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MASS INACTION: AN ANALYSIS OF PERSONAL JURISDICTION IN MASS ACTIONS IN FEDERAL COURT

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**MASS INACTION: AN ANALYSIS OF PERSONAL
JURISDICTION IN MASS ACTIONS IN FEDERAL
COURT**

*Jonathan Stephenson**

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I. INTRODUCTION

When considering any legal issue, a statute, caselaw, etc. there are several fundamental values vying for supremacy; two premiere interests in American jurisprudence are efficiency and fairness. The recent Supreme Court case *Bristol-Myers Squibb Co. v. Superior Court* is a modern example of this struggle.¹ The case involved specific personal jurisdiction in a mass-action lawsuit, in a state court.² One of the most basic elements of personal jurisdiction, specific, general, or any other variety, is fairness.³ In fact, it is the third and final test in determining whether specific personal jurisdiction will lie in a particular court.⁴ The primary arguments made in the majority opinion related heavily to the concept of fairness, due to its focus on interstate federalism and its concern that the suit at issue did not arise out of the contacts between the defendant and the forum state.⁵ In like fashion, the dissent was also concerned with fairness, but maintained that the majority's ruling would impede the efficient resolution of mass action suits.⁶

Personal jurisdiction, or *in personam* jurisdiction, is among the most basic prerequisites for a lawsuit, as it is the jurisdiction of the court over the parties involved.⁷ Personal jurisdiction is typically only relevant as to the defendant, or any third-parties to the suit, as it may be

1. See *Bristol-Myers Squibb Co. v. Super Ct.*, 137 S. Ct. 1773 (2017).

2. *Id.* The court was in California.

3. See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

4. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987).

5. See *Bristol-Myers Squibb*, 137 S. Ct. at 1777–84.

6. See *id.* at 1784–89 (Sotomayor, J., dissenting).

7. See *Personal Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

waived by any party,⁸ and, in a typical case, the plaintiff will have waived any objections simply by having brought suit.⁹

The impact of the *Bristol-Myers Squibb* decision on personal jurisdiction in state mass actions suits cannot be overstated. According to the majority, a state mass action suit that involves plaintiffs from multiple states must either demonstrate “a connection between the forum and the specific [non-resident] claims at issue,”¹⁰ split into separate mass actions for each of the states,¹¹ or the suit must take place in the home-state of the defendant, wherein lies general personal jurisdiction.¹² This ruling may increase the cost of mass action suits, in some cases drastically. It will necessarily limit the applicable choice-of-law provisions and restrict who may act as counsel for the plaintiffs, and may impact other matters of great import.

The Court’s holding, however, is limited to mass actions in state courts, under which the analysis proceeds under the Fourteenth Amendment.¹³ The Court specifically left open the question of “whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”¹⁴

This Note first provides background information on personal jurisdiction¹⁵ and the Supreme Court ruling in *Bristol-Myers Squibb*.¹⁶ The Note will then analyze how a hypothetical case identical to *Bristol-Myers Squibb*, with the caveat of being brought in federal court under federal law, should be resolved.¹⁷ Finally, it proposes a general solution for how federal courts should analyze personal jurisdiction in mass action suits brought by both resident and non-resident plaintiffs.¹⁸ The writer suggests that the appropriate analysis in federal court should be similar to that performed by a state court. In other words, the federal

8. See *O’Brien v. R. J. O’Brien & Ass’n, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993). “Unlike subject matter jurisdiction, which as a restriction on federal power cannot be waived, personal jurisdiction is ‘a legal right protecting the individual,’ which the defendant may waive.” *Id.* (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982)).

9. See *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938). For an example of a case examining personal jurisdiction in an atypical context, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (discussing personal jurisdiction over non-resident plaintiffs in a class-action lawsuit).

10. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

11. *Id.* at 1783. Thus, in a case like the one in *Bristol-Myers Squibb* spawning over thirty additional lawsuits.

12. *Id.*

13. *Id.* at 1783–84.

14. *Id.* at 1784.

15. See *infra* Part II.b.

16. See *infra* Part II.c.

17. See *infra* Part IV.

18. See *infra* Part V.

court should determine whether there are sufficient ‘minimum contacts’ between the defendant and the forum, so as to make the exercise of jurisdiction constitutional. Under that analysis, mass actions of the type forbidden in state court may be permissible in federal court.

II. BACKGROUND

a. Subject Matter Jurisdiction

Amusingly, to set the stage for a proper discussion of personal jurisdiction, one must begin by examining subject-matter jurisdiction. Subject-matter jurisdiction could be considered the most basic form of jurisdiction, as it is the power of the court over the substantive claims of the case.¹⁹ Unlike personal jurisdiction, subject-matter jurisdiction cannot be waived by any party.²⁰

The primary sources of subject-matter jurisdiction in federal court are 28 United States Code (“U.S.C.”) Section 1331—federal question jurisdiction—²¹ and 28 U.S.C. Section 1332—diversity jurisdiction.²² These statutes allow federal courts to hear two types of cases: (1) those involving a federal statute, a federal constitutional issue, a treaty, or other form of federal question, and (2) cases between parties from different states, or a citizen of a state and a foreign ‘subject.’²³ The source of subject matter jurisdiction being utilized in a given federal court case has a significant impact on how the court will analyze personal jurisdiction.²⁴

19. As opposed to the parties to the case. *See* Legal Information Institute, *Subject Matter Jurisdiction*, https://www.law.cornell.edu/wex/subject_matter_jurisdiction (last visited Apr. 26, 2018).

20. *See supra* note 8.

21. 28 U.S.C. § 1331 (2018). “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” *Id.*

22. 28 U.S.C. § 1332 (2018).

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in Section 1603(a) of this title, as plaintiff and citizens of a State or of different States. *Id.*

23. *See supra* notes 21–22.

24. *See infra* Part II.b.ii.

b. Personal Jurisdiction

When determining whether to exercise personal jurisdiction, a court must make two separate inquiries. The first is whether the exercise of jurisdiction in the specific instance is authorized by Congress (in federal court),²⁵ or the state legislative body (in state court).²⁶ The second is whether the exercise of jurisdiction comports with the requirements of due process under the Fifth Amendment (in federal court)²⁷ or Fourteenth Amendment (in state court).²⁸ The court may exercise jurisdiction only if said exercise is within the confines of constitutional authority under the relevant Due Process Clause and is authorized by the relevant legislative body.²⁹

There are four clear circumstances under which the Due Process Clause authorizes the exercise of personal jurisdiction: (1) when the defendant has been served while physically present within the boundaries of the forum state,³⁰ (2) when the defendant has consented to being sued in the forum state,³¹ (3) when the defendant is domiciled and/or has their principle place of business within the forum state (general personal jurisdiction),³² and (4) when the defendant has certain ‘minimum contacts’ with the forum state (specific personal jurisdiction).³³

This Note primarily discusses personal jurisdiction as applied to corporations, and therefore the ‘presence’ rule is not applicable, as corporations do not often travel to different states, where they might be served. In addition, the consent rule will not be discussed, as a corporation that has consented to personal jurisdiction will never encounter the Fifth Amendment question discussed in this Note. These two methods of obtaining personal jurisdiction therefore generally receive little attention in the corporate realm.³⁴

25. Through either a federal statute, or, more generally, the Federal Rules of Civil Procedure.

26. Through what is known as a “longarm statute.” See YEAZELL, STEPHEN C., CIVIL PROCEDURE 174–75 (7th ed. 2008).

27. The Fifth Amendment analysis is only utilized in certain circumstances, see *infra* Part II.b.ii.2.

28. See *Int’l Shoe*, 326 U.S. 310.

29. YEAZELL, *supra* note 26 at 174–75.

30. See *Burnham v. Super. Ct.*, 495 U.S. 604 (1990).

31. See *Nat’l Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964). “[P]arties to a contract may agree in advance to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.” *Id.* at 316. Consent can also be found by implication or waived, although the circumstances of such are beyond the scope of this note.

32. See *Milliken v. Meyer*, 311 U.S. 457 (1940).

33. See *Int’l Shoe*, 326 U.S. 310.

34. With the possible exception of corporations fighting about whether they have consented to personal jurisdiction, over which this author has seen much ink spilled.

Compared with jurisdiction based on presence or consent, general personal jurisdiction is more frequently encountered in the corporate context. General personal jurisdiction is the concept that a defendant can always be held to answer in its home state, regardless of where the actions at issue occurred.³⁵ The Supreme Court stated that general personal jurisdiction is appropriate when “continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities [that brought rise to the present suit].”³⁶

Further, “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”³⁷ However, the Supreme Court has recently limited the situations where general personal jurisdiction applies.³⁸ Given that the Court in *Bristol-Myers Squibb* reaffirmed that a defendant can always be sued in his home-state, irrespective of the state or states from which any of the plaintiffs in a mass action hail, such is not at issue here.³⁹

This Note focuses on the ‘minimum contacts’ method of establishing personal jurisdiction, also known as specific personal jurisdiction. A minimum contacts analysis arises in the following situations: (1) cases heard by state courts,⁴⁰ (2) cases heard by federal courts applying state law,⁴¹ (3) cases heard by federal courts applying federal laws that do not provide for service of process,⁴² and (4) cases heard by federal courts applying federal laws that provide for service of process.⁴³

i. State Court

As stated above, when considering the extent to which a state may exercise personal jurisdiction, the appropriate inquiry is twofold. First, whether the state’s long-arm statute will allow the exercise of jurisdiction, and second, whether the exercise of jurisdiction is within

35. *Milliken*, 311 U.S. at 464. “One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.” *Id.*

36. *See Int’l Shoe*, 326 U.S. at 318.

37. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *Int’l Shoe*, 326 U.S. at 317).

38. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct 1549 (2017).

39. *See id.* at 1783.

40. *See infra* Part II.b.i.

41. *See infra* Part II.b.ii.1.

42. *See infra* Part II.b.ii.2.a.

43. *See infra* Part II.b.ii.2.b.

the confines of the due process clause.⁴⁴ Unlike in federal court, where the amendment used in the analysis depends on the law applied,⁴⁵ state courts always utilize the Fourteenth Amendment, even when applying federal law.⁴⁶

The long-arm statute issue varies dependent on the state in question. For example, California's long-arm statute is California Code of Civil Procedure Section 410.10, which states "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."⁴⁷ California's long-arm is a highly liberal statute, which allows almost the full extent of personal jurisdiction.⁴⁸ Other states may be more restrictive, but statutory analysis is at the root of the inquiry.

Greater depth is required when analyzing whether the exercise of personal jurisdiction is constitutional. The principle of basic fairness serves as the rationale for the Due Process Clause's restriction of personal jurisdiction.⁴⁹ A person should not be unexpectedly dragged into a faraway state to stand trial for an incident that neither occurred within said state, nor impacted the residents of that state.⁵⁰ Hence, the common law rule of personal jurisdiction was that a state could exercise jurisdiction over any person found within its boundaries.⁵¹ There are three conditions for the modern exercise of specific personal jurisdiction:

1. "[T]he defendant [must have] purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws"⁵² or have "purposefully directed its conduct into the forum state;"⁵³
2. "[T]he plaintiff's claim must 'arise out of or relate to' the defendant's forum conduct;"⁵⁴ and

44. YEAZELL, *supra* note 26, at 174–75.

45. *See infra* Part II.b.ii.

46. *See* U.S. CONST. amend. XIV, §1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." This holds true, regardless of under which law the State is 'depriving' a person of 'life, liberty, or property.'

47. Cal. Civ. Proc. Code § 410.10 (2019).

48. *See id.*

49. *See Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

50. *See id.*

51. *See Burnham v. Super. Ct.*, 495 U.S. 604 (1990).

52. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

53. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1785 (2017) (Sotomayor, J., dissenting) (quoting *J. McIntyre Mach., Ltd. V. Nicastro*, 564 U.S. 873, 877 (2011)).

54. *Id.* at 1786 (quoting *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984)).

3. The exercise of personal jurisdiction must not “offend ‘traditional notions of fair play and substantial justice.’”⁵⁵

In determining this final factor courts are to consider “the burden on the defendant, the interests of the forum state, and the plaintiff’s interest in obtaining relief.”⁵⁶ It must also weigh “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”⁵⁷

The ‘purposeful availment’ factor requires an evaluation of the extent of the contacts with the forum state.⁵⁸ Courts must consider the number of contacts, and the level of involvement with the contacts.⁵⁹ This is a fairly simple inquiry for a court to perform. The ‘purposeful availment’ factor under the Fourteenth Amendment is also known as ‘statewide contacts’ and is defined here for purposes of contrast with the concept of ‘nationwide contacts,’ discussed later in this Note.⁶⁰

Jurisdiction will lie in the state court if, and only if, the constitutional tests are met, and the state long-arm permits the exercise of personal jurisdiction.⁶¹

ii. Federal Court

In federal court, determination of personal jurisdiction depends on whether the court is applying state or federal law.⁶² Federal Rule of Civil Procedure (hereafter “FRCP”) Section 4 governs personal jurisdiction in federal court.⁶³ Additionally, if the case is based on state law, the exercise of personal jurisdiction must comport with the Fourteenth Amendment.⁶⁴ If the case is based on federal law, the Fifth Amendment governs.⁶⁵

55. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) (quoting *Int’l Shoe*, 326 U.S. at 316).

56. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

57. *Id.*

58. *See Int’l Shoe*, 326 U.S. at 319–20.

59. *See id.*

60. *See infra* Part II.b.ii.2.b.

61. YEAZELL, *supra* note 26, at 174.

62. *See* Fed. R. Civ. P. 4(k).

63. Fed. R. Civ. P. 4.

64. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

65. *See* *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1784 (2017). Additionally, supplemental jurisdiction where, for example, there are both state and federal claims in the same case, is governed by 28 U.S.C. § 1367; such is beyond the scope of this Note.

1. State Law

When a federal court is hearing a case on the basis of diversity jurisdiction,⁶⁶ and therefore applying state law, the FRCP state that “[s]erving a summons . . . establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”⁶⁷ In other words, the federal court is to consider the situation in the same way as that state’s court would, and apply the Fourteenth Amendment ‘minimum contacts’ analysis, as well as that state’s long-arm statute.⁶⁸ Therefore, in this instance, the federal analysis is precisely the same as the state analysis.

2. Federal Law

Even when hearing a case on the basis of federal question jurisdiction⁶⁹ the federal court may still need to use the state-level analysis. The FRCP state that “[s]erving a summons . . . establishes personal jurisdiction over a defendant when authorized by federal statute.”⁷⁰ Thus, when federal statutes do not authorize federal personal jurisdiction, the federal court must analyze the issue in the same way as the relevant state court would, which “leads to the prospect of a federal court refusing to adjudicate a federal claim because the courts of the state in which it sits could not accept jurisdiction.”⁷¹ Meaning, there may be a situation in which neither federal nor state court has jurisdiction.⁷² While this is certainly ‘anomalous,’ “it would be equally anomalous to utilize a state long-arm rule to authorize service of process in a manner that the state body enacting the rule could not constitutionally authorize.”⁷³ Therefore, federal statutes that are silent as to service of process are treated differently from those that speak on the subject.⁷⁴

66. *See supra* Part II.a.

67. Fed. R. Civ. P. 4(k)(1)(A).

68. *See supra* Part II.b.i.

69. *See supra* Part II.a.

70. Fed. R. Civ. P. 4(k)(1)(C).

71. *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 296 (3d Cir. 1985).

72. *See id.*

73. *Id.* (quoting *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir. 1981)).

74. *See id.* at 297.

a. Silent as to Service of Process

When a federal statute is silent as to service of process FRCP 4(k)(1)(C) no longer applies, nor does FRCP 4(k)(1)(B),⁷⁵ only FRCP 4(k)(1)(A) is applicable.⁷⁶ This means that the appropriate analysis is the same as that used in state-court.⁷⁷

b. Authorizes Service of Process

When a federal statute authorizes service of process, the FRCP authorizes personal jurisdiction.⁷⁸ In this case, and this case alone, the appropriate inquiry becomes whether the Fifth Amendment, rather than the Fourteenth, will allow personal jurisdiction.⁷⁹

The Due Process Clause of the Fifth Amendment is “essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances.”⁸⁰ The ‘minimum contacts’ analysis, set out in *International Shoe*, was the Court’s attempt to ensure that personal jurisdiction honored these core values.⁸¹ Thus, perhaps the Fifth Amendment should likewise impose the ‘minimum contacts’ inquiry; there are a number of cases across several states and circuits which, ‘explicitly or tacitly’ have followed this approach.⁸² Additionally, Justice Stewart approved this approach in his dissent in *Stafford v. Briggs*.⁸³

Nationwide Contacts

Under the Fourteenth Amendment, ‘purposeful availment’ requires that the defendant have certain contacts with the forum state.⁸⁴ When considering the ‘purposeful availment’ factor in a Fifth Amendment

75. Fed. R. Civ. P. 4(k)(1)(B) describes personal jurisdiction over “part[ies] joined under Rule 14 or 19” Thus, it is only relevant when discussing third-party plaintiffs or defendants, or required parties. See Fed. R. Civ. P. 14 & Fed. R. Civ. P. 19.

76. See Fed. R. Civ. P. 4(k)(1).

77. See *Max Daetwyler Corp.*, 762 F.2d at 295. “In the absence of a federal statute authorizing nationwide service of process, federal courts are referred to the statutes or rules of the states in which they sit.” *Id.*

78. Fed. R. Civ. P. 4(k)(1)(C).

79. See *Max Daetwyler Corp.*, 762 F.2d at 293.

80. *Honeywell, Inc. v. Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975).

81. See 326 U.S. 310 (1945).

82. *Honeywell, Inc.*, 509 F.2d at 1143 (citing *Fisons Ltd. v. United States*, 458 F.2d 1241, 1250 (7th Cir. 1972), *cert. denied*; *Fraleigh v. Chesapeake & Ohio Ry. Co.*, 397 F.2d 1, 3–4 (3d Cir. 1968); *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 440 (1st Cir. 1966), *cert. denied*; *Stanley v. Local 926 of Op. Eng., AFL-CIO*, 354 F. Supp. 1267, 1271 (N.D. Ga. 1973); *SCM Corp. v. Brother Int’l Corp.*, 316 F. Supp. 1328, 1333–34 (S.D.N.Y. 1970); *Sec. & Exch. Comm’n v. Myers*, 285 F. Supp. 743, 748–49 (D. Md. 1968); *Japan Gas Lighter Ass’n v. Ronson Corp.*, 257 F. Supp. 219, 232 (D. N.J. 1966)).

83. *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting).

84. See *Int’l Shoe*, 326 U.S. 310.

context, the ‘forum’ has changed from a state to the nation. Some courts have exercised a national contacts theory in this situation, stating that “the appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States.”⁸⁵ The underlying basis of such is that “it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part.”⁸⁶ In other words, rather than looking to the boundaries of the state in which the federal court sits, the federal court should look to the boundaries of the nation.⁸⁷

The national contacts theory has yet to be considered by the United States Supreme Court. As far back as the *Asahi* case in 1987, the Court has refused to address this issue.⁸⁸ That same year, in a note in *Omni Capital International, Limited v. Rudolf Wolff & Co.* the Court specifically stated they “[had] no occasion” to address this issue.⁸⁹ More recently, the *Bristol-Myers Squibb* majority acknowledged the issue again, by way of citing *Omni*.⁹⁰

The Circuit Courts who have considered the national contacts theory, have often dodged the issue by finding a lack of a federal statute authorizing jurisdiction and thereby re-directing their analysis to that applied under the Fourteenth Amendment.⁹¹

The Third Circuit in *Max Daetwyler Corp.* stated, without deciding, that where a federal statute allows jurisdiction, the nationwide-contacts theory might well be constitutional.⁹² Even when there is no federal statute authorizing jurisdiction, there are certain courts that have found

85. *Max Daetwyler Corp. v. R. Meyer.*, 762 F.2d 290, 293 (3d Cir. 1985) (citing *Edward J. Moriarty & Co. v. Gen. Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967)).

86. *Id.* at 293–94. (quoting *Cryomedics, Inc. v. Spembly*, 397 F. Supp. 287, 291 (D. Conn. 1975); see also *Centronics Data Comput. Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 663–64 & n.1 (D. N.H. 1977); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 357 (W.D. Mich. 1973); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972)).

87. See *id.*

88. *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112–13 n.* (1987).

89. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

90. 137 S. Ct. at 1784.

91. See, e.g., *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (Lanham Act does not authorize nationwide contacts); *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 418–20 (E.D. Pa. 1979) (likewise the Clayton and Anti-Dumping Acts); *Amburn v. Harold Forster Indus.*, 423 F. Supp. 1302 (E.D. Mich. 1976) (likewise in patent infringement cases); *Graham Eng’g Corp. v. Kemp Products Ltd.*, 418 F. Supp. 915, 919–20 (N.D. Ohio 1976) (same); *Ag-Tronic, Inc. v. Frank Paviour Ltd.*, 70 F.R.D. 393, 401 (D. Neb. 1976) (same); *Edward J. Moriarty & Co. v. Gen. Tire & Rubber Co.*, 289 F. Supp. 381, 389–90 (S.D. Ohio 1967) (likewise the Sherman Act).

92. *Max Daetwyler Corp.*, 762 F.2d at 295.

nationwide contacts permissible under the Fourteenth Amendment and the relevant long-arm.⁹³

However, given the ruling in *Bristol-Myers Squibb*, discussed below, it seems unlikely that this analysis continues to hold water, as the federalism interests articulated in *Bristol-Myers Squibb* run directly counter to the idea that a state's long-arm can permit a nationwide contacts theory.⁹⁴

c. *Bristol-Myers Squibb Co. v. Superior Court*

i. *Background*

Bristol-Myers Squibb Co. v. Superior Court of San Francisco was a mass-action filed by over six hundred plaintiffs, eighty-six of whom live in California,⁹⁵ against Bristol-Myers Squibb.⁹⁶ Bristol-Myers Squibb is a Fortune 500 pharmaceutical company, incorporated in Delaware and headquartered in New York.⁹⁷ It also maintains substantial operations in New Jersey, with over fifty percent of its workforce in New York and New Jersey.⁹⁸

Bristol-Myers Squibb engages in business-activities across the nation, including in California.⁹⁹ It employs over 25,000 people worldwide.¹⁰⁰ It has over four hundred employees, five labs, and a government-advocacy office within California.¹⁰¹ Bristol-Myers Squibb's total revenues constitute roughly fifteen billion dollars.¹⁰²

The claims were based on California state law due to alleged injuries from the use of Plavix.¹⁰³ Plavix is a prescription blood-thinner, originating in the 90s, that was heavily marketed and earned Bristol-Myers Squibb billions in revenue.¹⁰⁴ Plavix was not developed, tested, labeled, packaged, or approved regulatorily in California.¹⁰⁵ Nor was the

93. See *Honeywell, Inc. v. Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975) (jurisdiction found under Illinois long-arm statute); *Centronics Data Comput. Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D. N.H. 1977) (jurisdiction found under New Hampshire long-arm statute); *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah, 1973) (jurisdiction found under Utah long-arm statute).

94. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773 (2017).

95. *Id.* at 1778. The remaining plaintiffs reside in thirty-three other states.

96. See *Bristol-Myers Squibb*, 137 S. Ct. 1773.

97. *Id.* at 1777–78; *Id.* at 1784 (Sotomayor, J., dissenting).

98. *Id.* at 1778 (majority opinion).

99. *Id.*

100. *Id.* at 1784 (Sotomayor, J., dissenting).

101. *Id.* at 1778 (majority opinion); *Id.* at 1786 (Sotomayor, J., dissenting).

102. See *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

103. *Id.* at 1778 (majority opinion).

104. *Id.* at 1784 (Sotomayor, J., dissenting).

105. *Id.* at 1778 (majority opinion).

marketing strategy for Plavix developed in California.¹⁰⁶ Rather, there was a nationwide marketing campaign, utilizing the same ads in every state.¹⁰⁷

Between 2006 and 2012, roughly 187 million Plavix pills were sold in California, earning Bristol-Myers Squibb over \$900 million, roughly one percent of Bristol-Myers Squibb's nationwide sales revenue.¹⁰⁸ Plavix was distributed through a few wholesalers, including McKesson, a California-based corporation, who was a defendant in the lower court case.¹⁰⁹ McKesson's distribution of Bristol-Myers Squibb's products generated nearly one-quarter of Bristol-Myers Squibb's revenue.¹¹⁰

Originally, eight separate complaints were filed in California Superior Court, each asserting thirteen claims.¹¹¹ None alleged that the non-resident plaintiffs had obtained Plavix through any California source, nor did the plaintiffs claim that they were treated with Plavix in California, nor injured by Plavix in California.¹¹²

Bristol-Myers Squibb moved to dismiss under California Code of Civil Procedure Section 418.10(a)(1),¹¹³ claiming the court lacked personal jurisdiction over the claims by the non-resident plaintiffs.¹¹⁴ The Superior Court denied this motion, claiming to have general jurisdiction over Bristol-Myers Squibb due to “[its] extensive activities in California.”¹¹⁵ Bristol-Myers Squibb petitioned the Court of Appeal for a writ of mandate, which was denied.¹¹⁶

106. *Id.*

107. *Id.* at 1784 (Sotomayor, J., dissenting).

108. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778.

109. *Id.* at 1784 (Sotomayor, J., dissenting).

110. *Id.*

111. *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 878 (Cal. 2016), *rev'd*, 137 S. Ct. 1773. The claims in each of the cases were: strict products liability (design and manufacturing defects), negligence, breach of implied warranty, breach of express warranty, deceit by concealment, negligent misrepresentation, fraud by concealment, unfair competition, false or misleading advertising, injunctive relief for false or misleading advertising, wrongful death, and loss of consortium; It is also worth noting that Bristol-Myers Squibb acknowledged that the claims brought by the non-resident plaintiffs are “materially identical” to those of the resident plaintiffs. *Bristol-Myers Squibb*, 137 S. Ct. at 1785 (Sotomayor, J. dissenting).

112. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778 (majority opinion).

113. In pertinent part:

(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her. Cal. Code of Civ. P. 418.10(a)(1) (2019).

114. *Bristol-Myers Squibb Co. v. Super. Ct.*, 228 Cal. App. 4th 605, 612 (2014), *remanded to*, 1 Cal. 5th 783, *rev'd*, 137 S. Ct. 1773.

115. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778.

116. *Id.*

After the denial, the United States Supreme Court decided *Daimler AG v. Bauman*, limiting the scope of general personal jurisdiction.¹¹⁷ The California Supreme Court instructed the Court of Appeal “to vacate its order denying mandate and to issue an order to show cause why relief sought [sic] in the petition should not be granted.”¹¹⁸ The Court of Appeal capitulated on the question of general jurisdiction,¹¹⁹ but found that specific jurisdiction was present.¹²⁰ The California Supreme Court unanimously affirmed the decision regarding general jurisdiction,¹²¹ and non-unanimously affirmed regarding specific jurisdiction.¹²²

The majority¹²³ applied a “sliding scale approach to specific jurisdiction,”¹²⁴ and stated that “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”¹²⁵ Under this test, the majority concluded that Bristol-Myers Squibb had sufficient contacts with California to permit specific jurisdiction “based on a less direct connection between [Bristol-Myers Squibb’s] forum activities and plaintiffs’ claims than might otherwise be required.”¹²⁶ The majority justified its holding based on the similarity of the non-resident’s claims to those of the California residents, and noted that Bristol-Myers Squibb conducted research within the state.¹²⁷

The dissenting justices¹²⁸ stated that “the claims of . . . nonresidents injured by their use of Plavix they purchased and used in other states . . . in no sense arise from [Bristol-Myers Squibb’s] marketing and sales of Plavix in California,” and that “mere similarity” of the claims was insufficient to establish specific personal jurisdiction.¹²⁹

117. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

118. See *Bristol-Myers Squibb*, 137 S. Ct. 1778 (quoting *Bristol-Myers Squibb Co. v. Super. Ct.*, 2014 Cal. LEXIS 1579).

119. See *Bristol-Myers Squibb*, 228 Cal. App. 4th 605 (2014).

120. *Id.*

121. *Bristol-Myers Squibb Co. v. Super. Ct.*, 1 Cal. 5th 783 (2016).

122. *Id.*

123. The opinion was written by Chief Justice Cantil-Sakauye, joined by Justices Liu, Cuellar, and Kruger. *Id.* at 783, 788.

124. See *Bristol-Myers Squibb*, 1 Cal. 5th at 806.

125. *Id.* (quoting *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 455 (1996)).

126. *Id.*

127. See *id.*

128. The dissent was written by Justice Werdeggar, joined by Justices Chin and Corrigan. *Id.* at 783.

129. See *Bristol-Myers Squibb*, 1 Cal. 5th at 819 (Werdeggar, J., dissenting).

ii. Majority Opinion

The majority opinion was written by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch.

The Court began by stating that personal jurisdiction in state court is limited by the Fourteenth Amendment, and that the crux of any examination of specific personal jurisdiction is “the defendant’s relationship to the forum state.”¹³⁰ The Court defined personal jurisdiction as “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation,” and thus, “is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”¹³¹

The Court also stated that when considering the “burden on the defendant,” vis-a-vis questions of fairness and substantial justice, one of the main considerations may be federalism.¹³² This is due, in part, to concerns about “submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”¹³³ The Court also noted that “the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each state . . . implie[s] a limitation on the sovereignty of all its sister states.”¹³⁴ And that “at times, this federalism interest may be decisive,”¹³⁵ quoting *World-Wide Volkswagen* for the proposition that:

[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.¹³⁶

130. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1779 (2017) (citing *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

131. *Id.* at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

132. *Id.* at 1776.

133. *Id.* at 1780.

134. *Id.* at 1780 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

135. *Id.* at 1780.

136. See *Bristol-Myers Squibb*, 137 S. Ct. at 1780–81 (quoting *World-Wide Volkswagen*, 444 U.S. 294).

The Court claimed to be simply applying settled principles regarding personal jurisdiction.¹³⁷ Firstly, it repudiated the California Supreme Court's concept of "sliding scale" specific personal jurisdiction.¹³⁸ The Court quoted the *Goodyear* case, which stated that "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."¹³⁹ It extrapolated that connections between the state and the defendant unrelated to the issue in a case do not meet the 'arising out of' factor of personal jurisdiction.¹⁴⁰ Regarding resident plaintiffs, in whom personal jurisdiction lies, the Court said "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."¹⁴¹ Thus, the Court dismissed the idea that because California plaintiffs could bring their claim, the non-resident plaintiffs could bring similar claims.¹⁴²

The Court then refuted the plaintiffs' arguments under *Keeton v. Hustler Magazine*¹⁴³ and *Phillips Petroleum Co. v. Shutts*.¹⁴⁴ *Keeton* involved a New York citizen suing Hustler for libel, alleging damages both inside and outside of her home state.¹⁴⁵ The plaintiffs used this case to argue that the defendant's forum contacts do not have to "give rise to" every claim in a case, instead it suffices for the claims to be "related to" those contacts.¹⁴⁶ Thus, because the non-residents claims were caused by the same course of conduct, and were identical to the resident plaintiff's claims, they were "related."¹⁴⁷

According to the Court, the plaintiffs misunderstood the *Keeton* case.¹⁴⁸ The Court stated that, in *Keeton*, the harm from within the plaintiff's home state (which "gave rise to" the claim) established personal jurisdiction, whereas the harm outside that state had to do with the "scope of the case," rather than "jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State."¹⁴⁹

137. *Id.* at 1781.

138. *Id.*

139. *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931 (2011)).

140. *Id.* at 1781.

141. *Id.* (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

142. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

143. *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

144. *Phillips Petroleum Co. v. Shutts* 472 U.S. 797 (1985); *Bristol-Myers Squibb*, 137 S. Ct. at 1782–83.

145. *See Keeton*, 465 U.S. 770.

146. Brief of Respondents at 12, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (No. 16-466).

147. *Id.*

148. *See Bristol-Myers Squibb*, 137 S. Ct. at 1782.

149. *Id.*

The plaintiffs used the *Phillips* case to argue that non-resident plaintiffs may join resident plaintiffs in complex litigation, as, in that case, non-residents were permitted to join a class-action in a Kansas court for “injuries [that] arose outside the forum.”¹⁵⁰ The Court held the case completely irrelevant, as it is a discussion of the due process rights of non-resident class members, in a class action suit.¹⁵¹ The Court, in that case, explained that the jurisdiction in such situations is distinct from the ability of a court to exercise personal jurisdiction over an out-of-state defendant.¹⁵² Further, the Court mentioned, the defendant in that case did not raise its own due-process rights, and the Court did not reach that issue.¹⁵³

Finally, the Court rejected the plaintiff’s contention that “[Bristol-Myers Squibb’s] ‘decision to contract with a [McKesson] to distribute [Plavix] nationally’ provides a sufficient basis for personal jurisdiction.”¹⁵⁴ Stating that a defendant’s relationship with a third party, unrelated to the instance at issue in the suit, is insufficient to grant personal jurisdiction.¹⁵⁵ In addition, the Court noted that the plaintiffs made no claim of Bristol-Myers Squibb acting with McKesson in the instances at issue, and the plaintiffs had “adduced no evidence” to show who had shipped their Plavix.¹⁵⁶ At oral argument the plaintiffs argued that “[i]t is impossible to trace a particular pill to a particular person It’s not possible for us to track particularly to McKesson.”¹⁵⁷ The Court found that “[t]he bare fact that [Bristol-Myers Squibb] contracted with a California distributor is not enough to establish personal jurisdiction in the State.”¹⁵⁸

Overall, the Court held that there was an insufficient relationship between Bristol-Myers Squibb’s connections with the state of California and the claims of the non-resident plaintiffs at issue, and therefore that California courts had no claim to personal jurisdiction over Bristol-Myers Squibb with regard to the non-resident plaintiffs.¹⁵⁹

150. Brief of Respondents at 27–28, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (No. 16-466).

151. See *Bristol-Myers Squibb*, 137 S. Ct. at 1782–83.

152. *Id.* at 1783 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–12 (1985)).

153. *Id.* (citing *Phillips*, 472 U.S. 812 n.3). “Indeed, the Court stated specifically that its ‘discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class.’”

154. *Id.*

155. *Id.*

156. *Id.* at 1783.

157. Transcript of Oral Argument at 33, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (No. 16-466) [hereinafter Transcript of Oral Argument].

158. See *Bristol-Myers Squibb*, 137 S. Ct. at 1783.

159. See *id.* 1783–84.

iii. Dissenting Opinion

The dissenting opinion was written by Justice Sotomayor, who saw the exercise of jurisdiction over the non-resident plaintiff's claims as perfectly permissible.¹⁶⁰ "A core concern of this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a state for a nationwide course of conduct that injures both forum residents and nonresidents alike."¹⁶¹ Her analysis focused on the well-established rule that personal jurisdiction over a defendant requires "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁶² Justice Sotomayor also began her discussion by defining specific personal jurisdiction, and noting the three requirements for the exercise thereof.¹⁶³

Sotomayor then stated that Bristol-Myers Squibb certainly had "'purposefully avail[ed] itself' . . . of California and its substantial pharmaceutical market."¹⁶⁴ Secondly, she stated that the claims "relate to" said availment, because all the plaintiffs were "injured by the same essential acts," the nationwide advertising campaign.¹⁶⁵ And finally, she found no issue of unfairness in this case, given that the claims are fundamentally identical, and therefore it would be less efficient for the parties to litigate the non-residents claims separately, possibly in as many as thirty-four distinct suits.¹⁶⁶

Sotomayor systematically examined the cases cited by the majority and found them wanting.¹⁶⁷ While the majority used *Walden* to argue that *Bristol-Myers Squibb's* conduct in California was unrelated to the claims of the non-resident plaintiffs,¹⁶⁸ Sotomayor claimed that *Walden* was irrelevant.¹⁶⁹ According to Sotomayor, *Walden* clarified that "purposeful availment" was the first requirement of specific personal jurisdiction.¹⁷⁰ Sotomayor did not see any discussion of the "relationship" requirement, and stated that "[o]nly if its language is taken out of context . . . can *Walden* be made to seem relevant to the case at hand."¹⁷¹ She supported this claim by noting that such was the

160. See *id.* at 1784–89 (Sotomayor, J., dissenting).

161. *Id.* at 1784.

162. *Id.* at 1785.

163. *Id.* at 1785–86.

164. See *Bristol-Myers Squibb*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting).

165. *Id.*

166. See *id.* at 1786–87.

167. See *id.* at 1787–88.

168. See *id.* at 1781–82 (majority opinion).

169. See *id.* at 1787 (Sotomayor, J., dissenting).

170. See *Bristol-Myers Squibb*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting).

171. *Id.*

understanding of the lower court in that case,¹⁷² the understanding of the parties, and the amicus curiae,¹⁷³ and that commentators have understood the case in that light.¹⁷⁴

Moving to *Keeton*, Sotomayor argued that the majority's attempt to distinguish this case from *Bristol-Myers Squibb* on the basis of only having one plaintiff was misguided.¹⁷⁵ She reasoned that *Keeton* also involved a corporation facing a penalty in a single-state for a nationwide course of conduct, and that the difference between the plaintiff in that case and the multitudes here was not significant.¹⁷⁶ Sotomayor focused on the fact that in either event a corporation will be held to account for nationwide-conduct in a single state, and whether to one plaintiff or many, "*Keeton* informs us that there is no unfairness in such a result."¹⁷⁷

According to Sotomayor, the primary motivation of the majority was interstate federalism,

Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation" but personal jurisdiction still will not lie.¹⁷⁸

Sotomayor saw "little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct."¹⁷⁹ She also questioned "[w]hat interest could any single State have in adjudicating respondents claims that the other States do not share?"¹⁸⁰ And stated that she would return to the *International Shoe* standard of "fair play and substantial justice."¹⁸¹

Sotomayor concluded with her concerns regarding the practical and policy implications of the majority's decision.¹⁸² Primarily, that plaintiffs injured in separate states are now only capable of bringing their suits in the home state of the defendant.¹⁸³ She was concerned that such

172. *Id.*; see *Fiore v. Walden*, 688 F.3d 558, 576–82 (9th Cir. 2012).

173. *Id.*; see Brief for Petitioner 17–31, Brief for Respondent 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden*, 134 S. Ct. 1115 (No. 12–574).

174. *Id.*; see 4 Wright §1067.1, at 388–89.

175. See *Bristol-Myers Squibb*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

176. See *id.*

177. *Id.*

178. *Id.* at 1788 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

179. *Id.* at 1788.

180. *Id.*

181. See *Bristol-Myers Squibb*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting) (quoting *Int'l Shoe*, 326 U.S. at 316).

182. See *id.* at 1788–89.

183. See *id.* at 1789.

a requirement, or the alternative, separation of suits on the basis of the state from whence the plaintiffs hail, will shift greater burdens to plaintiffs ill equipped to bear the cost and will prevent bringing corporate defendants to answer for their actions.¹⁸⁴

Sotomayor was also concerned that *Bristol-Myers Squibb* may have killed some suits before they were ever born.¹⁸⁵ As an example she discussed nationwide mass actions against two or more defendants from different states.¹⁸⁶ “There will be no State where both defendants are ‘at home,’ and so no State in which the suit against both can proceed.”¹⁸⁷ There will likewise be no state in which a nationwide mass actions could be brought against a foreign corporation.¹⁸⁸ Such cases may find little purchase in the post-*Bristol-Myers Squibb* landscape, and therefore may simply wither and die, leading, according to Sotomayor’s earlier point, to a situation where smaller suits must be brought, with greater costs to plaintiffs.¹⁸⁹

III. IDENTIFICATION OF THE LEGAL PROBLEM

Bristol-Myers Squibb Co. v. Superior Court has left a hole in the landscape of mass-action personal jurisdiction.¹⁹⁰ Whereas before a group of plaintiffs could rally together and bring suit against a corporate defendant *en masse* in a state wherein some, but not all, of the plaintiffs reside and/or were injured, such is now an impossibility.¹⁹¹ This leaves few options for would-be non-resident plaintiffs: split the suit (thus increasing costs), bring suit wherever the defendant is subject to general personal jurisdiction,¹⁹² or attempt to bring the case in federal court.¹⁹³ Given that some defendants may be from outside the country, and therefore not subject to general jurisdiction in any state,¹⁹⁴ or that a suit

184. See *id.*; Additionally, *id.* n.4 addresses Sotomayor’s concerns regarding the possible implications of this decision on class actions, which is beyond the scope of this note, but is nonetheless concerning.

185. See *id.* at 1789.

186. See *Bristol-Myers Squibb*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

187. *Id.*

188. See *id.*

189. See *id.*

190. See *Bristol-Myers Squibb*, 137 S. Ct. 1773.

191. See *id.* At least, the exercise of jurisdiction is now impossible as to the non-resident plaintiffs.

192. *Id.* at 1783 (suggested by the majority); *Id.* at 1789 (Sotomayor, J. dissenting) (criticized by Sotomayor, “[I]n a world in which defendants are subject to general jurisdiction in only a handful of States . . . the effect of today’s opinion will be to curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.”).

193. *Id.* at 1783–84 (suggested by the majority). *Id.* at 1789 (Sotomayor, J., dissenting) (largely ignored by Sotomayor).

194. See *id.* at 1789 (Sotomayor, J., dissenting).

may be brought against multiple defendants, who are only “at home” in different states,¹⁹⁵ it seems inevitable that certain suits will be brought in federal court in an attempt to bridge the gap that this case has left plaintiffs facing.

While establishing jurisdiction in such cases may be difficult,¹⁹⁶ *Bristol-Myers Squibb* may prompt litigants to try. As noted previously, the Court has specifically refused to address this issue three times,¹⁹⁷ which shows that the specter of such a case is already rising. Indeed, Sotomayor herself discussed the situations where a federal solution is the only remaining possibility.¹⁹⁸ When that day comes, courts will be faced with the question examined here, whether it is constitutionally permissible, under the Fifth Amendment, for a federal court to exercise jurisdiction over the defendant(s) in a mass-action where not all of the plaintiffs were injured in the state where the federal court sits.¹⁹⁹

It may be that the Court can avoid the problem for a time, as, under the FRCP, personal jurisdiction must be authorized by a federal statute before a Fifth Amendment analysis can commence.²⁰⁰ Thus, if suits are brought lacking such a statute, the Court may be able to avoid the question for a time. However, eventually the Court will have to confront this issue.

IV. ANALYSIS

The purpose of this Note is to consider the situation that the Court reserved in *Bristol-Myers Squibb v. Superior Court*, namely, “whether the Fifth Amendment imposes the same restrictions on the exercise of [specific] personal jurisdiction by a federal court,” as does the Fourteenth Amendment by a state court.²⁰¹ In order to accomplish this, this Note examines a hypothetical case, identical to the one at issue in *Bristol-Myers Squibb* in every aspect, except said case is brought under a theoretical federal statute that authorizes personal jurisdiction. The issue of whether such a statute actually exists, and, if not, how such ought to be formulated, and the pros and cons thereof are beyond the scope of this note. General personal jurisdiction will not be considered, nor will any situation that requires a Fourteenth Amendment analysis.

195. *Id.*

196. Indeed, it may be impossible without an act of Congress. *See supra* Part II.b.ii.2.

197. *See supra* notes 88–90.

198. *See Bristol-Myers Squibb*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

199. *See generally* *Bristol-Myers Squibb v. Super. Ct.*, 137 S. Ct. 1773 (2017).

200. Fed. R. Civ. P. 4(k)(1)(C).

201. *See Bristol-Myers Squibb*, 137 S. Ct. at 1784.

a. Congressional Authorization

The first thing to note is that the FRCP clearly authorizes the exercise of jurisdiction under our hypothetical statute, as “personal jurisdiction over a defendant” is “authorized by a federal statute.”²⁰² Assuming that the statute under which jurisdiction lies is unambiguous there can be no doubt that Congress has acquiesced to jurisdiction in this case, which satisfies the need for statutory authority.

b. Constitutional Analysis

The next step in the analysis is to determine whether the exercise of personal jurisdiction comports with due process under the Fifth Amendment. The basic constitutional analysis in this type of case was set out by the Court in *International Shoe*, where the Court stated that “in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²⁰³ This in turn was broken down into three requirements: (1) the defendant must have “purposefully avail[ed] itself of the privilege of conducting activities within the forum State,”²⁰⁴ (2) the instant action must “arise out of or relate to” the defendant’s forum contact,²⁰⁵ and (3) the suit must not offend “traditional notions of fair play and substantial justice.”²⁰⁶

International Shoe was based on the Fourteenth Amendment.²⁰⁷ However, like the Fourteenth Amendment, the Fifth Amendment is essentially about fairness.²⁰⁸ Therefore, following the approach from *Honeywell, Inc.*, and various other cases, the ‘minimum contacts’ analysis is still appropriate, despite the difference in circumstance between the instant matter and the scenario at issue in *International Shoe*.²⁰⁹

i. ‘Purposeful Availment’ Requirement

The requirement of purposeful availment is the ‘minimum contacts’ part of the ‘minimum contacts’ analysis. That is to say, it is the part where the court must actually examine whether there are any links

202. Fed. R. Civ. P. 4(k)(1)(C) (2019).

203. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

204. *J. McIntyre Mach., Ltd. V. Nicastro*, 564 U.S. 873, 877 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

205. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984).

206. *See Int’l Shoe*, 326 U.S. at 316.

207. *See id.* at 311.

208. *See Honeywell, Inc. v. Apparaterwerke*, 509 F.2d 1137, 1143 (7th Cir. 1975).

209. *Id.*; *see also supra* note 82–83.

between the defendant and the forum (apart from the plaintiff),²¹⁰ and if so, whether they are of sufficient quantity and/or quality to justify subjecting the defendant to the court's jurisdiction.²¹¹

As discussed above, when this issue is analyzed under the Fifth Amendment, the idea that the territorial bounds of the state in which the federal court sits should limit its jurisdiction ceases to be persuasive.²¹² Rather, the bounds of the forum should be those of the sovereign, in this case, the nation itself.²¹³ This eliminates the majority's concerns with interstate federalism, as that conflict has necessarily ceased to be.²¹⁴ There can be no question of a "sister-state" invading a state's sovereignty, if there is no 'state' exercising jurisdiction.

Given our hypothetical case, parallel as it is to *Bristol-Myers Squibb*, the 'purposeful availment' element must be met. The easiest way to make this argument is simply by noting that "Bristol-Myers [Squibb] does not dispute that it has purposefully availed itself of California's markets"²¹⁵, and by noting that Bristol-Myers Squibb is based in New York and incorporated in Delaware.²¹⁶ Also, Bristol-Myers Squibb has over fifty percent of its workforce in those two states (with, presumably, a fairly substantial amount of its remaining workforce in the United States), and that it marketed Plavix on a nationwide basis within the United States, earning billions of dollars of revenue.²¹⁷ These facts must be sufficient to find that Bristol-Myers

210. See *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

211. See *Int'l Shoe*, 326 U.S. at 319. "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less [citations omitted]. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.*

212. *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 291 (D. Conn. 1975). "[I]t is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part." *Id.*

213. See *id.* It is worth noting that the court in *Cryomedics* saw this analysis as especially applicable to alien defendants, as "[w]hen a defendant is a citizen of the United States, there are very real differences in convenience between litigating in a state where it does business or resides, and in one where it has only insignificant contacts." *Id.* at 292. However, this author would argue that those concerns are best dealt with in the 'fairness' inquiry, and therefore should not impact the analysis of 'purposeful availment.'

214. *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 295 (3d Cir. 1985). "[T]he present fifth amendment due process inquiry need not address concerns of interstate federalism, [but] it must still consider the remaining elements of the minimum contacts doctrine as developed by *International Shoe* and its progeny." *Id.*

215. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1787 (2017) (Sotomayor, J., dissenting).

216. *Id.* at 1777-78.

217. *Id.*

Squibb has “purposefully avail[ed] itself of the privileges of conducting activities within the forum,”²¹⁸ in this case the United States.

ii. ‘Arising out of’ Requirement

The ‘arising out of’ factor was, for the majority, the crucial missing piece of the analysis; they could not see a link between Bristol-Myers Squibb’s activities in California, extensive as they may have been, and the possible harm to the non-resident plaintiffs.²¹⁹ When the scope of the forum is the United States, however, a different outcome is likely.

The instant case must “arise out of or relate to” the defendant’s forum contacts.²²⁰ In a Fifth Amendment analysis the forum is the United States. Therefore, given that the plaintiffs allege injuries sustained within the United States, or that were caused by Plavix purchased in the United States, or at very least through Plavix that was created or distributed in the United States—a fact that the Defendant did not, and could not, refute—there must be a connection between the Defendant’s forum contacts and the instant case.²²¹

Under typical circumstances the above analysis might suffice as a demonstration that the instant conflict is “related to” the defendant’s forum conduct; however, given the concern of the majority in *Bristol-Myers Squibb* that the ‘arising out of’ element was not met, more depth may be desirable.

It cannot be argued that in this instance jurisdiction would be outside “[the] adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.”²²² Nor can it be argued that the defendant will be “submitting to the coercive power of a State that may have little legitimate interest in the claims in question,”²²³ because, if a state can be concerned with the protection of its citizens, how can the federal government be disallowed that same motive. And, as previously stated, issues of interstate sovereignty ought not prevent the federal government from exercising jurisdiction.²²⁴

Unlike in the state version of the case, all of the plaintiffs were now injured within the bounds of the forum. While some parts of the analysis remain constant, such as the non-helpfulness of McKesson (given that particular doses of Plavix still are “impossible to trace . . . particularly to McKesson.”²²⁵), they cease to be material, given the other connections

218. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

219. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781–82.

220. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984).

221. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778–79.

222. *Id.* at 1780.

223. *Id.*

224. *See supra* Part IV.b.i.

225. *See* Transcript of Oral Argument, *supra* note 157.

between Bristol-Myers Squibb's contacts within the forum and the litigation at bar.²²⁶ Further, because of the breadth of the forum compared with the original case, presumably one could look at all of the distributors used by Bristol-Myers Squibb to distribute Plavix in the U.S., and, assuming that all distributors were domestic, utilize that linkage. Although why one would feel the need to do so is beyond this author.

iii. 'Fairness' Requirement

The final requirement for the exercise of personal jurisdiction to be constitutional is that said exercise comport with "traditional notions of fair play and substantial justice," or, in other words, be reasonable under the circumstances.²²⁷ Factors in assessing this element include

[1] the burden on the defendant, [2] the forum State's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several States in furthering fundamental substantive social policies.²²⁸

Additionally, (6) a federalism interest is to be considered, which "may be decisive."²²⁹

Conventional wisdom, insofar as this author is aware, is that the 'fairness' requirement is the least important. If the first two requirements are met, it is highly unlikely that a lack of fairness will prevent jurisdiction. There are certainly instances where the exercise of personal jurisdiction would be unfair, but such are typically coupled with a lack of "purposeful availment" or a sufficient "relation" between the defendant's connections to the forum and the case at bar.²³⁰ However, because this is a somewhat novel area, and because the Court has refused to consider the issue three times, it may be that a somewhat deeper analysis of the fairness factors is called for.

Before beginning this analysis, it is worth noting that, "remarkably—[Bristol-Myers Squibb did not] argue below that it would be 'unreasonable' for a California court to hear respondents' claims."²³¹ Given that, this author believes it is unlikely that Bristol-Myers Squibb

226. See *Bristol-Myers Squibb*, 137 S. Ct. at 1777–78.

227. See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113–14 (1987).

228. *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 477 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

229. See *Bristol-Myers Squibb*, 137 S. Ct. at 1780.

230. See generally, *Asahi*, 480 U.S. 102.

231. See *Bristol-Myers Squibb*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting) (citing *Bristol-Myers Squibb*, 1 Cal. 5th at 799, n.2).

would argue that federal court is an “unreasonable” place for the case to be heard, nonetheless, a more thorough analysis follows.

1. The Burden on the Defendant

The burden on Bristol-Myers Squibb here cannot be considered severe. Even if the federal court in our hypothetical is in California, and therefore as far afield as any location in the continental United States might be from the defendant’s home state(s), it cannot be said that such is an extreme strain on the defendant. When discussing a multi-billion-dollar company, the cost of a flight to the opposite side of the country, or the cost of hiring a firm to litigate outside of their home state, cannot be counted as too heavy a burden to bear. Nor, it must be said, is there either of the heaviest of burdens on a defendant: that of surprise, or that of the foreign defendant, forced to defend itself in the American judicial system, rather than that of its home country.²³² Despite this, even if this factor were to cut against personal jurisdiction, such is not controlling.

2. The Forum State’s Interest in Adjudicating the Dispute

Here, the “forum state” is the United States. It can hardly be argued that the interest of the federal government is slight when a domestic corporation sells a drug, developed, at least in part, domestically, to domestic customers, resulting in harm to its citizens.²³³ The government certainly has an interest in protecting its citizens from harm by massive pharmaceutical corporations. Therefore, this factor favors the exercise of jurisdiction.

3. The Plaintiff’s Interest in Obtaining Convenient and Effective Relief

Given the holding of *Bristol-Myers Squibb v. Superior Court*, the plaintiffs’ interest in obtaining relief in federal court must be quite high, as it is one of a very few remaining options where all of the injured parties will be able to bring joint suit.²³⁴ While it is still possible for them to do so in the defendant’s home state, the intent of Congress by

232. See *Dole Food Co. v. Watts*, 303 F. 3d 1104, 1117 (9th Cir. 2002) (acknowledging that the burden on the defendant will typically be high when the defendant is a foreign person or entity).

233. The federal government’s interest is similar to the interests of California in the original case. See *Bristol-Myers Squibb*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting) (discussing California’s “interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents’ claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.”).

234. See *Bristol-Myers Squibb*, 137 S. Ct. 1773.

(hypothetically) creating a statute to authorize this lawsuit would clearly vindicate the plaintiffs' interest in obtaining federal relief. Further, it can hardly be argued that it is not convenient for the plaintiffs to obtain relief in such a fashion, as it allows the plaintiffs the opportunity to litigate all of their claims concurrently, which is incredibly efficient, compared with litigating their claims separately. Therefore, this factor favors the exercise of jurisdiction.

4. The Interstate Judicial System's Interest in Obtaining the Most Efficient Resolution of Controversies

In this hypothetical, the defendant is a domestic corporation, therefore this is an easy requirement to meet. The analysis would be more complicated in the case of a foreign entity.²³⁵ Given the alternative (separate suits in state courts), this is a highly efficient method of resolving the controversy. While it could be argued that bringing the matter in the defendant's home state would be just as efficient, that does not reduce the efficiency of this method. Likewise, it is possible to argue that individual plaintiffs will require sufficiently separate inquiries as to make a joint suit impracticable, but that is a highly case-specific inquiry. In this case, Bristol-Myers Squibb's activities were national in scope, people in all states saw the same commercials, purchased the same product, and, presumably, suffered the same injuries.²³⁶ Under such circumstances, it is hard to argue that a joint suit will be less efficient than several smaller suits.²³⁷ Therefore, this factor favors the exercise of jurisdiction.

5. The Shared Interest of the Several States in Furthering Fundamental Substantive Social Policies

This author does not know of any substantive social policies, regardless of the state at issue, that would be harmed by the exercise of jurisdiction in this hypothetical federal case. The only thought that occurs is that a state might wish to protect its corporations by dealing with any lawsuits against them in its own courts. This is not an interest that courts have recognized, insofar as this author is aware, and therefore this factor weighs towards the exercise of jurisdiction.

235. Not to say that a foreign entity could never be brought to account under this analysis, it certainly could. *But see* United States v. First National City Bank, 379 U.S. 378, 404 (1965). "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

236. *See Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

237. At least, insofar as we are discussing liability. Damages must be a more individualized inquiry.

6. Federalism Interest

Unlike in a state case, there is no interstate federalism interest at issue here. Rather, the proper analysis is that of a classical federalism interest (the balance of power between the states and the national government).²³⁸ Given the presence of our hypothetical federal statute, the argument that the states have a greater interest in adjudicating the conflict should probably fail. If the case were against an international defendant then there might be a question of international-relations, then we would examine the interests of the foreign government as well. Because our hypothetical involves a domestic defendant, and because a federal statute is at issue, there is no reason that the states have a greater interest in addressing the issue. Therefore, this factor favors the exercise of jurisdiction.

7. Overall

Considering all of the factors, only the burden on the defendant cuts against the exercise of jurisdiction. It is worth noting that the majority in *Bristol-Myers Squibb* categorized this factor as the “primary concern,” in a specific personal jurisdiction analysis.²³⁹ However, as the Court mentioned in *Burger King Corp. v. Rudzewicz*, “where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”²⁴⁰ Even if the burden on the defendant weighs against jurisdiction, that factor probably doesn’t make out a ‘compelling case.’ Given the higher burdens possible for foreign defendants, or individuals having to defend a case far from home,²⁴¹ a national corporation facing domestic suit in a state where it does business is not too heavy a load. And therefore, the exercise of jurisdiction is reasonable in this hypothetical.

V. PROPOSAL

The Court should find that the Due Process Clause of the Fifth Amendment permits federal courts, applying federal law that authorizes

238. A question of vertical, rather than horizontal, federalism, if you will. *But see* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 295 (3d Cir. 1985) (advocating simply not addressing the federalism issue). This author feels the suggested approach here is more complete.

239. *See Bristol-Myers Squibb*, 137 S. Ct. at 1776 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

240. *Burger King Corp.*, 471 U.S. at 477.

241. The time-burden and financial costs of defending a case away from home would necessarily weigh heavier on an individual than a multi-billion-dollar corporation.

service of process, to exercise specific personal jurisdiction over corporate defendants in a nationwide mass action.

The Court should look to the analysis performed in state court (and federal court, when applying state law or federal law that does not authorize service of process) under the ‘minimum contacts’ analysis under the Fourteenth Amendment, first articulated in *International Shoe*.²⁴² The crux of both the Fifth and the Fourteenth Amendments’ Due Process Clauses is fairness, and the ‘minimum contacts’ inquiry was designed to address this concern, and thus it is reasonable to treat them in similar fashion.²⁴³

However, given the different forum in a federal case, some adjustments will need to be made. These adjustments should be relatively minor. The ‘purposeful availment’ factor should follow the nationwide contacts approach discussed by many courts, since restricting the federal court’s jurisdiction when applying federal law to a state’s boundaries makes no sense.²⁴⁴ The ‘arising out of’ factor should remain the same as is in a Fourteenth Amendment analysis, although it is apt to be more readily satisfied, given the expansion of the ‘purposeful availment’ factor.

The ‘reasonableness’ factors should remain largely the same, but some changes are called for. However, courts should take greater care in assessing these factors in a federal setting, as the stakes may well be higher than they traditionally are in state court. Historically, courts have often given the ‘reasonableness’ factors short shrift, using a sort of gestalt feeling in lieu of a thorough analysis.

The burden on the defendant, the plaintiff’s interest in obtaining convenient and effective relief, and the interstate judicial system’s interest in obtaining the most efficient resolution of controversies should be analyzed in precisely the same way as they are under the Fourteenth Amendment, as these interests are unchanged despite the difference in forum. Likewise, the “forum state’s” interest in adjudicating the dispute should be largely unchanged, merely adjusting to reflect the interests of the nation rather than a state.

The shared interest of the several states in furthering fundamental social policies needs a minor change as well. The interests of the federal government, and its policies ought to be considered in addition to those of the several states. This will allow a balancing to occur to determine whether there is some reason to hear the case in state court.

242. See *Honeywell, Inc. v. Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975).

243. See *id.*

244. See *supra* Part II.b.ii.2.b.

Finally, the federalism interest needs to shift radically in this situation. The federalism interest was a heavy factor in *Bristol-Myers Squibb*,²⁴⁵ and must play out very differently in federal court. The federal government lacks “sister states” “the sovereignty of [which] . . . implie[s] a limitation on [its] sovereignty.”²⁴⁶ The question is no longer one of ‘interstate’ federalism, but rather one of classical federalism (in the case of a domestic defendant), or international relations (in the case of an alien defendant). This analysis will be performed in a similar way, but it is important to note the change in the players.

These changes will enable the primary purposes of the ‘minimum contacts’ analysis to remain, despite the change in the actors in question. A non-adjusted system would cease to vindicate the ideals of “fair play and substantial justice.”²⁴⁷ The adjustments suggested will enable the court to accurately balance the relevant interests in a federal context, leading to a Fifth Amendment analysis that works as well as those followed by state courts under the Fourteenth Amendment.

If the Court follows said analysis, it should, under this hypothetical, find that a mass-action against a domestic corporate defendant may be brought in federal court, without regard for the state in which the federal court sits. The Fifth Amendment gives no reason why the physical location of the court should impact the analysis to such an extent. In an actual case, wherein the facts are different, the Court may find the exercise of jurisdiction impermissible based on those facts. However, it should not find the exercise of jurisdiction impermissible on a more general basis, as it did in *Bristol-Myers Squibb*.

VI. CONCLUSION

In conclusion, *Bristol-Myers Squibb v. Superior Court* grossly reduced the possibilities for multi-state mass-actions in state court.²⁴⁸ This ruling limits the ability of plaintiffs to recover from harm, increases their costs when they can do so, and forces them to split their suits, minimizing the media attention their cases receive and therefore the plaintiffs’ bargaining power.

However, the Supreme Court specifically reserved the question of how a similar case would be resolved under the Fifth Amendment’s Due Process Clause.²⁴⁹ Allowing federal courts to exercise jurisdiction in such circumstances would address the unresolved issues this case left behind. This Note has demonstrated that there is no constitutional issue

245. See *Bristol-Myers Squibb*, 137 S. Ct. at 1777–84.

246. *Id.* at 1780.

247. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

248. See *Bristol-Myers Squibb*, 137 S. Ct. at 1788–89 (Sotomayor, J., dissenting).

249. *Id.* at 1784 (majority opinion).

with permitting such a case. This author hopes that Congress will authorize personal jurisdiction in such circumstances, or clever lawyers will find existing law allowing jurisdiction in such cases, so that the Court can finally decide the question it has avoided for the past thirty years, thus allowing plaintiffs to once again recover in the most efficient possible manner.