instance, considering originalism and a purely historical or tradition-based approach from the perspective of many modern litigants whose perspective was entirely left out of civic discourse in 1789, such as women and minorities, would suggest that this framework would result in both low perceptions of voice and courtesy/respect. In addition, being subject to rules perpetuated from a distant past in which they had no rights to property, to vote, etc., could suggest to these individuals that the decision-making body was both biased and untrustworthy. *See generally* Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941 (2023) (examining the emergent phenomenon of "procedural originalism").
142. *Burnham*, 495 U.S. at 622.

procedural justice values because it suggests that a new rule may be problematic, in part because a new rule would alter defendants' understanding of where they might be sued, with such a surprise characterizing a disrespect for the defendants by haling them into court in a place they would not expect. This unexpected result might additionally threaten their potential to have their voice heard, depending on the circumstances.

Justice Brennan, in a concurrence that uses a minimum contacts analysis to show why jurisdiction over the defendant is valid, relies far more than the plurality on elements that suggest the importance of procedural justice. For example, he considers purposeful availment of a defendant who is physically present in a state through the quid pro quo lens discussed above,[143] noting that the individual's "health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well."[144] Justice Brennan also views the jurisdictional question through the lens of voice, arguing that the fact that the defendant has "already journeyed at least once before to the forum" suggests that a return trip for defending a suit there would not be "prohibitively inconvenient."[145]

D. The (Largely) Moribund Path of General Jurisdiction

For many years after *Shoe*, the main focus of courts was on how to apply specific jurisdiction tests, as discussed above. General jurisdiction, also sometimes called "all-purpose jurisdiction," faded into the background—not so much because it was not used but more because it was simply not contested.[146] Parties appeared to understand that doing a lot of business in a particular locale would be enough to sue them in that forum; general jurisdiction was the "dog that didn't bark."[147] Take, for instance, *Ferens v. John Deere*,[148] a remarkable case in which the injured plaintiff and the cause of action had no connection whatsoever to the state of Mississippi. The plaintiff, Ferens, sued in Mississippi simply because it was a state in which the statute of limitations had not expired.[149] Yet there is no indication that John Deere offered any objection to the exertion of jurisdiction in this case, most likely because so many of its products were present in the state. So too, Volkswagen and Audi did not raise concerns about jurisdiction in Oklahoma in *World-Wide Volkswagen*,[150] despite the fact that the plaintiffs' particular car was not directed towards that forum by either company.

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143. *See supra* text accompanying notes 97–98.

144. *Burnham*, 495 U.S. at 637–38 (Brennan, J., concurring).

145. *Id.* at 638–39.

146. Peterson, *supra* note 1, at 712 (noting that most cases where general jurisdiction might be present have not been litigated "because most substantial corporate defendants never challenge the existence of corporate-activities-based jurisdiction").

147. *See* SIR ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 1, 27 (John Murray 1931) (1893) (discussing the absence of a dog's bark as an important clue to solving a mystery).

148. 494 U.S. 516 (1990).

149. *Id.* at 519.

150. 444 U.S. 286 (1980). *See also* Peterson, *supra* note 1, at 704.

Similarly, even in the more recent case of *Goodyear v. Brown*,[151] the Supreme Court noted that defendant Goodyear did not object to the assertion of personal jurisdiction in North Carolina despite the fact that it was not incorporated or headquartered there, and the litigation had no connection with the state of North Carolina, as the underlying incident had occurred in France.[152] Instead, the crux of the case was that general jurisdiction could not be used to assert power over two *international* defendants whose only connection with the state of North Carolina was that some of their products ended up there through the stream of commerce.[153] In the case, the Court focused on the core differences between general and specific jurisdiction in noting that the stream of commerce contacts between a defendant and state were never sufficient to endow the defendant with sufficient continuous and systematic contacts as to render it "at home" in the state such that the assertion of jurisdiction would comport with the Constitution.[154] While the holding of *Goodyear* was unsurprising because of the attenuated relationship between the particular foreign defendants and the state of North Carolina, commentators took note of the phrase "at home" and the potential change in perspective it might offer in future cases.[155]

E. The Past Decade of Personal Jurisdiction Doctrine

The last decade has been relatively tumultuous for personal jurisdiction, with a series of important cases that changed the landscape significantly.[156] In *Daimler v. Bauman*,[157] the Supreme Court moved further than most scholars had anticipated in articulating a new way to think about general jurisdiction.[158] Non-citizen plaintiffs pled human rights abuses occurring in Argentina, allegedly committed by an Argentinian subsidiary of a German corporation, Daimler, that clearly did business in California though its United States subsidiary.[159] Thus, again, the Court considered whether a court within the United States could assert personal

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151. 564 U.S. 915 (2011).

152. *Id.* at 919.

153. *Id.* at 920.

154. *Id.* at 929. *See also* Peterson, *supra* note 1, at 707 (noting Justice Ginsburg's use of the "newly minted phrase" of "at home" in conjunction with the traditionally used continuous and systematic language from *International Shoe*).

155. *See, e.g.*, Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 672 (2012) ("Despite the lack of fireworks in the Court's opinion, *Goodyear* seems likely to have far-reaching effects on both the doctrine and theory of general jurisdiction.").

156. *See, e.g.*, Charles W. "Rocky" Rhodes et al., Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102 (2020).

157. 571 U.S. 117 (2014).

158. *See, e.g.*, 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, 676–77 (2016) ("My assessment as to whether general jurisdiction over corporations on the basis of systematic and continuous activities would prevail . . . was correct for about 35 years, up until the Supreme Court's surprising dicta in *Goodyear Dunlop Tires v. Brown*, and later in *Daimler AG v. Bauman*.").

159. Daimler AG v. Bauman, 571 U.S. 117, 121 (2014).

jurisdiction over a foreign defendant[160]—here, a situation even more attenuated than that in *Goodyear*. (Notably, Daimler did not even bother to make an argument that the United States subsidiary, Mercedes-Benz USA, would not be subject to general jurisdiction in the case, supporting the idea that many national corporations tacitly accepted the idea that general jurisdiction applied to them in most situations, as described above.[161]) The Court found that no general jurisdiction could exist over Daimler, the parent company of Mercedes-Benz USA, because it was not "at home"—neither incorporated nor headquartered, nor at home in some other unspecified way[162]—in California.

From a procedural justice perspective, the holding in *Daimler* that no jurisdiction existed made sense for all relevant stakeholders. In some situations, there is likely no expectation on plaintiffs' part of an opportunity to be heard; in a forum that has no relationship to you or to your rights, it can hardly be stifling of voice to be denied participation. Similarly, to deny foreign plaintiffs the opportunity to have their case heard in a forum that bears absolutely no connection to the litigation seems unlikely to strike a dignitary blow.

From the defendant's side, asserting personal jurisdiction here could appear disrespectful, as it would require forcing an international party to defend actions in an entirely different locale from either the location where the relevant actions took place or the party's home base. Such a deeply attenuated locale might also impede the defendant's capacity to have its case heard, affecting perceptions of voice. That said, however, a foreign plaintiff bringing an action against a foreign defendant in a third location could indeed engender neutrality, as the decision-maker likely has no bias towards one party or the other, and one might also imagine that the decision-

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160. For further discussion of the way in which courts consider (or do not consider) differences between foreign and domestic defendants, see Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE. J. COMP. & INT'L L. 405, 408–10 (2017). Austen Parrish has noted that courts largely ignore the differences between domestic and international defendants, to the detriment of the development of the doctrine. He explains that there are critical differences in the burdens of jurisdiction on domestic versus international defendants:

> Foreign procedures can be difficult to maneuver and substantive law can be different, which may make foreign litigants "more subject to procedural default or tactical errors." A number of other factors also exist that are not present in interstate case, "including familiarity with the legal system, linguistic capacity, and especially the ability to retain local counsel." Nonresident, alien defendants also find the U.S. right to jury trials and contingency fees unfamiliar and hard to navigate.

Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 141–42 (2019).

161. *See also* Peterson, *supra* note 1, at 718.

162. *Daimler AG*, 571 U.S. at 137. Justice Ginsberg declined to close the door on a possible third category of place that might satisfy the "at home" test, saying, "*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." *Id.* at 138. However, the Court offered almost no guidance on what the contours of a test for such a third category might look like. *Id.*

maker would have a motive of fairness rather than favoritism towards one side. However, adding the procedural justice that the court itself might experience into the analysis helps bolster the Court's decision. For this particular California court, there is no need for its voice to be heard making pronouncements about human rights abuses committed in a foreign country. It does not disrespect the authority of the court to deny it that opportunity; it could overextend the authority of the state past its sovereign borders—not vis-à-vis a sister state but vis-à-vis the sovereign of a different country—in a way that calls into question its motives and its neutrality as an arbiter.

While the procedural justice concerns of the foreign plaintiff, the foreign defendant, and the domestic court all weigh against personal jurisdiction in *Daimler*, the Supreme Court's opinion failed to delineate the scope of the ruling's applicability. In particular, the Court gave no indication that such a holding would be limited to foreign defendants, whom many scholars believed were treated appropriately by the ruling.[163] In *BNSF Railway Co. v. Tyrrell*,[164] the Court clarified the scope of its general jurisdiction holding in *Daimler* by indicating that there was no scope to clarify: the ruling applied to all types of defendants.[165]

As one commentator noted, the Supreme Court had narrowed general jurisdiction almost completely to places where a defendant was either incorporated or had its principal place of business, and it has "continued this trend by denying Montana's courts general jurisdiction over a defendant that had continuous and systematic contacts with the state but was not essentially at home there."[166] This represented a radical shift from the previous background rule that had largely worked, invisibly, to subject corporations with continuous and systematic contacts with states to those state courts' jurisdiction in almost all situations.

This state of affairs, while perhaps sensible for foreign defendants,[167] privileged domestic corporate defendants in a way that provided lopsided benefits. While those defendants *might* feel increased procedural justice in the constricted fora in which they could now be subject to suit, there had been no real problem to address with their procedural justice beforehand. Merely closing off potential exposure to lawsuits is a favorable outcome for defendants but has no automatic procedural justice dimension. Those defendants, with their continuous and systematic ties to a forum, could not have claimed that they were hampered in their voice and opportunity to be heard by litigating in a deeply inconvenient or difficult

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163. *See, e.g.*, Silberman, *supra* note 158, at 681 ("There are strong arguments for reining in general jurisdiction, particularly as regards foreign country defendants.").

164. 581 U.S. 402 (2017).

165. *Id.* at 405–06 (Citing *Daimler*, the Court said, "Our precedent, however, explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere.").

166. Comment, BNSF Railway Co. v. Tyrrell, 131 HARV. L. REV. 333, 333 (2017). This commentator continued, "By demonstrating much more bluntly than its predecessors just how much the at-home test has altered general jurisdiction, *BNSF* highlights a number of problems with the newly narrowed doctrine and will likely exaggerate these problems as courts interpret and apply the case's reasoning." *Id.*

167. *See supra* text accompanying notes 155–61.

forum, nor could they argue that exerting jurisdiction over them, in light of their ties with the forum, was disrespectful or discourteous. And if the defendant was able to maintain continuous and systematic ties with the forum, how biased could the forum truly be? A defendant maintaining such ties may not even appear meaningfully different from a state citizen to a court or jurors. Similarly, how likely would it be that the court would have untrustworthy motives towards a defendant whose activities were already so entwined with the state?

In the meantime, however, the plaintiffs' procedural justice assessment declined dramatically. Even as plaintiffs were able to see, all around them, the continuous and systematic ties the defendant had to the forum, those plaintiffs were being forced to go elsewhere to seek redress. This relative inconvenience to plaintiffs, forcing them to undergo a shift in forum even while the defendant continued to operate in the forum, had to feel like a diminishment in their opportunity for voice and a statement of discourtesy and disrespect by the forum state.

Thus, post-*Daimler*,[168] historical notions of personal jurisdiction were upended. The dramatic change in the Supreme Court's articulated rule in *Daimler* about general jurisdiction, restricting it only to cases where a corporation is "at home" in a forum while simultaneously narrowly defining the "at home" term, excluded many cases that would previously have been litigable (and in fact were routinely litigated) in a particular forum.[169] Given the particular facts of *Daimler*, the Court's bottom-line decision rejecting personal jurisdiction did make sense from a procedural justice perspective. By preventing a foreign corporation from having to defend itself in a United States court on a matter that neither took place in the United States nor involved United States citizens, the Court honored principles of voice, dignity, neutrality, and trust. But in so doing, the *Daimler* Court created serious procedural justice problems for future cases.

Due to the exclusion of a whole host of cases from particular fora where they would have previously been brought without challenge under general jurisdiction, increased pressure was immediately placed post-*Daimler* on the specific jurisdiction pathway. Specific jurisdiction had long allowed defendants to be sued in a forum where their purposeful conduct in a state was related to the cause of action, and the question of "related to" had been a relatively common-sense (if undertheorized) one.[170] After *Daimler*, with general jurisdiction options closed to them, some plaintiffs tried to expand the definition of "related to" to include behavior in a forum that was similar or parallel to the behavior, occurring in a different forum, that was actually the subject of the litigation. So, for instance, the argument went, if a company marketed a product in state A and state B, harm from

168. 571 U.S. 117 (2014).

169. *Id.* at 139.

170. *But see* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 871 (2012) (arguing that "the Court has elided the two dimensions of the relatedness problem—the relationship between the defendant and the forum, and the relationship between the lawsuit and the forum—in a way that has made some specific jurisdiction cases nearly impossible to answer").

the product that occurred in state A was "related" to state B because the marketing was the same for both fora.

This effort to reclaim the ground lost in shifting general jurisdiction from a widely applicable doctrine to one permissible only when defendants were "at home" culminated in a case where the plaintiffs' lawyers argued that the Court should loosen the standard for specific jurisdiction by widening the definition of contacts "related" to the litigation. In *Bristol-Myers Squibb v. Superior Court*,[171] plaintiffs argued that activities undertaken in one state that were identical to activities in another state should be considered related to litigation that arose from the second set of activities; in particular, if a drug was marketed and sold in California and Ohio, a harm suffered by plaintiffs in Ohio should be redressable in a California court.[172]

This outcome would have defied the basic logic of the definition of "related" contact, and the Supreme Court, uneasy with this intellectually disingenuous move, closed this potential pathway. *Bristol-Myers Squibb* offered a sensible definition of "related to" that favored the traditional historical contours, meaning that "the *suit*" must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*."[173] From a case-specific procedural justice perspective, this did not harm the plaintiffs, whose failure to be heard in a forum distant from where they lived or where the harm was suffered could hardly be said to diminish their opportunity to be heard.[174] Indeed, the Court believed the plaintiffs were engaged in gamesmanship, trying merely to "engag[e] in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State."[175]

But from a procedural justice perspective writ large, the holding was an unhelpful response to the concerns bred by *Daimler*. Many cases that would previously have been litigable in a given forum under the old rules of general jurisdiction remained out in the cold. Defendants whose purposeful actions were ubiquitous in a particular forum were protected from suit while plaintiffs were denied the forum of their choice. Concerns about adequate voice, treating parties respectfully, and ensuring a neutral and trustworthy decision-maker were left by the wayside in favor of clarifying the logical boundaries of the general/specific jurisdiction distinction. And, taken together, these rulings further opened the door to a clever gambit by large corporations that was, in essence, designed to foreclose even more plaintiffs from the fora of their choice, which in turn would lead to even lower procedural justice perceptions by plaintiffs. Large corporations with systematic and continuous ties to a forum that were not related to a cause of action

171. 582 U.S. 255 (2017).

172. *Id.* at 260, 264.

173. *Id.* at 262.

174. That said, plaintiffs were hampered in their effort to have a set of claims heard together that came from disparate geographic locations. This splintering of claims could create inefficiency and higher cost that might have procedural justice consequences, namely for voice.

175. Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1031 (2021) (discussing *Bristol-Myers*, 582 U.S. at 265–66).

could argue that, as they were not "at home" in the forum, none of those continuous and systematic ties were able to be considered as part of a personal jurisdiction analysis. Instead, *only* the ties that the defendant had with the state that were related to the cause of action would be relevant. And those ties would be governed by the minimum contacts test that required purposeful availment and reasonableness.

For example, consider a case like *World-Wide Volkswagen*,[176] where Audi and Volkswagen did not object to the exertion of jurisdiction, presumably both because the specific car that injured plaintiffs caused an accident there *and* because many Audis and Volkswagens were sold in Oklahoma. In such a case, one can see that Audi and Volkswagen have some ties with the state of Oklahoma that are unrelated to the cause of action and some ties with the state of Oklahoma that are related to the cause of action. Each set of connections to the state might be considered separately. So, for instance, the vast majority of the many Audis and Volkswagens on Oklahoma roadways were unrelated to the accident, and, since the corporations were not "at home" there, the argument went, those contacts could disappear from the personal jurisdiction analysis. Left only with the sole Audi that caused *this* accident as a contact related to the litigation, the court could then engage in a minimum contacts analysis that considered whether these defendants purposefully availed themselves of the state of Oklahoma with this particular connection. Under the logic of *World-Wide Volkswagen* itself, they had not; they never directed the car to Oklahoma, nor did they sell the car in Oklahoma or take any affiliating steps to draw this car into this forum. The presence of this one Audi would thus fail the specific jurisdiction test. This bifurcation of contacts suggested by the Court's analysis teed up the next big moment in personal jurisdiction.

III. THE *FORD* CASE AND WHAT COMES NEXT

A. Ford*'s Recalibration*

In *Ford Motor Co. v. Montana Eighth Judicial District*,[177] two plaintiffs were killed by alleged defects in Ford cars in Montana and Minnesota. But Ford itself had not put the particular harm-causing cars into the states in which the deaths occurred. Both cars had been designed in Michigan, were manufactured respectively in Kentucky and Canada, and were originally sold by Ford to dealers in Washington and North Dakota.[178] Thus, under the *Bristol-Myers* "related to" definition, it was hard to conclude that Ford's purposeful conduct in Montana and Minnesota, the forum states (marketing and selling many other cars—ones that were *not* involved in these accidents), was "related to" the cause of action. As a result, Ford's lawyers relied on the twin strands of *Daimler* and *Bristol-Myers* to argue that in-state residents who were harmed in-state by a product purchased out-of-state, but that was also widely available in-state through a company that did a tremendous amount of business in-state (although not enough to be "at home" under the Supreme Court's newer, stringent definition in *Daimler*), would not be able to bring suit in-state.[179]

176. 444 U.S. 286 (1980).
177. 141 S. Ct. 1017 (2021).
178. *Id.* at 1023.
179. *Id.*

In *Ford*, the Supreme Court confronted the procedural justice consequences of the convoluted framework it had developed. Consider the perspective of the two *Ford* plaintiffs, allegedly injured by Ford-manufactured cars in accidents that occurred in their home states, as they contemplated litigation. Both living in states where Fords were ubiquitous (as they are in all fifty states), injured on state roadways, and suffering injury in-state from Ford cars purchased (albeit secondhand) in-state, it is hard to imagine how they might conclude that having their case heard in their home state courts would be an extraordinary measure. In-state plaintiffs with in-state injuries from in-state products purchased in-state would likely feel strongly denied a voice if the doors of their in-state forum were closed to them, and a requirement that such plaintiffs travel to a different state to have their case heard would seem deeply disrespectful to the plaintiff's needs.

The bulk of the majority opinion considered the fairness of exerting jurisdiction over Ford from Ford's perspective and highlighted the idea, explicit in the Court's personal jurisdiction doctrine since *Shoe*, that "[t]he contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.' They must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there."[180] The Court detailed the volitional connection that Ford has with the forum states and its concomitant relationship with the state further:

> In conducting so much business in Montana and Minnesota, Ford "enjoys the benefits and protection of [their] laws"—the enforcement of contracts, the defense of property, the resulting formation of effective markets . . . . All that assistance to Ford's in-state business creates reciprocal obligations[181]—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there. Thus our repeated conclusion: A state court's enforcement of that commitment, enmeshed as it is with Ford's government-protected in-state business, can "hardly be said to be undue."[182]

The opinion relied on the idea that, as Ford thrives and flourishes in Montana and Minnesota on a regular and volitional basis, it could not credibly suggest that it does not have an adequate voice there or that subjecting the company to jurisdiction there would result in dignitary harm. And the vast connections that Ford has in those states

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180. *Id.* at 1025 (citations omitted). For a recent discussion of the way in which this idea relates to privity, see Alexandra Lahav, *The New Privity in Personal Jurisdiction*, 73 ALA. L. REV. 539 (2022).

181. In psychology, social exchange theory is one of the most powerful theories for understanding how individuals and organizations function with one another. As one author explains, social exchange theory "may well have the potential to provide a unitary framework for much of organizational behavior." Russell Cropanzano & Marie S. Mitchell, *Social Exchange Theory: An Interdisciplinary Review*, 31 J. MGMT. 874, 875 (2005). The core tenet of social exchange theory is the idea of reciprocity between parties, which is directly implicated by the quid pro quo jurisdictional theory. *Id.* at 878. For this system to function, social exchange theory would posit, it makes sense that if a party benefits from the state's laws, it must also be willing to submit to the state's courts.

182. *Ford*, 141 S. Ct. at 1029–30.

also mean that it would be highly unlikely to be subject to bias or an inherently untrustworthy decision-maker in those fora.

Although the focus of the opinion is mainly on the consequences to Ford, the Court did address, even if somewhat obliquely, the procedural fairness viewpoint of the plaintiff when it said:

> But here, the plaintiffs are residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States. In sum, each of the plaintiffs brought suit in the most natural State—based on an "affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that took place" there.[183]

The Court highlighted the unfairness that these plaintiffs, essentially minding their own business and leading their own lives wholly within state boundaries, would suffer if they were forced to bring suit outside of this forum.[184] Forcing these plaintiffs into a different forum would diminish their voice by adding difficulty and cost and would disrespect their lived experiences as state citizens with an expectation that their states' courthouse doors would be open to them for harm suffered within the state. And forcing these plaintiffs to travel to a distant state, one with which Ford would have far more connection than would plaintiffs (since Ford sells its cars everywhere and is at home in at least two fora), could raise the specter of a biased or untrustworthy decision-maker.

When considering other potential fora in which plaintiffs might bring suit, the majority opinion couched its conclusion in relatively abstract and dry terms, stating that "by channeling these suits to Washington and North Dakota, Ford's regime would undermine, rather than promote, what the company called the Due Process Clause's 'jurisdiction-allocating function.'"[185] But Justice Alito's concurrence made the more party-specific plaintiff-side procedural justice point clear:

> [Minnesota and Montana] residents, while riding in vehicles purchased within their borders, were killed or injured in accidents on their roads. Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?
>
> Well, Ford makes that argument. It would *send the plaintiffs packing* to the jurisdictions where the vehicles in question were assembled (Kentucky and Canada), designed (Michigan), or first sold

183. *Id.* at 1031 (quoting Bristol-Myers Squibb Co. v. Superior Ct. of California, 582 U.S. 255, 262 (2017)) (cleaned up).

184. Lahav posits the idea that these cases might be barred in such fora as a form of immunity from suit, which would not only work a substantive distributive injustice but also dovetails with the notion of eliminating voice through forum closure. *See* Lahav, *supra* note 180, at 582.

185. *Ford*, 141 S. Ct. at 1030.

> (Washington and North Dakota) or where Ford is incorporated (Delaware) or has its principal place of business (Michigan).[186]

Implicit in the "send the plaintiffs packing" language is the inappropriate treatment this would entail. And Justice Alito also included in his analysis the fairness concerns of the defendants, suggesting that no procedural justice problems inhere because of the deep connections Ford has with these fora already: the exertion of jurisdiction will neither deny them a voice, demonstrate disrespect, nor force them into a biased forum with an untrustworthy decision-maker. So too, Justice Gorsuch's concurrence highlighted the lack of procedural justice concerns in exerting personal jurisdiction over the defendants: "No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back."[187]

With respect to the potential availability of North Dakota and Washington as fora, Justice Gorsuch (mistakenly) suggested that the majority was ruling this option out. In expressing his concern about this, he voiced what can be understood as procedural justice concerns vis-à-vis those states themselves: "Surely, North Dakota and Washington would contend they have a strong interest in ensuring they don't become marketplaces for unreasonably dangerous products."[188] Denying these states the *possibility* of exerting jurisdiction would deny them voice in weighing in on safety within their borders, would disrespect their sovereignty over in-state actions, and would cast aspersions on their neutrality and trustworthiness.

But the *Ford* decision ultimately respected the procedural justice perspective of the states. The majority opinion did *not* eliminate other potential forum states from possible jurisdiction—it merely focused its attention on Montana and Minnesota. By refusing to engage with an absolutist perspective on denying other states jurisdiction, the majority opinion preserved the potential voice of states like Michigan (design), Kentucky (manufacture), or North Dakota and Washington (original sale). The focus not on allowing one state forum *versus* another but merely one state forum *or not* means the other states need not experience any disrespect, and their status as impartial, unbiased, trusted adjudicators is also preserved. The Court's focus on Minnesota and Montana and its concerns about the problems inherent in denying these fora the opportunity to hear a case that is so inextricably linked to in-state activity reveal the need to honor state voice to rule on in-state harms, respect the state's adjudicative authority, and uphold the state's autonomy as a neutral and trusted decision-maker.

Ford provided a procedural justice rebalancing for plaintiffs, defendants, and forum states after *Daimler* and *Bristol-Myers* tilted too far towards privileging the rights of defendants over plaintiffs and boxing out concerned sovereigns. The cases offered a loophole that could leave in-state plaintiffs without an in-state forum for redress, even for harms suffered in-state as a result of the actions of a defendant with continuous and systematic ties in-state. Although *Ford* was a unanimous

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186. *Id.* at 1032 (Alito, J., concurring) (emphasis added).
187. *Id.* at 1039 (Gorsuch, J., concurring).
188. *Id.* at 1035.

opinion permitting jurisdiction over the defendant, it capped a decade of uproar over the Court's personal jurisdiction jurisprudence.[189] And the ultimate fix the Court offered, with a focus on conceptualizing the test for "related contacts" as a triangular relationship between the defendant, the forum, and the litigation, was palpably confusing, leaving even one member of the Court saying, "I readily admit that I finish these cases with even more questions than I had at the start."[190]

B. The Ghost of Consent Returns: Mallory v. Norfolk Southern

In Section II.B, I addressed the way in which *International Shoe* appeared to replace the consent and implied consent framework with its minimum contacts test. Pre-*Daimler*, the minimum contacts test meant that continuous and systematic ties in a forum were likely to yield personal jurisdiction over that defendant in the forum, rendering issues of consent largely irrelevant. But reports of consent's death were greatly exaggerated. When *Daimler* recast general jurisdiction as limited to places in which a defendant was at home, this put renewed focus on state statutes that purported to permit states to assert jurisdiction when a corporation had consented to jurisdiction in exchange for the privilege of doing business in a state. That is, some states still stipulated that corporations which had registered to do business in that state were impliedly or explicitly consenting to jurisdiction in that forum.[191]

In the recently decided case of *Mallory v. Norfolk Southern Railway*,[192] the Court upheld personal jurisdiction over railroad company Norfolk Southern in Pennsylvania, where plaintiff Robert Mallory, a Virginia resident injured in Ohio and Virginia, had chosen to sue. Mallory relied on a Pennsylvania statute under which Norfolk had agreed to be subject to jurisdiction in the state as part of its registration to do business therein. In the plurality opinion, Justice Gorsuch rests his conclusion on a 1917 Supreme Court precedent, *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,[193] which relied on a similar statute to establish jurisdiction over a Pennsylvania company sued in Missouri state court. Although the bulk of the plurality decision rests on the precedential effect of *Pennsylvania Fire*, an examination of the Court's opinions in the case, along with the briefs for petitioner and respondent, provides another perspective on the role of procedural justice in personal jurisdiction. First, the parties' and the members of the Court's various descriptions of the nature of consent in the case (or possible lack thereof) bear a critical connection to ideas about procedural justice. Secondly, the plurality, concurring, and dissenting opinions all include explicit and implicit discussions of fairness along broad dimensions that are illuminated by procedural justice research.

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189. Rhodes, *supra* note 77, at 414.

190. *Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring).

191. *See* Matthew D. Kaminer, *The Cost of Doing Business? Corporate Registration as Valid Consent to General Personal Jurisdiction*, 78 WASH. & LEE L. REV. ONLINE 55, 79–86 (2021). Interestingly, one argument that the plaintiffs made in *BNSF Railway Co. v. Tyrrell* was that the defendant had consented to the jurisdiction of the Montana state court. Because the Montana Supreme Court did not address that issue, the U.S. Supreme Court declined to consider the argument. 581 U.S. 402, 415 (2017).

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

193. 243 U.S. 93 (1917).

I begin, below, with the issue of consent, and then move to a discussion of the broader fairness concerns.

1. The Role of Fairness in Consent-Based Jurisdiction

In their briefs to the Court, the parties all agreed, in concert with unbroken historical precedent, that voluntary consent to a court's jurisdiction is sufficient to permit assertion of such jurisdiction.[194] And none of the *Mallory* opinions from the Supreme Court opine otherwise.[195] From a procedural justice viewpoint, this makes perfect sense. A party who is *willing* to be subjected to jurisdiction has both an opportunity to be heard in the ultimate case itself as well as an opportunity to be heard on the very point of jurisdiction itself. And consent to a process most certainly feels like an embodiment of dignity and respect, taking seriously the idea that parties have a dignitary right to choose an autonomous path for themselves. Presumably, a party would not consent to such a proceeding if it believed the decision maker was unfair or biased. Thus, asserting jurisdiction based on consent would seem, at an abstract level, to be completely consonant with procedural justice determinations.

That said, the literature that examines issues of consent in procedural justice provides a slightly more nuanced picture. While some theorists focus on the role that procedural justice assessments play in subsequently shaping deference to law, and thus will increase consent to legal regimes and frameworks,[196] other research focuses on the opposite directionality, considering the way that different kinds of consent processes may shape procedural justice assessments. Thus, consent is sometimes seen as a product of procedural justice rather than one of its component parts,[197] but sometimes is incorporated into the factors that make up the ways in which an individual assesses fair process.[198] It is the latter consideration that is of relevance here.

Courts have acknowledged that consent may be more or less voluntary; for example, the *Mallory* trial court noted that "'faced with this Hobson's choice, a foreign corporation's consent to general jurisdiction in Pennsylvania can hardly be

194. Brief for the Petitioner at 10, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) ("All parties agree that a court may establish personal jurisdiction based on voluntary consent.").

195. *Mallory*, 143 S. Ct. at 2039; *Id.* at 2046 (Jackson, J., concurring); *Id.* at 2048 (Alito, J., concurring); *Id.* at 2064 (Barrett, J., concurring).

196. *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

197. *See, e.g.*, Avram Bornstein et al., *Tell It to the Judge: Procedural Justice and A Community Court in Brooklyn*, 39 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 206, 207 (2016) (noting that, "[l]ike Max Weber's discussion of legitimate authority, Tyler and procedural justice theory are concerned with political rule by means of consent rather than coercion.").

198. For example, Finkelstein and Lifshitz described informed consent as an antecedent factor to procedural justice: "Our proposed regulation regime translates procedural justice principles (such as informed consent, voice, respect, trust, and impartiality) into enforceable legal norms." Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 OHIO ST. J. DISP. RESOL. 667, 673 (2010). "First, well-considered and informed consent are necessary for ensuring procedural justice." *Id.* at 701.

characterized as voluntary,' and instead is coerced."[199] Many courts, however, "routinely treated [consent by registration] statutes as generating voluntary, valid consent to personal jurisdiction."[200] And the Supreme Court previously noted that "[t]he difference between the formal and implied consent is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment."[201] Through the lens of procedural justice, however, the volitional nature of consent may be critical in determining whether the process honors voice and respects dignity and autonomy. The more consent is freely given, the more procedural justice concerns will be met, due to honoring the voice of the party and respecting the party's decisions.

Most of the previous research on the relationship between volition, consent, and procedural justice area takes place in two areas: consent to searches by police and consent to participate in alternative dispute resolution processes. I consider each of these briefly in turn.[202] First, procedural justice literature on consent in the police search context often makes the case that such consent is given under conditions that amount to duress, and that therefore this consent is anathema to the voluntariness that would support perceptions of procedural justice.[203] This viewpoint expresses deep skepticism about the role of consent and its relationship with procedural justice.[204] In contrast, scholars discussing a host of non-traditional dispute resolution

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199. Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 570 (Pa. 2021), *cert. granted*, 142 S. Ct. 2646 (2022), *and vacated and remanded*, 143 S. Ct. 2028 (2023) (quoting trial court opinion).

200. Brief for the Petitioner at 12, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023).

201. *Id.* at 38 (quoting Burnham v. Superior Court, 495 U.S. 604 (1990) (cleaned up).

202. There is, of course, also substantial discussion in the legal literature of the fairness of contracts of adhesion and the nature of so-called "consent" in those settings. *See, e.g.*, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 56 (2003); Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 56 (2023).

203. *See, e.g.*, Jacinta M. Gau, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy: An Analysis of Consent Requests During Traffic Stops*, 24 CRIM. JUST. POL. REV. 759 (2013).

204. Eric Miller has posited that procedural justice techniques can actually mask efforts to induce compliance in ways that undermine the idea of true consent:

> The experience of police practice to elicit confessions or consent is *not* that the police lack training in procedural justice: certain police officers have been heavily trained in psychological procedures identical or akin to procedural justice for over fifty years. That experience suggests that the police, intent on securing compliance from the public, will use compliance-inducing techniques similar to procedural justice in ways that undermine individual autonomy, and which may even put the integrity of the criminal justice system at risk.

Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 366 (2016). *See also* Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1767 (2018) (noting that, "[c]urrently the evidence on the effects of consent warnings on perceptions of legitimacy is mixed").

processes have suggested that consent is a critical antecedent to individuals' beliefs that a process is procedurally just.[205] As one scholar of mediation has explained:

> The legal principle of informed consent provides the structure through which [procedural justice] is measured. Informed consent promotes respect for human dignity through its emphasis on participatory, knowledgeable and consensual decision-making. Parties' perceptions of procedural justice are enhanced when they actively participate in the mediation process and voluntarily consent to an outcome that is free of any coercive influences.[206]

Other psychology research has also focused on the critical role of consent in how individuals perceive the law. For example, Tess Wilkinson-Ryan has found that consent to "boilerplate" form contract language is seen as less meaningful than consent to negotiated terms.[207] And Roseanna Sommers and Vanessa Bohns have discussed how ordinary people often feel obligated to comply with requests for consent even when they do not have a legal obligation to do so and, perhaps more troubling, even while "third parties judging the voluntariness of consent are likely to underestimate the pressure people feel to comply with intrusive requests."[208]

Issues around the validity and voluntariness of consent rest at the heart of the *Mallory* dispute, potentially allowing a significant role for procedural justice concerns. Yet Justice Gorsuch's opinion provides a fairly conclusory pronouncement. In considering Norfolk Southern's position that it "has not *really* submitted to proceedings in Pennsylvania," he simply noted that the company filed registration paperwork and "appreciated the jurisdictional consequences attending

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205. As Margo Bagley stated, "[the convention for biological diversity] requirements for prior informed consent for traditional knowledge and genetic resources are rooted in *procedural justice*." Margo A. Bagley, *"Just" Sharing: The Virtues of Digital Sequence Information Benefit-Sharing for the Common Good*, 63 HARV. INT'L L.J. 1, 10 (2022). For a discussion of employment mediation, see Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer A Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 357 (2005) ("As part of that procedural justice component, parties in mediation must have informed consent and not just sign away rights without understanding."). For pre-dispute arbitration, see Thomas M. Madden, *Mandatory Pre-Dispute Arbitration: An Alternative Approach*, 2019 MICH. ST. L. REV. 1033, 1064 (2019) ("The communitarian proposal also relies heavily on notions of informed consent as a cornerstone of procedural justice intended to address social psychology research emphasizing the import of disputant perception of procedure as fair."). For energy disputes, see Benjamin K. Sovacool & Michael H. Dworkin, *Energy Justice: Conceptual Insights and Practical Applications*, 142 APPLIED ENERGY 435, 440 (2015) ("[Energy democracy] includes procedural justice, which is about free prior informed consent for energy projects, representation in energy decision-making, and access to high quality information about energy.").

206. Jacqueline Nolan-Haley, *Self-Determination in International Mediation: Some Preliminary Reflections*, 7 CARDOZO J. CONFLICT RESOL. 277, 278–79 (2006).

207. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747 (2014).

208. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1967 (2019).

these actions and proceeded anyway."[209] He waved away Norfolk Southern's concern that "a raft of formalities" could amount to consent by noting that many legal precedents in the jurisdictional context rely on what might be considered "mere formalities."[210] And he noted that the Court's previous decisions have "recognized, too, that 'express or implied consent' can continue to ground personal jurisdiction—and consent may be manifested in various ways by words or deeds."[211]

Justice Jackson's concurrence also deemed Norfolk Southern's consent valid, but focused more explicitly on the related idea of waiver; because personal jurisdiction is considered a liberty interest of a party to litigation, it can be waived.[212] As Justice Jackson noted, "[a] defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts."[213] She then went on to conclude that the behavior of registering in Pennsylvania, when "the jurisdictional consequences of registration were clear," amounts to waiver, apparently by consent.[214]

Although neither opinion delved deeply into the relevant conditions necessary for consent, both made clear that Pennsylvania's legal regime, as Justice Gorsuch and Justice Jackson perceive it, relies on some *voluntary* action by the allegedly consenting party, thus making the scheme consonant with procedural justice concerns. In both Justice Gorsuch's and Justice Jackson's opinions, Norfolk Southern is presented as making a free choice to file paperwork with the state that then results in jurisdiction. This free choice is what enables the legal rule to succeed on procedural justice dimensions by honoring the defendant's voice and treating it with dignity by respecting its autonomous decision making.

The additional opinions in *Mallory*, however, are perhaps less sanguine about the consent question. Like Justice Gorsuch, Justice Alito, in concurrence, relied on the precedential holding of *Pennsylvania Fire*. But he went on to articulate a concern that, while couched in structural Constitutional terms, also implicates procedural justice. While agreeing that there is no due process concern with requiring a corporation to submit to personal jurisdiction based on registration rules that impose such an obligation, he was "not convinced . . . that the Constitution permits a State to impose such a submission-to-jurisdiction requirement."[215] In rejecting the idea that "giving force to the company's consent would violate the Fourteenth Amendment's Due Process Clause,"[216] Justice Alito, like his other colleagues in the plurality, relied on the Court's precedent. But he implicitly took aim at the potential fairness concerns of registration-as-consent-based jurisdiction

209. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2043 (2023).
210. *Id.* at 2044.
211. *Id.* at 2039.
212. *See, e.g.*, Maggie Gardner, Mallory *Decision Opens New Path for Personal Jurisdiction*, TRANSNAT'L LITIG. BLOG (June 28, 2023), https://tlblog.org/mallory-decision-opens-new-path-for-personal-jurisdiction/ [https://perma.cc/2Q5C-ZE8S].
213. *Mallory*, 143 S. Ct. at 2045 (2023) (Jackson, J., concurring).
214. *Id.* at 2046.
215. *Id.* at 2047 (Alito, J., concurring).
216. *Id.*

on the basis of its potential to run afoul of the dormant Commerce Clause, which "prohibits state laws that unduly restrict interstate commerce."[217]

Because the Commerce Clause issue was not briefed before the Court, Justice Alito's musings on the application to this case are not binding on the parties. However, he wrote skeptically of the potential for this type of registration "to survive Commerce Clause scrutiny under this Court's framework." Justice Alito's Commerce Clause concern is indeed structural, but at its core it has to do with the capacity of one state to treat citizens of another state in a manner that embodies procedural *in*justice. He grounded the doctrine in "the need to respect the interests of other states," and in discussion focuses on how one state may not unduly burden out-of-state citizens.[218] In dicta, he asserted that "[t]here is reason to believe that [this law] discriminates against out of state companies. But at the very least, the law imposes a significant burden on interstate commerce."[219] In particular, he described the unpredictable world that corporate defendants would face when they conducted business across state borders and suggests that some companies may choose to forgo a particular state market or registration itself. He noted that in order to survive a Commerce Clause challenge, the law must advance a "legitimate local public interest" even as he is "hard pressed to identify any *legitimate local interest* that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State."[220] Again, this characterization evokes procedural justice concerns. It preserves the procedural justice of an in-state plaintiff for claims that are connected to the forum state, as discussed in *Ford*:[221] blocking such claims from being heard might carry significant fairness implications for plaintiffs. But it also simultaneously invokes the unfairness to defendants of disrespecting their autonomy and haling them into a potentially biased forum when no such connections exist.

In dissent, Justice Barrett took direct aim at the nature of the consent involved in the case. In language that highlights Norfolk Southern's argument that no true consent was given in this situation, she characterized the type of legal regime here as one which can "manufacture 'consent' to personal jurisdiction."[222] She criticized the plurality's "ground[ing] of consent in a corporation's choice to register with knowledge (constructive or actual) of the jurisdictional consequences" and painted a slippery slope picture of a world in which "*any* long-arm statute could be said to elicit consent."[223] She distinguished *Pennsylvania Fire* by noting that consent in that case was express rather than "deemed . . . (inferred from doing business)."[224] And finally, relying on precedent from Judge Learned Hand, she made clear her belief that one must have "express consent" in such a scheme.[225] This express consent is exactly what Norfolk Southern, in its brief, sought as the test. While

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217. *Id.* at 2051.
218. *Id.* at 2052.
219. *Id.* at 2053.
220. *Id.* at 2054.
221. See *supra* notes 179–86 and accompanying text.
222. *Mallory*, 143 S. Ct. at 2055 (Barrett, J., dissenting).
223. *Id.* at 2057.
224. *Id.* at 2064.
225. *Id.*

Justice Barrett did not delve into the procedural justice experienced by the parties in terms of consent, Norfolk expressly characterized "true consent" in voice terms in its briefing—"expressed by the defendant's words or deeds,"[226] "clearly and unmistakably stated,"[227] and "measured by . . . the words used."[228] Norfolk maintained that the Pennsylvania registration statute at issue merely confers jurisdiction on corporations that register to do business in the state, with no clear moment in which a corporation expressly consents to jurisdiction per se, and argued in the alternative that even if this could be construed as consent, "it would not be voluntary."[229]

Both Justice Barrett and Norfolk Southern's briefing hearken back to the concerns of the pre-*Shoe* world, in which the imposed concept of implied consent roused consternation (and significant litigation) due to its fictional quality.[230] The implied consent framework was very difficult to reconcile, as noted above,[231] with honoring a party's true voice and treating their choice to explicitly consent (or not) with dignity and respect.[232]

In contrast, Justice Barrett focused her deeper analysis on structural (rather than personal) concerns about consent as it would affect the federalism issues inherent in personal jurisdiction: "The Due Process Clause protects more than the rights of defendants—it also protects interstate federalism."[233] She described Pennsylvania's legal scheme as a "power grab [that] infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system."[234] Her concern was that no limit would prevent State "overreach in demanding [the personal jurisdiction right's] relinquishment." And she noted that there is "nothing reasonable about a State extracting consent in cases where it has 'no connection whatsoever.'"[235] In particular, Justice Barrett invoked the specter of state-to-state procedural justice concerns: Pennsylvania's scheme here "infringes on the sovereignty of its sister States in a way no less 'exorbitant' and 'grasping' than attempts we have previously rejected." She continued, "[t]his case provides a textbook example of overreach at the expense of other States," invoking the serious interests Virginia has in the case. She insisted that the consent by registration law "intrudes on the prerogatives of other States—domestic and foreign—to adjudicate

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226. Respondent's Brief at 3, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023).

227. *Id.* at 11.

228. *Id.* at 12 (quoting Brief for the Petitioner at 39, *supra* note 183).

229. *Id.* at 49 n.2.

230. *See supra* note 78.

231. *See supra* text accompanying notes 78–79.

232. Such consent statutes were thought to have a limiting principle related to the context of a lawsuit. For example, the implied consent to suit from driving on a roadway did not subject a defendant to jurisdiction for a fistfight that occurred in a local bar. As Norfolk notes, just as there was a limit to the jurisdiction exerted based on a decision to drive on public roads, so too "there was a limit to the scope of the 'consent' a state could extract as a condition of doing business." Respondent's Brief, *supra* note 226, at 40.

233. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2058 (2023) (Barrett, J. dissenting).

234. *Id.* at 2059.

235. *Id.* at 2058.

the rights of their citizens and enforce their own laws."[236] Her forceful language suggests that Virginia is suffering procedural injustice through both a serious dignitary harm to its sovereignty as well as a deprivation of meaningful voice through the exercise of jurisdiction outside of its borders of a case it should properly hear.[237]

Justice Barrett's assessment of such state sovereignty concerns is in concert with, although less graphically fleshed out than, those provided by the defendant in its briefing. Focusing on the idea of "co-equal sovereigns," Norfolk had argued that by allowing Pennsylvania to take jurisdiction over this case and others like it, Pennsylvania's statutory scheme "infringe[s] upon the sovereignty of sister states."[238] Norfolk raised concerns that allowing jurisdiction here would "invite states to become 'busybodies,' regulating conduct without any legitimate interest."[239] Finally, Norfolk said, "One state cannot seize power from the others in this way."[240] By painting state sovereignty concerns as a zero-sum battle of wills between states, Norfolk invited a perception—taken up by Justice Barrett in dissent—of procedural *in*justice that would occur if Pennsylvania were deemed an acceptable forum. The very nature of the paradigm invoked suggests that other states would be deprived of voice if Pennsylvania exerted jurisdiction; so, too, the terms "seizure" and "infringement" embody the idea of disrespect.

2. Broader Fairness Concerns

In briefing, both parties had raised express fairness concerns beyond consent, and the opinions in *Mallory* similarly touch on other broader procedural justice concerns. While basing his decision squarely on precedent, Justice Gorsuch also went on to explicitly address what he calls "the spirit of our age,"[241] fairness concerns. In dismissing Norfolk Southern's concerns about the fairness of the forum of Pennsylvania, he specifically noted its argument that Pennsylvania would not treat it neutrally: "[O]n the company's telling, it would be 'unfair' to allow Mr. Mallory's suit to proceed in Pennsylvania because doing so would risk unleashing 'local prejudice' against a company that is not local in the eyes of the community."[242] In contrast, Justice Gorsuch took pains to describe just how much business Norfolk Southern does in Pennsylvania, even taking the remarkable step of reproducing a full-page graphic produced by the company that highlights how much the company does in the state,[243] including its vast track network, amount of shipping, business partnerships, and finally, its spending ($938 million), investments ($66 million), and payments ($306 million) within the state. "Given all this," he asked, "on what plausible account could [fairness concerns] require a

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236. *Id.*

237. Justice Gorsuch rejected the federalism concerns as inapposite in light of the defendant's consent, because personal jurisdiction is a personal defense that can be waived or forfeited. *Id.* at 2043 (majority opinion).

238. Respondent's Brief, *supra* note 226, at 17 (citation omitted).

239. *Id.* (citation omitted).

240. *Id.* at 24.

241. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2041 (2023).

242. *Id.* (internal quotation marks omitted).

243. *Id.* at 2042.

Pennsylvania court to turn aside Mr. Mallory's suit?"[244] The deep embeddedness of Norfolk Southern within Pennsylvania's borders makes it a "dead end"[245] for the company to argue on any fairness dimension—voice, dignity and respect, trust, or neutrality—that it cannot be a defendant in the state. Although Norfolk Southern argued that exerting jurisdiction over them would create a problem with the neutrality of the forum, stating that they would "expose defendants to suit in fora where they might be viewed with suspicion or hostility" or "where . . . the defendant is unpopular,"[246] none of the Justices' various opinions embraced this concern.

Instead, the plurality echoed Mallory's own arguments to the Court on the fairness point. In briefing, he had devoted significant space to concerns that track with procedural justice elements. The Pennsylvania court is "fair and efficient,"[247] i.e., neutral and trustworthy. And Mallory highlighted that "Norfolk Southern might incur modestly higher costs,"[248] and the jury pool might be "slightly different,"[249] making the case that jurisdiction in Pennsylvania ultimately changes very little for the defendant. Similarly, Mallory argued that "[a] corporation with a sophisticated legal department can be fairly charged with knowledge of legal precedent . . . particularly *in a State where it has registered to do business.*"[250] The defendant "owns thousands of miles of track and a dozen facilities"[251] in Pennsylvania, and the burdens on its litigation in the state are "slight."[252] Because of its extensive contacts in-state, it "need not even avail itself of the modern transportation and communications that have made it much less burdensome . . . to defend [i]tself there."[253] The defendant "has the resources" to defend itself in Pennsylvania court: Mallory characterizes Norfolk Southern as "[a] Fortune 500 company with immense resources, political clout, and a global operation" that is not denied its "free will or due process" when Pennsylvania exerts jurisdiction.[254] Commentators have echoed the plaintiff's concern here for the lopsided treatment that favors corporate defendants,[255] situating personal jurisdiction doctrine inside of a broader trend towards favored treatment of corporations by the Supreme Court.[256]

Similarly, Justice Alito rejected the fairness concerns of the defendant. "If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern," he explains, "it is only because it is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially

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244. *Id.* at 2043.
245. *Id.*
246. Respondent's Brief, *supra* note 226, at 21.
247. Brief for the Petitioner, *supra* note 194, at 32.
248. *Id.*
249. *Id.* at 33.
250. *Id.* at 43.
251. *Id.* at 44.
252. *Id.*
253. *Id.*
254. *Id.* at 48.
255. *See, e.g.*, Susan Gilles & Angela Upchurch, *Finding a "Home" for Unincorporated Entities Post*-Daimler AG v. Bauman, 20 NEV. L.J. 693 (2020).
256. *See, e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021).

favorable to tort plaintiffs. But we have never held that the Due Process clause protects against forum shopping."[257]

In dissent, Justice Barrett rejected Justice Gorsuch's conception of fairness, in rather dramatic language. "The plurality," she said, "denigrates 'the spirit of our age'—reflected by the vast majority of States—and appeals to its own notions of fairness."[258] Although she did not articulate a theory of fairness in enough detail to analyze it along procedural justice lines, her main complaint appears to be that (in contrast to the assertion made in *Burnham* that tag jurisdiction was alive and well everywhere in the country) many states have rejected ideas of implied consent. Thus, the entire Pennsylvania scheme has neither the pedigree of history nor the favor of the current landscape.[259] In conclusion, Justice Barrett invoked a future where *Daimler* and *Goodyear* hold little sway, saying, "And make no mistake: They are halfway out the door."[260] In this personal jurisdiction future, Justice Barrett apparently sees no potential limitation on the assertion of jurisdiction over non-resident corporations. Given its recent decisions, it seems unlikely that this Court will go that far. And of course, such a future could only come to pass if many states enacted new consent-by-registration statutes.[261] But any such statutes may ultimately put courts in the position of needing to grapple more fully with the procedural justice implications of implied consent that had previously seemed to be left by the wayside after *International Shoe*.

IV. TOWARDS A PROCEDURALLY JUST PERSONAL JURISDICTION JURISPRUDENCE

Even at its inception, the *Shoe* minimum contacts test was greeted with skepticism. How could an amorphous standard that purported to encapsulate "fair play and substantial justice" ever be operationalized to adequately define the limits of due process? This concern was expressed by Justice Black in concurrence in *Shoe* itself:

> There is a strong emotional appeal in the words "fair play," "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards.[262]

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257. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2049 (2023) (Alito, J., concurring).

258. *Id.* at 2060 (Barrett, J., dissenting).

259. *Id.* at 2059.

260. *Id.* at 2065.

261. *See, e.g.*, Zachary D. Clopton, Mallory*, Consent, and Political Economy*, TRANSNAT'L LITIG. BLOG (July 3, 2023), https://tlblog.org/mallory-consent-and-political-economy/ [https://perma.cc/2ZSC-6VLL] ("[M]y prediction is that we will not see a rush to enact consent-based statutes that apply to all corporations that register to do business in a state.").

262. Int'l Shoe v. Washington, 326 U.S. 310, 325 (1945) (Black, J., concurring).

And others have also critiqued the decision for its failure to properly capture the true nature of the due process inquiry.[263] In fact, Justice Black's concern about the elasticity of the test was well-founded. Decades of efforts to clarify and define the limits of due process in personal jurisdiction have produced so-called "tests" ranging from affiliating circumstances to purposeful availment to the "effects test" to certain types of foreseeability. And factors cited in support of assessments of reasonableness and convenience of parties have focused, variably, on the location of witnesses, parties, the state's regulatory interest, and more. But any one of these factors is only a part of a broader kaleidoscope of approaches that courts have used over time. The personal jurisdiction canvas is a muddied palimpsest indeed.

The psychology of procedural justice offers a new lens that could clarify and illuminate the Court's approach to fair process in this arena. While using the psychology of procedural justice to guide courts' due process analysis may seem farfetched, Justice Sotomayor recently highlighted the role that such work can play in guiding the Supreme Court's judgments. While Justice Sotomayor has long focused on the importance of procedures in a way that echoes psychology research on fair process,[264] she has also explicitly used procedural justice research in support of her decisions. In *Rosales-Mireles v. United States*,[265] considering whether an erroneous sentencing guideline range was grounds for vacating a sentence, Justice Sotomayor referred to procedural justice research in finding that perceptions of fairness were a part of the reason that such an error must result in vacating the sentence. "Likewise," she explained, "regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings."[266] Because procedural justice explicitly focuses on how individuals make assessments of fair process, and because fair process is such a key determinant of legitimacy, attention to procedural justice elements could be an important way in which courts could make an effort to reclaim some of the legitimacy grounds they may have lost with recent rulings, both in personal jurisdiction and beyond.[267]

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263. *See, e.g.*, Redish, *supra* note 65, at 1113 ("However, an examination of that test, both in its inception in *International Shoe* and during its subsequent judicial development, reveals that the problem is not, as Justice Brennan suggests, that the test is 'outdated,' but that many of its premises are constitutionally, pragmatically, and conceptually inaccurate.").

264. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525, 537 (2013) ("What is most striking about Justice Sotomayor's comments on legal procedures is how consistent they are with current psychological perspectives on why procedural justice is so central to people's evaluations of legal procedures.").

265. 138 S. Ct. 1897 (2018).

266. *Id.* at 1910 (citing Hollander-Blumoff, *Procedural Justice in the Federal Courts*, *supra* note 8, at 132–34).

267. *See, e.g.*, Matt Ford, *The Supreme Court's Public Legitimacy Crisis Has Arrived*, THE NEW REPUBLIC (Sept. 26, 2022), https://newrepublic.com/article/167846/supreme-court-legitimacy-crisis-dobbs [https://perma.cc/5A5U-RM95]; *America's Supreme Court Faces a Crisis of Legitimacy*, THE ECONOMIST (May 7, 2022), https://www.economist.com/briefing/2022/05/07/americas-

What would it look like to take the psychology of procedural justice seriously in personal jurisdiction cases? Such attention would explicitly consider, from the perspective of both plaintiff *and* defendant, whether the chosen forum would provide an adequate opportunity for voice, a neutral and trustworthy decision maker, and whether proceeding in the chosen forum or closing that forum's doors would be an affront to the dignity of any particular party. Specifically, the court could consider voice to ensure that it was sufficient, but would not need to determine that the chosen forum was the *best* or the *most robust* forum for voice,[268] just a forum that did provide both of the parties with an opportunity to present their side of the case without being significantly hampered by cost or inconvenience. The court could also look at any circumstances surrounding the identity of the parties to determine whether a court was likely to be biased or have a particular motive that would undermine the procedural justice of the proceedings. And finally, the court could consider, in light of all of the activities of both parties in the forum state, whether it would be offensive to the dignity of either party to drag it into court there, or offensive to the party's dignity, instead, to bar the courthouse doors.

Using the lens of these four factors helps illuminate the fact that procedural justice is not always a zero-sum game. Procedural justice for one party does not mean the lack thereof for the other. Unlike distributive justice, where there is always a winner and a loser in court, procedural justice *can* be provided for all parties. That is, a forum that provides voice for the plaintiff can also provide voice for the defendant; similarly, a forum that provides a neutral and trustworthy decision-maker, by definition, will do so for both sides; and finally, treating one side with dignity and respect does not inherently mean that the other side will get poor treatment. Merely because parties may disagree on the best forum, or the easiest or most convenient forum, or simply the forum that they want, does not mean that procedural justice concerns cannot be satisfied for both parties even when one party is denied its choice of forum or required to proceed in a forum it does not prefer.

Taking procedural justice seriously would provide the courts with a useful rubric for examining personal jurisdiction in a more even-handed way. As I have tried to demonstrate above, the Supreme Court has often been implicitly focused on ideas of procedural justice, but one confounding part of my analysis has rested on the question of exactly *whose* procedural justice is the focus of the Court's consideration. Surfacing procedural justice more explicitly as a framework would direct the Court's attention to an analysis that expressly considered *both* parties' procedural justice perspectives. I posit here that it will be likely that a forum exists that can satisfy both parties' basic procedural justice needs; if courts began to take such a two-sided analysis seriously, our personal jurisdiction jurisprudence would begin to take on more clarity and simply make more sense.

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supreme-court-faces-a-crisis-of-legitimacy [https://perma.cc/A4U9-AKXX]. S*ee also* Lahav, *supra* note 180, at 581 (explaining that the Court's pre-*Ford* approach "does not have much to commend it, either as a matter of judicial craft or of state-federal relations").

268. For an analogous decision with respect to notice, see Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 319 (1950) (holding that notice need not be undertaken in the very best manner, only a manner that was reasonably calculated under the circumstances to reach the defendant).

In addition, courts' analyses should consider the procedural justice aspects of state sovereigns themselves. States may indeed have procedural justice "skin in the game"—they may desire a voice to shape responses to harms occurring within their borders; to have their state authority respected by litigants as well as sister states; and to be acknowledged as providing a neutral and trusted forum. Considering the procedural justice needs of the states themselves further helps protect principles of federalism and state sovereignty that may have been obscured in the doctrinal shuffle post-*Daimler*. Furthermore, the focus on states' procedural justice helps illuminate the shared ground underneath the individual liberty due process concerns and state sovereignty focus that have both characterized personal jurisdiction doctrine since its inception.

CONCLUSION

It remains to be seen whether the aftermath of the *Mallory* case will have any broader effects in tilting outcomes back towards a procedural justice equilibrium between plaintiffs, defendants, and forum states, or whether the holding will be applied narrowly, or even reconsidered on Commerce Clause grounds. This Article does not suggest that our judges and jurists have explicitly used research from psychology on procedural justice to shape their decision-making. That said, perceptions of fairness that roughly track procedural justice insights already infuse the Court's due process perspective in the personal jurisdiction arena. Using the more robustly developed lens of procedural justice research to examine the doctrine provides a useful benchmark to help illuminate the strengths and weaknesses of the Supreme Court's past approach to personal jurisdiction and offers an opportunity for future courts to build an inclusive and multi-faceted analytical framework that is grounded in human behavior and perception.