

## RELATIONSHIP PROBLEMS: PENDENT PERSONAL JURISDICTION AFTER *BRISTOL-MYERS SQUIBB*

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### ABSTRACT

*The Supreme Court's recent decision in Bristol-Myers Squibb Co. v. Superior Court of California provides an opportunity to reexamine pendent personal jurisdiction in the federal courts. There are two types of pendent personal jurisdiction. The first form, embraced by federal courts since 1957, is pendent claim personal jurisdiction: when a court has personal jurisdiction over a defendant as to one anchor claim, it can exercise personal jurisdiction with respect to related claims that it could not adjudicate in the anchor claim's absence. This type is especially common where courts have personal jurisdiction over the defendant because of a statute with a nationwide service of process provision, like the Securities Exchange Act of 1934. The second type is new. After Bristol-Myers, some courts have maintained pendent party personal jurisdiction: where a court has specific personal jurisdiction over the defendant as to a particular claim by one plaintiff, it can exercise personal jurisdiction as to similar claims brought by different plaintiffs.*

*This Article offers an analytical framework to evaluate the legitimacy of pendent personal jurisdiction. First, it examines the doctrine's history and evolution, ultimately criticizing the federal courts for expanding their own jurisdiction without articulating a valid legal warrant. Second, it considers the potential sources of authority for federal courts to wield pendent personal jurisdiction,*

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concluding that all current federal court assertions of pendent personal jurisdiction depend on state long-arm statutes, as limited by the Fourteenth Amendment. In the process, this Article seeks to clarify how the federal courts issue service of process and exercise personal jurisdiction.

This Article then assesses whether pendent personal jurisdiction passes muster under the Court's personal jurisdiction cases. The Court's decision in *Bristol-Myers*, justified by interstate federalism principles, casts doubt on pendent personal jurisdiction because it forbids a court from adjudicating claims unconnected to the forum it sits in. Pendent personal jurisdiction often allows courts to breach that rule. Therefore, this Article argues that both pendent party and pendent claim personal jurisdiction are forbidden. This Article also provides broader insights into personal jurisdiction's relatedness element and interstate federalism's role in limiting the adjudicative reach of the nation's courts within a system of multiple sovereigns.

#### TABLE OF CONTENTS

INTRODUCTION: RELATIONSHIP PROBLEMS.....	217
I. HISTORY OF PENDENT PERSONAL JURISDICTION.....	222
A. <i>The Rise of Pendent Claim Personal Jurisdiction in Nationwide Service of Process Cases</i> .....	224
B. <i>Pendent Claim Personal Jurisdiction Beyond Nationwide Service of Process Cases</i> .....	228
C. <i>Pendent Party Personal Jurisdiction</i> .....	231
1. <i>Division on whether Bristol-Myers applies to federal courts</i> .....	232
2. <i>Division on whether Bristol-Myers applies in diversity and federal question cases</i> .....	235
3. <i>Division on whether Bristol-Myers applies to class actions</i> .....	236
D. <i>Observations on the Rise of Pendent Personal Jurisdiction</i> .....	239
II. THE SOURCE OF AUTHORITY FOR PENDENT PERSONAL JURISDICTION.....	240
A. <i>Federal Statutory or Rule-Based Authority</i> .....	241
1. <i>28 U.S.C. §§ 1331, 1332, and 1367</i> .....	243

2018]	<i>RELATIONSHIP PROBLEMS</i>	217
	2. <i>Federal Rule of Civil Procedure 4(k)(1)</i> .....	244
	3. <i>Specific federal statutes</i> .....	246
	a. <i>A representative example: the 1934 Securities Exchange Act</i> .....	246
	b. <i>Interpreting service of process provisions</i> .....	248
	c. <i>Other nationwide service of process provisions</i> .....	258
	B. <i>State Long-Arm Statutes</i> .....	259
	C. <i>Implications</i> .....	261
	III. <i>THE RELATEDNESS ELEMENT, BRISTOL-MYERS, AND INTERSTATE FEDERALISM</i> .....	262
	A. <i>Personal Jurisdiction's Relatedness Element</i> .....	262
	B. <i>The Resurgence of Interstate Federalism</i> .....	268
	C. <i>What Role Does Interstate Federalism Play in Personal Jurisdiction?</i> .....	270
	IV. <i>PENDENT PERSONAL JURISDICTION AFTER BRISTOL-MYERS</i> .....	273
	A. <i>Pendent Party Personal Jurisdiction</i> .....	274
	B. <i>Pendent Claim Personal Jurisdiction</i> .....	282
	1. <i>Specific personal jurisdiction is a claim-specific inquiry, so pendent claim personal jurisdiction is forbidden</i> .....	283
	2. <i>Interstate federalism should require a connection between each claim and the forum state, but not much more</i> .....	286
	3. <i>Pendent claim personal jurisdiction is often unnecessary</i> .....	290
	CONCLUSION.....	295

## INTRODUCTION: RELATIONSHIP PROBLEMS

Personal jurisdiction has relationship problems. Since the inception of modern personal jurisdiction doctrine in *International Shoe Co. v. Washington*,<sup>1</sup> the Supreme Court has

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1. 326 U.S. 310 (1945). In subsequent decisions, the Court articulated the three prerequisites to a state's exercise of specific personal jurisdiction. First, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Second, the state's maintenance of specific personal jurisdiction must be reasonable, accounting for the burden on the defendant, the plaintiff's interest in obtaining relief, the forum state's interest, the interstate judicial system's interest in the efficient resolution

frequently revisited it, but has often done more to muddy the doctrinal waters than clarify them.<sup>2</sup> For over seventy years, the Court had offered little guidance on one of the three elements of specific personal jurisdiction: the relatedness element, which requires that a claim “arise from” the defendant’s contacts with the forum state.

That changed in June 2017, when the Court handed down its opinion in *Bristol-Myers Squibb Co. v. Superior Court of California*—its sixth decision striking down a state court’s assertion of personal jurisdiction since 2011.<sup>3</sup> Now, a new battle opens. Although *Bristol-Myers* firmly established that *some* relationship is required between a claim and the defendant’s forum-state contacts for a court to exercise specific personal jurisdiction, the Court offered limited instruction on how strong this relationship must be. Now, litigants are introducing new strategies to test the outer limits of specific personal jurisdiction’s relatedness element. One prominent strategy is this Article’s focus: pendent personal jurisdiction.

Pendent personal jurisdiction is a mysterious doctrine. For decades, few scholars have considered it, and there is no recent, authoritative account of what it is or why it exists.<sup>4</sup> Even so,

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of disputes, and the “shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Third, the lawsuit must arise from the defendant’s forum-state contacts. *See infra* Part III.A. This Article focuses only on the third prerequisite.

2. *See, e.g.*, Patrick J. Borchers, *Extending Federal Rule of Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 414 (2018) (“I am tired of writing articles complaining about the dismal state of the Supreme Court’s personal jurisdiction jurisprudence—and complain I have.”).

3. *See* 137 S. Ct. 1773 (2017) (holding that due process did not permit exercise of specific personal jurisdiction in California as to claims by non-residents); *see also* *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (denying assertion of personal jurisdiction by Montana state court over FELA claim); *Walden v. Fiore*, 571 U.S. 277, 291 (2014) (denying personal jurisdiction by Nevada federal court for lack of minimum contacts); *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014) (establishing a corporation’s state of incorporation and principal place of business as the two standard locations where it is amenable to general personal jurisdiction); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011) (denying general personal jurisdiction in North Carolina because defendant was not “at home” there); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 909 (2011) (invalidating New Jersey’s assertion of personal jurisdiction because the defendant did not purposefully avail itself of the forum).

4. Few scholars have written about pendent personal jurisdiction, and most of their accounts are outdated. One recent, but brief, discussion is given by Charles W. “Rocky” Rhodes &

federal courts have invoked it in hundreds of cases.<sup>5</sup> Indeed, there are two types of pendent personal jurisdiction. The first, embraced by federal courts since 1957, is pendent *claim* personal jurisdiction: when a court has personal jurisdiction over a defendant with respect to one claim (the “anchor claim”), it can exercise pendent personal jurisdiction as to related claims. This form is especially common in cases involving nationwide service of process provisions, which courts have interpreted broadly to allow personal jurisdiction with respect to related state-law claims. After *Bristol-Myers*, a growing number of

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Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 243–44 (2014). No one else has devoted a detailed discussion in an article to pendent personal jurisdiction within the last fifteen years, even as the Court revolutionized its personal jurisdiction jurisprudence during that time. Further, pendent party personal jurisdiction has only truly emerged during the last year. There are a few older accounts, and the great majority of them defend the doctrine. See Jason A. Yonan, Note, *An End To Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization to Bring Supplemental Personal Jurisdiction Within Federal Courts’ Powers*, 2002 U. ILL. L. REV. 557, 559 (concluding “the power to create [pendent] personal jurisdiction belongs only to Congress and should not be exercised by courts”); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1662 (2001) (“[I]n most instances there will be no constitutional or statutory impediment to the federal court’s exercise of pendent personal jurisdiction . . . .”); Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 118 (1989) (arguing there are no constitutional or statutory obstacles to pendent personal jurisdiction); James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1466 (1986) (offering a justification for pendent personal jurisdiction); Steven Michael Witzel, Note, *Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 FORDHAM L. REV. 127 (1982) (analyzing pendent personal jurisdiction’s impact on choice-of-law considerations); Lewis R. Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423, 446 (1970) (defending pendent personal jurisdiction as consistent with the federal securities laws); William D. Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56, 79–80 (1965) (arguing pendent personal jurisdiction is not authorized by statute). A few other scholars mention pendent personal jurisdiction, but do not analyze it in depth. See, e.g., Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 21–22 (2018); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 528–29 (2018); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1607–09 (1992).

5. The term “pendent personal jurisdiction” appears in 466 cases in a Westlaw search. Although some of these cases do not extensively discuss it, some courts use other terms like “supplemental personal jurisdiction.” This Article focuses on pendent personal jurisdiction in the federal courts, though most of its arguments apply with equal force to its exercise in state courts. A small number of state court cases have discussed the doctrine. See, e.g., *Ex Parte Dill*, 866 So. 2d 519, 538–43 (Ala. 2003) (See, J., dissenting); *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, No. Civ.A. 1456-N, 2006 WL 2588971, at \*7 n.73 (Del. Ch. Sept. 1, 2006); *Swarey v. Stephenson*, 112 A.3d 534, 543 n.6 (Md. Ct. Spec. App. 2015); *Huynh v. Aker Biomarine Antarctic AS*, No. 74241-8-I, 2017 WL 2242299, at \*13 (Wash. Ct. App. May 22, 2017).

courts have maintained pendent *party* personal jurisdiction: where a court has specific personal jurisdiction over the defendant as to a particular claim by one plaintiff, it can wield pendent personal jurisdiction over the defendant as to similar claims by different plaintiffs.

However, courts have not paid careful attention to legal sources of authority when exercising pendent personal jurisdiction. After concluding that federal law does not authorize pendent personal jurisdiction, this Article argues that both state and federal courts wishing to maintain pendent personal jurisdiction must, under current law, rely on the long-arm statutes of the states in which they sit. In most cases, Congress has not authorized a federal court to exercise more personal jurisdiction than the state court across the street. Therefore, although some state long-arm statutes permit the full extent of personal jurisdiction allowed by the Constitution, the Fourteenth Amendment limits both state and federal court assertions of pendent personal jurisdiction.

Applying the Fourteenth Amendment, the Court's recent decision in *Bristol-Myers* raises questions about the continued viability of pendent personal jurisdiction. The rule of *Bristol-Myers* is that a state court cannot adjudicate a claim unconnected to it.<sup>6</sup> Because *Bristol-Myers* limits the scope of state long-arm statutes, it will have the effect of limiting the personal jurisdiction of the state *and* federal courts. Because pendent personal jurisdiction, by definition, enables courts to adjudicate claims unconnected to the forum state through an anchor claim or party, it is forbidden by *Bristol-Myers*. This Article challenges the precedents upholding pendent claim and pendent party personal jurisdiction. The validity of pendent personal jurisdiction is an urgent question because of the substantial divisions it has created among the federal courts within the past year.

Further, the existence of pendent personal jurisdiction implicates important questions about the Court's specific

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

personal jurisdiction rules. First, what role does interstate federalism play in personal jurisdiction? The Court's decision in *Bristol-Myers* is rooted in interstate federalism principles that limit the adjudicative reach of the nation's courts. At first, it might seem counterintuitive that the Fourteenth Amendment functions to police assertions of personal jurisdiction in the name of interstate federalism. However, examining the historical development of personal jurisdiction in our federalist legal system, this Article explains how the Fourteenth Amendment protects individual liberty by ensuring states do not reach beyond their sovereignty. Second, is specific personal jurisdiction a claim-specific inquiry? This Article, drawing on *Bristol-Myers*, argues that it must be in order to preserve the line between specific and general personal jurisdiction. Third, how related must a claim be to the defendant's forum-state contacts to satisfy the relatedness element? Taking a lesson from the Court's choice-of-law jurisprudence, this Article suggests that courts should require *some* connection, without excessively policing between potentially competing forums.

Ultimately, this Article seeks to clarify complicated legal questions, focusing almost exclusively on what the law is and how it is evolving, as opposed to what the law should be. This Article proceeds in five parts. Part I examines the history of pendent personal jurisdiction, explaining how the doctrine evolved. Part II analyzes the sources of authority for pendent personal jurisdiction. Although courts have distinguished between pendent claim personal jurisdiction in nationwide service of process cases and otherwise, this Article argues that this distinction is untenable because the relevant nationwide service provisions cannot be read to permit pendent personal jurisdiction.<sup>7</sup> Ultimately, after ruling out alternative options, it concludes that all assertions of pendent personal jurisdiction by the federal courts currently share the same source of authority: state long-arm statutes.<sup>8</sup> Part III discusses personal

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7. See *infra* Section II.A.3.

8. See *infra* Section II.B.

jurisdiction's relatedness element, its refinement in *Bristol-Myers*, and its inspiration in interstate federalism. Part IV explores pendent personal jurisdiction's future, ultimately concluding that both pendent party and pendent claim personal jurisdiction are unlawful, but that courts have an alternative jurisdictional option in some situations where pendent claim personal jurisdiction has been applied.<sup>9</sup> In short, the relationship between the federal courts and pendent personal jurisdiction must end.

### I. HISTORY OF PENDENT PERSONAL JURISDICTION

Imagine the following scenario, similar to a real case.<sup>10</sup> A California company, Capias Corp, and a Virginia company, RespondendCo, sign a contract for RespondendCo to provide Capias with one hundred computers. The companies negotiate the contract entirely in Virginia. Additionally, RespondendCo negotiates the same contract with AdCo, an Idaho corporation. RespondendCo starts complying with the deals, shipping fifty computers to both of its counterparts. Moreover, RespondendCo even sends representatives to California to ensure Capias's computers are working properly. But, three months into the deals, RespondendCo reneges on both obligations to ship fifty additional computers. Thus, Capias and AdCo withhold payment for the shipments. RespondendCo's CEO calls his counterpart at Capias's California headquarters, telling him that more computers are on their way, and asks for advance payment on them. Separately, RespondendCo's CEO makes the same call to his counterpart at AdCo. Capias and AdCo oblige, but no computers ever arrive.

Capias brings fraud and breach of contract claims in a California federal court, invoking diversity jurisdiction. The court concludes that it has specific personal jurisdiction as to the fraud claim, reasoning that RespondendCo intentionally caused harm within California by inducing Capias to pay for

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9. See *infra* Part IV.

10. Cf. *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1283-84 (9th Cir. 1977).

computers that were never going to arrive.<sup>11</sup> The court, however, decides that it cannot independently exercise specific personal jurisdiction as to the breach of contract claim, reasoning that it did not “arise from” RespondendCo’s California contacts because the events leading to the contract’s formation occurred in Virginia. Assuming this conclusion is right,<sup>12</sup> should the court be able to maintain personal jurisdiction as to the breach of contract claim? Further, if AdCo joins with Capias to bring its fraud claim, can the court wield personal jurisdiction as to AdCo’s claim due to its specific personal jurisdiction as to Capias’s claim?

Pendent claim personal jurisdiction allows a court, when it has personal jurisdiction over the defendant with respect to an anchor claim, to maintain personal jurisdiction as to a related claim it could not otherwise adjudicate.<sup>13</sup> There are two primary situations in which pendent claim personal jurisdiction has been relevant.<sup>14</sup> First are the “nationwide service of process cases,” where the court has jurisdiction over the defendant as to an anchor claim because of a nationwide service of process provision—like that governing Clayton Act claims<sup>15</sup>—and exercises personal jurisdiction with respect to related state or federal claims. Most circuits have blessed pendent claim personal jurisdiction in these cases.<sup>16</sup> Second, a court can have

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11. State long-arm statutes frequently authorize specific personal jurisdiction over defendants for intentional torts that cause effects in the forum state. *See Calder v. Jones*, 465 U.S. 783, 790 (1984).

12. I return later to whether this analysis is right, and its implications for the doctrine of pendent claim personal jurisdiction. *See infra* note 326 and accompanying text.

13. *See, e.g.,* *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 783 (N.D. Tex. 2008) (citing *United States v. Botefuhr*, 309 F.3d 1263, 1272–73 (10th Cir. 2002)).

14. Scholars discussing pendent personal jurisdiction have generally split consideration of the doctrine between “nationwide service of process cases” and those cases where the court has specific personal jurisdiction under a state long-arm statute as to one claim, but not the other related ones. *See* 14a CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE* § 1069.7 (4th ed. 2017); Cochran, *supra* note 4; Rhodes & Robertson, *supra* note 4; Simard, *supra* note 4, at 1627. This Article ultimately rejects this conceptual distinction, but frames the initial discussion as they did.

15. *See* 15 U.S.C. § 22 (2018).

16. The few scholars who have considered the doctrine’s legitimacy in this context have usually endorsed it. *See* WRIGHT ET AL., *supra* note 14 (not questioning its validity); Dodson, *supra* note 4, at 21–22 (arguing that pendent personal jurisdiction has been broadly adopted as

specific personal jurisdiction as to one anchor claim through a state long-arm statute, and then wield pendent personal jurisdiction as to related state or federal claims—as with the contract claim in our hypothetical. Fewer courts have recognized pendent claim personal jurisdiction in these cases.

Finally, some courts have embraced a new variant. Pendent party personal jurisdiction facilitates the joinder of parties with claims similar to those of an anchor party that brought a claim the court already had personal jurisdiction over. This corresponds to AdCo's fraud claim in our hypothetical. Because courts first developed the doctrine in nationwide service of process cases, we will start there.

*A. The Rise of Pendent Claim Personal Jurisdiction in Nationwide Service of Process Cases*

The first applications of pendent claim personal jurisdiction were in nationwide service of process cases. Several federal statutes, following the lead of the Clayton Act, have provisions authorizing nationwide service of process for federal claims.<sup>17</sup> If the facts underlying a plaintiff's federal claim under, say, the Investment Company Act also allow the plaintiff to bring a state-law fraud claim, can the court exercise personal jurisdiction as to the pendent state-law fraud claim when it would not otherwise have personal jurisdiction as to that claim, but for the Investment Company Act anchor claim? Inspired by pendent subject matter jurisdiction and the Court's landmark decision in *United Mine Workers v. Gibbs*,<sup>18</sup> many courts have endorsed pendent claim personal jurisdiction in these nationwide service of process cases.

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a doctrine accommodating aggregation in complex litigation); Rhodes & Robertson, *supra* note 4, at 244 (stating that it is the "nearly unanimous view" of courts that this practice is acceptable); Simard, *supra* note 4, at 1636 (analyzing the decisions in several circuits up until 2001 and asserting that the practice has achieved "considerable acceptance"). *But see* Yonan, *supra* note 4, at 578–79 (arguing that statutory authorization is necessary).

17. *See, e.g.*, 15 U.S.C. § 22. The provision actually authorizes worldwide service of process. I use the term "nationwide" service of process because the distinction is not particularly relevant in this Article. For a list, see *infra* note 185.

18. 383 U.S. 715, 742 (1966).

The first case where a federal court squarely considered the merits of pendent claim personal jurisdiction was *Schwartz v. Bowman*, where the court rejected the concept.<sup>19</sup> In *Schwartz*, the plaintiffs brought a federal shareholder derivative claim under the Investment Company Act of 1940 and a state-law claim for breach of fiduciary duty in a New York federal court.<sup>20</sup> The defendants were served out-of-state in Ohio under the Investment Company Act's nationwide service of process provision.<sup>21</sup> The defendants argued that the court had no personal jurisdiction over them with respect to the state-law claim.<sup>22</sup> Interestingly, the plaintiffs in *Schwartz* countered by citing the Supreme Court's decision in *Hurn v. Oursler*, a case that allowed pendent *subject matter* jurisdiction as to a state-law claim that was brought with a federal claim.<sup>23</sup> The district court rejected the plaintiffs' analogy, stating "it does not follow that, because a claim is pendent upon a federal claim for the purposes of jurisdiction over the subject matter, the claim is pendent for the purposes of jurisdiction over the person."<sup>24</sup> The court thus dismissed the plaintiffs' state-law claims, citing two reasons in support of its decision. First, the court thought it lacked statutory authority to exercise jurisdiction.<sup>25</sup> Second, without detailed explanation, the court asserted that a rule of pendent personal jurisdiction would inflict "hardship" on the defendant.<sup>26</sup>

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19. See 156 F. Supp. 361, 366 (S.D.N.Y. 1957). On appeal, the Second Circuit also considered pendent personal jurisdiction, albeit in dictum. Judge Clark favored the concept, arguing it was efficient and imposed no burden on the defendant. See *Schwartz v. Eaton*, 264 F.2d 195, 198 (2d Cir. 1959). Judge Moore disagreed, suggesting plaintiffs would abuse such a rule. See *id.* at 198–99 (Moore, J., concurring in judgment).

20. See 156 F. Supp. at 362.

21. See *id.*

22. See *id.*

23. See *id.* at 364–65 (citing *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)).

24. *Id.* at 365.

25. See *id.* at 366.

26. *Id.*

For about a decade after *Schwartz*, federal district courts consistently rejected pendent claim personal jurisdiction.<sup>27</sup> But starting in the late 1960s, a shift toward acceptance began. For example, in *Townsend Corp. of America v. Davidson*—a case resembling *Schwartz*—the plaintiffs brought a federal Investment Company Act claim and a state breach of fiduciary duty claim in a New Jersey federal court.<sup>28</sup> All defendants were served outside New Jersey under the Investment Company Act's nationwide service of process provision.<sup>29</sup> Opposing personal jurisdiction over them as to the state-law claims, the defendants cited *Schwartz*.<sup>30</sup> But citing "judicial economy and convenience of the parties," the court sided with the plaintiffs and allowed personal jurisdiction as to the state-law claim.<sup>31</sup> In the following years, several other district courts followed the lead of the *Townsend* court.<sup>32</sup>

The circuit courts soon joined in. In 1973, the Third Circuit recognized pendent claim personal jurisdiction in *Robinson v. Penn Central Co.*, arguing that the justifications for exercising pendent personal jurisdiction paralleled the considerations justifying supplemental subject matter jurisdiction: "considerations of judicial economy, convenience[,] and fairness to litigants."<sup>33</sup> In 1979, the Second Circuit embraced

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27. See, e.g., *Trussell v. United Underwriters, Ltd.*, 236 F. Supp. 801, 804 (D. Colo. 1964) (holding that a federal statute authorizing nationwide service of process for Securities Exchange Act claims did not authorize personal jurisdiction for related state-law claims); *Wilensky v. Standard Beryllium Corp.*, 228 F. Supp. 703, 705–06 (D. Mass. 1964); *Int'l Ladies Garment Workers' Union v. Shields & Co.*, 209 F. Supp. 145, 148 (S.D.N.Y. 1962); *Phillips v. Murchison*, 194 F. Supp. 620, 622 (S.D.N.Y. 1961); *Kappus v. Western Hills Oil, Inc.*, 24 F.R.D. 123, 127 (E.D. Wis. 1959); *Lasch v. Antkies*, 161 F. Supp. 851, 852–53 (E.D. Pa. 1958). For a discussion of these early cases, see *Cochran*, *supra* note 4, at 1471–72.

28. 222 F. Supp. 1, 1–2 (D.N.J. 1963).

29. See *id.* at 2.

30. See *id.* at 4.

31. See *id.*

32. See *Puma v. Marriott*, 294 F. Supp. 1116, 1121 (D. Del. 1969); *Sprayregen v. Livingston Oil Co.*, 295 F. Supp. 1376, 1379 (S.D.N.Y. 1968) (authorizing pendent personal jurisdiction as to state-law claim when court had personal jurisdiction from nationwide service of process provision in federal securities laws); *Kane v. Central Am. Mining & Oil, Inc.*, 235 F. Supp. 559, 565–67 (S.D.N.Y. 1964); *Cooper v. N. Jersey Tr. Co.*, 226 F. Supp. 972, 980–81 (S.D.N.Y. 1964).

33. 484 F.2d 553, 555–56 (3d Cir. 1973) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

pendent claim personal jurisdiction on the simple rationale that the Third Circuit's view was "better reasoned."<sup>34</sup> It is worth noting that in all the preceding cases, the pendent state-law claim was closely related to the federal claim. Indeed, as some circuits continued to embrace pendent claim personal jurisdiction, they added the explicit requirement that the pendent claim arise from the same nucleus of operative fact as the anchor claim.<sup>35</sup>

In nationwide service of process cases, pendent claim personal jurisdiction has achieved broad acceptance. Pointing to earlier precedents as persuasive authority, several other circuits have adopted pendent claim personal jurisdiction in such cases, including the Fourth,<sup>36</sup> Seventh,<sup>37</sup> Ninth,<sup>38</sup> Tenth,<sup>39</sup> and Federal Circuits.<sup>40</sup> Federal courts across the country have continued to apply pendent personal jurisdiction in many similar nationwide service of process cases up until the present

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34. See *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 175 n.5 (2d Cir. 1979).

35. See, e.g., *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 3 (D.C. Cir. 1977) (holding that the patent statute's nationwide service of process provision enabled personal jurisdiction as to any claims that "arose out of the same core of operative fact as those claims that clearly fell within the scope" of the patent statute); cf. *Gibbs*, 383 U.S. at 725 ("The state and federal claims must derive from a common nucleus of operative fact.").

36. See, e.g., *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997) (holding that where a South Carolina federal district court had personal jurisdiction over a New Hampshire resident because of the federal RICO statute's provision for nationwide service of process, it could exercise pendent personal jurisdiction as to New Hampshire state-law claims "so long as the facts of the federal and state claims arise from a common nucleus of operative fact").

37. See, e.g., *Robinson Eng'g Co. Pension Plan & Tr. v. George*, 223 F.3d 445 (7th Cir. 2000) (recognizing pendent personal jurisdiction with respect to state-law claims when court had personal jurisdiction from nationwide service of process under the federal securities laws).

38. See, e.g., *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180–81 (9th Cir. 2004) (allowing pendent personal jurisdiction as to state-law antitrust claims when the court had jurisdiction as to the Clayton Act anchor claim through a nationwide service provision).

39. See, e.g., *United States v. Botefuhr*, 309 F.3d 1263, 1272 (10th Cir. 2002) ("Pendent personal jurisdiction . . . exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim.").

40. See, e.g., *Inamed Corp. v. Kuzmak*, 249 F.3d 1356 (Fed. Cir. 2001) (upholding pendent personal jurisdiction as to a state breach of contract claim that arose from the same nucleus of operative fact as a federal patent claim with a nationwide service of process provision).

day, and several have applied it since *Bristol-Myers*.<sup>41</sup> So far, no circuit has since reconsidered its cases in this area.

*B. Pendent Claim Personal Jurisdiction Beyond Nationwide Service of Process Cases*

What about when a court has specific personal jurisdiction as to one claim through a state long-arm statute—with no nationwide service of process provision in play—but not as to other related claims? For an example, recall the fraud and breach of contract claims in our ongoing hypothetical. Even though both claims arose from the same business relationship, our hypothetical court concluded only the fraud claim was sufficiently connected to California, and that the breach of contract claim did not arise from RespondentCo's California contacts. Assuming that's right, the question is whether a California court could adjudicate the two claims together anyway. Usually, these cases arise in the context of diversity jurisdiction, though it is also possible for the court to have specific personal jurisdiction over one federal claim, but not related federal or state-law claims.<sup>42</sup> Courts have divided on the doctrine's validity in this context.

Several federal courts have embraced pendent claim personal jurisdiction outside the nationwide service of process context.

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41. See, e.g., *Dennis v. JPMorgan Chase & Co*, 16-cv-6496 (LAK), 2018 WL 6169313, at \*58 (S.D.N.Y. Nov. 26, 2018) (exercising pendent personal jurisdiction as to state-law claims where plaintiffs had anchor claims under the Clayton Act); *Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharm., Inc.*, No. 3:15-1100, 2017 WL 6381434, at \*3-4 (M.D. Tenn. Dec. 14, 2017) (recognizing validity of pendent claim personal jurisdiction with anchor claim under the Clayton Act); *Rilley v. MoneyMutual, LLC*, No. 16-4001, 2017 WL 3822727, at \*3-4 (D. Minn. Aug. 30, 2017) (exercising pendent claim jurisdiction as to related state-law claims when it had jurisdiction over defendant as to RICO claim under the RICO statute); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 154-55 (E.D.N.Y. 2017) (exercising pendent claim personal jurisdiction as to related state-law claims when the court had personal jurisdiction over the defendant for a claim under the Anti-Terrorism Act).

42. See, e.g., *Noble Sec., Inc. v. MIZ Eng'g, Ltd.*, 611 F. Supp. 2d 513, 553-56 (E.D. Va. 2009) (exercising pendent claim personal jurisdiction as to a federal Lanham Act claim through a federal RICO claim); *Alcohol Monitoring Sys., Inc. v. Actsoft, Inc.*, 682 F. Supp. 2d 1237, 1253 (D. Colo. 2010) (exercising pendent claim personal jurisdiction as to direct patent infringement claims through related indirect patent infringement claims); *Miller Pipeline Corp. v. British Gas Plc.*, 901 F. Supp. 1416, 1423 (S.D. Ind. 1995) (holding pendent claim personal jurisdiction applies to related federal claims in addition to related state-law claims).

The first appellate court to do so was the Second Circuit in *Hargrave v. Oki Nursery, Inc.*<sup>43</sup> *Hargrave* involved a dispute between a New York vineyard and Oki Nursery, a California provider of grape vines that allegedly sold bad vines to Hargrave.<sup>44</sup> Hargrave brought a New York fraudulent misrepresentation claim and five contract law claims against Oki in a New York federal court, invoking diversity jurisdiction.<sup>45</sup> The court, finding that Oki targeted New York and externally caused harm within the state, held that specific personal jurisdiction existed as to the fraudulent misrepresentation claim.<sup>46</sup> The court then allowed pendent claim personal jurisdiction as to the five contract claims.<sup>47</sup> In justifying its decision, the court reasoned that the same policy considerations supporting pendent subject matter jurisdiction favored pendent claim personal jurisdiction.<sup>48</sup> In an interesting interpretive move (analyzed in more detail below), the court interpreted the diversity statute—28 U.S.C. § 1332—to authorize pendent personal jurisdiction.<sup>49</sup>

Since then, several other courts have applied pendent personal jurisdiction in such cases.<sup>50</sup> Even after *Bristol-Myers*,

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43. 636 F.2d 897, 898 (2d Cir. 1980).

44. *See id.*

45. *See id.*

46. *See id.* at 899–900.

47. *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 721 (2d Cir. 1981).

48. *See id.* at 720.

49. *See id.* at 719.

50. *See, e.g.*, *Gen. Elec. Capital Corp. v. Mackzilla, L.L.C.*, H-15-2425, 2016 WL 1059529, at \*6 (S.D. Tex. Mar. 17, 2016) (“[T]he use of pendent personal jurisdiction may be equally or even more justified in some diversity cases than in federal question cases with a mix of federal and state law claims.”); *Inspirus, L.L.C. v. Egan*, No. 4-11-CV-417-A, 2011 WL 4439603, at \*1 (N.D. Tex. Sept. 20, 2011) (allowing pendent claim personal jurisdiction as to two state-law claims the court did not independently have personal jurisdiction for when it had personal jurisdiction as to a related breach of contract claim); *Pension Advisory Grp. Ltd. v. Cty. Life Ins. Co.*, 771 F. Supp. 2d 680, 695–96 (S.D. Tex. 2011); *Rosenburg v. Seattle Art Museum*, 42 F. Supp. 2d 1029, 1037 (N.D. Wash. 1999); *Anderson v. Century Prods. Co.*, 943 F. Supp. 137 (D.N.H. 1996) (holding that pendent personal jurisdiction allowed the court to exercise personal jurisdiction as to contract claim in case where the court had specific personal jurisdiction with respect to a related tort claim); *Salpoglu v. Widder*, 899 F. Supp. 835 (D. Mass. 1995) (exercising pendent personal jurisdiction as to a breach of contract claim when the court already had jurisdiction from a malpractice claim); *Rice v. Nova Biomedical Corp.*, 763 F. Supp. 961 (N.D. Ill. 1991) (exercising personal jurisdiction as to retaliatory discharge and defamation claims because the

courts have applied pendent claim personal jurisdiction outside the nationwide service of process context.<sup>51</sup>

Other courts have declined to apply pendent personal jurisdiction in the absence of a nationwide service of process provision. The Fifth Circuit explicitly rejected it in *Seiferth v. Helicopteros Atuneros, Inc.*, where the plaintiff brought tort claims against Camus, a Tennessee engineer, in a Mississippi federal court under diversity jurisdiction.<sup>52</sup> Seiferth was the victim of a helicopter accident in Mississippi. Camus had designed the defective part in Florida, but he installed it in Mississippi.<sup>53</sup> The plaintiff's estate brought four claims against Camus: defective design, failure to warn, negligence, and negligence *per se*.<sup>54</sup> After concluding it had specific personal jurisdiction as to the failure to warn, negligence, and negligence *per se* claims, the court also reasoned that the defective design claim did not "arise out of" Camus's contacts with Mississippi.<sup>55</sup> The court confronted as an issue of "first impression" whether "specific jurisdiction is a claim-specific inquiry."<sup>56</sup>

The court answered this question affirmatively, rejecting pendent personal jurisdiction and dismissing the defective design claim.<sup>57</sup> It reasoned that its conclusion "flow[ed] logically from the distinction between general and specific jurisdiction."<sup>58</sup> It then rejected pendent personal jurisdiction, asserting that "[p]ermitting the legitimate exercise of specific

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court had specific personal jurisdiction as to the plaintiff's tortious interference claim); *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343, 1345 (D. Mass. 1988) ("[I]n a multi-count complaint, if a court has personal jurisdiction over the defendant with respect to one count, it has personal jurisdiction with respect to all counts . . .").

51. See *Hicks v. Jayco, Inc.*, 1:16 CV1236, 2018 WL 1363843, at \*8 (M.D.N.C. Mar. 15, 2018); *Doe v. Cotterman*, No. 17 C 58, 2018 WL 1235014, at \*5–6 (N.D. Ill. Mar. 9, 2018); *Knowledge Based Sols., Inc. v. Renier*, 2017 WL 3913129, at \*9–11 (E.D. Mich. Sept. 7, 2017); *Miller v. Native Link Constr., LLC.*, No. 15-1605, 2017 WL 3536175, at \*29 (W.D. Pa. Aug. 17, 2017).

52. See 472 F.3d 266, 269–70 (5th Cir. 2006).

53. See *id.* at 270.

54. See *id.* at 274.

55. *Id.* at 275–76.

56. *Id.* at 274.

57. See *id.* at 275–75.

58. See *id.* at 274.

jurisdiction over one claim to justify the exercise of specific jurisdiction over a different claim that does not arise out of or relate to the defendant's forum contacts would violate the Due Process Clause."<sup>59</sup> The Fifth Circuit did not engage with precedents from other circuits, like *Hargrave*, that had embraced the doctrine.

Several other federal courts have declined to extend pendent claim personal jurisdiction beyond the nationwide service of process context.<sup>60</sup>

### C. Pendent Party Personal Jurisdiction

As discussed below, the Court's decision in *Bristol-Myers* limits a court to adjudicating claims connected with the forum where it sits. Sensing an opportunity, class action defendants around the country facing claims by out-of-state plaintiffs moved to dismiss them for lack of personal jurisdiction, citing the Court's decision. Dozens of courts have addressed these motions, and they are deeply divided on the scope of *Bristol-Myers*. Some have granted dismissal, reasoning that the Court requires a connection between each claim and the forum state for personal jurisdiction to exist. Others have denied the motions. Some cases invoke the doctrine of pendent *party*

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59. See *id.* at 275.

60. See, e.g., *Remick v. Manfredy*, 238 F.3d 248, 255–56 (3d Cir. 2001) (declaring the district court must find that personal jurisdiction exists over the defendant as to each of the plaintiff's claims); *Philips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999) ("Questions of specific jurisdiction are always tied to the particular claims asserted."); *MG Design Assocs. v. CoStar Realty Info. Inc.*, 267 F. Supp. 3d 1000, 1016–23 (N.D. Ill. 2017) (looking at personal jurisdiction separately for all claims); *Evergreen Int'l Airlines, Inc. v. Anchorage Advisors, LLC.*, No. 3-11-CV-1416-PK, 2012 WL 3637551, at \*9 (D. Or. July 9, 2012) (rejecting pendent personal jurisdiction because it would "effectively swallow the distinction between general and specific personal jurisdiction"); *Figawi, Inc. v. Horan*, 16 F. Supp. 2d 74, 77–78 (D. Mass. 1998) (refusing to apply pendent personal jurisdiction and rejecting the analogy to subject matter jurisdiction); *Milford Power Ltd. P'ship v. New Eng. Power Co.*, 918 F. Supp. 471, 479–80 (D. Mass. 1996) (refusing to consider personal jurisdiction as to claims that did not arise from the defendant's forum-state contacts even though plaintiff met burden with respect to other claims in the same controversy); see also *Simard*, *supra* note 4, at 1641–42 (discussing *Milford* and *Figawi*). *Remick* means the Third Circuit is the only circuit that accepts pendent personal jurisdiction in the context of a federal claim with a nationwide service of process statute, *Robinson v. Penn Central Co.*, 484 F.2d 553, 555–56 (3d Cir. 1979), but rejects it otherwise. See *Remick*, 238 F.3d at 255. This Article will explore whether this distinction withstands scrutiny.

personal jurisdiction by name (analogizing to pendent claim personal jurisdiction in the process).<sup>61</sup> Others courts have not, but have reasoned that they can adjudicate the claims of plaintiffs unrelated to the state they sit in because they have personal jurisdiction over the defendant as to another plaintiff's similar claim. In other words, they are effectively exercising pendent party personal jurisdiction.

These courts have advanced three rationales. First, some courts conclude that *Bristol-Myers* only applies to state courts, not federal ones. Second, some courts concede that *Bristol-Myers* applies to federal courts exercising diversity jurisdiction, but maintain it is irrelevant to courts exercising federal question jurisdiction. Third, some courts acknowledge that *Bristol-Myers* applies to federal courts, but not to class actions. The division between these courts is stark.

#### 1. *Division on whether Bristol-Myers applies to federal courts*

An example of the first camp is *Sloan v. General Motors LLC*, where a federal court wielded pendent party personal jurisdiction after concluding *Bristol-Myers* does not apply to federal courts.<sup>62</sup> California plaintiffs brought a putative class action for design defects in cars purchased in California under both state and federal law. General Motors did not question the court's personal jurisdiction as to the claims of the California plaintiffs.<sup>63</sup> Plaintiffs from four other states also sought to bring the same claims arising from purchases in their respective states.<sup>64</sup> Even though the court acknowledged those claims had no "independent relationship" with the defendant's California contacts, it exercised personal jurisdiction as to them.<sup>65</sup> The court acknowledged that its decision stood in tension with *Bristol-Myers*, but determined that the Court's reasoning only

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61. See, e.g., *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 858–59 (N.D. Cal. 2018); *Allen v. Conagra Foods, Inc.*, No. 3:13-cv-01279, 2018 WL 6460451, at \*7–8 (N.D. Cal. Dec. 10, 2018).

62. See 287 F. Supp. 3d at 858–59.

63. See *id.* at 853.

64. See *id.* at 856.

65. See *id.* at 857–58.

applied to state courts, not federal courts, because of its emphasis on interstate federalism.<sup>66</sup> The court reasoned that, especially since it had federal question jurisdiction because of the plaintiffs' Magnuson Moss Warranty Act claims, "the due process analysis does not incorporate the interstate sovereignty concerns that animated *Bristol-Myers* and which may be 'decisive' in a state court's analysis."<sup>67</sup> In somewhat confused reasoning, the court then stated the plaintiffs' claims must still relate to the defendant's contacts with California, and acknowledged they did not.<sup>68</sup> However, citing the Ninth Circuit's decision in *Action Embroidery*, the court reasoned the jump from pendent *claim* to pendent *party* personal jurisdiction was not significant.<sup>69</sup> The court also cited the case's status as a putative class action, impliedly recognizing that nationwide class actions would not be possible against defendants in states where they are not amenable to general personal jurisdiction without pendent party personal jurisdiction.<sup>70</sup>

However, several other courts have concluded that *Bristol-Myers* does govern federal courts, not just the state courts. For example, in *Muir v. Nature's Bounty (DE), Inc.*, an Illinois federal court considered state-law claims by plaintiffs from California, Michigan, and Pennsylvania who sought to join with Illinois plaintiffs in alleging consumer fraud against Nature's Bounty, a Delaware corporation with its principal place of business in New York.<sup>71</sup> Although the court had specific personal jurisdiction as to the claims of the Illinois plaintiffs (who bought their products in Illinois), it decided it lacked personal

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66. *See id.* at 858–59.

67. *Id.* at 859.

68. *See id.* at 859–60. Logically, if *Bristol-Myers* only applied to state courts, then a relation between each claim and the forum state when a federal court exercises personal jurisdiction should not be necessary.

69. *See id.* at 860 ("[T]he Ninth Circuit did not limit its holding in *Action Embroidery* to situations involving the same parties. Rather, it focused on whether the new *claims* arose out of the same nucleus of operative facts, not whether the claims belonged to the same plaintiffs.").

70. *See id.* at 861 ("[T]his is a putative nationwide class action. The Court may well have jurisdiction over absent class members (including the named out-of-state plaintiffs) who are non-forum residents in any event.").

71. *See* No. 15 C 9835, 2018 WL 3647115, at \*1 (N.D. Ill. August 1, 2018).

jurisdiction as to the out-of-state claims because of *Bristol-Myers*.<sup>72</sup> The plaintiffs argued for pendent party personal jurisdiction (citing old pendent *claim* personal jurisdiction cases), but the court concluded *Bristol-Myers* prohibited that.<sup>73</sup> The court first acknowledged the argument for not extending *Bristol-Myers*, which reversed a state court judgment:

Arguably, the interstate federalism concerns underlying [*Bristol-Myers*] play out differently in federal court, where it is the coercive power of the United States, rather than the coercive power of another state, to which a defendant is asked to submit. So long as a defendant has sufficient contacts with the United States, the Constitution might not prohibit . . . pendent personal jurisdiction.<sup>74</sup>

However, the court explained that it was bound by *Bristol-Myers* because the Federal Rules of Civil Procedure require federal courts to rely on state law, thus subjecting them to the constitutional limits on state courts articulated in *Bristol-Myers*.<sup>75</sup> It also noted that several other courts have performed the same analysis.<sup>76</sup> Outside the class-action context, several other district courts have considered pendent party personal jurisdiction and refused to embrace it.<sup>77</sup>

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72. *Id.* at \*5.

73. *See id.* at \*4.

74. *Id.* (citations omitted).

75. *See id.* at \*5.

76. *See id.* at \*4–5.

77. *See, e.g.,* Roy v. Fed-Ex Ground Package Sys., Inc., No. 3:17-cv-30116-KAR, 2018 WL 2324092, at \*11 (D. Mass. May 22, 2018) (dismissing out-of-state unpaid overtime claims brought under the FLSA); Horowitz v. AT&T Inc., No. 3:17-cv-4827-BRM-LHG, 2018 WL 1942525, at \*14–16 (D.N.J. Apr. 25, 2018) (dismissing out-of-state claims brought under Age Discrimination in Employment Act); BeRousse v. Janssen Research & Dev., LLC, No. 3:17-cv-00716-DRH, 2017 WL4255075 (S.D. Ill. Sept. 26, 2017) (dismissing out-of-state plaintiffs' claims); Spratley v. FCA U.S. LLC, 3:17-CV-0062, 2017 WL 4023348, at \*1 (N.D.N.Y. Sept. 12, 2017). Several cases predated *Bristol-Myers*. *See* Famular v. Whirlpool Corp., 16 CV 944 (VB), 2017 WL 2470844, at \*5–6 (S.D.N.Y. June 7, 2017); DeMaria v. Nissan N. Am., Inc., No. 15 C 3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016); Tulsa Cancer Inst., PLLC v. Genentech Inc., No. 15-CV-157-TCK-TLW, 2016 WL 141859 (N.D. Okla. Jan. 12, 2016).

2. *Division on whether Bristol-Myers applies in diversity and federal question cases*

Another rationale suggests that *Bristol-Myers* does not apply to courts exercising federal question jurisdiction. For example, in *In re Packaged Seafood Products Antitrust Litigation*, a California federal court considered antitrust claims against an international company only subject to general personal jurisdiction in the United Kingdom.<sup>78</sup> The court had personal jurisdiction over the defendant with respect to a putative class of direct purchasers under the Clayton Act's nationwide service of process provision. Stating the obvious, the court's subject matter jurisdiction as to those claims arose from a federal question. But the court then questioned whether it could exercise pendent personal jurisdiction as to the out-of-state indirect purchaser claims brought under state law. The court acknowledged a "general consensus [that] because *Bristol-Myers* dealt with limits on state sovereign power within a federal system, its reasoning is applicable to federal courts sitting in diversity."<sup>79</sup>

But the court reasoned that the "due process concerns are different" when a federal court is exercising federal question jurisdiction.<sup>80</sup> Because it was exercising federal question jurisdiction as to the direct purchaser claims, the court reasoned that pendent party personal jurisdiction as to the out-of-state indirect purchaser claims was appropriate, given that they arose from the same alleged antitrust conspiracy as the federal direct purchaser claims, enabling the court to adjudicate all the claims before it.<sup>81</sup> Although they did not rely on this rationale, a couple of other courts have suggested agreement that *Bristol-Myers* does not apply to federal question jurisdiction cases.<sup>82</sup>

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78. No. 15-MD-2670 JLS (MDD), 2018 WL 4222506, at \*1-2 (S.D. Cal. Sept. 5, 2018).

79. *See id.* at \*32.

80. *See id.*

81. *See id.* (citing policy advantages such as judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties).

82. *See Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018) (noting that the court had federal question jurisdiction under the Magnuson Moss Warranty Act to strengthen

Other courts have relied on *Bristol-Myers* to dismiss claims while exercising federal question jurisdiction. Indeed, the logic of these cases closely resembles that in the cases where federal courts exercising diversity jurisdiction rejected pendent personal jurisdiction. For example, in *Roy v. FedEx Ground Package System, Inc.*, a Massachusetts district court dismissed out-of-state claims under the Fair Labor Standards Act (FLSA) for lack of personal jurisdiction.<sup>83</sup> The court cited the rule that “before a federal court may exercise personal jurisdiction over a defendant in a federal question case, there must be authorization for service of summons on the defendant” in state law or a specific federal statute.<sup>84</sup> Because the FLSA did not authorize service of process, the court relied on Massachusetts’s long-arm statute to wield personal jurisdiction, thus bringing *Bristol-Myers* (which limits the reach of the long-arm statute) into play.<sup>85</sup> Other courts have reached the same conclusion.<sup>86</sup>

### 3. *Division on whether Bristol-Myers applies to class actions*

Third, several federal courts have exercised pendent party personal jurisdiction in class actions. In *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, California plaintiffs brought a nationwide class action against Dr. Pepper in a California federal court.<sup>87</sup> After *Bristol-Myers*, Dr. Pepper argued the court lacked specific personal jurisdiction over it as to the claims of

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its decision to exercise pendent personal jurisdiction); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, No. 17-cv-00564, 2017 WL 4224723, at \*4 (N.D. Cal. Sept. 22, 2017) (citing considerations unique to diversity jurisdiction in support of argument that *Bristol-Myers* applies to federal courts “in cases that are before them solely on the basis of diversity”).

83. See No. 3:17-cv-30116-KAR, 2018 WL 2324092 (D. Mass. May 22, 2018).

84. See *id.* at \*3 (quotations omitted) (quoting *Pike v. Clinton Fishpacking, Inc.*, 143 F. Supp. 2d 162, 166 (D. Mass. 2001)). I discuss the relationship between service of process and personal jurisdiction below. See *infra* notes 144–84 and accompanying text. Although service of process is not the same thing as personal jurisdiction, the former is a prerequisite to the latter.

85. See *id.* at \*3–5.

86. See, e.g., *Roy*, 2018 WL 2324092, at \*9 (rejecting out-of-state claims brought under FLSA); *Horowitz v. AT&T Inc.*, No. 3:17-cv-4827-BRM-LHG, 2018 WL 1942525, at \*14–16 (D.N.J. Apr. 25, 2018) (dismissing out-of-state Age Discrimination in Employment Act claims).

87. See 2017 WL 4224723, at \*1–2.

the non-California class members.<sup>88</sup> The court rejected the plaintiffs' argument that *Bristol-Myers* did not apply to federal courts—at least those sitting in diversity—but concluded instead that it did not apply to class actions.<sup>89</sup> The court reasoned that, unlike in mass actions, absent class members are not full parties in interest, thus making *Bristol-Myers* distinguishable; the court acknowledged that its decision allowed plaintiffs to “manipulate[] the[ir] complaint so as to not run afoul” of the Court's decision.<sup>90</sup>

Several other courts have likewise determined *Bristol-Myers* does not apply to class actions.<sup>91</sup> It is noteworthy that several of these courts concluded that *Bristol-Myers* applies to federal courts, but not to class actions.<sup>92</sup> This divide appears most starkly in *Molock v. Whole Foods Market*. There, the court dismissed out-of-state claims by named plaintiffs in a putative class action but maintained personal jurisdiction with respect to the in-state named plaintiffs' class claims, effectively exercising pendent party personal jurisdiction over the defendant as to out-of-state claims from across the country.<sup>93</sup>

In class actions, other courts have refused to wield pendent party personal jurisdiction since *Bristol-Myers*, creating a substantial split. For example, in *Cirque du Soleil*, an Illinois plaintiff brought a putative nationwide class action under the

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88. See *id.* at \*3. The parties agreed the court did not have general personal jurisdiction.

89. See *id.* at \*4.

90. See *id.* at \*5.

91. See *Allen v. Conagra Foods, Inc.*, No. 3:13-cv-01279-WHO, 2018 WL 6460451, at \*4–8 (N.D. Cal. Dec. 10, 2018); *Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 WL 3580775, at \*6 (W.D. Va. July 25, 2018); *Garcia v. Peterson*, 319 F. Supp. 3d 863, 880 (S.D. Tex. 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342, 1344 (S.D. Fla. 2018); *Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc.*, 305 F. Supp. 3d 1342, 1350–51 (M.D. Fla. 2018); *Weisheit v. Rosenberg & Assocs., LLC.*, No. JKB-17-0823, 2018 WL 1942196, at \*15 (D. Md. Apr. 25, 2018); *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods.*, No. 17-2161, 2018 WL 1377608, at \*5 (E.D. La. Mar. 19, 2018); *Molock v. Whole Foods Mkt.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018); *Sanchez v. Launch Tech. Workforce Sols., L.L.C.*, 297 F. Supp. 3d 1360, 1369 (N.D. Ga. 2018); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at \*12 (E.D. La. Nov. 30, 2017); see also *Swamy v. Title Source, Inc.*, No. 17-0117, 2017 WL 5196780, at \*2 (N.D. Cal. Nov. 10, 2017) (concluding *Bristol-Myers* does not apply to FLSA collective actions).

92. See, e.g., *Molock*, 297 F. Supp. 3d at 126–27; *Fitzhenry-Russell*, 2017 WL 4224723, at \*5; see also *Allen*, 2018 WL 6460451, at \*5–6 (acknowledging the division and reserving the question).

93. See *Molock*, 297 F. Supp. 3d at 126.

Telephone Consumer Protection Act (TCPA) in an Illinois federal court.<sup>94</sup> Although the court granted class certification, it limited the class to Illinois citizens, concluding *Bristol-Myers* barred it from exercising personal jurisdiction as to the out-of-state class members' claims.<sup>95</sup> With no nationwide service of process provision in the TCPA, the court explained that it had to assert personal jurisdiction under state law.<sup>96</sup> This meant the Supreme Court's Fourteenth Amendment cases (including *Bristol-Myers*) limited the court, even though it exercised federal question jurisdiction.<sup>97</sup> Because the out-of-state class members' claims had no connection to Illinois, the court dismissed them.<sup>98</sup> Several other district courts have reached the same conclusion.<sup>99</sup>

In summary, there is a substantial split on the validity and scope of pendent party personal jurisdiction among the federal courts after *Bristol-Myers*. As this Article heads to the printer, no court of appeals has directly considered the doctrine's validity, though the Seventh Circuit recently highlighted the question of whether *Bristol-Myers* applies to class actions in an interlocutory

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94. See *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 844–46 (N.D. Ill. 2018).

95. See *id.* at 860–62.

96. See *id.* at 862.

97. See *id.* at 861–62. *Contra Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018).

98. See *Cirque du Soleil*, 301 F. Supp. 3d at 864.

99. See, e.g., *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191, at \*9–11 (N.D. Ill. May 16, 2018); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at \*2 (N.D. Ill. Jan. 18, 2018); *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 874 (N.D. Ill. 2017) (“Nothing in *Bristol-Myers* suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principal—that due process requires a ‘connection between the forum and the specific claims at issue.’ That principle applies with equal force whether or not the plaintiff is a putative class representative.”); *McDonnell v. Nature’s Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910, at \*3–4 (N.D. Ill. Oct. 26, 2017); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX-DLR, 2017 WL 4357916, at \*4 n.4 (D. Az. Oct. 2, 2017) (“The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.”); *In re Dental Supplies Antitrust Litig.*, No. 16–696, 2017 WL 4217115, at \*9 (E.D.N.Y. Sept. 20, 2017) (“The constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.”); see also *Demedicis v. CVS Health Corp.*, No. 16-cv-5973, 2017 WL 569157, at \*4–5 (N.D. Ill. Feb. 13, 2017) (refusing to exercise specific personal jurisdiction as to out-of-state class members' claims before *Bristol-Myers*).

appeal and declined to address it, since the parties had not argued the issue before the district court.<sup>100</sup>

D. *Observations on the Rise of Pendent Personal Jurisdiction*

A few observations about the doctrine's evolution are in order. First, early courts usually embraced pendent claim personal jurisdiction based on an analogy to the Supreme Court's articulation of pendent subject matter jurisdiction in *Gibbs*. However, these early decisions often failed to give coherent reasoning or acknowledge the significant differences between personal and subject matter jurisdiction.<sup>101</sup>

Second, later courts that accepted pendent claim personal jurisdiction, including the appellate courts, often relied uncritically on earlier precedents from other courts. For example, the D.C. Circuit adopted pendent personal jurisdiction in one paragraph featuring a citation to *Gibbs*,<sup>102</sup> a footnote collecting precedents, an unsupported statement that cases upholding the doctrine were "better reasoned" than those rejecting it, and a cursory assertion that pendent personal jurisdiction facilitated enforcement of the federal statute.<sup>103</sup> As another example, the Second Circuit adopted the doctrine two years later in a footnote that collected cases and summarily concluded that the pro-jurisdiction cases were "better reasoned" than the contrary ones.<sup>104</sup>

Third, pendent party personal jurisdiction is provoking significantly more controversy and division among the lower courts than its pendent claim cousin. The biggest divide is on whether *Bristol-Myers* limits multistate class actions.

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100. See *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1024–25 (7th Cir. 2018) ("[I]t is not for us to take the first bite of this apple.").

101. For a convincing critique of the reasoning in the earliest pendent personal jurisdiction cases, see Ferguson, *supra* note 4, at 72 ("In summary, few of the decisions have really analyzed the issue and the arguments on both sides and come to a reasoned conclusion.").

102. *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 4–5 (D.C. Cir. 1977) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

103. *Id.* at 5.

104. *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 175 n.5 (2d Cir. 1979).

Fourth, courts generally have not articulated a source of authority for both types of pendent personal jurisdiction, usually relying solely on precedent and free-floating public policy considerations. Before returning to the doctrine's legality below,<sup>105</sup> the following Part takes up the project that courts have overlooked: finding a source of authority for pendent personal jurisdiction.

## II. THE SOURCE OF AUTHORITY FOR PENDENT PERSONAL JURISDICTION

As the previous Part documents, pendent personal jurisdiction has a dubious origin. Federal courts embraced it without paying careful attention to their authority to do so. In brief, early courts analogized pendent claim personal jurisdiction to pendent subject matter jurisdiction; later courts then uncritically relied on earlier precedents to fuel its expansion; and more recently, courts are expanding pendent claim personal jurisdiction to allow pendent party personal jurisdiction, usually to enable multistate class actions.

This Article questions the federal courts' authority to adopt pendent personal jurisdiction. Although the Supreme Court's recent personal jurisdiction cases focused primarily on constitutional limits, personal jurisdiction is first and foremost statutory law. As with subject matter jurisdiction, federal courts cannot exercise personal jurisdiction without statutory or rule-based authority.<sup>106</sup> More specifically, federal courts have long understood service of process to be a prerequisite to personal jurisdiction, and that statutory authorization is required for a court to issue process.<sup>107</sup>

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105. See *infra* Part IV.

106. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987) (citing the "unmalleable principle of law that federal courts must ground their personal jurisdiction on a federal statute or rule" (quoting *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 423 (5th Cir. 1986))); *ESAB Grp. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir. 1997) ("Federal district courts may exercise *in personam* jurisdiction only to the degree authorized by Congress acting under its constitutional power to 'ordain and establish' the lower federal courts.").

107. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017) ("[A]bsent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.");

There are two primary ways that federal courts can exercise personal jurisdiction through service of process. First, Federal Rule of Civil Procedure 4(k)(1)(A) specifies the default rule: a federal court can maintain personal jurisdiction following service of process when authorized by the jurisdictional statute of the state where it sits.<sup>108</sup> Second, as recognized by Rule 4(k)(1)(C), Congress has the power to expand personal jurisdiction from this default in particular federal statutes.<sup>109</sup>

This Part addresses the possible sources of authority for pendent personal jurisdiction. First, Section II.A considers whether the federal courts can rely on federal law to wield it, ultimately concluding they may not. Second, Section II.B explains that, at least in some states, the federal courts can rely on state long-arm statutes to maintain pendent personal jurisdiction, subject only to constitutional limits. Section II.C clarifies that, under current law, the assertion of both pendent claim and pendent party personal jurisdiction depends on the same source of authority: the state long-arm statutes.

#### *A. Federal Statutory or Rule-Based Authority*

Some courts have concluded that they had affirmative authority to apply pendent claim personal jurisdiction because of a federal statute or rule. No scholars or courts have yet claimed that a federal statute or rule authorizes pendent party personal jurisdiction, so this section focuses on pendent claim personal jurisdiction.

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*Omni*, 484 U.S. at 111 (“In summary, the District Court may not exercise jurisdiction . . . without authorization to serve process.”); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444–46 (1946) (describing how service of process is the mechanism by which a federal court maintains statutorily-authorized personal jurisdiction); LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE THEORY AND PRACTICE* 180–81 (4th ed. 2013).

108. *See* FED. R. CIV. P. 4(k)(1)(A).

109. *See id.* 4(k)(1)(C). There is a third way, though it arises in a relatively limited number of cases. If a party is joined under Rule 19 as a required party or Rule 14, process can be served on a party not more than one hundred miles away from the relevant district court. *See id.* 4(k)(1)(B).

Congress has the power to authorize nationwide service of process.<sup>110</sup> Indeed, it has done so for certain claims under particular federal statutes. However, the Supreme Court has a longstanding rule that it will construe congressional extensions of service of process narrowly.<sup>111</sup> In *Omni*, the Court reaffirmed this principle: because Congress knows it has the power to establish nationwide service of process, the Court stated it will not presume Congress intended to permit nationwide service of process unless it does so explicitly.<sup>112</sup>

Scholars and courts have proposed three bases for concluding that federal law enables pendent claim personal jurisdiction: the subject matter jurisdiction statutes, Rule 4, and the nationwide service of process provisions in particular federal statutes. This section ultimately argues that no federal statute or rule blesses pendent claim personal jurisdiction, leaving state statutes as the only potential source of authority for it. Additionally, this section challenges the distinction, made by some courts and scholars, between the legitimacy of pendent claim personal jurisdiction in cases involving a nationwide service of process provision and in cases without one.<sup>113</sup> For this to be true, one

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110. See *Omni*, 484 U.S. at 103–04; *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) (“Congress has power, likewise, to provide that the process of every [d]istrict [c]ourt shall run into every part of the United States.”).

111. See *Robertson*, 268 U.S. at 627 (“It is not lightly to be assumed that Congress intended to depart from a long established policy” of personal jurisdiction rules).

112. See 484 U.S. at 106 (“It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention.”). *Omni* and *Robertson* seem to articulate a clear statement rule for service of process statutes, or at least command cautious, narrow interpretations. To date, no scholar considering pendent personal jurisdiction has seen *Robertson*’s or *Omni*’s rule of narrow construction as relevant. Without citing either case, *Heller* asserts the opposite principle. See *Heller*, *supra* note 4, at 131 (“Such an inquiry is especially proper here because statutes that extend the jurisdiction of the courts, as nationwide service of process statutes do, are to be broadly construed.”).

113. See *WRIGHT ET AL.*, *supra* note 14; *Cochran*, *supra* note 4, at 1489–92 (arguing for different analyses for nationwide service of process cases and cases where a state long-arm statute is used to gain pendent personal jurisdiction); *Rhodes & Robertson*, *supra* note 4, at 244–46 (describing nationwide service of process cases as being on the least controversial end of a “spectrum,” with other cases being more controversial on the spectrum); *Simard*, *supra* note 4, at 1627–31. *But see Yonan*, *supra* note 4, at 571–72 (arguing for narrow interpretations of four nationwide service of process provisions because of the Supreme Court’s decision in *Finley*, where the Court declined to read the subject matter jurisdiction statute broadly).

must interpret the nationwide service of process provisions to permit pendent claim personal jurisdiction. Section II.A.3 argues that interpretation is not plausible.

1. 28 U.S.C. §§ 1331, 1332, and 1367

In *Hargrave*, the Second Circuit held that 28 U.S.C. §§ 1331 and 1332, the primary statutes for federal subject matter jurisdiction, gave it the authority to assert pendent claim personal jurisdiction.<sup>114</sup> First, the Second Circuit concluded that New York's long-arm statute only enabled personal jurisdiction as to the plaintiff's fraud claim, not his related contract claims.<sup>115</sup> As the court framed it, "The question is whether Congress has authorized the district court" to adjudicate the contract claims.<sup>116</sup> The court then acknowledged that Rule 4(e)—now 4(k)(1)(A)—did not allow jurisdiction either.<sup>117</sup> In a remarkable move, the court then turned to the federal statutes establishing *subject matter* jurisdiction, sections 1331 and 1332.<sup>118</sup> The court noted that, in both statutes, Congress authorized jurisdiction over "actions," either between citizens of different states or those arising under federal laws or the Constitution.<sup>119</sup> The court, citing *Gibbs*, noted that the term "action" has been understood in some contexts to mean "the entire controversy."<sup>120</sup> Therefore, the court interpreted sections 1331 and 1332 to permit a district court to exercise pendent personal jurisdiction to adjudicate the entire "action."<sup>121</sup> Similarly, at least one court has argued that the supplemental jurisdiction statute—28 U.S.C. § 1367—enables pendent claim personal jurisdiction.<sup>122</sup>

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114. See 646 F.2d 716, 719 (2d Cir. 1980).

115. See *id.* at 718–19.

116. See *id.*

117. See *id.*

118. See *id.* at 719.

119. See *id.*

120. *Id.*

121. *Id.*

122. See *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 796, 804 (N.D. Ohio 1998).

There are two fundamental problems with this approach. First, the language of sections 1331, 1332, and 1367 refers to only one type of jurisdiction, long understood to be subject matter jurisdiction.<sup>123</sup> These sections make no reference to personal jurisdiction or “service of process,” which Congress has codified as a separate prerequisite to federal jurisdiction since the Judiciary Act of 1789.<sup>124</sup> Second, this approach would render pointless all the separate federal statutory provisions defining the scope of service of process. In short, rooting authority for pendent personal jurisdiction in sections 1331, 1332, or 1367 would overturn the longtime understanding that Congress authorizes subject matter and personal jurisdiction separately.

## 2. Federal Rule of Civil Procedure 4(k)(1)

Professor Linda Simard has proposed a different, but ultimately unpersuasive, source of authority: Rule 4. As she points out, the language of Rule (4)(k)(1) says that service of process under the section “establish[es personal] jurisdiction over the person of a defendant,” not that it establishes personal jurisdiction over a defendant *as to a particular claim*.<sup>125</sup> She suggests that the rulemakers’ decision not to use the word “claim” is especially notable since they used the term in Rule (4)(k)(2).<sup>126</sup> She concludes that Rule 4 is ambiguous, and then says policy arguments should push us to favor the broader interpretation.<sup>127</sup>

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123. See, e.g., WRIGHT ET AL., *supra* note 14, at § 1069.7 (“Neither the plain meaning of this statute, which shows it to be a subject matter jurisdiction provision, nor its legislative history supports the conclusion that Congress intended [s]ection 1367 to include personal jurisdiction.”); cf. BNSF Ry. v. Tyrrell, 137 S. Ct. 1549, 1553 (2017) (concluding that similar language in FELA refers only to subject matter jurisdiction, and not to personal jurisdiction). See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 778–84, 1413–14 (7th ed. 2015).

124. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103–04 (1987) (reasoning that congressional authorization of subject matter jurisdiction alone is not sufficient to confer personal jurisdiction over a defendant). For more on the Judiciary Act, see *infra* note 151.

125. Simard, *supra* note 4, at 1645–46.

126. *Id.* at 1646.

127. See *id.* at 1646–48. She attempts to ground her policy argument in the rules. First, Simard observes that Rule 1 commands that rules “shall be construed and administered to secure the

But even if Rule 4 is ambiguous, that ambiguity does not give free rein to set a meaning consistent with public policy goals—*Robertson* and *Omni* command that service of process provisions be narrowly construed.<sup>128</sup> Further, her interpretation has serious problems. Except for Rule 4(k)(1)(B), Rule 4(k)(1) does not deal in specifics; it delegates determination of when service is appropriate to state or federal statutes, suggesting we should look to them to determine the scope of a federal court’s process. Moreover, Simard’s interpretation would allow plaintiffs to bring claims unrelated to the anchor claim, thus obliterating the line between specific and general personal jurisdiction.<sup>129</sup> Because the Court has cautioned against blurring that line,<sup>130</sup> her interpretation is untenable. Rule 4(k)(1) does not authorize pendent personal jurisdiction.<sup>131</sup>

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just, speedy, and inexpensive determination of every action.” *Id.* at 1647 (quoting FED. R. CIV. P. 1). She also points to notes from the Advisory Committee on Civil Rules of Practice and Procedure. *See id.* at 1648. The notes that Simard points to, however, refer specifically to subject matter jurisdiction, as is made clear by the Committee’s citation to 28 U.S.C. § 1367. *See* FED. R. CIV. P. 4(k)(1)(A) advisory committee’s note to 1993 amendment.

128. *See Omni*, 484 U.S. at 105–06 (“It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention.”); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 624–27 (1925); *supra* note 112. Logically, the rule of strict construction should also apply to rules promulgated under the Rules Enabling Act. *See Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001) (urging that the Federal Rules of Civil Procedure be narrowly construed to “minimize potential conflict with the Rules Enabling Act” (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999))); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444–46 (1946) (stating that the Federal Rules of Civil Procedure should not be interpreted to expand the jurisdiction of federal courts). Indeed, historical evidence suggests that members of the original Advisory Committee on Civil Rules were concerned about the rules usurping Congress’s power to define the scope of service of process. *See* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1172 n.673 (1982) (discussing the anxieties of various constituencies).

129. Professor Simard acknowledges this problem. *See* Simard, *supra* note 4, at 1646.

130. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017) (emphasizing that specific and general jurisdiction are “very different”).

131. Although I have seen no published work suggest this, one of the individuals who helpfully commented on drafts of this Article asked whether Rule 18 could be understood to authorize pendent claim personal jurisdiction. Rule 18 allows plaintiffs to join multiple claims against a defendant. The Advisory Committee on Civil Rules made clear that this rule, like the rules dealing with the joinder of parties, governs only pleading requirements, and does not address jurisdictional requirements. *See* FED. R. CIV. P. 18 advisory committee’s note to 1966 amendment (stating that Rule 18 “does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading”).

### 3. *Specific federal statutes*

Finally, some scholars and courts have proposed that specific federal laws enable pendent claim personal jurisdiction.<sup>132</sup> If a federal statute authorizing nationwide service of process allowed pendent claim personal jurisdiction, a federal court could exercise it without needing to rely on the long-arm statute of the state where it sits.<sup>133</sup> Congress has only established nationwide service of process for federal claims in a limited number of statutes.<sup>134</sup> Ultimately, this Article concludes that these various federal statutes (with one potential, limited exception) do not bless pendent claim personal jurisdiction as to claims that are related to the relevant federal claims referred to in the statutes.

#### a. *A representative example: the 1934 Securities Exchange Act*

Section 27 of the 1934 Securities Exchange Act provides a representative example of the language contained in these provisions, so we start our analysis there. The provision states:

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder . . . may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an

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132. See Cochran, *supra* note 4, at 1477; Heller, *supra* note 4, at 137; Mills, *supra* note 4, at 439–40. This subsection does not focus on pendent *party* personal jurisdiction because a nationwide service of process provision makes it unnecessary to invoke that doctrine. Subject to any pertinent constitutional limitations under the Fifth Amendment, see *infra* note 176, personal jurisdiction rules do not bar anyone from bringing a direct purchaser claim under the Clayton Act anywhere in the United States because of the nationwide service of process provision. Thus, plaintiffs from around the country can, assuming any other requirements are met, join together their Clayton Act claims in any federal court.

133. See Yonan, *supra* note 4, at 560 (stating that a statutory provision would allow a federal court to “circumvent” the long-arm statute limitation).

134. See *infra* note 184.

inhabitant or wherever the defendant may be found.<sup>135</sup>

Many applications of pendent claim personal jurisdiction have occurred under this provision.<sup>136</sup> Analyzing this provision in *Hargrave*, the Second Circuit started by pointing to prior cases—*International Controls Corp.* and *Robinson*—and then it justified how the courts in those cases embraced pendent claim personal jurisdiction under section 27.<sup>137</sup> The court, as it did when analyzing sections 1331 and 1332, focused on the word “action.”<sup>138</sup> Pointing to cases like *Gibbs*, where “action” was interpreted broadly to mean “the entire controversy,” the court decided that section 27 authorized pendent claim personal jurisdiction as to state-law claims related to the federal securities claim.<sup>139</sup>

However, this conclusion is unsatisfactory. Take a closer look at the relevant sentence, which allows nationwide service of process for “[a]ny suit or *action* to enforce any liability or duty created by this chapter or rules and regulations thereunder.”<sup>140</sup> The court focused on the word “action,” and then interpreted it broadly. But the sentence qualifies what type of “action” nationwide service of process is permitted for: the “action” is one to enforce a duty or liability “created by this chapter.”<sup>141</sup> Although it is possible to read “action” in its broadest *Gibbs*-esque sense here, the more plausible reading is that nationwide service of process is conferred only for claims brought to enforce the provisions of the Act.<sup>142</sup> Thus, section 27 does not

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135. 15 U.S.C. § 78aa (2018).

136. See, e.g., *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 175 n.5 (2d Cir. 1979); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555 (3d Cir. 1973).

137. See 646 F.2d 716, 720 (2d Cir. 1980). In those cases, the courts did not attempt to articulate a statutory basis for their actions.

138. See *id.* at 719–20.

139. See *id.*

140. 15 U.S.C. § 78aa (emphasis added).

141. *Id.*

142. But see *Cochran*, *supra* note 4, at 1476 (making a similar *Gibbs*-centered argument for the Investment Company Act of 1940); *Mills*, *supra* note 4, at 439–40 (arguing that the statute should be read similarly to how the *Gibbs* Court interpreted “case” in Article III of the Constitution).

permit service of process for claims other than those created by the Act. Therefore, a court cannot exercise pendent claim personal jurisdiction through section 27.

b. *Interpreting service of process provisions*

This subsection takes a closer interpretive look at section 27, confronting the challenge of interpreting service of process provisions. Scholars have devoted little attention to this challenge.

Interpreting section 27 is complicated because of the confusing relationship between personal jurisdiction and service of process. Literally speaking, service of process is merely the means by which the court gives notice to a defendant that she is being sued.<sup>143</sup> Traditionally, service of process has also served the function of asserting the court's personal jurisdiction over the defendant, which explains why Congress has authorized "service of process" when it wanted to allow federal courts to assert personal jurisdiction.<sup>144</sup> Thus, statutes or rules regulating service of process serve two roles.<sup>145</sup> First, they regulate the *procedure*, the means by which notice is given to a defendant.<sup>146</sup> Second, they define the *scope* of process and, by extension, a court's power to exercise personal jurisdiction.<sup>147</sup>

Still, service of process is not the same thing as personal jurisdiction, posing this question: does section 27's delineated scope of service of process limit a federal court's scope of personal jurisdiction under section 27? If so, then federal courts

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143. See HERMA KAY ET AL., *CONFLICT OF LAWS* 414 (9th ed. 2013) (explaining that notice is "so often confused with personal jurisdiction because both are commonly dealt with under the single rubric of due process"); Leslie M. Kelleher, *Amenability to Jurisdiction as a 'Substantive Right': The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1203-04 (2000) (distinguishing between the "manner and method of service of process" and "amenability to jurisdiction").

144. See *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017) ("Congress uses this terminology because, absent consent, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction.").

145. See SILBERMAN, STEIN & WOLFF, *supra* note 107, at 255.

146. See FED. R. CIV. P. 4(a)-(j), (l)-(n) (describing the contents, issuance, specifics of service, time limits, and jurisdiction over property and assets for a summons).

147. See *id.* 4(k); see also SILBERMAN, STEIN & WOLFF, *supra* note 107, at 255.

cannot exercise pendent claim personal jurisdiction. This Article considers two interpretive approaches: textualism and purposivism.

Textualists should conclude that “service of process” implies personal jurisdiction, so that statutory boundaries on service of process limit, by extension, personal jurisdiction. The rule of ordinary meaning, a textualist’s starting point,<sup>148</sup> does little to elucidate the meaning of “service of process.”<sup>149</sup> A more promising option is to treat “service of process” as a legal term of art that implies “personal jurisdiction.”<sup>150</sup> Moreover, the textualist would investigate how the phrase “service of process” was historically used in an effort to describe an objective legislative intent.<sup>151</sup>

The historical inquiry should lead a textualist to determine that section 27’s use of the phrase “service of process” was understood to delineate the bounds of personal jurisdiction, not just the means by which a party is informed of a lawsuit. Historically, when Congress has wished to authorize personal jurisdiction, it has used the term “service of process.” Starting in the Judiciary Act of 1789, Congress established service of process scope rules as separate constraints on assertions of jurisdiction by the lower federal courts.<sup>152</sup> Throughout

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148. See Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court’s Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 136–37 (2016) (discussing the “signs” to be used when determining the meaning of words with the ordinary meaning of the word being the touchstone).

149. See, e.g., *Nix v. Hedden*, 149 U.S. 304, 306–07 (1931) (applying the rule of ordinary meaning).

150. See, e.g., *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”); see also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings soil with it.”).

151. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997).

152. See Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 79 (“And no civil suit shall be brought before [the lower federal courts] against an inhabitant of the United States, by any original

American history, courts referred to personal jurisdiction in terms of “service of process.”<sup>153</sup> For example, in 1814, the Connecticut Supreme Court stated, “there must be not only a jurisdiction of the subject matter, but also a jurisdiction of the process.”<sup>154</sup> Thus, it is unsurprising that, starting with the Clayton Act, all of the relevant nationwide service of process provisions featured the “service of process” language.<sup>155</sup> Just nine years before Congress enacted section 27, the Supreme Court stated that personal jurisdiction “implies . . . service of process upon” the individual.<sup>156</sup>

The foregoing allows textualists to identify an objective legislative intent in the “service of process” phraseology, concluding section 27 defines the scope of personal jurisdiction, not just the means by which a defendant is given notice. Moreover, today’s legal community still treats the terms

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process in any other district than that whereof he is an inhabitant.”); *see also Ex Parte Graham*, 10 F. Cas. 911, 912 (C.C.E.D. Pa. 1818) (Washington, Circuit Justice) (stating that Congress “has not left this subject to implication” and that the Judiciary Act’s provisions on service of process “appear manifestly to circumscribe the jurisdiction” of the federal courts); G.W. Foster, Jr., *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 79–80 (1968) (identifying the Judiciary Act’s regulation of personal jurisdiction through service of process terminology). Until 1938, absent a nationwide service of process provision in a federal statute, the Judiciary Act limited the scope of a federal district court’s process to the geographical territory of the judicial district that it sat in. Federal Rule of Civil Procedure 4(f), adopted by the Supreme Court under the Rules Enabling Act in 1938, expanded the scope of the district courts’ process to reach throughout the particular states they sat in. *See Kelleher, supra* note 143, at 1204–05 (explaining the historical development).

153. *See Burnham v. Superior Court of Cal.*, 495 U.S. 604, 608–09 (1990); *Mech. Appliance Co. v. Castleman*, 215 U.S. 437, 441–42, 446 (1910) (dismissing complaint for “want of jurisdiction” when process was served beyond the authorized scope (emphasis added)); *Boswell’s Lessee v. Otis*, 50 U.S. 336, 338–40 (1850) (“If the process be not sufficient to bring the defendant into court and make him a party to the decree, where all the other proceedings are regular, the case cannot be improved.”); *Picquet v. Swan*, 19 F.Cas. 609, 616 (C.C.D. Mass. 1828) (Story, Circuit Justice); *Dunn v. Dunn*, 4 Paige Ch. 425, 430 (N.Y. Ch. 1834); *Evans v. Instine*, 7 Ohio 273, 275 (1835); *Steel v. Smith*, 7 Watts & Serg. 447, 449 (Pa. 1844).

154. *Gruman v. Raymond*, 1 Conn. 40, 44 (1814).

155. *See infra* note 184. In a recent proposed bill, Congress considered replacing the traditional “service of process” language with text instead defining the scope of “personal jurisdiction.” *See Justice Against Sponsors of Terrorism Act*, S. 1535, 113th Cong. § 5(e) (2004) (authorizing “personal jurisdiction” while not mentioning “service of process”). However, Congress deleted that language from the final version of the bill, substituting “service of process” in its place. Even if Congress is shifting away from its old “service of process” language, that does not change the original meaning of past provisions.

156. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–23 (1925).

“service of process” and “personal jurisdiction” interchangeably.<sup>157</sup> The Court’s controlling precedents recognize the distinction between the two concepts, yet strongly imply that the power to exercise personal jurisdiction necessarily depends on the authorization to issue process.<sup>158</sup> Thus, a conventionalist interpreter would reach the same result as a textualist focusing on original, objective legislative intent.<sup>159</sup>

Having determined that the legal community historically used—and currently uses—“service of process” to imply “personal jurisdiction,” section 27 is not otherwise ambiguous: it allows nationwide service of process for “[a]ny suit or action to enforce any liability or duty *created by this chapter or rules and regulations thereunder.*”<sup>160</sup> Thus, textualists and conventionalists would conclude the provision only authorizes nationwide personal jurisdiction for federal courts as to claims created by the 1934 Exchange Act or SEC regulations promulgated thereunder, and not for related claims created by other sources.

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157. See, e.g., Ohio Civ. R. 4.1 (“Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state.”); *Stafford v. Briggs*, 444 U.S. 527, 553 n.5 (1980) (Stewart, J., dissenting) (“[A]s a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant . . . .”); *KAY ET AL.*, *supra* note 143, at 414 (explaining that notice is “so often confused with personal jurisdiction because both are commonly dealt with under the single rubric of due process”); Rachel M. Janutis, *Pulling Venue Up By Its Bootstraps: The Relationship Among Nationwide Service of Process, Personal Jurisdiction, and § 1391(C)*, 78 ST. JOHN’S L. REV. 37, 37–38 (2004) (“Since a corporation subject to nationwide service of process is subject to nationwide personal jurisdiction . . . .”); see also FED. R. BANKR. P. 7004(f) (“[S]erving a summons or filing a waiver of service . . . is effective to establish personal jurisdiction . . . .”).

158. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555 (2017) (“Congress’ typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process.”); *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (“[A] federal district court’s authority to assert personal jurisdiction in most cases is linked to service of process on a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”); *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 102, 111 (1987) (“In summary, the District Court may not exercise jurisdiction . . . without authorization to serve process.”); *United States v. First Nat’l City Bank*, 379 U.S. 378, 381 (1965) (assuming the federal district court in New York had personal jurisdiction over an international defendant where New York’s long-arm statute authorized international service of process on all those who conducted business within the state).

159. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 510–15 (1996) (defining the conventionalist approach to statutory interpretation).

160. See 15 U.S.C. § 78aa(a) (2018) (emphasis added).

Indeed, it does not make intuitive sense that Congress intended to permit personal jurisdiction beyond the scope of process it authorized for the district courts.<sup>161</sup> Although there are policy arguments against this conclusion, a textualist approach deems such considerations irrelevant because federal courts have limited power and must be faithful to statutes passed by an elected legislature.<sup>162</sup> Although judges might prefer a different public policy outcome, a textualist approach accepts that democratically accountable branches of government must make these choices.<sup>163</sup>

Section 27's meaning is a closer call for purposivist interpreters. Because service of process does not literally mean the same thing as personal jurisdiction, one could think that Congress did not reveal how much personal jurisdiction it wished to authorize in the statute. This conclusion would allow courts to determine how much personal jurisdiction is consistent with Congress's purpose, and then to promulgate a federal common-law standard consistent with that purpose.<sup>164</sup>

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161. To clarify, this Article does not suggest the scope of authorized process and validly-asserted personal jurisdiction are coextensive. Sometimes, service of process is allowed by statute but personal jurisdiction cannot be asserted for constitutional reasons. See SILBERMAN, STEIN & WOLFF, *supra* note 107, at 271–72. This Article does suggest that, in statutes using the “service of process” phraseology, the scope of service is the *maximum* scope of valid personal jurisdiction, a category which might be narrower than statutorily-authorized service for constitutional reasons.

162. See, e.g., Scalia, *supra* note 151, at 12–14 (arguing that courts play a limited role in making public policy within a representative system of government); see also THE FEDERALIST NO. 47 (James Madison) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.”) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans., Hafner Pub. Co. N.Y. 1949)). Conventionalists would approach the issue similarly. See Merrill, *supra* note 159, at 513 (“Thus, like originalism, conventionalism posits that the role of the interpreter is to *find* the meaning of the contested textual provision . . . not to make it up.”).

163. See, e.g., Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process, an Institutional Perspective*, 83 NW. U. L. REV. 761, 762–64 (1989) (“[A] fundamentally democratic society assumes as its ultimate normative political premise some notion of self-determination . . . Thus a representational democratic system will measure the legitimacy of governmental decisionmaking . . . not by objective examination of the wisdom of the decision, but rather by determining how consistent the processes used to reach that decision are with the notion of self-determination.”).

164. This approach was suggested to me by Professor Stephen Burbank. See also HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge & Philip P. Frickey eds., 1994) (encouraging

Under this approach, the federal courts could infer authority to exercise personal jurisdiction as to claims for which section 27 does not authorize service of process.

Seeking a meaning consistent with the congressional purposes behind section 27 will likely produce two alternative, constructive answers. The provision's narrower purpose is to ensure that federal courts are not inhibited from adjudicating claims under the Act because of traditional jurisdictional barriers.<sup>165</sup> This purpose does not support pendent claim personal jurisdiction as to the related claims, because claims under the Act can be brought without it. An alternative, broader constructive purpose behind section 27 is to encourage plaintiffs to bring claims under the Act in federal court. Further, one can argue that allowing pendent claim personal jurisdiction advances this purpose because, without it, forcing a plaintiff to occasionally bring her state-law claims separately would discourage that plaintiff from bringing her claim under the Act in federal court. Additionally, section 27 grants federal courts *exclusive* jurisdiction with respect to claims arising under the Act. This means that if section 27 does not permit pendent

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judges to use tools of construction to determine "what purpose ought to be attributed to the statute" to "carry out [Congress's] purpose as best it can"). Although this section discusses "interpretation," the line between statutory interpretation, construction, and the promulgation of federal common law can become blurry. Outside certain substantive areas of uniquely federal concern, like the interpretation of collective bargaining agreements under the *Lincoln Mills* doctrine, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), even strong defenders of federal common law acknowledge it must be tethered to a source of written law. See, e.g., Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: A General Approach*, 70 CORNELL L. REV. 625, 759 (1985) (stating that the Rules of Decisions Act requires a federal judge to justify federal common law with reference to a constitutional or statutory source that either "expressly" requires its creation or "implicitly and plausibly call[s] for" it); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 927-30 (1986) ("[T]he primary limit on power to make federal common law is that there must be a source of authority for any given federal common law rule."). In federal common-law terms, this subsection argues that the constructive purposes behind section 27 should not lead one to favor promulgating a federal common law of pendent personal jurisdiction.

165. See Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 68-69 (1984) ("Although the legislative history of the securities laws is silent as to the government interests furthered by nationwide personal jurisdiction, one can easily assume that Congress believed that allowing investors to litigate securities fraud issues anywhere in the nation was a beneficial approach to policing the stock market . . . ."). I found no relevant legislative history when searching through the Act's congressional record.

personal jurisdiction, there will be some cases where the plaintiff must bring her federal and state-law claims separately. Even without embracing a broad interpretation, however, plaintiffs will usually be able to bring all claims together in a federal court within the state where the court can adjudicate the state-law claims under the state's long-arm statute, mitigating the problem of exclusive jurisdiction.

Precedent suggests that the purposivist judge should embrace the narrower purpose and thus not discover pendent personal jurisdiction within section 27. Deliberating in light of Congress's record of defining limits on the jurisdiction of the federal courts through service of process,<sup>166</sup> the Supreme Court has instructed federal courts not to expand the scope of their service of process by promulgating common law.<sup>167</sup> In *Omni*, the Court considered the question of whether federal courts could exercise a federal common-law power to allow nationwide service of process under the Commodity Exchange Act, which did not have a nationwide service of process provision.<sup>168</sup> The Court held that it was not appropriate to imply such a provision.<sup>169</sup> The Court noted that Congress knows how to authorize nationwide service of process, stating that its failure to do so speaks forcefully against the idea that it intended to do so.<sup>170</sup> The Court's language resembles a clear statement rule. At the very least, it suggests that nationwide service of process statutes should be interpreted narrowly.<sup>171</sup>

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166. For another example, at a 1924 congressional hearing, Justice Willis Van Devanter testified that the Court had "always dealt with" out-of-state service of process "as a question to be regulated by Congress or by statutes." See *Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the H. Judiciary Comm.*, 68th Cong. 62 (1924).

167. But see *Heller*, *supra* note 4, at 131–37 ("[I]t is appropriate to read nationwide service of process statutes as authorizing pendent process, because pendent process furthers the purposes for which these statutes were enacted.").

168. See 484 U.S. 102, 108–09 (1987).

169. See *id.*

170. See *id.* at 106.

171. See SILBERMAN, STEIN & WOLFF, *supra* note 107, at 180 (interpreting *Omni* to hold that "federal courts must have explicit authorization in a statute or federal rule in order to effect service beyond state lines"); *supra* note 112.

But unlike the statute in *Omni*, section 27 does have a nationwide service of process provision. But the same rationales justifying application of *Omni*'s interpretive rules to whether a nationwide service of process statute exists should also apply to measuring an existing provision's scope. Congress could have chosen language making it clear that process was also authorized for related claims.<sup>172</sup> Congress has authorized nationwide service of process for state-law claims in other situations.<sup>173</sup> But it did not do so in section 27. Under *Omni*'s logic, the fact that Congress did not use broader language in section 27 counsels against a broad interpretation.<sup>174</sup>

Further, public policy considerations point in both directions and do not provide a compelling reason to depart from the Court's precedent and the statute's natural reading. Although

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172. Congress arguably did that with the Federal Arbitration Act, which authorizes nationwide service of process by a federal court to enforce an arbitration award. When the statute is triggered, "the court shall have jurisdiction of [the served] party as though he had appeared generally in the proceeding." 9 U.S.C. § 9 (2018). If one is persuaded this provision allows pendent personal jurisdiction, then it is an exception to the analysis that follows.

173. It has done so twice. See SILBERMAN ET AL., *supra* note 107, at 181. First, 28 U.S.C. § 2361 authorizes nationwide service for claims brought under the federal interpleader statute. See 28 U.S.C. § 2361 (2018). Second, the Multiparty, Multiforum Trial Jurisdiction Act permits nationwide service of process in cases involving mass accidents that kill at least seventy-five people. See 28 U.S.C. § 1369 (2018).

174. See, e.g., *Knight v. Comm'r.*, 552 U.S. 181, 188 (2008) (citing Congress's decision not to adopt "apparent alternative" language to support a statutory reading). The most significant precedent pointing the other way is *Gibbs*. In *Gibbs*, the Court cited public policy reasons to recognize pendent claim subject matter jurisdiction, and it neglected to cite the governing statutory provisions. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (citing justifications of "judicial economy, convenience, and fairness to litigants"). There is tension between *Gibbs* and the Court's tradition of paying careful attention to Congress's statutory authorization of jurisdiction. See FALLON, JR. ET AL., *supra* note 123, at 866–67. Indeed, scholars recognized that the Court repudiated much of the rationale underlying *Gibbs* in *Finley v. United States*, 490 U.S. 545 (1989). See, e.g., James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 157 (1999) ("*Finley* brought to a close the free-wheeling jurisdictional days of *Gibbs* and inaugurated an era of close attention to statutory text."). This Article will not address whether *Gibbs* was correct, because it does not undercut my argument. Whereas section 27's language cannot be fairly read to authorize pendent personal jurisdiction, one can justify *Gibbs*'s holding under the statutory language in 28 U.S.C. § 1331, which allows subject matter jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." Even if not the most natural reading, the term "civil action" can be understood to be coextensive with Article III's "case." To the extent there is tension between *Gibbs* and my argument, this Article privileges *Robertson* and *Omni*, the governing cases.

pendent claim personal jurisdiction helps plaintiffs, honoring the principle that the plaintiff is the “master of his forum,”<sup>175</sup> it threatens defendants’ interests. Although a purposivist may dislike the occasional situation where a plaintiff must litigate federal and state claims separately, a broad reading would greatly expand plaintiffs’ forum shopping options. It would allow a plaintiff to bring state-law claims in any federal court across the country if she can articulate a related claim under a federal law with a nationwide service of process provision. Further, the Fifth Amendment—the constitutional check on nationwide service of process—offers defendants little protection against extreme forum shopping.<sup>176</sup> Similarly, venue provisions will often not protect defendants in these cases.<sup>177</sup>

Defendants aside, it is questionable whether reading section 27 to enable pendent personal jurisdiction would promote good policy. Although it seems attractive to resolve a plaintiff’s claims in one judicial proceeding, a broad reading does little to facilitate efficiency, as plaintiffs ordinarily can have their claims resolved in one judicial proceeding without pendent claim personal jurisdiction, even in cases involving exclusive federal

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175. See, e.g., Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 301 (1996) (quoting and referencing George D. Brown, *The Ideology of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 669 (1993)).

176. Courts are currently split on whether the Fifth Amendment provides any limits on assertions of personal jurisdiction within the United States. Compare *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) (“[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum . . . . The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.”), and *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (holding that jurisdiction within the United States does not implicate a Fifth Amendment fairness concern), with *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 n.3 (3d Cir. 1981) (suggesting that extreme inconvenience to a defendant may violate due process even if it has significant contacts with the United States). Any limits are likely minimal and would offer little protection. *But see* Fullerton, *supra* note 165, at 16–22 (arguing for more robust limits on personal jurisdiction within the United States under the Fifth Amendment).

177. See Janutis, *supra* note 157, at 37 (observing that federal courts have interpreted nationwide service of process provisions to allow for nationwide venue); Fullerton, *supra* note 165, at 62–63 (observing that venue protections often do not protect against unreasonable applications of nationwide service of process provisions).

jurisdiction.<sup>178</sup> Moreover, federal courts are not best equipped to resolve state-law issues unconnected with the state they sit in.<sup>179</sup> Relatedly, the local community that the federal court sits in would likely have little interest in expending resources to adjudicate controversies utterly unconnected with it.<sup>180</sup> Further, beyond the parties' interests, a narrow reading promotes comity with the state courts, who have an interest in adjudicating cases connected to them.<sup>181</sup> Finally, allowing lower federal courts—whose authority is defined by Congress—to expand the scope of their process threatens the separation of powers.<sup>182</sup> Because Congress has the authority to define the federal courts' personal jurisdiction, it would be an usurpation of that authority for the federal courts to expand it *sua sponte*.<sup>183</sup>

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178. Ordinarily, plaintiffs could bring their federal and state-law claims in a federal court sitting within the state that the state-law claims are connected to or in a state where the defendant is subject to general personal jurisdiction.

179. See *Gibbs*, 383 U.S. at 726 (noting that letting state courts decide state-law questions “promote[s] justice between the parties [] by procuring for them a surer-footed reading” of state law); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1774 (1992) (“[A] court’s level of expertise in and familiarity with a sovereign’s body of law will be in direct proportion to the amount of time it devotes to interpretation of that law.”).

180. Cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (“Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.”).

181. See, e.g., *Gibbs*, 383 U.S. at 726 (“Needless decisions of state law [by federal courts] should be avoided as [] a matter of comity . . .”).

182. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 9 n.1 (1799) (“The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress . . . [and] Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts to every subject, in every form, which the Constitution might warrant.”); see also *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 (1981) (“[T]he federal lawmaking power is vested in the legislative, not the judicial branch, of government.”).

183. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 109 (1987) (“It seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized.”); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 20 (1985) (describing separation of powers considerations “as the dominant ground for questioning lawmaking by federal courts”); cf. Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1054 (2002) (identifying federal judges’ “perfectly natural desires to maximize their own power and to serve their own institutional interests,” but arguing in the interjurisdictional preclusion context that they should “not be given free rein to define and pursue that interest”).

In short, section 27 should not be read to authorize pendent personal jurisdiction. For textualists, it seems like an easy call. For purposivists, the question is closer, but precedent and public policy favor the more natural reading. This argument calls into question the precedents that have relied on section 27's service of process provisions to adjudicate state-law claims.

*c. Other nationwide service of process provisions*

The analysis of the preceding subsection reaches beyond the 1934 Securities Exchange Act. It should apply with equal force to the Clayton Act, Investment Company Act, the RICO Act, the Employee Retirement Income Security Act, and several other statutes with similar language.<sup>184</sup> Consistent with the preceding

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184. The language authorizing nationwide service of process is similar in all relevant statutes. I italicize the limiting language in each one. See Clayton Act, 15 U.S.C. § 22 (2018) (“Any suit, action, or proceeding *under the antitrust laws* against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process *in such cases* may be served in the district of which it is an inhabitant, or wherever it may be found.”); Investment Company Act of 1940, 15 U.S.C. § 80a-43 (2018) (“Any suit or action to enforce any liability or duty *created by, or to enjoin any violation of, this subchapter or rules, regulations, or orders thereunder*, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process *in such cases* may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.”); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965d (2018) (“All other process in any action or *proceeding under this chapter* may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.”); Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2334 (2018) (“Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent. Process *in such a civil action* may be served in any district where the defendant resides, is found, or has an agent.”); Mandamus and Venue Statute of 1962, 28 U.S.C. § 1391(e) (2018) (“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides; (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) the plaintiff resides if no real property is involved in the action . . . . The summons and complaint *in such an action* [may] be served . . . by certified mail beyond the territorial limits of the district in which the action is brought.”); Employee Retirement Income Security Act, 29 U.S.C. § 1451(d) (2018) (“An action *under this section* may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.”); Patent Codification Act, 35 U.S.C. § 293 (2018) (“Every patentee not residing in the United States may file in the Patent and Trademark Office a written designation stating the name and address of a person residing within the

discussion, the nationwide service of process provisions in these statutes should not be read to allow pendent claim personal jurisdiction.

In summary, the subject matter jurisdiction statutes, Rule 4, and the cited federal nationwide service of process provisions do not authorize pendent claim personal jurisdiction. However, accepting my argument does not yet doom pendent claim personal jurisdiction. If a federal court cannot rely on a federal statute to authorize its personal jurisdiction, it can rely on the long-arm statute of the state in which it sits.

### B. *State Long-Arm Statutes*

The federal courts, at least in some states, could attempt to rely on state long-arm statutes to exercise pendent claim and party personal jurisdiction. The United States has a federalist system of personal jurisdiction for the federal courts, often forcing them to rely on state law to assert it, even as to federal claims.<sup>185</sup> Historically speaking, this situation is best understood as the inheritance of a long history and tradition of personal jurisdiction based on the territorial boundaries of the state courts.<sup>186</sup> Today, Rule 4(k)(1)(A) designates state long-arm statutes as the primary source of authority for federal court

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United States on whom may be served process or notice of proceedings affecting the patent or rights *thereunder*.”).

185. See, e.g., *Point Landing, Inc. v. Omni Capital Int’l, Ltd.*, 795 F.2d 415, 422–23 (5th Cir. 1986) (“It may seem anomalous to tie personal jurisdiction in a federal question case to the long-arm statute of the state in which the federal court sits . . . . A heavy weight of authority, however, accepts the anomaly.”).

186. See *Omni*, 484 U.S. at 109 (explaining how the history of territory-based personal jurisdiction has influenced the modern doctrine); Foster, Jr., *supra* note 152, at 79–80 (“These restrictions represented a policy choice that reflected the prevailing [eighteenth century] procedural practices and, perhaps to some extent, the larger compromise which led to the establishment of a system of federal trial courts exercising a jurisdiction largely concurrent with that of the state courts.”). It is not my current project to analyze whether, as a matter of policy, the status quo make sense. Other scholars have recently addressed this question. See, e.g., Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014) (proposing legislation establishing nationwide personal jurisdiction for the federal courts and suggesting we rely on venue rules to limit where lawsuits may be brought).

assertions of personal jurisdiction.<sup>187</sup> Since there is no federal law authorizing pendent claim or party personal jurisdiction, we must ask if state law authorizes it for the federal courts.

No state long-arm statute explicitly authorizes either pendent claim or party personal jurisdiction. However, states often formulate these statutes to allow the maximum amount of personal jurisdiction that is consistent with the Constitution (“full-extent statutes”).<sup>188</sup> As of 2004, thirty-two states had adopted full-extent statutes either by their terms or judicial construction.<sup>189</sup> Because there is no other federal source of authority for pendent claim or party personal jurisdiction, federal courts in the states that have not adopted full-extent statutes need to articulate a source of authority under state law for pendent personal jurisdiction before doing so. This will require federal courts in those states to look at the particular long-arm statute and precedents of the state in which they sit.<sup>190</sup>

For federal courts sitting in states that do have long-arm statutes authorizing pendent personal jurisdiction, the next question is whether exercising that jurisdiction is consistent with the Fourteenth Amendment. Although it may seem odd that the Fourteenth Amendment, not the Fifth Amendment, limits federal court assertions of pendent personal jurisdiction, the Fourteenth Amendment limits the state laws that federal courts must rely on. Indeed, this analytical framework is well

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187. See FED. R. CIV. P. 4(k)(1)(A); *Walden v. Fiore*, 571 U.S. 272, 283 (2014) (“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.” (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014))). Although Rule 4(k)(1)(A) is widely understood to apply when a federal district court exercises diversity and federal question jurisdiction (absent a nationwide service process provision), some think it should not. Professor Kelleher argues that Rule 4(k)(1)(A) violates the Rules Enabling Act by governing the scope of the district courts’ service of process, and not merely the manner of it. See Kelleher, *supra* note 143, at 1209–14. Professor Kelleher, moreover, asserts that the scope of a federal court’s service of process in diversity cases is governed by statute, as she interprets the Rules of Decision Act to require federal courts to rely on state long-arm statutes in diversity cases. See *id.* at 1211–12; see also *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711–12 (1982) (Powell, J., concurring in judgment) (articulating the same view of the Rules of Decision Act).

188. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 492–99 (2004) (documenting the trend).

189. For a list, see *id.* at 525–31.

190. Some state courts have already concluded that pendent claim personal jurisdiction is invalid under state law. See *supra* note 5.

established by the Supreme Court.<sup>191</sup> Consequently, although a bit constitutionally quirky, the Fourteenth Amendment currently limits federal court assertions of pendent claim and party personal jurisdiction

### C. Implications

State long-arm statutes are the only possible source of authority for a federal court's assertion of pendent claim or party personal jurisdiction. Two important implications follow from this conclusion. First, courts and scholars have sometimes drawn a conceptual line between pendent claim personal jurisdiction in the "nationwide service of process cases" and its application in other cases.<sup>192</sup> Indeed, almost all circuits have embraced it in nationwide service of process cases, whereas far fewer courts have done so beyond that.<sup>193</sup> But there is no meaningful distinction between these different contexts because those statutes do not authorize pendent claim personal jurisdiction. All current applications of pendent claim personal jurisdiction depend on the same source of authority: the state long-arm statutes. Although Congress could authorize pendent claim personal jurisdiction in a federal statute, it has not done so. It does not make sense to accept the legitimacy of pendent claim personal jurisdiction in the nationwide service of process context but reject it in other contexts.

Second, federal assertions of pendent personal jurisdiction can only be legitimate in states that have authorized it. Although no state long-arm statute explicitly authorizes

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191. See *Walden*, 571 U.S. at 283–91 (analyzing Nevada federal court's assertion of personal jurisdiction under the Fourteenth Amendment); *Daimler AG*, 571 U.S. at 125–29 (detailing the analytical framework when a federal court asserts personal jurisdiction under state law); see also *Brook v. McCormley*, 873 F.3d 549, 552 (7th Cir. 2017) ("As a procedural matter, federal courts look to state law in determining the bounds of their jurisdiction over a party. The Illinois long-arm statute permits the court to exercise jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment. Thus, the state statutory and federal constitutional requirements merge."); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54–55 (D.C. Cir. 2017); Borchers, *supra* note 2, at 443.

192. See *supra* note 14.

193. See *supra* Sections I.A, I.B.

pendent personal jurisdiction, some states have “full-extent statutes,” meaning a federal court can exercise pendent personal jurisdiction *in those states* as long as it is consistent with the Constitution, a question I take up below. In the states without full-extent long-arm statutes, the federal courts cannot authorize pendent personal jurisdiction unless they cite a state-law source of authority.

### III. THE RELATEDNESS ELEMENT, *BRISTOL-MYERS*, AND INTERSTATE FEDERALISM

This Article ultimately argues that pendent personal jurisdiction must fall under specific personal jurisdiction’s Fourteenth Amendment relatedness element, as it is defined in *Bristol-Myers*. As discussed in Section II.B, pendent personal jurisdiction in the federal courts will usually be evaluated under the Fourteenth Amendment, as the federal courts generally rely on state law to maintain personal jurisdiction. Thus, it is important to introduce the relatedness element. In short, the relatedness element reflects a historical commitment to interstate federalism by balancing among the competing sovereigns within the United States.

#### A. Personal Jurisdiction’s Relatedness Element

In 1945, the Court ushered in the modern era of personal jurisdiction in *International Shoe Co. v. Washington*,<sup>194</sup> which upheld out-of-state service of process in a large set of cases implicating what would eventually come to be called specific personal jurisdiction.<sup>195</sup> *International Shoe*’s language sets modest limitations on assertions of specific personal jurisdiction by the states. The defendant must merely have “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of

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194. 326 U.S. 310 (1945).

195. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (introducing the terms “specific” and “general” personal jurisdiction).

fair play and substantial justice.”<sup>196</sup> But not just any minimum contacts suffice. As the Court explained, “the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state on the corporation’s behalf are not enough to subject it to suit on causes of action *unconnected with the activities there*.”<sup>197</sup> This birthed the relatedness element: a defendant is only subject to jurisdiction in a forum state if it had contacts related to the claim there. Although the Court has established additional requirements for specific personal jurisdiction since *International Shoe*, this Article focuses on the relatedness element.

Until recently, the Court paid little attention to specific personal jurisdiction’s relatedness element,<sup>198</sup> allowing the lower courts to develop a wide variety of tests.<sup>199</sup> In part, *International Shoe* enabled this diversity because it used three different phrases to describe the relatedness element: “related to,” “connected with,” and “arising from.”<sup>200</sup> The “arising from” language, although itself elastic, is noticeably narrower than “related to.”<sup>201</sup> An “arising from or related to” element would thus require a looser relationship between the claim and the forum state for specific personal jurisdiction than would an “arising from” standard.<sup>202</sup>

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196. See *Int’l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

197. See *id.* (emphasis added) (citations omitted).

198. In *Helicopteros*, the Court flagged the question but declined to address it. See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 415 n.10 (1984). Dissenting, Justice Brennan advocated for a broad definition, favoring easy availability of specific personal jurisdiction. See *id.* at 427 (Brennan, J., dissenting) (“[A] court’s specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum.”).

199. See, e.g., *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (describing three different approaches courts have adopted). See generally SILBERMAN, STEIN & WOLFF, *supra* note 107, at 89; Borchers, *supra* note 2, at 434–35.

200. See *Int’l Shoe Co.*, 326 U.S. at 318–20 (using all three terms); see also Borchers, *supra* note 2, at 433 (identifying the problem and labeling the three terms as “synonyms”).

201. In *Helicopteros*, the majority suggested a claim could satisfy one standard but not the other, though it did not define the difference between them. 466 U.S. at 415 n.10; accord Lea Brillmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 737 (1988) (identifying the problem).

202. See Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 126 (making this observation).

Working with these different phrases, courts have developed a spectrum of approaches. On the spectrum's more demanding end, the First and Eighth Circuits established a "proximate cause" standard, holding that the defendant's forum-state contacts must be an "important, or perhaps even a material element of proof" in the plaintiff's case.<sup>203</sup> In contrast, the Ninth Circuit has embraced a looser "but for" standard, deeming the "relatedness" element satisfied if the plaintiff's claim would not have arisen "but for" the defendant's forum-state contacts.<sup>204</sup> On the spectrum's least demanding end stands the California Supreme Court's decision in *Cornelison v. Chaney*.<sup>205</sup> After the defendant's employee, a truck driver, hit the plaintiff's decedent in Nevada, the plaintiff brought suit in California.<sup>206</sup> The court concluded that the Nevada accident, together with the defendant's other California trucking operations, created a sufficient relationship between the claim and California, stating: "The accident arose out of the driving of the truck, the very activity which was the essential basis of defendant's contacts with this state. These factors demonstrate, in our view, a substantial nexus between plaintiff's cause of action and defendant's activities in California."<sup>207</sup> *Cornelison's* relatedness standard is loose; the defendant's forum contacts do not even need to be a cause-in-fact of the plaintiff's injury. Other courts have staked middle positions.<sup>208</sup>

In 2017, the Court finally confronted the meaning of the relatedness element in *Bristol-Myers*.<sup>209</sup> The case featured a mass

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203. See *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (citing *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983)); *Pearrow v. Nat'l Life & Accident Ins. Co.*, 703 F.2d 1067, 1068–69 (8th Cir. 1983); see also *Borchers*, *supra* note 2, at 434–35.

204. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

205. 16 Cal. 3d 143 (1976); see also *Lea Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 83–84 (analyzing the case and evaluating varying degrees of relatedness between the defendant's contacts and a claim).

206. See *Cornelison*, 16 Cal. 3d at 146.

207. See *id.*

208. See, e.g., *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312 (3d Cir. 2007) (adopting a but-for test "hew[ing] closely to the reciprocity principle upon which specific jurisdiction rests").

209. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017).

action against the pharmaceutical company Bristol-Myers Squibb (BMS) for alleged defects in Plavix, its well-known blood thinner drug. The plaintiffs—Plavix consumers from thirty-four states—attempted to join with each other against BMS in a California state court.<sup>210</sup> BMS defended itself by arguing the California court only had personal jurisdiction over it as to the California plaintiffs' claims, and not as to claims brought by out-of-state plaintiffs who had neither purchased nor consumed Plavix in California.<sup>211</sup>

One is tempted to ask, "What's wrong with California?"<sup>212</sup> BMS had plenty of contacts in California: it employed thousands of people and sold billions of dollars' worth of Plavix there.<sup>213</sup> Litigating the out-of-state claims in California also did not seem unreasonable, since BMS was already being forced to litigate the California claims there, and San Francisco was more convenient for BMS than the various state courts the out-of-state plaintiffs would otherwise have to file in.<sup>214</sup> In short, BMS's only real argument was that the out-of-state plaintiffs' claims did not "arise from" its contacts with California.

After the plaintiffs won at trial and before the intermediate appellate court, the California Supreme Court agreed that specific personal jurisdiction existed as to the out-of-state claims.<sup>215</sup> Concluding that BMS had purposefully availed itself of California, the justices confronted the question of how related a claim must be to the defendant's California contacts.<sup>216</sup> They adopted a "sliding scale approach," under which "the more

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210. The plaintiffs were able to avoid removal to federal court under the Class Action Fairness Act. See Andrew Bradt & Theodore D. Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1268 (2018).

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

212. See Bradt & Rave, *supra* note 210, at 1253.

213. See *id.*

214. During oral arguments, Justice Kennedy made this point. See Transcript of Oral Argument at 4, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466).

215. See *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal. 5th 783 (2016). The court also concluded that general personal jurisdiction did not exist. *Id.* at 883–84 (noting that BMS was not "at home" under the Supreme Court's decision in *Daimler*).

216. See *id.* at 801–02.

wide-ranging a defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>217</sup> Applying its test, the court held that because

Bristol-Myers' contacts with California are substantial and the company had enjoyed sizeable revenues from the sales of its product here—the very product that is the subject of all of the claims of the plaintiffs . . . Bristol-Myers' extensive contacts with California establish minimum contacts based on a less direct connection between Bristol-Myers' forum activities and plaintiffs' claims than might otherwise be required.<sup>218</sup>

The court also decided that jurisdiction was reasonable and that exercising jurisdiction would advance judicial efficiency.<sup>219</sup>

The Supreme Court decisively rejected this sliding scale approach, though it provided limited clarity on the relatedness element. Writing for the Court, Justice Alito stated that California's approach would blur the line between specific and general personal jurisdiction.<sup>220</sup> As for the relatedness element, Justice Alito noted, "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue."<sup>221</sup> In other words, the plaintiffs needed *some* connection between their claims and the forum state. Apparently, the similarity between the California claims and the out-of-state claims did not qualify as *some* connection to California.<sup>222</sup> At the same time, the Court did not take up BMS's

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217. *See id.* at 802.

218. *See id.* at 806.

219. *See id.* at 808–13.

220. *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1781 (2017) (explaining that California's approach "resembles a loose and spurious form of general jurisdiction").

221. *See id.*

222. *Contra Cornelison*, 16 Cal. 3d at 149.

suggested “proximate cause” test for relatedness, fostering continued uncertainty about the relatedness element.<sup>223</sup>

Combined with the Court’s tightening of general personal jurisdiction in *Daimler AG v. Bauman*,<sup>224</sup> *Bristol-Myers* will make nationwide mass and class actions more difficult to aggregate, particularly in cases involving multiple defendants headquartered in different states.<sup>225</sup> After *Daimler*, scholars proposed work-arounds. One suggestion focused on expanding general personal jurisdiction by relying on state statutes deeming consent to jurisdiction by corporations doing business within the state,<sup>226</sup> though several courts and scholars agree this proposal rests on dubious constitutional grounds.<sup>227</sup> Another suggestion is the concept of pendent personal jurisdiction, which the *Bristol-Myers*’ plaintiffs unsuccessfully tried out in the California appellate court.<sup>228</sup> Although they failed, litigants in dozens of recent cases are invoking pendent party personal jurisdiction, especially in nationwide class actions. If successful, they can effectively shield class actions from the Court’s personal jurisdiction cases.

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223. See Brief for Petitioner at 37–46, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466).

224. 571 U.S. 117 (2014). There, the Court held that a defendant corporation is usually only subject to general personal jurisdiction in its state of incorporation and where its principal place of business is. *Id.* at 137.

225. Some courts are resisting this interpretation of *Bristol-Myers*, though this Article argues that resistance is improper. See *infra* notes 257-89 and accompanying text.

226. See, e.g., Rhodes & Robertson, *supra* note 4, at 258–63.

227. See, e.g., *Famular v. Whirlpool Corp.*, 16 CV 944 (VB), 2017 WL 2470844, at \*4 (S.D.N.Y. June 7, 2017) (interpreting the Court’s decision in *Daimler* to invalidate consent statutes as a basis for general personal jurisdiction); Brilmayer et al., *supra* note 201, at 757 (“The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment.”). But see Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1185–86 (acknowledging that “[w]ith few exceptions . . . the implied consent statutes have been used without challenge as the basis for jurisdiction in most of Delaware’s corporate governance cases ever since Delaware declared them constitutional in 1980”).

228. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 175 Cal. Rptr. 3d 412, 439 (2014). Professors Rhodes and Robertson, *supra* note 4, at 243–52, make the suggestion.

### B. *The Resurgence of Interstate Federalism*

*Bristol-Myers* requires “a connection between the forum and the specific claims at issue”<sup>229</sup> for personal jurisdiction. To understand what this rule means for pendent personal jurisdiction, this Article examines the reason it exists: interstate federalism.

The Court has had an on-and-off relationship with interstate federalism in its personal jurisdiction jurisprudence. In *World-Wide Volkswagen Corp. v. Woodson*,<sup>230</sup> Justice White justified the Court’s decision to reject Oklahoma’s assertion of personal jurisdiction because it was inconvenient to the defendant and violated interstate federalism principles.<sup>231</sup> As to interstate federalism, the Court explained:

we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution . . . the Framers also intended 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, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.<sup>232</sup>

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229. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017).

230. 444 U.S. 286 (1980).

231. See *id.* at 291–92 (“The concept of minimum contacts, in turn, 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.”).

232. *Id.* at 292.

Justice White, however, explicitly repudiated this passage in *Bauxites*, suggesting interstate federalism did not operate “as an independent restriction on the sovereign power of the court.”<sup>233</sup> As he explained it, the source of authority for the *World-Wide Volkswagen* rule is the Fourteenth Amendment, which protects individual liberty while making “no mention of federalism concerns.”<sup>234</sup> Yet in *Bristol-Myers*, the Court stridently reembraced interstate federalism. Indeed, the Court quoted the very passage from *World-Wide Volkswagen* that Justice White had denounced as erroneous in *Bauxites*.<sup>235</sup> Moreover, Justice Alito gave a full-throated defense of interstate federalism’s role in personal jurisdiction.

In her dissent, Justice Sotomayor asked a good question: “What interest could any single State have in adjudicating respondents’ claims that the other states do not share?”<sup>236</sup> Justice Alito’s opinion answered by noting that personal jurisdiction “encompasses the more abstract matter of submitting to the coercive power of a State that may *have little legitimate interest* in the claims in question.”<sup>237</sup> In other words, some states have an interest in adjudicating claims, and others either have no interest or too weak an interest. This language suggests the states may compete to assert jurisdiction.<sup>238</sup> But states cannot always assert jurisdiction when they want to. As Justice Alito noted, “The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.”<sup>239</sup> Thus,

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233. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

234. *Id.*

235. *See Bristol-Myers*, 137 S. Ct. at 1780–81 (citing *World-Wide Volkswagen* for the proposition that interstate federalism limits assertions of personal jurisdiction and stating it “may be decisive”).

236. *See id.* at 1788 (Sotomayor, J., dissenting).

237. *See id.* at 1780 (emphasis added).

238. *See also* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT. & COMP. L. 111, 113 (1999) (arguing that the linkage between state law on jurisdiction and federal constitutional law may “encourage a race to the bottom, as state lawmakers consider either the interests of their residents or the interests of their lawyers in securing access to a local forum and do not want to suffer comparative disadvantage”).

239. *See Bristol-Myers*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

although an isolated state may have the sovereign power to adjudicate claims with no connection to it, that power is limited by the sovereignty of other states, which also have interests in adjudicating claims. Applied to the case's facts, Justice Alito's logic meant that states other than California had an interest in adjudicating the out-of-state plaintiffs' claims. The Court's rule therefore reserved adjudicatory power to them.

### *C. What Role Does Interstate Federalism Play in Personal Jurisdiction?*

Scholars may wince at its resurgence,<sup>240</sup> but interstate federalism is the driving force behind the Court's decision in *Bristol-Myers*.<sup>241</sup> But why? At first glance, it makes little sense. What does interstate federalism have to do with an individual's Fourteenth Amendment liberty interest? Like many traditions, personal jurisdiction does not make perfect sense if summoned to the altar of modern reason.<sup>242</sup> We must examine the history.

In our ongoing dispute between Capias and RespondendCo, imagine instead that Capias traveled to Paraguay and sued RespondendCo there, and that Paraguay's courts cooperated and issued the judgment. If Capias tried to enforce the

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240. Interstate federalism's role in personal jurisdiction is deeply contested, with most scholars arguing it should not be relevant. *See, e.g.*, Robert R. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 83–86 (1984) (arguing that the focus on state sovereignty in personal jurisdiction promotes wasteful litigation and does not make theoretical sense); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1057–58 (1983) (arguing that interstate federalism is not relevant to personal jurisdiction and that state sovereignty will not be harmed by eliminating its consideration); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137 (1981); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 503 (1984). *But see* James Weinstein, *The Federal Common Law Origins of Personal Jurisdiction*, 90 VA. L. REV. 169 (2004) (arguing that personal jurisdiction rules should account for interstate federalism).

241. *See, e.g.*, Transcript of Oral Argument at 24–29, 37–38, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466) (featuring invocations of interstate federalism in personal jurisdiction by Justices Gorsuch, Kagan, Kennedy, Ginsburg, and Breyer).

242. *Cf.* MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 8 (1991) (criticizing those who aggressively bring society's "political, legal, and institutional inheritance" before "the tribunal of intellect").

judgment in an American court, the effort would almost certainly fail under standard international law principles.<sup>243</sup> The basic idea is that Paraguay would be overreaching, and that the United States' own sovereignty would entitle it to enforce limits on Paraguay's.<sup>244</sup>

A similar scenario commonly played out in early American history. The states were once independent sovereigns. Although the Constitution tore down some lines between the states and eliminated some of their powers, the states retained essential elements of sovereignty, including their equality to each other.<sup>245</sup> Thus, the states were, in some ways, foreign to one another, including in the recognition of judgments.<sup>246</sup> If sued out-of-state, defendants would frequently just default, leaving the plaintiff attempting to enforce the judgment in the defendant's home state.<sup>247</sup> In those situations, state courts drew on traditional rules of international recognition in deciding whether to enforce another state's judgment.<sup>248</sup> The most important rule was that a judgment was not valid unless the defendant was served with process within the issuing state's territory. Out-of-state service was seen as overreach. A state could purport to do it, but other states would not be forced to recognize an ensuing judgment.<sup>249</sup>

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243. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 403 (AM. LAW INST. 2014) ("A court in the United States will not recognize a judgment of a court of a foreign state if . . . the court that rendered the judgment did not have personal jurisdiction over the party resisting recognition . . .").

244. See *id.* § 400 ("States have the right to preserve their sovereignty. Accordingly, they validly may resist recognition and enforcement if they view a foreign judgment as the product of deficiencies or significant differences in the law or procedure of the foreign forum.").

245. See *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("Each state stands on the same level with all the rest."); see also *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the [f]ederal [g]overnment.").

246. See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1273 (2017) ("Early American states stood in much the same way as foreign nations.").

247. See *id.* at 1271 (noting that "[i]n the early Republic, jurisdiction was frequently raised at the recognition stage" of litigation once a party tried to enforce a judgment already won).

248. See *id.* at 1273–78 (documenting historical practice and acknowledging ambiguity on the source of these rules).

249. See *id.* at 1281–82.

Moreover, the Supreme Court enforced these traditional principles. Although the Court could not, on direct review, police state court assertions of personal jurisdiction because they presented no federal question, it could ensure compliance with the Full Faith and Credit Clause at the recognition stage.<sup>250</sup> And the Court only required states to enforce judgments that comported with traditional principles.<sup>251</sup> As Stephen Sachs documents, the Fourteenth Amendment changed the *manner* of federal supervision but not the content of it.<sup>252</sup> It allowed the Court to directly review state court judgments rendered without due process. And a state asserting jurisdiction beyond its sovereignty was understood to deny due process.<sup>253</sup>

In other words, the Fourteenth Amendment recognizes a liberty interest in not being subject to jurisdiction by a state reaching beyond its sovereignty in a system of interstate federalism. By protecting that liberty interest, the Court enforces an equilibrium between the states. Although *Pennoyer v. Neff's* in-state service rule has given way to *International Shoe's* minimum contacts standard, *Pennoyer's* basic regime still exists. *International Shoe's* minimum contacts rule still focuses on territorial contacts, making state borders central to the inquiry. If anything, *International Shoe* strengthened the Court's role in policing interstate federalism by articulating the relatedness element, empowering the Supreme Court to decide whether a claim was related to the forum state.

Let us return to Justice Sotomayor's question: "What interest could any single State have in adjudicating respondents' claims

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250. See *id.* at 1280–82.

251. See, e.g., *D'Arcy v. Ketchum*, 52 U.S. 165, 176 (1850) ("[T]he international law as it existed among the States in 1790 was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process . . ."); Sachs, *supra* note 246, at 1280–82.

252. See Sachs, *supra* note 246, at 1288 ("[T]he Fourteenth Amendment altered the prevailing jurisdictional rules by adjusting the mechanisms of appellate review.").

253. See *id.* at 1288–89; see also Daniel Klerman, Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and *Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713, 715 (2015) ("[T]he Court has made federalism an integral part of its due process jurisprudence by stating that a defendant has a liberty interest in being subjected only to lawful judgments.").

that the other states do not share?"<sup>254</sup> It is the same interest a state had pre-Fourteenth Amendment: protecting its own sovereignty by refusing to recognize a sister state's overreach. The key difference is that the Supreme Court on direct review, rather than the states at the recognition phase, now protects this interest. Even if California would like to dispense its sense of justice in resolving claims arising in other states, it cannot do so because other states have the same desire. Without some federal policing, plaintiffs could pick any forum they desired, allowing pro-plaintiff states to essentially force their law on individuals in other states. To those committed to preserving basic equality and peace among the states, personal jurisdiction's relatedness element is an important tool.

#### IV. PENDENT PERSONAL JURISDICTION AFTER *BRISTOL-MYERS*

After a long history of obscurity, the Court's decision in *Bristol-Myers* provides an opportunity to reconsider the relationship between federal courts and pendent personal jurisdiction. Indeed, the case and the doctrine are linked. Attempting to shield class actions from *Bristol-Myers'* implications, courts have expanded pendent claim personal jurisdiction to facilitate the easier joinder of parties via pendent party personal jurisdiction.<sup>255</sup> This Article argues that the Fourteenth Amendment, as interpreted in *Bristol-Myers*, currently bars the federal courts from exercising both forms of pendent personal jurisdiction.

At the start, it is worth clarifying what I am *not* arguing. This Article is not suggesting that Congress lacks the power to authorize either pendent party or pendent claim personal jurisdiction. There are undoubtedly valid policy arguments in favor of pendent personal jurisdiction.<sup>256</sup> If Congress decided

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254. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1788 (2017) (Sotomayor, J., dissenting).

255. See *supra* Section I.C.

256. Either form of pendent personal jurisdiction would arguably facilitate the more efficient resolution of disputes by the federal courts. Pendent claim personal jurisdiction would generally not impose a substantial burden on defendants, as the anchor claim would already

that public policy favored legislative reform, that law would be evaluated under the Fifth Amendment. Under the Fifth Amendment, it would not be difficult for the plaintiffs in a particular case to establish that their claim arises from contacts with the territory of the relevant sovereign: the United States.

Instead, this Article argues that Congress simply has not authorized the federal courts to exercise either type of pendent personal jurisdiction. At least in most cases, a federal court cannot wield broader personal jurisdiction than the state court across the street. Because the federal courts must usually rely on the same state long-arm statutes as the state courts, both types of courts typically confront the same Fourteenth Amendment limitations—motivated largely by interstate federalism concerns—on personal jurisdiction articulated by the Supreme Court. Because Congress has not expanded the scope of the federal courts' process, the federal courts cannot maintain pendent personal jurisdiction.

#### A. *Pendent Party Personal Jurisdiction*

Dozens of district courts have confronted the issue of pendent party personal jurisdiction within the last year. However, *Bristol-Myers* should be understood to rule it out, effectively limiting where multistate mass and class actions can be brought. This is undoubtedly a significant legal development.

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force them to litigate in a particular forum. Cf. *Bradt & Rave*, *supra* note 210, at 1253 (observing that it was not logistically inconvenient for BMS to litigate the out-of-state claims in California because it had to litigate the in-state claims there). On the other hand, both types would promote forum shopping by plaintiffs, especially those bringing state-law claims. They would likely seek to benefit from the Supreme Court's decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, which held that a federal court exercising diversity jurisdiction must apply the substantive choice-of-law rules of the state it sits in, thus often allowing plaintiffs to forum shop for the favorable substantive laws of particular states. 313 U.S. 487, 498 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."). That risk arguably creates interstate federalism problems by effectively allowing the substantive laws of pro-plaintiff states to govern disputes from around the country. Admittedly, pendent claim personal jurisdiction would represent a substantially more modest step in this direction than pendent party personal jurisdiction. The former doctrine (absent a nationwide service of process statute) requires that an individual plaintiff bring at least one claim with some connection to the forum state, whereas the latter features no such limitation.

Crucially, the Court noted that “a connection between the forum and the specific claims at issue” is required.<sup>257</sup> Consider the Court’s analysis of the facts in *Bristol-Myers* as they pertain to the relatedness element:

The [California] Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.<sup>258</sup>

Put another way, the Court demands a link between the forum state and each of the out-of-state plaintiffs’ claims. Speaking even more directly to the point, the Court declared that third-party relationships do not authorize circumventing this rule:

The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims. As we have explained, a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.<sup>259</sup>

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

258. See *id.*

259. See *id.* (quotations omitted).

The key takeaway is that a defendant's relationship with a third party does not enable specific personal jurisdiction. That is the entire rationale behind pendent party personal jurisdiction, so *Bristol-Myers* plainly rules it out.

Courts and litigants have advanced three arguments to avoid this conclusion. First, a small number of district courts have claimed that *Bristol-Myers* only applies to state courts, and not to federal courts.<sup>260</sup> They have noted that the Court explicitly left open the question of whether its decision applied to the federal courts.<sup>261</sup> However, as one district court observed, the Court reserved that issue because it was not presented in the case before it; there is no need to unduly infer from its prudential reservation.<sup>262</sup> Additionally, as one district court recently reasoned, it seems odd that concerns rooted in interstate federalism could limit the federal courts, instruments of a sovereignty higher than the states.<sup>263</sup> At first blush, this argument seems logical. However, as discussed above, it is well settled that federal court assertions of pendent personal jurisdiction are generally governed by state law, and hence subject to the Court's Fourteenth Amendment jurisprudence.<sup>264</sup> If this seems odd, the Court applied this framework in both *Daimler* and *Walden v. Fiore*.<sup>265</sup> Moreover, the federal courts' personal jurisdiction has been tethered to state boundaries since

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260. See, e.g., *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 859 (N.D. Cal. Feb. 7, 2018); *supra* Section I.C.1.

261. See *Bristol-Myers*, 137 S. Ct. at 1783–84 (“Since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”).

262. See *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564, 2017 WL 4224723, at \*4 (N.D. Cal. Sept. 22, 2017) (“Fitzhenry-Russell confuses the Supreme Court’s leaving the issue . . . open with the Supreme Court affirmatively stating that *Bristol-Myers* necessarily would not apply to federal courts. Because the *Bristol-Myers* fact pattern did not involve a federal court, there was no reason for the Supreme Court to confront that issue.”).

263. See *Sloan*, 287 F. Supp. 3d at 859.

264. See *supra* note 191 and accompanying text.

265. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 125–29 (2014) (detailing the analytical framework when a federal court asserts personal jurisdiction under state law); *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (analyzing Nevada federal court’s assertion of personal jurisdiction under Court’s Fourteenth Amendment cases).

1789.<sup>266</sup> In other words, it's nothing new. Unsurprisingly, the majority of courts that have considered this issue have concluded that *Bristol-Myers* does apply to the federal courts.

Second, a small number of courts have suggested that *Bristol-Myers* may apply to federal courts exercising diversity jurisdiction, but not federal question jurisdiction.<sup>267</sup> This rationale does not withstand scrutiny. The requirement that a federal court have statutory authorization to wield personal jurisdiction applies regardless of what type of subject matter jurisdiction the court is applying. Unless a federal claim is created by a federal statute authorizing nationwide service of process, the federal court must rely on the long-arm statute of the state it sits in. Since most federal laws do not include nationwide service of process provisions, the analysis usually entails the same two questions as when a federal court exercises diversity jurisdiction: does the state long-arm statute authorize jurisdiction, and is it consistent with the Court's Fourteenth Amendment cases?<sup>268</sup> When a federal statute does authorize nationwide process, pendent party personal jurisdiction is unnecessary. Either way, the type of subject matter jurisdiction wielded by a federal court is irrelevant. The relevant statute and its attendant constitutional limitations are what matter.

Third, a greater number of courts have insisted *Bristol-Myers* does not apply to class actions.<sup>269</sup> Several district courts have carefully differentiated between the mass action at issue in *Bristol-Myers* and class actions. They have suggested that, unlike in mass actions, absent class members are not true parties to the litigation.<sup>270</sup> They have also pointed to other

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266. See *supra* note 152 and accompanying text.

267. See *supra* Section I.C.2.

268. For an example of a case that identifies this clearly, see *Roy v. Fed-Ex Ground Package Sys., Inc.*, No. 3:17-cv-30116-KAR, 2018 WL 2324092, at \*3 (D. Mass. May 22, 2018).

269. See *supra* Section I.C.3.

270. See, e.g., *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018) ("In a mass tort action such as *Bristol-Myers*, each plaintiff is a real party in interest, meaning that each plaintiff is personally named and required to effect service. In contrast, claims asserted in a class action, such as those in the action presently before the Court, are prosecuted through representatives on behalf of absent class members." (citations omitted)).

special rules that apply to class actions, like the fact that the absent class members' citizenship does not affect diversity jurisdiction.<sup>271</sup> One can also observe that some courts have not required plaintiffs to prove that all absent class members have standing.<sup>272</sup> Indeed, the Court has acknowledged that nonnamed plaintiffs "may be parties for some purposes and not for others . . . based on context."<sup>273</sup>

Here, context suggests that nonnamed plaintiffs are parties for personal jurisdiction purposes. First, personal jurisdiction concerns a defendant's *personal right* to Fourteenth Amendment due process.<sup>274</sup> In contrast, special rules for diversity jurisdiction and standing concern the federal courts' power, implicating the personal rights of litigants only indirectly.<sup>275</sup>

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271. See, e.g., *id.* at 1369; see also *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (stating that courts need not consider the citizenship of absent class members when confirming diversity jurisdiction). In *Sanchez*, the court cited *Shutts* to argue that *Bristol-Myers* does not apply. See *Sanchez*, 297 F. Supp. 3d at 1369 ("If due process was not offended in *Shutts*, a class-action in State court with absent non-resident plaintiff class members, it is not offended by a potential class-action in federal court where the plaintiff class is made up in part with non-resident members."). This misinterprets *Shutts*, where the defendant argued the *plaintiffs'* due process rights were violated. The defendant did not suggest that its own due process right was violated, presumably because it thought itself subject to general personal jurisdiction in a pre-*Daimler* world. In *Shutts*, the Court emphasized that due process rules were different for absent class members because litigation burdened them less than defendants. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985). *Shutts* is simply not relevant in this context.

272. See, e.g., *In re Prudential Ins. Co. Am. Sales Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998) ("[W]hether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties.").

273. *Devlin*, 536 U.S. at 10.

274. See, e.g., *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

275. One could argue that this question implicates the longstanding debate on the nature of the class action. One camp suggests that class actions are merely a form of joinder, while the other articulates a "representational model, [which] places much greater importance on the named class representative." Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 460. Although this debate is deeply interesting, I do not think it is particularly relevant to the question of whether pendent party personal jurisdiction is legitimate when class actions are involved. The representational model's focus on the named representative will explain some unique rules for class actions, but not others. For example, Judge Wood explains that embracing the representational model over the joinder model should lead one to be less concerned about the personal jurisdiction rights of absent *plaintiff* members of the class, because Rule 23's requirement that they be adequately represented by the named

Acknowledging the need for flexible federal court power to adjudicate class actions does not necessarily justify eliminating defendants' personal rights. Further, defendants have a practical interest in seeing this right respected; exempting class actions from the *Bristol-Myers* framework would potentially allow one plaintiff to subject a defendant to nationwide liability under any state's laws, enabling extreme forum shopping capabilities. Second and relatedly, suggesting that defendants' rights vary in mass actions versus class actions runs up against the Rules Enabling Act, which mandates that Federal Rule of Civil Procedure 23 cannot alter defendants' substantive rights.<sup>276</sup> Third, the Court's solicitude for interstate federalism clashes with carving an exception for class actions. Indeed, particular states (and the federal courts sitting within) have a reputation for liberally certifying multistate class actions encompassing claims from other states.<sup>277</sup> Arguably, a multistate class action is the manner in which a state can most aggressively assert its court system at the expense of other states, thus causing interstate federalism damage.<sup>278</sup> Finally, this approach effects an end-run around *Bristol-Myers*. It would allow plaintiffs to enable a state (or a federal court sitting within) to adjudicate claims unrelated to it simply by using class representatives from that state. Indeed, one California district court explicitly blessed this effort, acknowledging it was

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plaintiffs protects their interests. *See id.* at 504–05. It is difficult to see how that logic would support watering down a defendant's due process right to be exposed to liability only by courts authorized to adjudicate all the claims against it.

276. 28 U.S.C. § 2072 (2018) ("Such rules shall not abridge, enlarge or modify any substantive right.").

277. *See, e.g.,* Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, BLOOMBERG (Aug. 23, 2013, 6:21 AM), <https://www.bloomberg.com/news/articles/2013-08-22/californias-food-court-where-lawyers-never-go-hungry> (describing the pro-consumer class action reputation of California's federal courts).

278. This was a driving motivation behind the Class Action Fairness Act. *See* S. REP. NO. 109-14 (2005) ("[F]requently in such cases [where certain state courts certified nationwide class actions], there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation.").

letting plaintiffs “manipulate[] their complaint so as not to run afoul of *Bristol-Myers*.”<sup>279</sup> The Court will likely not let plaintiffs circumvent its ruling.<sup>280</sup>

In short, *Bristol-Myers* applies in federal court and to class actions. Admittedly, personal jurisdiction rules are making it more difficult for plaintiffs to bring multistate class actions on their preferred terms, especially where defendants are not amenable to general personal jurisdiction.<sup>281</sup> Wishful thinking about *Bristol-Myers*—which demands a connection between each claim and the forum state—will not ultimately counter that tide. Although some lower courts have suggested *Bristol-Myers*, which purported to modestly extend existing precedent, was not intended to impact class actions, nothing in Court’s reasoning suggests a carveout is forthcoming.<sup>282</sup> It is also difficult to argue the Court was unaware of the decision’s potential impact on class actions. Indeed, an amicus brief warned that deciding in BMS’s favor would cause “dramatic” consequences for multistate class actions, whereby the “only available forum would [often] be in the defendant’s home state.”<sup>283</sup> Because pendent party personal jurisdiction in class actions does not require a connection between each claim and the forum state, it is inconsistent with the Court’s decision.

Moreover, it is not the role of the federal courts to expand their own jurisdiction for policy reasons. Fundamentally, the Constitution empowers Congress to define the jurisdiction of

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279. *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-cv-00564, 2017 WL 4224723, at \*5 (N.D. Cal. Sept. 22, 2017).

280. *See also* Dodson, *supra* note 4, at 31 (stating that the argument against *Bristol-Myers*’ applicability to class actions “seems to be in tension with the Supreme Court’s current trend narrowing personal jurisdiction and its current skepticism of class aggregation”).

281. *See, e.g.*, Bradt & Rave, *supra* note 210, 1318–19.

282. *See, e.g.*, Hoffheimer, *supra* note 4, at 532 (“Nothing in Justice Alito’s opinion provides a plausible ground for distinguishing class actions . . . from the consolidated mass actions before the Court.”).

283. Brief of Amici Curiae Civil Procedure Professors in Support of Respondents at 16–17, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (No. 16-466).

the federal courts.<sup>284</sup> Within a system of separated powers, Congress's prerogative suggests the federal courts, at most, have a limited ability to expand their own jurisdiction.<sup>285</sup> One longstanding limitation—first established by Congress in the Judiciary Act of 1789<sup>286</sup> and now codified in the Federal Rules of Civil Procedure by the Supreme Court's exercise of delegated legislative authority<sup>287</sup>—is that federal courts must have statutory authority to wield personal jurisdiction.

At the very least, Congress has left undisturbed a rule that often has the effect of tying federal court jurisdiction to state borders.<sup>288</sup> In cases where a federal court relies on a state long-arm statute to maintain personal jurisdiction, it is well

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284. See *Sheldon v. Sill*, 49 U.S. (How.) 441, 449 (1850); see also *See U.S. CONST.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

285. See *Finley v. United States*, 490 U.S. 545, 547 (1989) (“[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.” (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807))).

286. See *supra* note 151 and accompanying text. Admittedly, the role of the Judiciary Act in this history is not entirely clear. Scholars and judges have debated whether the Judiciary Act regulated personal jurisdiction, merely the *method* of service of process, or venue. Compare *Arrowsmith v. United Press Int'l.*, 320 F.2d 219, 228 n.10 (2d Cir. 1963) (Friendly, J.) (asserting that section 11 of the Judiciary Act merely regulated venue and not personal jurisdiction), *with id.* at 238 (Clark, J., dissenting) (asserting that section 11 of the Judiciary Act regulated both personal jurisdiction and venue), and *Foster, Jr.*, *supra* note 152, at 79 n.15 (agreeing with Judge Clark's view). Even if one concludes section 11 of the Judiciary Act had nothing to do with personal jurisdiction, others have argued that section 34 of the Judiciary Act, better known as the Rules of Decision Act, requires federal courts to sometimes rely on the long-arm statute of the states they sit in. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711–12 (1982) (Powell, J., concurring in judgment); *Kelleher*, *supra* note 142, at 1211–12 (agreeing with Justice Powell's interpretation). Under either view, Congress has, since 1789, regulated the personal jurisdiction of the federal courts.

287. For an explanation of how the Supreme Court exercises delegated legislative authority under the Rules Enabling Act, see Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 15 (2018).

288. It is somewhat unclear whether this status quo is based solely on Federal Rule of Civil Procedure 4(k), or whether it is also required by statute. For example, Justice Powell argued in *Bauxites* that the Rules of Decision Act requires federal courts to rely on state long-arm statutes for personal jurisdiction in diversity cases. See *Bauxites*, 456 U.S. at 711 (Powell, J., concurring in judgment). That theoretical question aside, Congress can change the status quo if it wants to. Several scholars have noted that Congress can untether the personal jurisdiction of the federal courts from state borders. See, e.g., Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1192 (2018) (“[A]lthough federal districts have always been organized according to state boundaries, they need not be under Article III, which gives Congress leeway to design a system of inferior courts as it sees fit.”).

established that the Court's Fourteenth Amendment rules apply, meaning that geography limits the jurisdiction of the federal courts.<sup>289</sup> Indeed, the Court's decision in *Bristol-Myers* represents merely a continuation of traditional geographical limitations. Pendent party personal jurisdiction, if accepted, would destroy these limitations by allowing a federal court in any state to adjudicate similar claims from all fifty states as long as one plaintiff's claim is connected to the state it sits in. In other words, it would be a dramatic expansion of the power of particular federal courts to adjudicate controversies—whether arising under state or federal law—from around the country. Whether motivated by a desire to facilitate judicial efficiency or to enable multistate class actions where the defendant is not amenable to general personal jurisdiction, federal courts play a constitutionally dubious game when they press the boundaries of their own jurisdiction for policy reasons. Undoubtedly, there are valid policy arguments in favor of adjusting jurisdictional rules to make it easier for plaintiffs to bring class actions. But because the Constitution empowers Congress to decide whether to expand the federal courts' jurisdiction, the courts should proceed cautiously in this area, lest they disturb the separation of powers.

#### B. Pendent Claim Personal Jurisdiction

During oral arguments for *Bristol-Myers*, Justice Sotomayor presciently suggested BMS's stance would imperil pendent claim personal jurisdiction.<sup>290</sup> First, this section affirms her concern. Although it may have once been an open question, the Court made clear that specific personal jurisdiction is a claim-

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289. See *supra* note 191 and accompanying text. Of course, there are exceptions. The Court's general personal jurisdiction rules, prior to *Daimler*, were understood to effectively allow plaintiffs to sue major national corporations in most states for any cause of action. See Dodson, *supra* note 4, at 18 (citing Wal-Mart as an example of such a corporation).

290. See Transcript of Oral Argument at 7, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466); see also Dodson, *supra* note 4, at 29 (stating that *Bristol-Myers* can be read to prohibit pendent claim personal jurisdiction); Hoffheimer, *supra* note 4, at 529–30 (stating that pendent personal jurisdiction's status is “unsettled” after *Bristol-Myers*).

specific inquiry. Consequently, pendent claim personal jurisdiction cannot survive under existing law.

Second, this section will confront some broader questions about specific personal jurisdiction. How close of a relationship does the relatedness element require between the defendant's forum-state contacts and a claim, and what role does interstate federalism play? This Article concludes that *Bristol-Myers* left these questions open and offers suggestions for further doctrinal development of the relatedness element.

Finally, this section observes that courts may have an alternative jurisdictional option in some cases where pendent claim personal jurisdiction has been incorrectly applied.

1. *Specific personal jurisdiction is a claim-specific inquiry, so pendent claim personal jurisdiction is forbidden*

*Bristol-Myers* confirms that specific personal jurisdiction is a claim-specific inquiry. This question is essential because pendent claim personal jurisdiction's validity depends on it *not* being a claim-specific inquiry. Consider, for example, the facts of *ESAB Group v. Centricut, Inc.*: using the RICO statute's nationwide service of process provision to bring RICO claims, the plaintiff also brought state-law claims in a South Carolina federal court concerning activities by the defendant with no connection to South Carolina.<sup>291</sup> If specific personal jurisdiction is a claim-specific inquiry, pendent personal jurisdiction in cases like *ESAB* is invalid, because the state-law claims cannot independently satisfy the relatedness element.

The Court's language in *Bristol-Myers* suggests specific personal jurisdiction is a claim-specific inquiry. For example, the Court states that a "connection between the forum and *specific claims at issue*" is required.<sup>292</sup> The Court's criticism of California's approach highlights the centrality of this assertion:

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291. See 126 F.3d 617, 625–26 (4th Cir. 1997).

292. See *Bristol-Myers*, 137 S. Ct. at 1781 (emphasis added).

Under the California approach, the strength of the requisite connection between the forum *and the specific claims* at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough.<sup>293</sup>

Notice that the Court refers to "specific claims." It is irrelevant if the defendant has "extensive forum contacts that are unrelated" to those specific claims. The implication is that each claim in a lawsuit must be related to the forum state.

This is true even though Justice Alito quoted more ambiguous language from earlier cases. Quoting *Helicopteros* and *Daimler*, the Court said specific personal jurisdiction rules require that the "suit must 'aris[e] out of or relat[e] to the defendant's contacts with the forum.'"<sup>294</sup> The Court did not use the narrower word "claim," but the more ambiguous word "suit." A "suit" can seemingly refer either to a claim or the broader lawsuit.<sup>295</sup> Quoting *Goodyear Dunlop*, the Court said there must be:

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 . . . . specific jurisdiction is confined to adjudication of issues *deriving from, or connected*

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293. *See id.*

294. *See id.* (emphasis added).

295. Indeed, one court has seized upon this ambiguity to justify pendent party personal jurisdiction as to unnamed class plaintiffs. *See Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 WL 3580775, at \*6 (W.D. Va. July 25, 2018) (quoting the Court's use of the word "suit" to argue it "framed the substantive right at [a] level of generality" justifying its decision).

*with, the very controversy* that establishes jurisdiction.<sup>296</sup>

Again, the word controversy is amenable to either the narrow meaning of “claim” or the broader meaning of “claims within a controversy.”

However, the Court’s underlying logic suggests that specific personal jurisdiction must be a claim-specific inquiry. The Court demands separation between specific and general personal jurisdiction, insisting they are “very different” from each other.<sup>297</sup> Therefore, specific personal jurisdiction must be a claim-specific inquiry. Central to its definition is that it covers claims with a *specific* connection to the forum state. Ever since Professors Arthur von Mehren and Donald Trautman coined the terms, *the* defining difference between general and specific personal jurisdiction is that only the latter requires a relationship between a claim and the defendant’s forum-state contacts.<sup>298</sup> That is what differentiates specific from general personal jurisdiction.

Another problem with California’s sliding-scale approach, according to the Court, is that it transforms specific personal jurisdiction into a “spurious form of general personal jurisdiction.”<sup>299</sup> And that is the fatal flaw with pendent claim jurisdiction: it is also a “spurious form” of general personal jurisdiction. Pendent claim personal jurisdiction blends the two types of categories together; it essentially says that a state can adjudicate claims not sufficiently related to the defendant’s forum-state contacts without general personal jurisdiction. In *Bristol-Myers*, the Court made clear it will not tolerate such blending.<sup>300</sup>

Because specific personal jurisdiction is a claim-specific inquiry, pendent claim personal jurisdiction is legally dubious.

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296. See *Bristol-Myers*, 137 S. Ct. at 1780 (emphasis added).

297. See *id.*

298. See von Mehren & Trautman, *supra* note 195, at 1136.

299. See 137 S. Ct. at 1781.

300. See *id.*

The whole point of pendent claim personal jurisdiction is to allow jurisdiction over claims that, independently, might not satisfy the elements of specific personal jurisdiction.

Since *Bristol-Myers*, however, district courts are taking a range of approaches to pendent claim personal jurisdiction. Some are refusing to apply it, others are still partially accepting it,<sup>301</sup> and some are continuing to apply it as before.<sup>302</sup> As appellate courts consider pendent claim personal jurisdiction after *Bristol-Myers*, it is worth watching whether they will reexamine their precedents in light of the Court's decision.

2. *Interstate federalism should require a connection between each claim and the forum state, but not much more*

As discussed above, *Bristol-Myers* establishes, in the name of interstate federalism, a Fourteenth Amendment rule that state courts cannot adjudicate a claim unrelated to the defendant's forum-state contacts. As long as the process of the district courts remains tethered to state law, the federal courts will often be subject to the same interstate federalism limitations on personal jurisdiction as the state courts. That reality adds urgency to the unresolved question of how broad the relatedness element is. Although the Court did not decide in *Bristol-Myers* how broad the relatedness element is, it gave some clues.

As discussed above, the Court required that there be *some* relationship between the claim and the defendant's forum-state contacts. But how much of a relationship is required? The Court declined BMS's invitation to establish a "proximate cause" test for relatedness.<sup>303</sup> But the Court also gave clues as to what types of relationships are insufficient, as it rejected those asserted by California. As Justice Sotomayor pointed out in dissent, the out-of-state plaintiffs' claims were related to BMS's forum-state

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301. See *Spratley v. FCA U.S. LLC*, 3:17-CV-0062, 2017 WL 4023348, at \*7 (N.D.N.Y. Sept. 12 2017) (rejecting pendent claim personal jurisdiction in a diversity case but not questioning the validity of pendent claim personal jurisdiction in nationwide service of process cases).

302. See *supra* Section I.B.

303. See Brief for Petitioner at 37–46, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466).

contacts in a sense; they resulted from conduct by BMS that was “materially the same” as its activity in California.<sup>304</sup> For Justice Sotomayor—like the California Supreme Court in *Cornelison*<sup>305</sup>—this relationship should be sufficient.<sup>306</sup>

Aside from rejecting California’s proposed standard, it is unclear what degree of relatedness the Court will require between the claim and the defendant’s forum-state contacts. There are three potential approaches the Court can take. First, the Court could decline to enforce the requirement, throwing up its hands and pleading institutional incompetence. The Court effectively ruled this option out in *Bristol-Myers*. Second, the Court could acknowledge the difficulty of developing a judicially manageable standard and establish a deferential rule that gives the states (and, by extension, the federal courts) substantial latitude within limits. Third, the Court could aggressively police state assertions of personal jurisdiction. I recommend the second approach, but it is worth considering the third, which remains open.

The Fifth Circuit’s decision in *Seifert* demonstrates how courts could aggressively police interstate federalism through the relatedness element. In *Seifert*, where the court had personal jurisdiction as to three related claims, it declined to exercise jurisdiction with respect to a defective design claim, concluding that it did not “arise from” the defendant’s contacts with Mississippi because the defendant designed the product in Florida.<sup>307</sup> Standing in isolation, there seems to be *some* relationship between the defective design claim and Mississippi. The product—which was designed in Florida—injured someone in Mississippi. Mississippi certainly seems to have *some* interest in regulating the design of a product that ultimately killed someone within its borders. Implicitly, *Seifert*’s relatedness element balanced the interests of Mississippi and Florida, privileging Florida’s potentially

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

305. See 16 Cal. 3d 143, 146 (1976).

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

307. See *supra* notes 52–56 and accompanying text.

greater interest in providing a forum<sup>308</sup> and applying its own substantive law.<sup>309</sup> Here, the Fifth Circuit essentially umpired between Florida and Mississippi, determining Florida was the better fit.

Although the Court could aggressively police interstate federalism through the relatedness element, the Court's choice-of-law jurisprudence demonstrates why it should not do so. Within the choice-of-law realm, there was a longstanding debate on whether the Constitution gave federal courts the authority to balance between competing state interests to strike down a state's application of its own law.<sup>310</sup> Although the Court once blessed a balancing of state interests in evaluating a state's application of its own law,<sup>311</sup> it backtracked four years later, suggesting that a state can apply its own law as long as it has an interest in the claim.<sup>312</sup> In part, the Court's decision seems

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308. This Article deliberately focuses on the power to provide a forum, rather than the power of a state to have its substantive law applied. Different states have different choice-of-law rules, and it is possible the federal court in *Seiferth*, applying Mississippi's choice of law rules, would have ultimately applied Florida substantive law to the defective design claim. However, there are many situations where a forum state will, for public policy reasons, choose to apply its own law, perhaps because it thinks its public policy is better. See Brilmayer, *supra* note 205, at 83 n.9. Because the Supreme Court has developed minimal constitutional limitations on a forum state's application of its own substantive law, such choices will rarely be struck down. See *id.* Another potential interstate federalism concern is that states have an interest in developing their own substantive law rather than letting other states do so. See David A. Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1, 20–21 (2017) (arguing the Delaware legislature has taken several steps to ensure Delaware courts apply the state's own corporate law, including passing a statute only allowing exclusive forum clauses in corporate charters or bylaws if they include Delaware as a forum).

309. Florida would, presumably, apply its own substantive law. But denying personal jurisdiction to Mississippi does not guarantee that Florida will get to provide a forum or apply its own substantive law. Instead, the plaintiff could sue the defendant in his home state, Tennessee, which could then presumably apply its substantive law to the dispute within constitutional bounds.

310. See Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945) (arguing that the Full Faith and Credit Clause requires federal courts to “impose uniformity in choice of law problems” because it was designed “to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition”); KAY ET AL., *supra* note 143, at 359–64.

311. See *Alaska Packers Assn. v. Indus. Accident Comm'n*, 294 U.S. 532, 549–50 (1935) (“[California’s] interest is sufficient to justify its legislation and is greater than that of Alaska . . .”).

312. See *Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 503 (1939) (“Although Massachusetts has an interest in safeguarding the compensation of Massachusetts

motivated by a lack of a judicially manageable standard to evaluate competing claims.<sup>313</sup> Further, although federal policing of state choice-of-law decisions might promote more equality between states, it would subject state assertions of jurisdiction to an open-ended balancing test, creating a “diminution of state power.”<sup>314</sup> Consequently, in *Allstate Insurance Co. v. Hague*, the Court adopted the deferential, judicially manageable rule that a state could apply its own law to a claim as long as the state has “significant” contacts with it.<sup>315</sup> This rule adequately protects interstate federalism—prohibiting overreach by states to adjudicate claims they have no interest in—while adopting a judicially manageable standard that avoids undermining the power of all the states.

Taking a lesson from *Allstate*, the Court should use personal jurisdiction’s relatedness element to ensure the forum state’s court has a regulatory interest in adjudicating the claims before it.<sup>316</sup> Indeed, one can interpret *International Shoe* as an attempt to ensure that the forum state has a regulatory interest in the suit.<sup>317</sup> The term “regulatory interest” is admittedly vague; it

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employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it.”).

313. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495–96 (2003) (explaining that the balancing approach of *Alaska Packers* “quickly proved unsatisfactory” and that “[i]n light of this experience, we abandoned the balancing of interests approach”). *But see* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2528–29 (1999) (proposing a deferential non-discrimination standard for policing state choice-of-law decisions).

314. Elliot E. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 588 (1953).

315. See 449 U.S. 302, 312–13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

316. The term “regulatory interest” has appeared in the personal jurisdiction context multiple times. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 223 (1977) (Brennan, J., dissenting in part) (“State courts have legitimately read their jurisdiction expansively when a cause of action centers in an area in which the forum State possesses a manifest regulatory interest.”); see also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (explaining that specific personal jurisdiction principally depends on an “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”).

317. Professor Burbank suggests *International Shoe* can be understood as requiring a state to have a regulatory interest as part of a due process balancing test. See also Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18

does not automatically decide individual cases. But it conveys an attitude: the federal courts should not aggressively umpire between multiple states that have legitimate interests in adjudicating a claim. Rather, it should be enough that a state has *some* regulatory interest. Although the full spectrum of state interests cannot be catalogued, most are connected with the state's police power: protecting those within its borders. As with other deferential tests, like the Fourteenth Amendment's rational basis test, courts should proceed cautiously before concluding a state lacks a regulatory interest in a particular claim. Demanding more is likely not judicially manageable.<sup>318</sup> Under this test, a Mississippi court should be able to adjudicate the defective design claim presented in *Seiferth*, as Mississippi undoubtedly had a regulatory interest in regulating machinery injuring people within its borders, even if it was designed out-of-state. This rule is faithful to *Bristol-Myers*; it ensures that a state with no legitimate interest in adjudicating a claim will not do so.<sup>319</sup> It also limits the judiciary's line-drawing challenge and avoids unduly diminishing the power of the state courts.

3. *Pendent claim personal jurisdiction is often unnecessary.*

As Section IV.B.1 demonstrates, *Bristol-Myers* instructs that specific personal jurisdiction requires each claim in a lawsuit be related to the forum state. Because the whole point of pendent claim personal jurisdiction is that an independent relationship

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HASTINGS CONST. L.Q. 819, 854 (1991) (describing personal jurisdiction rules as a form of procedural due process). There is some support for this view. The Court started with the acknowledgment that a defendant's presence in a state is what traditionally gave its courts power to issue a binding judgment, because the state had regulatory power over those within its borders. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). But, as the Court went on to explain, a corporation's presence in a state can only be manifested by the actions of its agents within. *Id.* at 317. Thus, "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." *Id.* at 316–17. This language suggests the Court envisioned a due process balancing test where contacts weighed in the calculus.

318. Courts have long established doctrinal tests recognizing their limited institutional competence. See, e.g., *United States v. Kahriger*, 345 U.S. 22, 29 (1953) (deferentially reviewing congressional action under the Tax Clause because "a final definition of the line between state and federal power has baffled judges and legislators").

319. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017).

with the forum state is not required for each claim, the doctrine is forbidden. However, it is also sometimes unnecessary. In the situations where courts might be most tempted to apply pendent claim personal jurisdiction, they could instead consider more carefully whether specific personal jurisdiction independently exists as to the “pendent” claims.

Courts, state and federal, are currently divided on what the proper test for the relatedness element is.<sup>320</sup> Some courts apply a relatively demanding standard, requiring the defendant’s forum-state contacts be a proximate cause of the claim. Other courts apply a relaxed but-for standard, which usually allows personal jurisdiction as long as an event relevant to the lawsuit took place in the forum state. Others have staked out a middle ground. The Court’s decision in *Bristol-Myers* does not establish a uniform standard, leaving this diversity in place for now.

Whatever a jurisdiction’s particular test is, courts that may be tempted to resort to pendent claim personal jurisdiction should first ask whether it is even necessary. If one of the plaintiff’s claims is related to the forum state, and the other claims arise from the same nucleus of operative fact, then the other claims may have a sufficiently close relationship with the forum state to independently justify specific personal jurisdiction. Outside the nationwide service of process cases, the first condition must be true, and most courts applying pendent claim personal jurisdiction already require the second condition as well.<sup>321</sup>

To see how this will sometimes be the case, consider again the facts of the Fifth Circuit’s decision in *Seiferth*. Camus, an engineer, designed a helicopter platform for his employer, Air2. Although Camus designed the platform in Florida, he transported it to Mississippi and, while there, installed it on Air2’s helicopter.<sup>322</sup> The plaintiff, an inspector, died after the platform broke in Mississippi. The plaintiff’s estate then brought four claims—defective design, failure to warn,

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320. See *supra* notes 199–208 and accompanying text.

321. See *supra* note 35 and accompanying text.

322. See *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 269–70 (5th Cir. 2006).

negligence, and negligence *per se*—in a Mississippi federal court.<sup>323</sup> The Fifth Circuit ultimately found specific personal jurisdiction existed as to the failure to warn, negligence, and negligence *per se* claims, but it determined the Fourteenth Amendment barred jurisdiction as to the defective design claim.<sup>324</sup> Justifying its conclusion that the claim was not sufficiently related to the defendant's forum state contacts, the court observed that Camus had designed the platform in Florida, not Mississippi.

However, this analysis may be too stingy. Under the Mississippi Products Liability Act, which governed the defective design claim, the plaintiff must prove (among other things) that “the product failed to perform as expected.”<sup>325</sup> In this case, the platform failed to perform as expected in Mississippi, the forum state. Thus, Camus's forum-state contacts are an important part of the plaintiff's defective design claim, and under any existing relatedness standard, the federal court probably could have adjudicated this entire case without pendent claim personal jurisdiction.

For another example, consider our ongoing hypothetical.<sup>326</sup> The court would have specific personal jurisdiction as to Capias's fraud claim, since the effects of the fraud were felt in the forum state. But what about the breach of contract claim? Admittedly, the contract was negotiated entirely in Virginia, so that state likely has the strongest nexus with the claim. But one element of a breach of contract claim is the question of whether a breach occurred. Even if the fact is not vigorously disputed, the number of computers shipped to California by RespondendCo is relevant to determining whether a breach occurred, so those shipments are arguably a but-for cause of the breach of contract claim. The visits to California by RespondendCo's representatives are also pertinent to the question of breach. Thus, in at least some jurisdictions, the

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323. *See id.* at 274.

324. *See id.* at 275.

325. MISS. CODE ANN. § 11-1-63 (2013).

326. *See supra* notes 10–12 and accompanying text.

breach of contract claim does arise from the defendant's forum-state contacts, and pendent claim personal jurisdiction would be entirely unnecessary. Indeed, in the real-life version of the case, the Ninth Circuit (reversing the district court) concluded specific personal jurisdiction *did* exist independently for the breach of contract claim, making it unnecessary to resort to pendent claim personal jurisdiction.<sup>327</sup>

*Seifert* and the hypothetical demonstrate that pendent claim personal jurisdiction will sometimes not be necessary to adjudicate a group of claims where an anchor claim is clearly related to the defendant's forum-state contacts and the other claims are related to the anchor claim. Intuitively, that makes sense. If A is related to B, and B is related to C, there is likely at least some nexus between A and C. In other words, before federal courts consider employing a tool not properly available to them, they should ask if they can exercise jurisdiction under established doctrine.

Of course, this analysis does not apply to cases where a nationwide service of process provision authorized the court's jurisdiction over the defendant with respect to an anchor claim, and the anchor claim is not otherwise related to the defendant's forum-state contacts. Recall the facts of *ESAB*, where the South Carolina federal court used pendent claim personal jurisdiction to adjudicate state-law claims with no connection to South Carolina.<sup>328</sup> There, the anchor claim was a RICO claim (so personal jurisdiction was authorized by a nationwide service of process provision), yet none of the pertinent events that made up that claim occurred in South Carolina. Thus, the related state-law claims were also, unsurprisingly, entirely unconnected with South Carolina. This Article has argued that the South Carolina federal court lacked authority to adjudicate the pendent claims in this case.

But I also submit that this is a good policy outcome. Because none of the events in this case involved South Carolina—the

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327. See *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1287–89, 1289 n.8 (9th Cir. 1977).

328. See *ESAB Grp., Inc., v. Centricut, Inc.*, 126 F.3d 617, 625–26 (4th Cir. 1997).

Fourth Circuit acknowledged the defendant did not have minimum contacts there<sup>329</sup>—South Carolina lacked any regulatory interest in the state-law claims. Further, it made no sense to burden South Carolina’s people—for example, through jury duty—in adjudicating claims unconnected to their state.<sup>330</sup>

In contrast, it made good sense to adjudicate all of the *Seifert* plaintiff’s claims in Mississippi. First, jurisdiction would be consistent with *Bristol-Myers*’ twin commands that specific personal jurisdiction be claim-specific, and that each claim have *some* connection to the forum state. Second, Mississippi had a clear regulatory interest in the case. A man was killed by Camus’s design within its territory, implicating the state’s strong interest in preserving public safety.<sup>331</sup> This case is thus different than *Bristol-Myers*, where the Court concluded that California had “little legitimate interest” in the out-of-state plaintiffs’ claims.<sup>332</sup> Third, burdening the local Mississippi community with the costs of adjudicating the claim is appropriate; a community’s interest in adjudicating a dispute implicating its safety is undeniably strong.

In response, one could argue that, because the product was designed in Florida, Florida had an even stronger regulatory interest that might justify the Fifth Circuit’s decision to reserve adjudication of the plaintiff’s defective design claim to it. But the Court long ago discovered the difficulties inherent in policing between states’ competing interests in the choice-of-law context.<sup>333</sup> Moreover, choosing between multiple states with solid regulatory interests in adjudicating a claim would require a blurry and manipulable standard that puts state court assertions of personal jurisdiction at the mercy of federal law.

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329. *See id.* at 625–26.

330. *Cf. Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (“Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.”).

331. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 338 n.5 (1981) (Powell, J., dissenting) (“The State does have an interest in the safety of motorists who use its roads.”).

332. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017).

333. *See supra* notes 310–15 and accompanying text.

Such a rule, justified by interstate federalism's solicitude for the states, would come at a high cost if it demeaned them all.

#### CONCLUSION

In *Bristol-Myers*, the Court finally addressed the meaning of the relatedness requirement, the last element of specific personal jurisdiction that was mostly undefined. If nothing else, the Court's opinion signals that the relatedness element has teeth, and litigants are already trying to find ways around it. One method is pendent party personal jurisdiction, which a substantial number of courts have embraced. Yet the Court's opinion also sets the stage to overturn decades of pendent claim personal jurisdiction jurisprudence in the federal courts. If accepted, this Article's analysis upends both types of pendent personal jurisdiction, creating several important implications.

First, pendent party personal jurisdiction is plainly inconsistent with *Bristol-Myers*. This is true in both federal and state courts. Further, the rule should not vary for class actions. Although the combination of limited statutory authority for service of process and the Court's personal jurisdiction decisions is putting pressure on multistate class actions in the federal courts, pendent party personal jurisdiction should not be used to circumvent the law. If the current law is unwise, Congress can always broaden the scope of the federal courts' personal jurisdiction by extending the scope of their process.

Second, state long-arm statutes are the only current, viable source of authority for pendent claim personal jurisdiction. Pendent claim personal jurisdiction is illegitimate in any state with a long-arm statute that does not authorize it, so the federal courts must articulate a basis under state law to exercise it. Federal precedents based on assertions of personal jurisdiction in states without full-extent statutes are dubious. The rationale of precedents like *Hargrave*—a case where the Second Circuit did not articulate a basis in state law when exercising pendent claim personal jurisdiction—should be rejected.

Third, pendent claim personal jurisdiction in nationwide service of process cases will usually fail *Bristol-Myers'* rule. The

nationwide service of process statutes cannot be fairly read to authorize it, which means jurisdiction must be consistent with state long-arm statutes and the Fourteenth Amendment. Because these cases frequently involve pendent claims with no connection to the forum state, *Bristol-Myers* does not permit jurisdiction for such claims. Consequently, this Article challenges the viability of precedents allowing pendent claim personal jurisdiction in nationwide service of process cases—for example, the Fourth Circuit's opinion in *ESAB*.

Fourth, in states with full-extent long-arm statutes, specific personal jurisdiction will sometimes be possible over a group of related claims where one claim is related to the defendant's forum-state contacts. If a court, understandably, wants to adjudicate these claims together, it should carefully consider whether each claim is sufficiently related to the defendant's forum-state contacts. In such cases, where the argument for pendent claim personal jurisdiction would seem most appealing, it may be unnecessary. For example, specific personal jurisdiction as to all the claims should be possible in *Seifert* and our ongoing hypothetical.

Finally, this Article urges caution as the courts continue developing personal jurisdiction law. As the Court's choice-of-law jurisprudence demonstrates, it is not wise to use constitutional law, a blunt instrument, to aggressively police between states' competing adjudicative interests. While the line in *Bristol-Myers* seems easily enforceable, the Court should hesitate before demanding a relationship stronger than *some* relationship. Even in the status quo, the Court's recent personal jurisdiction decisions are undoubtedly putting pressure on various forms of aggregation in complex litigation, particularly multistate class actions. The lower federal courts, however, lack the authority to counter these pressures by ignoring the Supreme Court's rules or expanding their jurisdiction beyond what Congress has authorized. Even if the status quo is unfortunate, pendent personal jurisdiction is not the answer.