

Hybrid Removal

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ABSTRACT: In the wake of the Supreme Court’s recent activity in the domain of personal jurisdiction, defendants have greater leverage to challenge the forum choices made by plaintiffs when initiating litigation. This Article uncovers an unexpected way that defendants are deploying that leverage: by filing hybrid removals in federal court. Hybrid removals are filed in cases that lack facial diversity of citizenship and involve no federal question. Ordinarily, these characteristics would trigger a quick remand. To avoid that result, defendants have sought to make personal jurisdiction part of the removal analysis. This crossing of jurisdictional lines has the potential to facilitate expediency, but it may also undermine the relationship between federal and state courts. For that reason, the Article concludes that hybrid removal should be embraced with due care, and offers some guidelines for its implementation.

I.	INTRODUCTION.....	794
II.	THE EVOLVING PERSONAL JURISDICTION LANDSCAPE.....	796
	A. <i>IMPACT: GOODYEAR AND DAIMLER</i>	797
	B. <i>REVERBERATION AND CALIBRATION</i>	799
III.	NAVIGATING THE NEW LANDSCAPE.....	805
	A. <i>THE EXPECTED RESPONSES</i>	805
	B. <i>THE UNEXPECTED RESPONSE: HYBRID REMOVAL</i>	810
IV.	ASSESSING HYBRID REMOVAL.....	816
	A. <i>EXPEDIENCY AND DOCTRINAL FIT</i>	816
	B. <i>FEDERALISM AND RESTRAINT</i>	821
	C. <i>STRIKING THE BALANCE</i>	823
	D. <i>DISTRUST</i>	827
V.	CONCLUSION.....	828

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I. INTRODUCTION

In 1945, the United States Supreme Court revolutionized personal jurisdiction with its decision in *International Shoe Co. v. Washington*.¹ Dispensing with the rigid constraints that had governed for roughly 70 years,² the Court embraced a new vision of the adjudicatory authority of states rooted in the now-familiar concept of “minimum contacts.”³ Now, roughly 70 years after *International Shoe*, a second personal jurisdiction revolution is underway. This current revolution is softer than the first—no longstanding precedent has been overturned, and the Court has instead strained to frame its decisions as mere extensions of established principles.⁴ But revolutions take many forms, and as Part II of this Article explains, there can be little doubt that the Court’s recent cases have articulated narrowing principles that mark a substantial shift in both doctrine and tone.⁵

For confirmation of this, one need only look to the trial courts. Both plaintiffs and defendants have been making adjustments in litigation strategy in response to the Court’s activity, and trial judges have been faced with an influx of personal jurisdiction-related motions.⁶ The bulk of this Article is focused on these adjustments and these motions in the context of aggregate litigation. There is certainly much to be said about current developments in other forms of litigation,⁷ but the basic case structure under consideration here involves claims—most often product liability claims—by multiple plaintiffs against one or more defendants. Plaintiffs have long had substantial leeway in their selection of a forum for the litigation of these sorts of disputes.⁸ They have used that leeway to achieve both horizontal and vertical objectives. Horizontally, plaintiffs seek to identify states that may be hospitable to the claims being brought; vertically, plaintiffs often seek to secure a state court

1. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

2. See generally *Pennoy v. Neff*, 95 U.S. 714 (1877) (establishing the test courts should use to determine whether parties had personal jurisdiction).

3. See *Int’l Shoe Co.*, 326 U.S. at 316. The classic discussion of the impact of *International Shoe* is Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

4. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (“Our settled principles regarding specific jurisdiction control this case.”); *id.* at 1783 (“Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up.”).

5. See *infra* Part II.

6. See *infra* notes 116–19 and accompanying text.

7. As discussed *infra* notes 29–34 and accompanying text, a particular area for concern is the impact on transnational cases.

8. See *infra* notes 84–85 and accompanying text.

within that hospitable state by structuring the parties to the suit in a way that shields the case from removal.⁹

The nascent personal jurisdiction revolution gives defendants powerful tools that can be employed to disrupt the ability of plaintiffs to achieve these objectives. Part III explains what those tools are, and how they are being used on the ground. In many cases, the forum selected by plaintiffs is insufficiently connected to at least some of the claims being asserted, and that permits defendants to force those claims to be litigated elsewhere.¹⁰ When plaintiffs are from multiple states, this connectedness problem may extend only to those claims brought by non-resident plaintiffs, and the victory for defendants is in that sense impartial. But because the unconnected—and therefore jurisdictionally suspect—claims are often included in the suit precisely to destroy diversity of citizenship among the parties, their elimination renders the remaining claims removable to federal court.¹¹ In this way, the personal jurisdiction revolution frustrates the plaintiffs' vertical preferences and creates echoes in the domain of subject matter jurisdiction. Whether these echoes were intended or anticipated is not clear, but they are nevertheless an understandable outgrowth of the new jurisdictional landscape.

What is less understandable is the procedural route by which the defendants are seeking to achieve these results. Rather than raise their personal jurisdiction arguments in state court, many defendants are opting instead to remove directly to federal court, notwithstanding a facial lack of diversity that would ordinarily provoke a remand.¹² To avoid that outcome, defendants are asking federal courts to consider questions of personal jurisdiction prior to assessing the viability of removal.¹³ If this request is successful, then some parties to the state suit may be dismissed, and the remaining parties may then satisfy the requirements for removal to federal court.¹⁴ This Article labels this procedural strategy “hybrid removal” because it hinges on a consideration of personal jurisdiction arguments as part of the subject matter jurisdiction determination.

Hybrid removal deviates from the traditional federal analysis of removability, and its use is traceable directly to the personal jurisdiction revolution.¹⁵ Part II discusses the evolution of personal jurisdiction beginning with *International Shoe* up until present day. Part III tells the story of the introduction of hybrid removals, its early failures, and eventual success in the

9. See *infra* notes 85–88 and accompanying text.

10. See *infra* notes 80–86 and accompanying text.

11. See *infra* notes 86–94 and accompanying text.

12. See *infra* Section III.B.

13. See *infra* Section III.B.

14. See *infra* Section III.B.

15. See *infra* notes 110–27.

wake of the Supreme Court's most recent personal jurisdiction decision.¹⁶ Part IV then offers a critical analysis of whether and when hybrid removal should be permitted. Although there is no reason to impose a categorical bar, federal judges ought to approach the doctrine with care. Personal jurisdiction determinations based on questions of federal law and limited to the pleadings are good candidates for hybrid removal; determinations requiring the development and assessment of jurisdictional facts or interpretations of state law are not.

II. THE EVOLVING PERSONAL JURISDICTION LANDSCAPE

Almost since the day the modern approach to personal jurisdiction was ushered in by the Supreme Court's opinion in *International Shoe*, courts have distinguished between jurisdiction based on contacts related to the suit and jurisdiction based on aggregate contacts.¹⁷ The first category, now shorthanded as specific jurisdiction, supports jurisdiction only for particular claims and has been the subject of fairly sustained attention by the Supreme Court.¹⁸ Although litigated less frequently, the second category—general jurisdiction—remained a viable if less visible form of adjudicatory authority.¹⁹ In particular, general jurisdiction proved useful in cases where a foreign defendant conducted substantial business activities within a state (or states). In such circumstances, a foreign defendant could be hauled before an American court based on those activities, even when they bore no relation to

16. See generally *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (holding that specific personal jurisdiction was not satisfied in California for a nonresident consumer of a drug manufactured in California).

17. See *id.* at 1778–80. In addition to jurisdiction based on the “minimum contacts” formulation introduced in *International Shoe*, courts continue to recognize jurisdiction based on “traditional” grounds such as presence, consent, and domicile. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596–97 (1991) (holding that forum-selection clauses forcing individuals to consent to jurisdiction are enforceable); *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 617–19 (1990) (holding that physical presence in a state at the time a person is served is consistent with “traditional notions of fair play and substantial justice” (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945))); *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (stating that individuals are subject to jurisdiction wherever they are domiciled).

18. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 487 (1985) (holding that a contractual relationship, including forum selection clause, constituted purposeful availment sufficient to comport with notions of “fair play and substantial justice” (quoting *Int'l Shoe Co.*, 326 U.S. at 320)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298–99 (1980) (holding that the connection created by the unilateral activity of plaintiffs was insufficient to make the exercise of jurisdiction reasonable); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957) (mailing a reinsurance certificate established substantial connection enough for specific jurisdiction).

19. This form of jurisdiction was less visible in part because it did not seem to occur to defendants to mount a challenge. For example, even in *Daimler AG v. Bauman*, Mercedes Benz USA did not challenge the jurisdiction of the California court. See *Daimler AG v. Bauman*, 571 U.S. 117, 131–32 (2014); *infra* note 42 and accompanying text. Perhaps that is because they were content to defend there, but more likely they concluded that any such challenge would be futile. See Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 111 (2015).

the particular claims in the suit.²⁰ Those days are now over. A pair of recent Supreme Court cases placed substantial limitations on the scope of general jurisdiction,²¹ and plaintiffs have scrambled to adjust.

A. *IMPACT: GOODYEAR AND DAIMLER*

In 2004, a bus crashed en route to the Paris airport, killing two young boys from North Carolina.²² Their survivors filed a wrongful death suit in a North Carolina state court against the manufacturer of the bus tires, Goodyear Tire and Rubber, and several of its foreign subsidiaries.²³ There was no serious effort to articulate a specific jurisdiction theory, and the plaintiffs instead relied on an assertion that the defendants' regular sales of products within the state provided authority for the exercise of general jurisdiction.²⁴ Goodyear itself did not object, but its separately named subsidiaries argued that their connection with the forum state was too attenuated to sustain a valid exercise of adjudicative authority.²⁵ In 2011, a unanimous Supreme Court agreed, finding that general jurisdiction was appropriate only where a defendant could be considered "at home."²⁶ Business activity alone did not meet that high standard.²⁷

The Court followed that opinion with a similar one in *Daimler* only three years later.²⁸ At issue in *Daimler* were claims filed in California against a German corporation based on actions taken in Argentina that allegedly violated the human rights of foreign plaintiffs.²⁹ The only connection between the suit and the forum was the substantial number of cars manufactured by

20. See Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617, 631–32 n.63 (2017) (providing citations to case examples).

21. See *Daimler*, 571 U.S. at 136 ("Even if we were to assume that [Daimler's indirect subsidiary] is at home in California, and further to assume [the subsidiary]'s contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011) (holding that because the respondents did not "urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a 'unitary business,'" general jurisdiction could not be established against foreign subsidiaries petitioners).

22. *Goodyear*, 564 U.S. at 918.

23. *Id.* at 918–20.

24. *Id.* The foreign subsidiaries did not directly sell tires in North Carolina, but tires did regularly make their way to the state through the "stream of commerce." *Id.* at 926.

25. *Id.* at 918.

26. *Id.* at 924, 929.

27. *Id.* at 927.

28. *Daimler AG v. Bauman*, 571 U.S. 117 (2014). One difference between the two cases was that *Daimler* presented a question about whether the contacts of a subsidiary could be assigned to the principal for personal jurisdiction purposes. *Id.* at 120, 138–39. The Court declined to provide a definitive answer to that question. See *infra* notes 39–43.

29. *Daimler*, 571 U.S. at 120–21.

the foreign defendant that were sold within the state.³⁰ Again, the Court found that kind of business activity insufficient to trigger the availability of general jurisdiction, even if continuous and substantial.³¹ As a result, the plaintiff's claims were beyond the reach of the California courts.³²

Both of these cases arose in the transnational context, and so were immediately understood to have broad implications for transnational litigation.³³ Commentators predicted that it would be difficult to bring claims against foreign defendants in American courts unless the claims at issue arose out of activities taken in or producing effects in the United States.³⁴ But the decisions also raised alarm bells for a second category of cases—namely, those brought by multiple plaintiffs against a defendant or defendants based on a pattern of conduct occurring in several states.³⁵ Flexible joinder rules often

30. *Id.* at 123–24. The Court mentioned the underlying issue of whether a foreign corporation may be subject to general jurisdiction in the U.S. based on the activities of its subsidiary but declined to pass judgment. *Id.* at 134–35.

31. *Id.* at 139.

32. *Id.*

33. Justice Ginsburg's opinion in *Daimler* explicitly emphasized the transnational context of the case. *Id.* at 140–42. See generally Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643 (2015) (exploring the effects of recent Court decisions, including *Daimler*, on specific and general jurisdiction); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325 (discussing growing tension between the Court and federal laws in the jurisdiction context and arguing for greater deference to Congressional interpretations); Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617 (2017) (advocating for an expansion of personal jurisdiction to cover transnational claims).

34. See, e.g., Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U.L. REV. 413, 415 n.6 (2017) (complaining that the “retraction of corporate general jurisdiction . . . leave[s] many plaintiffs without any U.S. forum, even when foreign defendants injure plaintiffs in the United States and in so doing reap the benefits of the U.S. market”); Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 786–88 (2017) (explaining that the inquiry as to what drives the Roberts Court's approach to personal jurisdiction points to a reluctance to draw foreign disputes into U.S. courts and an overall commitment to formalistic notions of sovereignty dependent upon territorial boundaries); see also *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) (predicting that the majority's opinion will eliminate the ability to bring a mass action against a defendant not headquartered or incorporated in the United States since they are not “at home” in any state). In response to these transnational litigation concerns, some have proposed expanding personal jurisdiction in the federal courts by shifting from Fourteenth Amendment due process to Fifth Amendment due process. See Borchers, *supra*, at 417; Jonathan R. Nash, *National Personal Jurisdiction* 10–11 (Feb. 6, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119383; Simowitz, *supra* note 33, at 329; see also Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 45–52 (2018) (making a similar argument for expansion in response to concerns about aggregate litigation).

35. *Bristol-Myers Squibb*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting) (concluding the majority's opinion will make it difficult for plaintiffs in multiple states injured by a defendant's nationwide conduct to sue in a single action); Arthur R. Miller, *Simplified Pleading, Meaningful*

permit such claims to be brought together as a procedural matter, and jurisdiction in such cases largely went unchallenged when based on substantial business activities directed at the state.³⁶ But the restrictions on the use of such activities to support general jurisdiction raises questions about whether personal jurisdiction would undermine the goals of flexible joinder by requiring claims to be split, or alternatively, brought together in a forum inconvenient (and perhaps undesirable) to plaintiffs.³⁷

B. REVERBERATION AND CALIBRATION

Plaintiffs have developed a variety of strategies to avoid the potentially harsh jurisdictional consequences of *Goodyear* and *Daimler*.³⁸ One such strategy is suggested by *Daimler* itself. There, the plaintiffs attempted to reach Daimler, a foreign corporation, through the contacts of its subsidiary, Mercedes Benz USA.³⁹ The Ninth Circuit explicitly embraced a theory of agency to support its conclusion that jurisdiction was proper,⁴⁰ but the Supreme Court demurred.⁴¹ According to Justice Ginsburg, the subsidiary's contacts with California were insufficient to support general jurisdiction even if they were imputed to the parent corporation, and that finding made it unnecessary for the Court to articulate the circumstances under which jurisdictional agency might be permitted.⁴² Technically, then, the issue of agency was left unresolved, but only because it was made irrelevant in most cases. The issue may reappear if a plaintiff attempts to reach a foreign defendant by suing in a subsidiary's home state, but rather than demonstrating an exception, such a case will reflect the impact of *Daimler's* rule.

Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. REV. 286, 348 (2013).

36. See, e.g., FED. R. CIV. P. 20; Cornett & Hoffheimer, *supra* note 19, at 111.

37. *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (arguing that “[t]he majority’s rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone,” resulting in “piecemeal litigation and the bifurcation of claims”). *But see* Alani Golanski, *Why Daimler Accommodates Personal Jurisdiction in Mass Tort Litigations*, 80 ALB. L. REV. 311, 311–12 (2016) (arguing pre-BMS that *Daimler* “correlates with an expansive view of specific jurisdiction capable of accommodating the multiparty, multi-jurisdictional mass tort scenario”).

38. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228–29 (2014).

39. *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014).

40. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920–24 (9th Cir. 2011), *rev'd*, 571 U.S. 117 (2014).

41. *Daimler*, 571 U.S. at 134–35.

42. *Id.* at 136. This result was muddied by the fact that Mercedes-Benz USA did not challenge jurisdiction, a litigation decision that almost certainly reflects the prevailing understanding that doing substantial business in the state was sufficient to expose a corporate defendant to jurisdiction. *Id.* at 131–32. That concession led Justice Ginsburg to conclude, “for purposes of this decision only, that MBUSA qualifies as at home in California.” *Id.* at 134. Even so, she then determined that those same contacts were not enough to render *Daimler* itself at home in California. *Id.* at 135–36. Future subsidiaries are not likely to make the same concession.

A second strategy has been to abandon the newly limited theory of general jurisdiction in favor of an expanded vision of specific jurisdiction. This approach is a poor fit for many transnational cases,⁴³ but it appeared to have substantial promise in the domain of aggregate litigation. Much of that promise was extinguished by the Supreme Court's decision in *Bristol-Myers Squibb* ("BMS").⁴⁴ BMS involved a classic aggregate litigation fact pattern. Multiple plaintiffs joined together to sue the manufacturer of the drug Plavix.⁴⁵ All of the claims involved harms that arose from the use of Plavix, but in only some of the claims did the allegedly harmful use occur in the forum state of California.⁴⁶ For the California claims, no one disputed that there was a clear basis for the exercise of specific jurisdiction.⁴⁷ BMS targeted California consumers with advertising in the state, distributed and sold the drug to patients within the state, and the California claims arose directly from that purposeful activity.⁴⁸ The difficulty in the case involved personal jurisdiction over BMS for the joined claims that were brought by non-California users of Plavix.⁴⁹ One option would have been to use the continuous and systematic sales of the drug as a hook for general jurisdiction, but of course that was precisely the move targeted by *Daimler*.⁵⁰

43. For example, this approach would have failed in *Daimler* itself because there were no forum-linked activities by the defendant that were in any way related to the claims being brought. *See id.* at 120–21. Thus, it was not possible to attempt an argument that the claims were "related to" forum activities, even absent a causal link. In other words, the unrelated business activities were the only conceivable basis for jurisdiction, and the contraction of general jurisdiction was therefore decisive.

44. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1777–78 (2017) (holding that due process does not permit exercise of specific personal jurisdiction in California over claims by nonresident consumers).

45. *Id.* at 1777.

46. *Id.* at 1778.

47. *Id.*

48. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 377 P.3d 874, 886 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017). The California Supreme Court emphasized that BMS maintained a physical presence in California, employed well over 400 individuals in the state, and actively and purposefully sought to promote sales of Plavix to California residents, resulting in California sales of nearly \$1 billion over six years. *Id.*

49. *See Bristol-Myers Squibb*, 137 S. Ct. at 1778. The group of plaintiffs consisted of 86 California residents and 592 residents from 33 other states who filed eight separate complaints in California Superior Court. *Id.* Although the complaints asserted 13 claims arising solely under California law, the nonresident plaintiffs did not allege that they obtained the drug through any California sources, that they were injured by the drug in California, or that they were treated for their drug-related injuries in California. *Id.*

50. The California trial court originally denied BMS's motion to dismiss based on a finding of general jurisdiction. Order Denying Defendant Bristol-Myers Squibb Company's Motion to Quash Service of Summons for Lack of Personal Jurisdiction at 2, Plavix Product and Marketing Cases (Cal. Sup. Ct. Sept. 23, 2013) (No. JCCP 4748), 2013 WL 6150251, at *2 ("BMS's wide-ranging, continuous, and systematic activities in California, as detailed above, are clearly sufficient to establish that Court's [sic] has general jurisdiction over it."). After Justice Ginsburg described use of the continuous and systematic formulation for general jurisdiction as "unacceptably

With general jurisdiction off the table, the plaintiffs embraced a specific jurisdiction theory that hinged on the assertion that the non-California claims were nevertheless related to BMS's activities within the state.⁵¹ In other words, the non-resident plaintiffs relied on the same purposeful conduct at issue in the California claims, and then linked that conduct to their own claims through a flexible view of the connection necessary to support specific jurisdiction. That flexible view was good enough for the California Supreme Court,⁵² but was squarely rejected by an eight-justice majority of the United States Supreme Court.⁵³ According to the latter court, what is required is "a connection between the forum and the specific claims at issue," and that requisite connection cannot be provided by claims brought by others.⁵⁴

In the wake of *BMS*, plaintiffs in aggregate products liability litigation have scrambled to comply with the requirement of a direct link between a defendant's forum-state activity and each claim in the action. Where the plaintiffs themselves live in different states, such that the sale, use, and harm allegedly caused by the product in question did not all occur in the forum state, plaintiffs have instead sought to find some other activity within the state that can be said to contribute in some way to each claim. This strategy first emerged in *BMS* itself, when the lawyers for the plaintiffs floated an alternative argument to support jurisdiction that relied on contractual activity between BMS and McKesson, a California corporation who contracted with BMS to distribute the drug nationally.⁵⁵ The Supreme Court dismissed that theory as a "last ditch contention,"⁵⁶ but it has been picked up and fleshed out in subsequent cases, with mixed success. Plaintiffs seeking to protect a major verdict in Missouri were unsuccessful in getting the court to permit additional jurisdictional discovery to develop evidence of forum activity common to all claims.⁵⁷ But other plaintiffs have successfully brought claims by plaintiffs

grasping," *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014), the California appellate courts recognized that the trial court's reasoning was no longer tenable. *Bristol-Myers Squibb Co. v. Superior Court of S.F. Cty.*, 175 Cal. Rptr. 3d 412, 423-24 (Cal. Ct. App. 2014), *rev'd*, 137 S. Ct. 1773 (2017); *Bristol-Myers Squibb*, 377 P.3d at 883-84.

51. Brief of Respondents at 17-38, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466), 2017 WL 1207530; *Bristol-Myers Squibb*, 377 P.3d at 888 (stating the claims were "based not on 'similar' conduct . . . but instead on a single, coordinated, nationwide course of conduct" directed out of BMS's New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country (alteration in original) (quoting Pet. App. 29a-30a)).

52. *Bristol-Myers Squibb*, 377 P.3d at 888.

53. *Bristol-Myers Squibb*, 137 S. Ct. at 1777-78 (stating that the California Supreme Court found specific jurisdiction without identifying any adequate link between California and the nonresidents' claims).

54. *Id.* at 1781.

55. *Id.* at 1783.

56. *Id.*

57. *Fox v. Johnson & Johnson*, 539 S.W.3d 48, 52 (Mo. Ct. App. 2017) (vacating a \$72 million jury verdict and declining to remand for additional jurisdictional discovery). In a related

from multiple states in a consolidated action based on “clinical trials” or “field tests” that were conducted in the forum state.⁵⁸

A third strategy has been to search for federal statutory language that might be read to expand the scope of personal jurisdiction for certain claims. For a time, certain provisions within the Federal Employers’ Liability Act (“FELA”) looked promising. Section 56 of FELA provides that “an action may be brought . . . in the district . . . in which the defendant shall be doing business at the time of commencing [an] action.”⁵⁹ Based on this language, plaintiffs argued that FELA claims could be brought in any federal district where a defendant was doing business, even if the particular claim arose from business activity elsewhere.⁶⁰ Moreover, the same section further declares that

case, a trial court judge in Missouri declared a mistrial in the immediate aftermath of *BMS*. Amanda Bronstad, *SCOTUS Ruling Instantly Touches Off Mistrial in Missouri Talc Case*, NAT’L L.J. (June 19, 2017, 7:15 PM), <https://www.law.com/nationallawjournal/almID/1202790568692/SCOTUS-Ruling-Instantly-Touches-Off-Mistrial-in-Missouri-Talc-Cas>.

58. The same Missouri trial judge who declared a mistrial after the *BMS* decision later upheld a \$110.5 million verdict after finding that personal jurisdiction was supported by allegations that the defendant enlisted a Missouri company to “manufacture, mislabel, and package” the product in question. Order at 7, *Slemp v. Johnson & Johnson*, No. 1422-CC09326-02 (Mo. Cir. Ct. Nov. 29, 2017); Verdict and Settlement Summary, *Slemp v. Johnson & Johnson* (Mo. Cir. Ct. May 4, 2017), (JVR No. 1705150043), 2017 WL 2131178; *see also* M.M. *ex rel.* Meyers v. GlaxoSmithKline LLC, 61 N.E.3d 1026, 1037 (Ill. Ct. App. 2016) (finding specific jurisdiction based on defendant’s contracts with doctors within the state to conduct clinical trials on the drug in question). *Meyers* was decided and the appeal to the Illinois Supreme Court was denied before the United States Supreme Court decided *BMS*, but the United States Supreme Court denied certiorari in the case after *BMS*. *GlaxoSmithKline LLC v. M.M. ex rel. Meyers*, 138 S. Ct. 64 (2017) (denying the petition for writ of certiorari); *see also In re Syngenta Mass Tort Actions*, No. 3:16-cv-00255-DRH, 2017 WL 2117728, at *4 (S.D. Ill. May 15, 2017) (finding specific jurisdiction based on “field tests” conducted in Illinois). A similar argument was used in a single plaintiff case to support jurisdiction in a state that was the home of neither party. *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034, at *3 (N.D. Cal. June 27, 2017) (“[C]linical trials conducted [in California] were part of the unbroken chain of events leading to Plaintiff’s alleged injury.”). But after finding a valid basis for the exercise of personal jurisdiction, the court granted a motion to transfer the case to the plaintiff’s home state. *Id.* at *5–6.

59. 45 U.S.C. § 56 (2012). That same section also describes other districts where the action may be maintained. *Id.* Due to Supreme Court precedent, plaintiffs’ reliance on this section to approve personal jurisdiction over defendants seemed promising. As Judge Learned Hand explained in *Kilpatrick v. Texas & Pacific Railway Co.*, 166 F.2d 788 (2d Cir. 1948), in both *Baltimore & Ohio Railroad. Co. v. Kepner*, 62 S. Ct. 6 (1941), and *Miles v. Illinois Central Railway Co.*, 62 S. Ct. 1037 (1942), the Supreme Court held that once a railroad did business in any jurisdiction, “Sec[ti]on] 6 subjected it to personal service regardless of how much inconvenience or expense was involved in trying the action far away from the scene of the accident and the residence of all the defendant’s witnesses”; accordingly, a plaintiff might select a jurisdiction which promised “the richest harvest, and the railroad must meet him on his chosen ground.” *Kilpatrick*, 166 F.2d at 790.

60. *See* Brief for Respondents at 23–24, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (No. 16-405), 2017 WL 1192088, at *23–24 (arguing that some statutes or cases using “concurrent” jurisdiction to refer only to subject-matter jurisdiction hardly establishes that “concurrent” jurisdiction is susceptible to only one meaning because a term “may mean one thing for one purpose and something different for another” (quoting *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933))).

for FELA claims the jurisdiction of the federal courts “shall be concurrent with that of the courts of the several States.”⁶¹ According to plaintiffs, that meant that any FELA claim could also be brought in any state court within a federal district where the defendant was doing business.⁶² As with the other strategies already discussed, success here was limited and short-lived. Plaintiffs succeeded in convincing the Supreme Court of Montana to adopt their reading of FELA,⁶³ but the United States Supreme Court stepped in once again to reject that effort.⁶⁴ According to the Court, the provisions relied on by the plaintiffs were directed at venue and subject matter jurisdiction, but had nothing to do with personal jurisdiction.⁶⁵ Personal jurisdiction for FELA claims therefore must be based on standard due process principles, meaning that a connection between business activities and the claim must be present unless the defendant is sued “at home.”⁶⁶

Finally, plaintiffs have argued that corporate defendants have consented to the exercise of jurisdiction through their compliance with state business registration requirements. This effort resuscitates a strategy used a century ago to resist narrow jurisdictional rules,⁶⁷ but it has met with limited success.⁶⁸

61. 45 U.S.C. § 56.

62. This was even argued in jurisdictions where the defendant conducted only a small portion of business. *See, e.g.*, Respondent’s Brief in Opposition of Petition for Writ of Prohibition or, in the Alternative, Writ of Mandamus at 67, *Missouri ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017) (No. SC95514), 2016 WL 3944143, at *67 (“Daimler did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under FELA wherever the railroad is ‘doing business.’”).

63. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 424 ¶ 19 (Mont. 2016).

64. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–60 (2017). *See generally Civil Procedure – Personal Jurisdiction – BNSF Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333 (2017) (discussing the *BNSF Railway* case). Even before the United States Supreme Court answered the question definitively, other state supreme courts rejected the effort to read FELA to confer authority to exercise personal jurisdiction. *See, e.g., Dolan*, 512 S.W.3d at 50–51 (finding that FELA provides only subject matter jurisdiction); *Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031, 1038 (Or. 2017) (explaining instead that the first sentence of section 56 provides for expanded venue “if there is jurisdiction” (quoting *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 51 (1941))).

65. *Tyrrell*, 137 S. Ct. at 1555.

66. And of course after *Bristol Myers Squibb* that connection requires more than that the activities are of the same kind that the defendant conducts within the state. *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 377 P.3d 874, 886 (2016), *rev’d*, 137 S. Ct. 1773 (2017).

67. *See, e.g., Hess v. Pawloski*, 274 U.S. 352, 356–57 (1927) (finding no substantial due process difference between requiring formal designation of local official for service of process and providing that use of highway is tantamount to such an appointment); *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) (finding consent to personal jurisdiction where an agent was appointed to accept service of process within forum state). *See generally Philip B. Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958) (discussing jurisdiction over corporations before and after *International Shoe*).

68. *See, e.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016) (“[T]he holding in *Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era. The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general ‘consent’ has

To be successful, plaintiffs must first convince the court that the applicable business registration statute was intended to trigger broad consent to jurisdiction, and then convince the court that such broad consent would be consistent with due process constraints.⁶⁹ A few courts have concluded that both of these hurdles have been cleared, thereby permitting the exercise of jurisdiction over claims unrelated to activities within the state against corporations not at home in the state.⁷⁰ But a greater number of courts that have considered the issue recently have stopped short of that conclusion.⁷¹ In

yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the [Supreme] Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.”).

69. Unlike subject matter jurisdiction, a party may consent to personal jurisdiction and thus waive protection of the Due Process Clause. *Ins. Corp. of Ire., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04 (1982) (explaining that personal jurisdiction is waivable because it “flows . . . from the Due Process Clause” and “protects an *individual* liberty interest” (emphasis added)). But there may be limits on the scope of consent that a state can extract in exchange for registration to do business. Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436–45 (2012) (considering this question); see also Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1364–68 (2015) (discussing differences among state foreign corporation registration statutes).

70. Specifically, courts in the Third and Fourth Circuits have declined to interpret *Daimler* as creating a sea change regarding personal jurisdiction by consent. *Hegna v. Smitty's Supply, Inc.*, No. 16-3613, 2017 WL 2563231, at *3–4 (E.D. Pa. June 13, 2017) (concluding that by registering to do business under § 5301, the corporation consented to general personal jurisdiction in Pennsylvania and that its consent is still valid under *Goodyear* and *Daimler*); *Kukich v. Electrolux Home Prods., Inc.*, No. ELH-16-3412, 2017 WL 345856, at *6 (D. Md. Jan. 24, 2017) (finding the foreign corporation consented to general jurisdiction in the state by registration); *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 658 (E.D. Pa. 2016) (holding that a foreign corporation registered to do business in Pennsylvania thereby consented to exercise of personal jurisdiction over it in Pennsylvania in a products liability action).

71. Since *Daimler* did not fully address the issue of jurisdiction through consent, many courts subsequently followed the foundation laid by *Brown v. Lockheed Martin Corp.* *Brown v. Lockheed Martin Corp.* 814 F.3d 619 (2d Cir. 2016) (concluding that the Connecticut business registration statute “did not require Lockheed to consent to general jurisdiction in exchange for the right to do business in the state.”). See, e.g., *Perez v. Air & Liquid Sys. Corp.*, No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153, at *9 (S.D. Ill. Dec. 2, 2016) (finding that the corporation did not consent to jurisdiction by registering to do business and appointing an agent for service of process, as required by Illinois law to do business in the state); *Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734, 748–50 (N.D. Ill. 2016) (rejecting plaintiffs’ argument that the court should exercise general personal jurisdiction because banks consented to jurisdiction by registering to do business in Illinois); *McDonald AG Inc. v. Syngenta AG (In re Syngenta AG MIR 162 Corn Litig.)*, No. 14-md-2591-JWL, 2016 WL 2866166, at *5 (D. Kan. May 17, 2016) (holding that jurisdiction-via-registration violates the Dormant Commerce Clause); *Missouri ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 51–53 (Mo. 2017) (holding that statutes governing registration of foreign corporations and service thereon do not provide an independent basis for exercising jurisdiction over foreign corporations for suits unrelated to the corporation’s activities in the state); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016) (holding that a foreign corporation’s compliance with statutory requirements for registration of a foreign corporation to do business within a state does not constitute implied consent to general jurisdiction over corporation within that state). Many courts that have considered the issue have

part this is attributable to the different language contained in the registration statutes being interpreted. That said, many courts have openly worried that expansive interpretations of registration requirements would chart an end run around the limitations imposed by *Daimler*;⁷² and for that reason have favored narrower constructions that avoid due process concerns.⁷³ Ultimately the Supreme Court will likely have to resolve the limits (if any) on a consent-based theory rooted in a state's business registration statute.⁷⁴ Given the Court's reaction to other efforts to avoid the impact of *Daimler*, there is reason to believe that the success enjoyed by plaintiffs here may not only be limited but also short-lived.⁷⁵

III. NAVIGATING THE NEW LANDSCAPE

There may yet prove to be a route that plaintiffs can forge to avoid or at least mitigate the impact of the Supreme Court's recent activity in the domain of personal jurisdiction. Until then, it appears that these decisions provide a powerful tool to defendants involved in aggregate litigation. This Article turns now to the ways that defendants are using that tool. Specifically, the discussion here explores the specific procedural mechanisms by which the newly recognized jurisdictional restrictions are being introduced into litigation in the federal and state courts. Although attention is paid to a variety of litigation trends that have emerged in recent years, the focus of this section—and indeed the remainder of the Article—will turn to one trend in particular: hybrid removal.

A. THE EXPECTED RESPONSES

If a case is filed in federal court, as a general matter the due process constraints on personal jurisdiction articulated by the *Daimler* series of cases will be applicable thanks to the command of the federal procedural rules.⁷⁶

concluded that the statutes in question were directed at ensuring the availability of service rather than expanding the scope of the state's jurisdictional authority.

72. See, e.g., *Brown*, 814 F.3d at 639 (“[W]ere we to accept *Brown*'s interpretation of Connecticut's business registration statute, we would risk unravelling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely.”); *Cepec*, 137 A.3d at 140–41 (stating that expansive interpretations could lead to “perverse result[s]”).

73. See *Brown*, 814 F.3d at 639; *Cepec*, 137 A.3d at 139 (explaining that the decision aligned with current federal rules on jurisdiction by giving the statute “a narrower and constitutionally unproblematic reading”).

74. See *Monestier*, *supra* note 69, at 1398–400; *Rhodes*, *supra* note 69, at 444 (noting that registration-based jurisdiction is “ripe for invalidation by the Supreme Court”).

75. For a more optimistic view of the potential viability of this strategy, see generally Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of “Registration” Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159 (2018).

76. FED. R. CIV. P. 4(k)(1)(A). Two exceptions to this are found in Rule 4(k). In cases involving joinder under Rule 14 or 19, service “not more than 100 miles from where the summons was issued” is sufficient to establish personal jurisdiction. FED. R. CIV. P. 4(k)(1)(B).

As a result, defendants served with a federal summons today can respond with a motion to dismiss if their only contact with the state where the federal court sits is unrelated business activity.⁷⁷ Depending on the circumstances, this motion may be targeted at the entire suit or at certain claims within it.

If the defendant is foreign and the claim arises from activities outside the United States, a full dismissal may be granted and the practical result will be to force the litigation to relocate outside of the American system.⁷⁸ If the defendant is not foreign or if the claim arose from activities that occurred elsewhere within the United States, then a full dismissal would have the effect of forcing the litigation to relocate within the American system, either where the defendant is at home or in a state where specific jurisdiction over all claims can be supported.⁷⁹ The federal court may achieve this result more efficiently by granting a transfer of the case rather than ordering a dismissal.⁸⁰

In many cases, the holding in *Daimler* threatens only a subset of the claims within a case and so a motion to dismiss will not achieve complete dismissal

For federal claims, jurisdiction can be supported based on nationwide contacts, so long as the defendant would not be subject to personal jurisdiction in any individual state and “exercising jurisdiction is consistent with the United States Constitution and laws.” FED. R. CIV. P. 4(k)(2).

77. See FED. R. CIV. P. 12(b)(2). This is true notwithstanding the fact that state long arm statutes may purport to reach the defendant. See, e.g., DEL. CODE ANN. tit. 10, § 3104(c) (West 2018) (permitting exercise of jurisdiction over defendants who cause tortious injury out of the state if the person does regular business in the state or “engages in any other persistent course of conduct”); MISS. CODE ANN. § 13-3-57 (2017) (allowing state to exercise personal jurisdiction over defendants who do “any business” in the state); NEB. REV. STAT. § 25-536(1)(d) (2016) (stating the court can exercise personal jurisdiction over defendants if they cause injury in the state by acts outside of the state if they regularly do business or “engage[] in any other persistent course of conduct” within the state); N.C. GEN. STAT. ANN. § 1-75.4 (West 2017) (authorizing exercise of personal jurisdiction over defendants whether the claim arises in the state or without the state if defendants are “engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise”); OR. R. CIV. P. 4(d) (2018) (granting exercise of personal jurisdiction over defendants whether the claim arises within the state or without the state if the defendant “is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise”); WIS. STAT. ANN. § 801.05(1) (West 2017) (granting exercise of personal jurisdiction over defendants whether the claim arises within or without the state if the defendants “engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise”).

78. *Daimler* did not lead to full dismissal because Mercedes Benz USA consented to jurisdiction. See generally *Daimler AG v. Bauman*, 571 U.S. 117 (2014). If only *Daimler* had been sued, then there would have been no American jurisdiction where the case could have been sustained. See *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1173, 1789 (2017) (Sotomayor, J., dissenting) (arguing the majority’s opinion will make it impossible for plaintiffs to bring nationwide actions against foreign corporations who are not “at home” in any state, curtailing and even eliminating their ability to hold corporations accountable).

79. See *supra* text accompanying notes 26–31.

80. See, e.g., *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034, at *5–6 (N.D. Cal. June 27, 2017) (finding personal jurisdiction based on defendant conduct in the state but transferring to the plaintiff’s home state). And of course it is well established that a federal court may transfer even if it concludes that it lacks personal jurisdiction. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466–67 (1962).

for the defendant. This was true of *Daimler* itself, thanks to the fact that one of the defendants consented to jurisdiction.⁸¹ It is also true of many aggregate litigation cases with a structure similar to *BMS*. The claims that arise from in-state activity are jurisdictionally secure, but other claims may be targeted by a motion to dismiss even if they are sufficiently related for joinder purposes and arise from activity identical to that used to support the in-state claims.⁸² Should a defendant decide to deploy the jurisdictional defense supplied by the *Daimler* line of cases, the result will be to force the plaintiff to choose between pursuing a single case in the defendant's home state or pursuing a fractured case in multiple states.

The impact of *Daimler* is more complex in cases filed in state court. At a superficial level, the state court location of the suit makes no difference, at least in cases that would fall within the scope of federal rule 4(k)(1)(A). In those cases, the procedural device used to raise a jurisdictional challenge may vary based on state practice, but the availability of a jurisdictional defense should be identical in either court system. So again, depending on the circumstances, defendants in state court today may use *Daimler* to seek dismissal either of the entire case or of some subset of claims within a case.⁸³

The complexity arises because the resolution of the personal jurisdiction issues may have implications for federal subject matter jurisdiction. It is no secret that many plaintiffs bringing tort actions prefer to litigate in state court.⁸⁴ Indeed, when structuring cases, plaintiffs often strive to secure that preferred forum by shielding the suit from removal. Sometimes this is done by foregoing federal claims that might otherwise be brought.⁸⁵ In many other cases, it is done by destroying complete diversity through the strategic

81. See *Daimler*, 571 U.S. at 134.

82. *Bristol-Myers Squibb*, 137 S. Ct. at 1785 (Sotomayor, J., dissenting).

83. *Daimler*, 134 S. Ct. 746, and *Bristol-Myers Squibb*, 137 S. Ct. 1773, are examples of partial dismissals. For an example of a complete dismissal, see *Ace Decade Holdings v. Ubs Ag*, 653316/2015, 2016 NYLJ LEXIS 4553 (N.Y. App. Div. 2016). Almost immediately after *BMS* was decided, a state court judge in St. Louis declared a mistrial in an ongoing trial involving an alleged link between talcum powder and ovarian cancer. *Mistrial Declared in Talcum Powder Suit After U.S. Supreme Court Limits Where Companies Can Be Sued*, ST. LOUIS POST-DISPATCH (June 19, 2017), https://www.stltoday.com/news/local/crime-and-courts/mistrial-declared-in-talcum-powder-suit-after-u-s-supreme/article_b68ddca2-f152-50ea-9f44-0530a5b81797.html.

84. See, e.g., Robertson & Rhodes, *supra* note 34, at 788–89 (discussing how forum shopping is based on the premise that justice may vary on the vagaries of geography unrelated to the merits of the claim at hand); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (finding that, after controlling for other variables such as case selection, removal to federal court decreased plaintiffs' odds of winning by roughly one-fifth); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 55 (2009) ("Forum selection is often the most important strategic decision a party makes in a lawsuit.").

85. See, e.g., *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1986) (noting that a plaintiff is "the master of the claim" and may choose to avoid removal by omitting federal claims from the initial complaint).

inclusion of plaintiffs who are citizens of the defendant's home state.⁸⁶ Defendants have long resisted this strategy, with limited success.⁸⁷ The new jurisdictional landscape should alter that track record. In many cases, defendants should now have the tools necessary to target the claims by non-diverse plaintiffs, and then remove the remaining claims to federal court. In other words, the Supreme Court's recent activity should be expected to have both horizontal and vertical effects. It will lead not only to relocation of suits from one state to another, but it will also lead to relocation of suits from state court to federal court.⁸⁸

To see how this may play out, consider a slight simplification of *BMS*.⁸⁹ Ten years ago, if some California users of Plavix decided to sue BMS, and had a strong preference to do so in a state court in California, then they would likely consider joining forces with some other Plavix users from either New York (where BMS's headquarters are located) or Delaware (where BMS is incorporated).⁹⁰ California's joinder rules would permit the claims to proceed together as a matter of procedure, and personal jurisdiction would be supported by BMS's substantial business activity (including sales of Plavix)

86. A recent article, which characterizes this strategic case structuring as "fraudulent aggregation," provides many recent examples. Jeff Lingwall & Chris Wray, *Fraudulent Aggregation: The Effect of Daimler and Walden on Mass Litigation*, 69 FLA. L. REV. 599, 600 & n.4 (2017). Because this destroys diversity, the action is not removable under 28 U.S.C. §1441(a). *See id.*; 28 U.S.C. § 1441(a) (2012).

87. The Class Action Fairness Act of 2005 ("CAFA"), which was designed to facilitate the relocation of some class actions to a federal forum, is an example of substantial success on a systemic level. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). But CAFA has had unintended consequences that have mitigated much of its forum effects. Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 REV. LITIG. 591, 593 (2013) ("CAFA has inspired some of the most creative lawyering in recent decades, as plaintiffs' attorneys seek to evade CAFA class and mass action provisions and to retain aggregate litigation in state court forums."). At the individual case level, defendants have been forced to resort to arguments like fraudulent joinder, which are rarely successful. *See infra* Section IV.A. This limited success in the courts has triggered efforts to forge a legislative solution, which have thus far led nowhere. *See, e.g.*, Arthur D. Hellman, *The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine*, 17 FEDERALIST SOC'Y REV. 34 (2016) (discussing fraudulent joinder and the attempt to codify the doctrine in the Fraudulent Joinder Prevention Act).

88. Lingwall & Wray, *supra* note 86, at 602.

89. This hypothetical leaves out the defendant's "last ditch contention" to contract with a forum-based company to distribute the drug nationally to create a sufficient link to support specific jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1783 (2017); *see supra* notes 55-56 and accompanying text.

90. Under 28 U.S.C. § 1332(c)(1), a corporate party is deemed "a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The "principal place of business" language has been interpreted to refer to the corporation's "nerve center," which usually coincides with the location of its headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010).

within the state of California.⁹¹ The array of parties would also prevent removal, at least if the plaintiffs limited their complaint to state law causes of action,⁹² and thus the plaintiffs could rather easily structure their complaint to achieve their objectives. Today, that effort would fail. *Daimler* and *BMS* in combination make it clear that the California court could not exercise jurisdiction over the out of state defendants, and once those parties are dismissed, the remaining parties satisfy the federal subject matter jurisdiction requirement of complete diversity. As a result, the surviving portion of the case may be heard in a federal court.⁹³

As a procedural matter, how should a defendant go about achieving this result? The most straightforward answer is that a defendant may proceed in two steps. First, the defendant should file a motion to dismiss based on lack of personal jurisdiction in the state court where the plaintiffs filed the action. When that motion is resolved, and the claims by the out of state (and non-diverse) plaintiffs are dismissed, what remains is a removable case. The second step, therefore, is to take advantage of the 30-day statutory window to file a notice of removal when changes to a case render it removable.⁹⁴ Consider again the California plaintiffs who join forces with a New Yorker to sue *BMS* in a California state court. The defendant's strategy would be to file a motion to dismiss the claim by the New York plaintiff, and after *Daimler* and *BMS* there is little doubt that such a motion would be granted. When the case is thus reduced to claims by California plaintiffs against a corporation headquartered

91. See Brief in Opposition at 11, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017) (No. 16-466), 2016 WL 7156384, at *11 (explaining that California had routinely exercised jurisdiction based on business activity within the state).

92. The presence of federal claims would raise the possibility that the case would fall within the scope of federal subject matter jurisdiction—and therefore be subject to removal—through some combination of original jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367.

93. The prospect of removal will affect how plaintiffs respond to the sub-optimal choices provided them under the new regime. Think again about the modified *BMS* case. Today, the plaintiffs will have two choices from the standpoint of personal jurisdiction: bring the claims together in the defendant's home state using a general jurisdiction theory or split the claims and rely on specific jurisdiction to bring the claims in multiple states. One way to view this choice is as a trade-off between the inconvenience of litigating on the defendant's home turf and the inefficiency of piecemeal litigation. But that misses the vertical implications of the *Daimler* line of cases. If the plaintiffs split the claims, the result will not just be inefficiency, but a shift to a federal venue for many (though not all) of the claims. That result can be avoided if the plaintiffs choose instead to accept the inconvenience of litigating in the defendant's home state. Put differently, if we observe plaintiffs traveling together post-*Daimler* to sue defendants at home, that could reflect either a desire to maximize litigation efficiency or the strength of the plaintiffs' preference for litigation in state court.

94. 28 U.S.C. § 1446(b) (3) ("Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.").

in New York and incorporated in Delaware, BMS can relocate the case to federal court with an uncomplicated notice of removal.

B. *THE UNEXPECTED RESPONSE: HYBRID REMOVAL*

Interestingly, many defendants navigating the post-*Daimler* terrain have opted not to chart the straightforward path just described. Instead, they have skipped the step of presenting a personal jurisdiction challenge to the state court in favor of filing an immediate notice of removal in federal court.⁹⁵ When the plaintiffs respond to the removal with a motion to remand, the defendants urge the federal court to dismiss certain claims based on personal jurisdiction, and then uphold the removal of the claims that remain. This approach asks the federal court to assess personal jurisdiction as part of its consideration of subject matter jurisdiction, and because it blends those two doctrines it will be referred to here as “hybrid removal.” On a superficial level, hybrid removal appears to be a more expedient manner of proceeding as it involves one step rather than two. But in fact this approach introduces greater complexity because it raises questions about the sequencing of jurisdictional decisions and about judicial federalism that are avoided by the two-step approach.

When deciding whether a case has been properly removed, the default position for federal judges is to consider the case as presented on the date of removal through the attached state court materials.⁹⁶ This default position is problematic for defendants pursuing hybrid removal in cases that have been structured to defeat the requirement of complete diversity. If no challenge to personal jurisdiction has been made in state court, the materials presented to the federal court show a case that does not meet the requirements for removal, and the ordinary result is a remand.⁹⁷ To avoid this outcome, defendants need an argument to nudge federal judges away from the default position, and they have found an attractive candidate in *Ruhrigas AG v. Marathon Oil*.⁹⁸ In *Ruhrigas*, the Supreme Court considered whether a federal court could dismiss a removed case on personal jurisdiction grounds without first establishing a basis for subject matter jurisdiction.⁹⁹ A unanimous Court answered in the affirmative, at least where the personal jurisdiction issue is “straightforward” and “present[s] no complex question of state law.”¹⁰⁰ Defendants have seized on *Ruhrigas* to argue that because the personal

95. See *infra* notes 105–09 and accompanying text.

96. 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 n.12 (4th ed. 2018); *Pullman Co. v. Jenkins*, 305 U.S. 534, 537–38 (1939) (right to remove should be “determined according to the plaintiffs’ pleading at the time of the petition for removal”).

97. See *infra* note 115 for examples of this ordinary result.

98. *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). As discussed *infra* Section IV.A, some defendants have relied on the doctrine of procedural misjoinder to achieve a similar result.

99. *Id.* at 585.

100. *Id.* at 588; see also *id.* at 578 (“[T]here is no unyielding jurisdictional hierarchy.”).

jurisdiction issues presented post-*Daimler* are indeed straightforward, federal courts need not consider the viability of removal based on the case as presented to them. Instead, the court should dismiss certain claims from the action based on personal jurisdiction before assessing whether the requirements for removal are satisfied.¹⁰¹ Thus, defendants achieve their goals—dismissal of some claims and relocation of the others to federal court—in one fell swoop.

Notwithstanding the appeal of this approach, it is not without its difficulties. Primary among them is that even if *Ruhrigas* does apply, it operates as a source of discretion rather than as a command.¹⁰² That means that defendants need to convince federal judges not only that they can consider personal jurisdiction before assessing removal, but also that they should. This initially proved challenging, even after *Daimler*.¹⁰³ As a pragmatic matter, the jurisdictional sequencing approved by *Ruhrigas* is enticing to federal judges because it promotes the expedient resolution of cases. Rather than engage in a complex analysis of whether the case must be dismissed for lack of subject matter jurisdiction, the court can reach the same result by recognizing a straightforward defect in personal jurisdiction. But the invocation of *Ruhrigas* in a hybrid removal scenario does not simplify matters in the same way. In part this is because the alternative that is being avoided is itself straightforward. If the court takes up subject matter jurisdiction first, it looks at the removal materials and sees a case that lacks complete diversity on its face. True, the court may have to consider an argument sounding in something like fraudulent joinder along the way, but even so the path to remand is fairly smooth.¹⁰⁴ So a decision to consider personal jurisdiction first does not help the court avoid complexity, particularly since the personal jurisdiction issues might require the court to consider issues of first impression. Just as important, a decision to consider personal jurisdiction first does not provide the court with an alternative path to dismissal. Quite to the contrary, defendants are pressing hybrid removals precisely because they are trying to steer the court to a different result, one that would add a complex case (or part of one) to the federal docket.

A second difficulty relates to timing. The standard approach to removal reflects the general rule that subject matter jurisdiction should be assessed at the time of filing and that subsequent changes to the structure of the suit

101. See, e.g., Reply Brief of Appellant Pfizer Inc. at 18, *Robinson v. Pfizer, Inc.*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 7228481, at *18.

102. *Ruhrigas*, 526 U.S. at 585.

103. See *supra* Section III.A.

104. See, e.g., *Dotson v. Bayer Corp.*, No. 4:16cv01593PLC, 2017 WL 35706, at *4-5 (E.D. Mo. Jan. 4, 2017) (considering and rejecting fraudulent misjoinder and fraudulent joinder before remanding). Many of the cases cited *infra* note 117 are very similar in their reasoning and result. For further discussion of the doctrines of fraudulent joinder and fraudulent misjoinder, see *infra* notes 116-39.

should have no bearing on the court's jurisdiction.¹⁰⁵ Indeed, in the context of removal, this timing requirement may be viewed as statutorily compelled.¹⁰⁶ If the relevant jurisdictional facts are fixed at the time that the notice of removal is filed, then an argument for resequencing will be futile even if successful. This timing issue has not been seriously examined by any of the courts who have entertained hybrid removal petitions, but it is not fatal to the viability of the doctrine. That is because the Supreme Court has never treated the time of filing rule as categorical and has recognized exceptions even in the context of removal.¹⁰⁷ Professors Dodson and Pucillo characterize these not as "exceptions," but as shifts in the time for judicial assessment of subject matter jurisdiction.¹⁰⁸ Jurisdictional resequencing can trigger just such a shift, one that Dodson and Pucillo refer to as "defect agnosticism."¹⁰⁹ In other words, the timing problem is easily resolved because a decision to resequence also represents a decision to alter the time at which removal is assessed.

Despite these hurdles, defendants began to pursue hybrid removal in the aftermath of the Supreme Court's decision in *Daimler*. This was no accident, but was instead the result of a concerted effort by defendants to leverage the Supreme Court's personal jurisdiction jurisprudence to manipulate venue in their favor.¹¹⁰ At first, the overwhelming reaction of federal judges faced with hybrid removals was to dispatch the cases quickly back to state court.¹¹¹ Notwithstanding these early failures, defendants continued to press hybrid removal and indeed continued doing so even after receiving clear instructions

105. See, e.g., 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3608 ("[F]iling the complaint with the district court is the critical time for purposes of determining whether the district court has subject matter jurisdiction.")

106. 28 U.S.C. § 1441(a) (2012); Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1349 (2016).

107. See, e.g., *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74–75 (1996) ("Once a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming."); Dodson & Pucillo, *supra* note 106, at 1351 ("[T]he statutory time-of-removal requirement . . . can be overridden by countervailing practical considerations.")

108. Dodson & Pucillo, *supra* note 106, at 1352.

109. *Id.* at 1356–57 ("As long as the potentially spoiling claim is dismissed on nonmerits grounds, the court can continue with a case that then has complete diversity." (footnote omitted)).

110. Richard A. Dean & Jennifer L. Mesko, *How to Remove Multi-Plaintiff Cases Involving Personal Jurisdiction Challenges and Avoid Subject Matter Remand*, 23 RX FOR THE DEFENSE, Mar. 26, 2015, at 3 ("It is well known that *Daimler* provides a powerful tool for defendants to attack claims of personal jurisdiction. But the novel combination of the *Daimler* personal-jurisdiction argument with the *Ruhrgas* approach to the 'hierarchy of jurisdiction' question provides an even more powerful removal option for multi-plaintiff cases filed in state court."); see also Sherri S. Rich, *The Yielding Jurisdictional Hierarchy: Removal Proceedings After Ruhrgas AG v. Marathon Oil Co.*, 51 FED. LAW. 34, 35–36 (2004) (describing the history and consequences of the *Ruhrgas* decision).

111. See *infra* note 115. The only exception to this early trend of remands is *Addelson v. Sanofi S.A.*, No. 4:16CV01277ERW, 2016 WL 6216124, at *5 (E.D. Mo. Oct. 25, 2016) (approving hybrid removal and issuing stay pending transfer to multidistrict litigation).

to stop.¹¹² As but one example, consider the experience of Bayer Corp. in the Eastern District of Missouri. Bayer and a number of its subsidiaries have been subject to a multitude of lawsuits surrounding the Essure birth control device.¹¹³ Some of those lawsuits have been filed in the state courts of Missouri by groups of plaintiffs, at least some of whom both shared citizenship with a defendant and asserted claims that were unrelated to any activity undertaken by Bayer within the state.¹¹⁴ At least since *Daimler* was decided, Bayer has consistently responded to these lawsuits by filing a notice of removal, invoking *Ruhrgas* in an effort to get the federal court to consider personal jurisdiction first, and arguing that dismissal of the unrelated claims creates complete diversity and therefore a valid basis for removal. The first 12 times it did so, a variety of federal judges rebuffed Bayer's efforts and instead issued quick and unreviewable remands back to state court.¹¹⁵

112. As an interesting illustration, consider *Robinson v. Pfizer, Inc.*, No. 4:16-CV-439(CEJ), 2016 WL 1721143, at *4 (E.D. Mo. Apr. 29, 2016). Sixty-four plaintiffs from twenty-nine states joined together to file a complaint against Pfizer in the Circuit Court for the City of St. Louis, Missouri. *Id.* at *1. Notwithstanding the fact that six plaintiffs shared New York citizenship with the defendant, Pfizer filed a notice of removal. *Id.* In the district court, the defendants raised the issue of hybrid removal, but the district court's opinion relied primarily instead on arguments sounding in fraudulent joinder and procedural misjoinder. *Id.* On the basis of those arguments, the district judge not only issued a remand order, but also entertained and granted a request by plaintiffs for attorneys' fees and costs under 28 U.S.C. § 1447(c). *Id.* In doing so, the district judge noted the numerous efforts by defendants to seek removal in similar cases and concluded that those efforts were no longer "objectively reasonable." *Id.* at *4. That cost order triggered something relatively uncommon in this area: appellate review. A remand by a district judge is a non-appealable order, 28 U.S.C. § 1447(d), but the order imposing costs was subject to appeal. Because the costs order should not have been imposed if the removal was objectively reasonable, the appeal in *Robinson* opened the window to present the issue of hybrid removal to the Eighth Circuit. See Brief of Appellant Pfizer at 37–39, *Robinson v. Pfizer, Inc.*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 4728015, at *37–39. In response, the plaintiffs disclaimed the costs awarded and argued that the appeal was therefore moot. Brief for Plaintiff-Appellees at 12–16, *Robinson v. Pfizer, Inc.*, 855 F.3d 893 (8th Cir. 2017) (No. 16-2524), 2016 WL 6679969, at *12–16. The Eighth Circuit accepted the mootness argument, and therefore made no statement regarding the propriety of hybrid removal. *Robinson v. Pfizer, Inc.*, 855 F.3d 893, 898 (8th Cir. 2017).

113. For a general discussion of the lawsuits filed against Bayer in connection with the Essure device, see Sheila Kaplan, *Bayer Will Stop Selling the Troubled Essure Birth Control Implants*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/health/bayer-essure-birth-control.html>.

114. See *infra* notes 168–79 and accompanying text.

115. *Hines v. Bayer Corp.*, No. 4:17-CV-01395-JAR, 2017 WL 2535709 (E.D. Mo. June 12, 2017); *Jordan v. Bayer Corp.*, No. 4:17-CV-01330-JAR, 2017 WL 1909059 (E.D. Mo. May 10, 2017); *Langston v. Bayer Corp.*, No. 4:17-CV-00888 JAR, 2017 WL 1873285 (E.D. Mo. May 9, 2017); *Whitlock v. Bayer Corp.*, No. 4:16-CV-1913-SPM, 2017 WL 564489 (E.D. Mo. Feb. 13, 2017); *Hall v. Bayer Corp.*, No. 4:16-CV-1523 (CEJ), 2017 WL 86011 (E.D. Mo. Jan. 10, 2017); *McPeters v. Bayer, Corp.*, No. 4:16-CV-1680-SPM, 2017 WL 57250 (E.D. Mo. Jan. 5, 2017); *Dotson v. Bayer Corp.*, No. 4:16cv01593PLC, 2017 WL 35706 (E.D. Mo. Jan. 4, 2017); *Jones v. Bayer Corp.*, No. 4:16CV1192 JCH, 2016 WL 7230433 (E.D. Mo. Dec. 14, 2016); *Mounce v. Bayer Corp.*, No. 4:16CV1478 RLW, 2016 WL 7235707 (E.D. Mo. Dec. 13, 2016); *Robb v. Bayer Healthcare, LLC*, No. 4:16-CV-1727-RLW, 2016 WL 7235708 (E.D. Mo. Dec. 13, 2016); *Tenny v. Bayer Healthcare, LLC*, No. 4:16-CV-1189-RLW, 2016 WL 7235705 (E.D. Mo. Dec. 13, 2016); *Dorman v. Bayer Corp.*, No. 4:16CV601 HEA, 2016 WL 7033765 (E.D. Mo. Dec. 2, 2016).

Eventually, though, Bayer's persistence paid off. On July, 14, 2017, the 13th time proved the charm and Bayer achieved precisely the result it sought.¹¹⁶ Other defendants litigating in the Eastern District of Missouri have similarly seen their luck change. Hybrid removals have now been accepted in numerous cases, by multiple judges in the district.¹¹⁷

So what changed? As previously discussed, the decision whether to engage in jurisdictional resequencing is influenced by pragmatic considerations, and those considerations have been shifting in favor of permitting hybrid removal. When the Supreme Court decided *Goodyear* and then *Daimler*, it marked a clear shift in the doctrine of general jurisdiction. Even so, as detailed in Part III, many doctrinal ambiguities remained, particularly around the potential for an expanded use of specific jurisdiction as an alternative source of adjudicatory authority. Subsequent actions by the Court—most notably the decision in *BMS*—have resolved much of that ambiguity, and federal judges therefore perceive it as much more straightforward to conclude that there is no basis for personal jurisdiction over plaintiffs bringing claims against out-of-state defendants based on out-of-state contacts. The timing of Bayer's first hybrid removal victory in the Eastern District of Missouri is therefore not coincidental. The 12 losses came before the *BMS* decision; the first victory came less than a month after.¹¹⁸

Indeed, the influence of *BMS* can be seen even more acutely in a series of five cases involving Bayer affiliates filed across the Mississippi River in the Southern District of Illinois.¹¹⁹ All five cases are essentially identical in their

116. See generally *Jordan v. Bayer Corp.*, No. 4:17-CV-865 (CEJ), 2017 WL 3006993 (E.D. Mo. July 14, 2017) (invoking *Ruhrgas*, dismissing unrelated claims based on lack of personal jurisdiction, and denying the motion to remand as to the remaining claims). For further discussion of this case, see *infra* notes 168–79 and accompanying text. Notably, Bayer's victory was delivered by a district judge who had previously rebuffed hybrid removal efforts and had even awarded costs against another repeat defendant based on a finding that the filing of a hybrid removal was not "objectively reasonable." See *supra* note 109 (discussing *Robinson v. Pfizer*).

117. *Livaudais v. Johnson & Johnson*, No. 4:17-CV-1851 SNLJ, 2017 WL 3034701 (E.D. Mo. July 18, 2017); *Ingham v. Johnson & Johnson*, No. 4:17-CV-1857 SNLJ, 2017 WL 3034696 (E.D. Mo. July 18, 2017); *Reppell v. Johnson & Johnson*, No. 4:17-CV-1858 SNLJ, 2017 WL 3034707 (E.D. Mo. July 18, 2017); *Swann v. Johnson & Johnson*, No. 4:17-CV-1845 SNLJ, 2017 WL 3034711 (E.D. Mo. July 18, 2017); *Jordan*, 2017 WL 3006993; *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, No. 4:16 CV 1942 CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017). But see *Moody v. Janssen Pharm., Inc.*, No. 4:17CV2029 HEA, 2018 WL 1397534 (E.D. Mo. Mar. 20, 2018) (declining hybrid removal and remanding to state court).

118. *Siegfried*, 2017 WL 2778107, at *2 ("Plaintiffs argue that the more straightforward issue here is subject-matter jurisdiction. This is consistent with the holdings of many cases from this district over the past few years. But recent decisions by the United States and Missouri Supreme Courts make the personal jurisdiction issue in this case much easier to decide." (footnote omitted)).

119. As explained here, each case resulted in two relevant opinions: (1) *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-cv-00442-DRH, 2017 WL 2492663 (S.D. Ill. June 9, 2017) and *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-cv-00755-DRH, 2017 WL 4224036 (S.D. Ill. Sept. 22, 2017); (2) *Bandy v. Janssen Research & Dev., LLC*, No. 17-cv-0440-DRH, 2017 WL 2492660 (S.D. Ill. June 9, 2017) and *Bandy v. Janssen Research & Dev., LLC*, No. 17-cv-00753-DRH, 2017

procedural history; *Pirtle v. Janssen Research* is illustrative.¹²⁰ The complaint was filed in Illinois state court on March 16, 2017 by an Illinois plaintiff and a New Jersey plaintiff against numerous defendants with multiple citizenships that included New Jersey but not Illinois.¹²¹ On April 28, 2017, the defendants filed a notice of removal in the Southern District of Illinois.¹²² Defendants cited *Ruhrgas* and asked the federal court to first conclude that personal jurisdiction for the New Jersey plaintiff's claim was lacking and then to uphold the removal as to the remaining claim by the Illinois plaintiff.¹²³ The court declined, and instead remanded the case back to state court on June 9, 2017 based on the lack of diversity on the face of the state court materials.¹²⁴ *BMS* was decided a few weeks later, and the defendants responded to the decision by filing a second notice of removal in federal court on July 19, 2017.¹²⁵ To justify the "re-removal," the defendants characterized the *BMS* decision as an "order" or "other paper" for purposes of 28 U.S.C. § 1446(b)(3), meaning that its issuance triggered a new 30-day removal window.¹²⁶ The district court accepted that statutory argument, invoked *Ruhrgas* to resequence jurisdictional decisions and dismiss the New Jersey claim, and denied the motion to remand as to the Illinois claim.¹²⁷

As these cases demonstrate, *BMS* is having a direct impact on the availability of hybrid removals in the federal district courts. To be clear, that result is not required. Even though it may now be simple to resolve hybrid removals by considering personal jurisdiction first, it remains equally simple (or at least nearly so) to resolve them by considering subject matter jurisdiction first. *Ruhrgas* permits federal judges to begin with personal jurisdiction when doing so would avoid a difficult subject matter jurisdiction analysis.¹²⁸ But when neither issue is difficult, judges are presented with an

WL 4224035 (S.D. Ill. Sept. 22, 2017); (3) Woodall v. Janssen Research & Dev., LLC, No. 17-0441-DRH, 2017 WL 2495410 (S.D. Ill. June 9, 2017) and Woodall v. Janssen Research & Dev., LLC, No. 3:17-cv-00752-DRH, 2017 WL 4237924 (S.D. Ill. Sept. 22, 2017); (4) Braun v. Janssen Research & Dev., LLC, No. 17-cv-0443-DRH, 2017 WL 2492662 (S.D. Ill. June 9, 2017) and Braun v. Janssen Research & Dev., LLC, No. 17-cv-00756-DRH, 2017 WL 4224034 (S.D. Ill. Sept. 22, 2017), and (5) Douthit v. Janssen Research & Dev., LLC, No. 3:17-cv-00439-DRH, 2017 WL 2492661 (S.D. Ill. June 9, 2017) and Douthit v. Janssen Research & Dev., LLC, No. 3:17-cv-00752-DRH, 2017 WL 4224031 (S.D. Ill. Sept. 22, 2017).

120. *Pirtle*, 2017 WL 2492663, at *1.

121. *Id.*

122. *Id.*

123. Plaintiffs' Memorandum in Support of Their Motion to Remand at 6–10, *Pirtle v. Janssen Research & Dev., LLC*, 2017 WL 2492663 (S.D. Ill. June 9, 2017) (No. 3:17-cv-00442-DRH), 2017 WL 6996738, at *6–10.

124. *Pirtle*, 2017 WL 2492663, at *3.

125. *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-cv-00755-DRH, 2017 WL 4224036, at *1 (S.D. Ill. Sept. 22, 2017).

126. *Id.*

127. *Id.* at *3–6.

128. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

easy path to either a full remand or hybrid removal. We might expect incentives related to caseload management to nudge federal courts toward returning cases to state court.¹²⁹ Federal courts who are instead using their *Ruhrgas* discretion are doing so at least in part because they perceive that a remand will not actually result in any workload reduction.¹³⁰ That is, if it is clear that the only impact of a remand will be to lengthen the amount of time it takes for a narrowed version of the case to make its way to federal court, then it hardly seems controversial to pursue the expedient result of achieving the same result immediately.¹³¹ Even so, as the next Part explains, further attention is warranted.

IV. ASSESSING HYBRID REMOVAL

Hybrid removal is an intentional strategy being deployed by defendants in complex cases, particularly those with multiple plaintiffs. The judicial reception to this strategy has evolved with the jurisdictional doctrine, and especially since the decision in *BMS*, the trend has moved strongly in the direction of acceptance of hybrid removal as a doctrine of expediency. This Part undertakes a critical analysis of the doctrine. It concludes that there is no categorical argument against hybrid removal and that it is a sensible and defensible procedural device in some circumstances. Indeed, it is a superior procedural device to some others that have developed in response to persistent agitation by defendants, and it should be viewed going forward as the preferred vehicle for assessing whether removals should be sanctioned despite their facial nonconformity with the diversity statute. That said, there are limits to expediency, and hybrid removal should be resisted when judicial federalism concerns are particularly acute.

A. EXPEDIENCY AND DOCTRINAL FIT

One complication with hybrid removal is that it overlaps with other doctrines that have developed over the years within the rubric of subject matter jurisdiction. The inclusion of stray plaintiffs or defendants who happen to destroy complete diversity is a time-honored practice used by

129. Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intra-suit Preclusion*, 63 FLA. L. REV. 301, 306 (2011) (“[G]iven the reasonable assumption that judges tend to act in their self-interest, judges may too heavily weigh the first factor of minimizing workload.”).

130. *See, e.g.,* Siegfried v. Boehringer Ingelheim Pharmaceuticals, No. 4:16 CV 1942 CDP, 2017 WL 2778107, at *2 (E.D. Mo. June 27, 2017) (“Remanding this case for lack of complete diversity, only to have the case removed again later once the non-Missouri plaintiffs are dismissed, would be a waste of judicial resources.”).

131. *Id.* The expediency being pursued here is not simply the result that produces the least federal effort but is instead rooted in considerations of intersystemic efficiency.

plaintiffs who would prefer to litigate in state court.¹³² Efforts by defendants to counter that practice are equally time-honored and have given rise to two related but distinct doctrines.

The first, fraudulent joinder, enjoys wide acceptance but limited applicability.¹³³ Defendants initially pressed this doctrine by pointing out the somewhat obvious nature of the litigation strategy being deployed by plaintiffs and asked federal courts to intervene and permit removal when it was clear that the intent behind the structure of the suit was to secure a state court forum.¹³⁴ No federal court has been willing to go this far; to the contrary, all have concluded that questionable intent standing alone is insufficient to trigger the availability of removal.¹³⁵ That said, defendants have been able to convince federal courts to disregard non-diverse parties and permit removal in two situations: (1) when the claim brought by or against the non-diverse party is clearly not colorable;¹³⁶ and (2) when the jurisdictional facts pled by plaintiff reflect outright fraud.¹³⁷ The burden is placed on the defendant to demonstrate the existence of one of these conditions by clear and convincing evidence,¹³⁸ and it is met only rarely.¹³⁹

The second doctrine, procedural misjoinder,¹⁴⁰ is an extension of the same theme. The basic argument is that the combination of the claims in a single action is deficient under the procedural joinder rules, notwithstanding the possibility that the claims being asserted are both colorable and devoid of

132. See John C. Henegan, *Jurisdictional Manipulation and The Federal Constitutional Right of Removal*, BUTLERSNOW (Mar. 3, 2014), <https://www.butlersnow.com/2014/03/jurisdictional-manipulation-and-the-federal-constitutional-right-of-removal>.

133. See generally WRIGHT ET AL., *supra* note 96, § 3723 (comparing fraudulent joinder to other ways of obtaining diversity of citizenship).

134. See *supra* notes 85–88 and accompanying text.

135. WRIGHT ET AL., *supra* note 96, § 3723.

136. *Mumfrey v. CVS Pharmacy, Inc.*, 719 F.3d 392, 403, 406 (5th Cir. 2013) (finding claim against non-diverse party was insufficient based on the pleadings and denying remand as a result); *Welk v. GMAC Mortg., LLC*, 720 F.3d 736, 738–39 (8th Cir. 2013) (finding the same); see also *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 575 (5th Cir. 2004) (finding no fraudulent joinder when non-colorable nature of claim applies to both non-diverse and diverse parties); WRIGHT ET AL., *supra* note 96, § 3723.

137. WRIGHT ET AL., *supra* note 96, § 3723.

138. *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1332 (11th Cir. 2011) (applying a “clear and convincing evidence” standard); WRIGHT ET AL., *supra* note 96, § 3723.

139. In part because of the difficulties meeting the high burden associated with fraudulent joinder doctrine as developed by the courts, legislative solutions that effectively lower the burden have been proposed from time to time. See Hellman, *supra* note 87, at 46.

140. There is some terminological inconsistency associated with this doctrine. Some courts have referred to it as fraudulent misjoinder to indicate its connection with the fraudulent joinder doctrine. See, e.g., *In re Prempro Products Liability Litigation*, 591 F.3d 613, 620 (8th Cir. 2010). But since the doctrine is not always based on any inquiry into motive or intent, the “fraudulent” label is misleading. I will instead refer to the doctrine here as procedural misjoinder. For a general discussion of the doctrine, see E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL’Y 569 (2006).

outright fraud.¹⁴¹ Most often, the procedural joinder issue relates to party joinder requirements that joined claims must share a transactional relationship and at least one common question of law or fact.¹⁴² If the claim brought by or against the non-diverse party is sufficiently unconnected, they may be disregarded for purposes of assessing the removal to federal court.¹⁴³ Once disregarded, a case that appears non-removable may successfully withstand a motion to remand back to state court.¹⁴⁴

Procedural misjoinder in particular shares an affinity with hybrid removal. Both are ways of asserting that non-diverse parties are insufficiently connected with the rest of the suit, and that a facially non-removable case should be permitted to remain in federal court as a result. In procedural misjoinder, the relevant lack of connection is between the non-diverse claims and the other claims. In hybrid removal, the relevant lack of connection is between the non-diverse claims and the forum state. To be sure, the overlap between these doctrines is not complete.¹⁴⁵ But in the run of cases, these are two separate doctrines being invoked for the same reason and to achieve the same result.

If procedural misjoinder is capable of addressing these cases, then what explains the rise of hybrid removal in the wake of *Daimler* and *BMS*? The answer to that lies in the uncertain status of procedural misjoinder in the federal courts. Even where the doctrine has been met with approval,¹⁴⁶ it tends to be applied quite narrowly. Many courts have demanded something more

141. *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006) (“If these requirements are not met, joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.”).

142. *See, e.g.*, FED. R. CIV. P. 20(a) (requiring joined party claims to share a transactional relationship and a common question of law or fact); E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 215–16 n.195 (2005) (“Courts usually evaluate alleged misjoinder pursuant to Federal Rule of Civil Procedure 20 or its state counterpart, which require that the joined claims arise out of the same transaction, occurrence, or series of transactions or occurrences and involve a common question of law or fact.”). It is not obvious that federal joinder rules should provide the procedural requirements when assessing procedural misjoinder. *See infra* notes 153–57.

143. For a description and illustration of the doctrine, see Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 797–98 (2006).

144. *See id.* at 800–03 (discussing cases applying procedural misjoinder).

145. For example, if the plaintiffs sued where the defendant is “at home,” then personal jurisdiction for all claims would be unproblematic, and defendants would not be able to use hybrid removal as a strategy to move some claims to federal court. But defendants might still argue that the claims brought by plaintiffs who share forum citizenship are insufficiently connected to the remaining claims as a matter of joinder.

146. The seminal procedural misjoinder case is *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds by* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *see also Crockett*, 436 F.3d at 533 (approving removal based on a finding of improper joinder). *But see In re Prempo Products Liability Litigation*, 591 F.3d 613, 622–24 (8th Cir. 2010) (finding that the alleged misjoinder was “not so egregious as to constitute fraudulent misjoinder,” and, thus, remand to the state court was warranted).

than mere inconsistency with procedural requirements and have instead looked for evidence that the misjoinder at issue is egregious.¹⁴⁷ An egregiousness requirement for procedural misjoinder encourages hybrid removal in two ways: (1) it renders the standard for dismissal based on personal jurisdiction effectively lower because there is no equivalent requirement, and (2) it facilitates an argument that personal jurisdiction should be considered first because the analysis of the misjoinder issue would be more complex. In other circuits, the doctrine of procedural misjoinder has been ignored or viewed skeptically.¹⁴⁸ For defendants in these jurisdictions, there is no clear path to raising a connection-based challenge that could preserve a removal to federal court, and hybrid removal is for that reason an attractive alternative.¹⁴⁹

Both hybrid removal and procedural misjoinder can support a defendant's goal of achieving a partial removal to federal court in a single step. But the uncertain status of both doctrines contributes to doctrinal confusion. This confusion should be resolved by permitting the doctrine of hybrid removal to displace procedural misjoinder.¹⁵⁰ The primary reason for

147. See Hines & Gensler, *supra* note 143, at 819–21 (collecting cases and criticizing the egregiousness requirement). Courts in the Eastern District of Missouri have consistently applied an egregiousness standard, which flows from the Eighth Circuit's opinion in *In re Prempro*. *In re Prempro*, 591 F.3d at 624 (fraudulent misjoinder not relevant “absent evidence that plaintiffs’ misjoinder borders on a ‘sham’” (quoting *Tapscott*, 77 F.3d at 1360)). See, e.g., *Hines v. Bayer Corp.*, No. 4:17-CV-01395-JAR, 2017 WL 2535709, at *3 (E.D. Mo. June 12, 2017) (remanding because misjoinder was not egregious); *Dickerson v. GlaxoSmithKline, LLC*, No. 4:10CV00972 AGF, 2010 WL 2757339, at *1–2 (E.D. Mo. July 12, 2010) (same).

148. For example, the Seventh Circuit has said very little about the doctrine, leaving the district judges in the Southern District of Illinois free to reject it altogether. See, e.g., *Abel v. SmithKline Beecham Corp.*, No. 13-cv-780-DRH-DGW, 2013 WL 5835404, at *2 (S.D. Ill. Oct. 30, 2013) (noting the rejection of the fraudulent misjoinder doctrine by numerous judges in the district); *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 851–52 (S.D. Ill. 2006) (characterizing fraudulent misjoinder as an “improper expansion of the scope of federal diversity jurisdiction by the federal courts”).

149. For their part, Plaintiffs have attempted to turn the judicial skepticism toward procedural misjoinder into a justification for sidestepping hybrid removal. Their argument is that if procedural misjoinder is not a viable doctrine, then the analysis of subject matter jurisdiction is just as straightforward as personal jurisdiction and jurisdictional resequencing is unnecessary. In response, some judges who have previously rejected procedural misjoinder out of hand have treated it instead as a “difficult and novel” issue that can be avoided by considering personal jurisdiction first. *Pirtle v. Janssen Research & Dev., LLC*, No. 3:17-cv-00755-DRH, 2017 WL 4224036, at *3–4 (S.D. Ill. Sept. 22, 2017) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)); see also *Livingston v. Hoffmann-La Roche Inc.*, 293 F. Supp. 3d 760, 765 (N.D. Ill. 2018) (authorizing hybrid removal after characterizing fraudulent misjoinder as an unsettled issue). Other judges have treated subject matter jurisdiction as sufficiently straightforward as to be decisive. *Hamby v. Bayer, Corp.*, No. 17-CV-17-SMY-DGW, 2017 WL 3327593, at *2–3 (S.D. Ill. Aug. 4, 2017).

150. This is based on an acknowledgement—but not necessarily an endorsement—of those developments. For better or worse, the Supreme Court is unlikely to rethink its current approach to personal jurisdiction anytime soon. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1305 (2014).

this relates to the fit between the actual argument being made by defendants and the doctrine being employed. When defendants resist the filing of a multi-plaintiff suit against them in a disfavored forum, the basis for their resistance has more to do with the location of the suit rather than its structure. Personal jurisdiction, of course, relates to location, and so it more closely tracks the concern being raised. Hybrid removal also avoids difficult questions about intent. As discussed above, courts applying procedural misjoinder have struggled to define what must be shown in order to trigger severance and partial removal.¹⁵¹ Part of the reason for this confusion is the perceived relationship between procedural misjoinder and fraudulent joinder.¹⁵² Hybrid removal carries no such doctrinal baggage and requires no attempt to discern the motivation of the litigants.

A final reason relates to choice of law. There is a complicated but underappreciated choice of law question embedded in the procedural misjoinder doctrine. When assessing whether parties have been properly joined to the suit (and therefore whether they should be considered for removal purposes), should the court apply the federal joinder rules or the joinder rules of the state where the case was filed? Courts who have applied the doctrine have not answered this question uniformly,¹⁵³ and most courts have not really addressed the issue directly.¹⁵⁴ Scholarly attention to the matter has been limited. Professors Hines and Gensler have suggested that federal courts ought to favor the application of federal joinder rules, not as a matter of a Rules Enabling Act command, but to better serve the policy goal of policing strategic behavior on the part of plaintiffs.¹⁵⁵ It is not obvious why the removal statute, which is explicitly rooted in subject matter jurisdiction, should be read to deprive plaintiffs of the availability of state procedural rules related to joinder.¹⁵⁶ The removal statute is without question designed to vindicate policy goals, some of which relate to the protection of defendants, but even so its application has traditionally been tempered by the traditional deference to a plaintiff's choice of forum, which is partially embodied in the maxim that the statute should be interpreted narrowly.¹⁵⁷ A full discussion of this issue is

151. See *supra* note 148.

152. Hines & Gensler, *supra* note 143, at 819 (tracing the undue influence of fraudulent joinder on procedural misjoinder analysis).

153. Compare *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 815–16 (S.D. Miss. 2002) (applying federal joinder rules), *abrogated by* *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 875 (S.D. Miss. 2004), with *Conk v. Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) (applying state joinder rules).

154. See Hines & Gensler, *supra* note 143, at 812 (noting that some of the foundational decisions on procedural misjoinder said little or nothing on the choice of law question).

155. *Id.* at 817–18.

156. *Id.* at 815 (“Whether the state thinks the party structure is acceptable is wholly beside the point.”).

157. See, e.g., *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007) (invoking federalism to support the proposition that “[t]he removal statute is therefore to be

beyond the scope of this Article. The relevant point is that the doctrine of hybrid removal avoids these complications. Thanks to the command of the Federal Rules of Civil Procedure, there is typically no question that a federal court must analyze personal jurisdiction using the same analysis that the state court would use.¹⁵⁸ Hybrid removal thus does not represent any expansion in the scope of removability; rather, it merely facilitates expeditious consideration of personal jurisdiction and subject matter jurisdiction in a single inquiry.

B. FEDERALISM AND RESTRAINT

Even though it has some advantages over existing doctrines, and even though it may promote judicial efficiency, hybrid removal should be not available as a procedural mechanism in every case. Instead, principles of judicial federalism should often caution in favor of restraint. This section explains the reasons why restraint is warranted, and the next section develops an account of how that restraint should operate in practice. The concerns about judicial federalism being raised here are not novel. Similar concerns led some federal appellate courts to adopt the firm rules regarding the primacy of subject matter jurisdiction that were at issue in *Ruhrgas*.¹⁵⁹ It must of course be noted that the United States Supreme Court concluded that such

strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand"); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) ("[T]he removal statute should be strictly construed and all doubts should be resolved in favor of remand."); *Brumfield v. Merck & Co.*, No. 17-CV-6526 (JFB) (ARL), 2018 WL 1955216, at *2 (E.D.N.Y. Apr. 25, 2018) ("[I]n light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." (quoting *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013))); *Partners for Payments Relief DE II, LLC v. Lopez*, No. ED-CV-18-0723 FMO (SPx), 2018 WL 1918596, at *1 (C.D. Cal. Apr. 23, 2018) ("Where Congress has acted to create a right of removal, those statutes, unless otherwise stated, are strictly construed against removal jurisdiction.").

158. There are a few slight exceptions to this general approach to personal jurisdiction in the federal courts. First, in cases involving parties joined under Rule 14 or 19, Federal Rule of Civil Procedure 4(k)(1)(B) extends the scope of personal jurisdiction one hundred miles from the federal courthouse, regardless of state borders. FED. R. CIV. P. 4(k)(1)(B). Second, the Federal Rules allow for the exercise of personal jurisdiction when authorized by a federal statute, and Congress has passed statutes permitting nationwide service of process in limited contexts. FED. R. CIV. P. 4(k)(1)(C); *see, e.g.*, 28 U.S.C. §§ 1335, 2361 (2012) (discussing service of process in interpleader cases); *id.* §§ 1369(a), 1697 (discussing service of process in cases of mass torts); Nash, *supra* note 34, at 14–15 (discussing these exceptions and others). The other current extension of personal jurisdiction in federal courts is not relevant to this discussion because it applies only to federal question cases. FED. R. CIV. P. 4(k)(2). In response to the recent changes in personal jurisdiction doctrine, however, some commentators have proposed modifications to this rule to expand the scope of federal personal jurisdiction in diversity cases. *See Borchers, supra* note 34, at 417; Nash, *supra* note 34, at 4; Simowitz, *supra* note 33, at 328–29.

159. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 214 (5th Cir. 1998) (en banc), *rev'd*, 526 U.S. 574 (1999).

inflexible rules were unwarranted.¹⁶⁰ In reaching that conclusion, however, the Court cautioned that “[a] State’s dignitary interest bears consideration when a district court exercises discretion in a case of this order.”¹⁶¹ In other words, the power to resequence jurisdictional decisions is not absolute, and should be informed not just by the interests of the federal courts, but also by the countervailing interests of the state courts.

Much of the discussion of *Ruhrgas* has revolved around how far its resequencing power extends, or about how and where to draw the line between *Ruhrgas* and the constraint imposed by the predecessor case *Steel Company v. Citizens for a Better Environment*.¹⁶² This discussion has not produced a uniform understanding, but central to the defense of some form of resequencing has been the recognition that it operates as a limitation on the exercise of federal judicial power. The federal court may be deciding “threshold” or “non-merits” issues in a manner that carries some preclusive effect,¹⁶³ but it is doing so in the service of declining adjudicative power over the merits of the claim. As a result, the power recognized by *Ruhrgas* has generally been characterized as a power to dismiss,¹⁶⁴ and the use of that power has been viewed as consistent with principles of judicial restraint and judicial federalism.¹⁶⁵

Like *Ruhrgas*, hybrid removal involves the interaction between subject matter jurisdiction and personal jurisdiction, and it is in that sense

160. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587–88 (1999).

161. *Id.* at 586.

162. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (holding that a federal court could not reach the merits of a claim without first establishing subject matter jurisdiction). For discussions of the scope and contours of *Ruhrgas*, see generally Clermont, *supra* note 129; Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After Ruhrgas*, 68 U. CHI. L. REV. 193 (2001); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099 (2013).

163. For discussions of the preclusive effects of federal decisions on threshold issues made pursuant to *Ruhrgas*, see Clermont, *supra* note 129; Edney, *supra* note 162; Trammell, *supra* note 162.

164. See, e.g., Clermont, *supra* note 129, at 309 (“[*Ruhrgas*] allows courts to avoid decision on subject-matter jurisdiction by hypothesizing its existence in order to dismiss on other threshold grounds with a binding effect.”); Trammell, *supra* note 162, at 1101 (describing the doctrine as “the ability to dismiss a case on easier grounds before taking up harder jurisdictional questions”). That framing is supported, if perhaps not required, by Justice Ginsburg’s opinion in *Ruhrgas*, which speaks most often in terms of flexibility to choose among different pre-merits paths to dismissal. *Ruhrgas*, 526 U.S. at 1570 (“It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.”). It is also consistent with the petition for certiorari, which described the issue as “[w]hether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction.” *Id.* at 1567 (quoting petition for certiorari) (alteration in original).

165. See generally Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725 (2009) (exploring jurisdictional resequencing and concluding it avoids judicial overreach); Trammell, *supra* note 162, at 1143 (“Dismissals on the basis of an allocative rule do not arrogate new powers to the federal courts.”).

unremarkable. That said, hybrid removal is remarkable in the sense that it does not culminate in the dismissal of the case before the federal court. Rather, certain claims are dismissed, but the court then asserts power to decide remaining claims on the merits. Hybrid removal thus presents a significantly different context for the application of *Ruhrgas*: resequencing to support the assertion of adjudicative power rather than mere dismissal. When a federal court assumes power to declare law¹⁶⁶ (or, in Alan Trammell's phrasing, to create conduct rules¹⁶⁷), the potential for intrusion on the dignitary interests of the states is more significant. Reliance on expediency alone is therefore insufficient; instead, special attention must be paid to ensure that hybrid removal does not encroach on the domain of the state courts.

C. STRIKING THE BALANCE

The argument thus far suggests that hybrid removal presents an appealing doctrinal fit for the concerns being pressed by defendants in many removal cases, but that restraint is warranted. This section elaborates on how that restraint might operate. Federal judges should entertain hybrid removals only when they are convinced that doing so is consistent with both pragmatism and federalism. In practice, this is most likely to be the case when the jurisdictional facts pled by the plaintiff are flatly inconsistent with the constitutional exercise of personal jurisdiction over some claims in the suit. On the other hand, when the analysis of jurisdiction would require the federal court to pierce the pleadings or grapple with issues of state law, remand is warranted.

One of the first successful hybrid removals in the Eastern District of Missouri helps to illustrate both sides of this proposed approach. In *Jordan v. Bayer Corp.*, the plaintiffs filed a complaint that contained claims by ninety-four plaintiffs against Bayer and four affiliated entities.¹⁶⁸ Only eight plaintiffs pled facts connecting their claims to the forum state of Missouri.¹⁶⁹ The remaining eighty-six plaintiffs were from an assortment of other states,¹⁷⁰ and all of the specific allegations relating to those plaintiffs occurred outside of

166. *Ruhrgas*, 526 U.S. at 1571 (“[A] court that dismisses on . . . non-merits grounds . . . makes no assumption of law-declaring power.” (first and second alterations in original) (quoting *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998))).

167. Trammell, *supra* note 162, at 1137–38.

168. *Jordan v. Bayer Corp.*, Case No. 4:17-CV-865 (CEJ), 2017 WL 3006993, at *1 (E.D. Mo. July 14, 2017). This case is one of a number of cases filed against Bayer in Missouri arising from injuries allegedly caused by the Essure medical device. See *supra* notes 113–15.

169. *Jordan*, 2017 WL 3006993, at *1. Seven plaintiffs were Missouri residents who had the Essure device implanted in Missouri and suffered injuries there; another was an Illinois resident who had the Essure device implanted in Missouri. *Id.*

170. *Id.* These other states overlapped with the corporate citizenship of the defendants, which rendered the case non-removable on its face. *Id.*

the forum state.¹⁷¹ Thus, the only forum connection for those claims was the general business activity of the defendant in the state.¹⁷² After *Daimler* and *BMS*, there can be no question that such activity is insufficient to support the constitutional exercise of personal jurisdiction, and so the plaintiff's own allegations revealed a fundamental and inescapable defect.¹⁷³ This is a paradigm case for hybrid removal, and the district court's decision to permit it was perfectly sensible.¹⁷⁴

The plaintiffs in *Jordan* filed an amended complaint, and then sought reconsideration of the hybrid removal order.¹⁷⁵ To support their reconsideration request, plaintiffs relied on new factual allegations that the defendant had targeted the forum state as "ground zero" for its development of the medical device in question. These factual allegations include details about clinical trials conducted by doctors and at hospitals within the state,¹⁷⁶ and the central role of the St. Louis area in the overall marketing of the device.¹⁷⁷ Taken together, the plaintiffs argued that these intentional connections with the state created a sufficient link to create specific jurisdiction with respect to all claims arising from the eventual use of the device.¹⁷⁸ The district court initially denied reconsideration on technical grounds—the new allegations appeared in an amended complaint that was

171. *Id.* at *4.

172. Including of course the activity of selling the device to the seven Missouri plaintiffs.

173. The strength of this conclusion was bolstered by a Missouri Supreme Court opinion, decided prior to *BMS*, that held that specific jurisdiction could not be based on allegations that the defendant engaged in the same "type" of activity that gave rise to the plaintiff's claim. *Missouri ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41, 49 (Mo. 2017). *Dolan* also decided that the Missouri business registration statute did not confer consent to jurisdiction. *Id.* at 51–52.

174. *But see* *Rios v. Bayer Corp.*, No. 17-CV-758-SMY-SCW, 2017 WL 3600374 (S.D. Ill. Aug. 22, 2017) (denying hybrid removal and remanding in a similar case); *Hamby v. Bayer, Corp.*, No. 17-CV-17-SMY-DGW, 2017 WL 3327593 (S.D. Ill. Aug. 4, 2017) (standing for the same proposition).

175. For procedural history of the case, see *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700, at *1–2 (E.D. Mo. Feb. 13, 2018) (denying motion to remand based on amended complaint); *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 339305, at *1 (E.D. Mo. Jan. 8, 2018) (denying reconsideration and granting leave to file amended complaint). In between the filing of the original complaint and the consideration of the amended complaint, the case was also transferred to a new judge due to the retirement of the judge who entered the original hybrid removal order. Assignment of Cases, *Jordan*, 2018 WL 339305; Press Release, U.S. Dist. Court for the E. Dist. of Mo., Retirement of United States District Judge Carol E. Jackson (Aug. 15, 2017) (on file with author).

176. Amended Petition for Damages ¶ 170 C–H, *Jordan v. Bayer Corp.*, No. 4:17-CV-00865-CEJ, 2017 WL 5563904 (E.D. Mo. July 13, 2017) (detailing clinical trials).

177. *Id.* ¶ 170 I–J (detailing marketing plan).

178. *Id.* ¶ 169 ("There is 'specific' personal jurisdiction, because Defendants used St. Louis, Missouri, to develop, create a marketing strategy for, label, or work on the regulatory approval, for Essure,(r) [sic] and all of the Plaintiffs' claims arise out of or relate to the Defendants' contacts with Missouri.").

filed without leave—but the plaintiffs were permitted to file the amended complaint and pursue remand.¹⁷⁹

Even after *BMS*, the amended complaint in *Jordan* presents a more uncertain jurisdictional case than the original complaint. The new facts pled were explicitly designed to respond to *BMS*, which noted that the defendants did not develop the drug at issue in California or create a marketing strategy there.¹⁸⁰ According to the plaintiffs, those concerns provide a “blueprint” for how to properly establish specific jurisdiction in these types of cases.¹⁸¹ One way of resolving this uncertainty is to conclude that this understanding of *BMS* is misguided and that these sorts of allegations are legally insufficient. This resolution requires more than simply applying the core holding of *BMS*. Instead, it requires a decision about how far that core holding extends, and courts facing similar decisions have produced results that are far from uniform.¹⁸² Even so, the question at issue rests entirely on federal law and can be decided on the face of the complaint. Permitting a hybrid removal on this basis does not present any serious intrusion upon the domain of the state courts.¹⁸³ Alternatively, the source of uncertainty may derive not just from legal ambiguity as to what sort of connection is necessary to support jurisdiction, but also from factual ambiguity about the actual connection that existed between the defendant and the forum state. If the jurisdictional inquiry is contested and factually-bound, the federal court should hesitate to wade too far into the consideration of a hybrid removal request. To do so is to take on a complex inquiry unnecessarily, one that might easily bleed into a consideration of issues that run to the merits.¹⁸⁴ Meanwhile, the analysis of subject matter jurisdiction remains straightforward, and indeed is even more so if procedural misjoinder arguments are no longer considered.¹⁸⁵ In this situation, then, remand is the expedient outcome. It is also an outcome that respects the domain of state courts while preserving the availability of a federal forum should the facts ultimately show an insufficient connection to sustain jurisdiction.

179. *Jordan*, 2018 WL 339305, at *2.

180. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1778 (2017).

181. *Jordan v. Bayer Corp.*, No. 4:17-cv-00865-AGF, 2018 WL 837700, at *4 (E.D. Mo. Feb. 13, 2018).

182. See *supra* notes 50–51.

183. On February 13, 2018, the district judge in *Jordan* found that the new allegations in the amended complaint remain “too attenuated to serve as a basis for specific personal jurisdiction over Bayer.” *Jordan*, 2018 WL 837700, at *4. On that basis, the non-Missouri plaintiffs were dismissed from the suit, and the removal as to the remaining parties was then upheld based on complete diversity. *Id.*; see also *Dyson v. Bayer Corp.*, No. 4:17CV2584 SNLJ, 2018 WL 534375, at *4–5 (E.D. Mo. Jan. 24, 2018) (reaching a similar result).

184. For a discussion of how the resolution of personal jurisdictional issues may inevitably affect the merits of the underlying claims, see generally Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301 (2012).

185. See *supra* text accompanying notes 140–45.

The approach suggested by these two cases mirrors the development of fraudulent joinder doctrine in the federal courts. Despite requests to peek through the pleadings and assess the underlying motivations behind a particular case structure, the federal courts have generally confined their analysis to the face of the pleadings and have dismissed claims (and thereby disregarded non-diverse parties) only when the allegations as pled reveal no possibility of relief.¹⁸⁶ Similarly, when a hybrid removal is presented, federal courts should dismiss claims (and thereby disregard non-diverse parties) only when the allegations as pled reveal no possibility of proper jurisdiction. Such an approach has the benefit of creating a symmetry between the two doctrines, but more importantly it strikes a fair balance between considerations of expediency and federalism.

As discussed in Part III, plaintiffs developed several nascent strategies to combat the impact of *Goodyear* and *Daimler* and protect their preferred forum and case structure. Today, there are two primary survivors: pleading jurisdictional facts that link the development of the product in question to the state, and using a state's business registration statute as grounds for consent to jurisdiction.¹⁸⁷ Both of these push against the broad use of hybrid removal. In terms of the first, plaintiffs are searching for in-state activity by the defendant that can be used to provide a jurisdictional hook for claims brought by out-of-state plaintiffs.¹⁸⁸ After *Daimler*, of course, general sales of products in the state are insufficient; instead, plaintiffs must articulate an argument that the claims asserted "arise out of" the identified activities.¹⁸⁹ The amended complaint in *Jordan* reflects this trend in the pleading of complex cases,¹⁹⁰ and complaints following this trend are not good candidates for hybrid removal, at least insofar as they require development of jurisdictional facts. The same can be said for complaints pursuing registration-based consent as a jurisdictional strategy. Plaintiffs pursuing a consent strategy must rely on the state's business registration statute, and the jurisdictional question will therefore often involve a consequential interpretation of state law.¹⁹¹ Initially, at least, federal courts should permit state court judges to make those interpretations, and remand provides an excellent vehicle for that kind of intersystemic judicial deference.¹⁹²

186. See *supra* notes 116–17 and accompanying text.

187. See *supra* Part IV.

188. See *supra* text accompanying notes 58–61.

189. See *supra* notes 44–54 and accompanying text (discussing *BMS*).

190. See *supra* notes 168–79 and accompanying text.

191. See *supra* notes 67–74 and accompanying text.

192. I say "initially" here because once the statute has been given a definitive interpretation by the state, the need for deference may diminish. See, e.g., *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145–47 (Del. 2016) (concluding that a state business registration does not establish consent to jurisdiction); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 52 (Mo. 2017) (same). Similarly, if a federal court were to conclude that business registration statutes cannot be

D. DISTRUST

If plaintiffs adapt to the new jurisdictional reality and begin pleading in accordance with the strategies just discussed, remands should become more frequent, leaving plaintiffs and defendants to determine the structure of the suit—and ultimately its location—by litigating jurisdictional facts in state court. Formally, this is a neutral result that merely affects the sequencing and location of jurisdictional decisions. Time will tell if this is a result that defendants embrace. To the extent they do not embrace this result, it may reflect a troubling source of the jurisdictional gamesmanship underlying these cases: defendants are interested not just in where they will litigate the ultimate merits of the claims lodged against them, but also in where they will litigate the jurisdictional issues associated with those claims. This is true despite the fact that the jurisdictional standards to be applied are generally insensitive to location.¹⁹³ Put differently, defendants' concern with location may not simply be about the standards that apply, but also about who will apply them.

Although defendants may frame their requests for hybrid removal in terms of expediency, the real underlying motivation is often a judgment that federal courts are more likely to be receptive to their personal jurisdiction arguments. This may be attributable to a general sense that state judges are more inclined to favor the exercise of adjudicative authority relative to federal courts. Empirical data on this question is sparse but lends some modest support for the proposition that federal judges may be more likely to enter personal jurisdiction dismissals.¹⁹⁴ A related explanation is a more specific concern that state judges may be resistant to enter personal jurisdiction dismissals in these types of cases. The federal districts that have seen a pattern of hybrid removals tend to overlap with state court jurisdictions considered by defendants as “judicial hellholes.”¹⁹⁵ That is potentially relevant for two reasons. First, the reputations earned by these districts are presumably attributable to the behavior of both juries and judges, and so the particular judges involved may be perceived to be systematically pro-plaintiff. More controversially, the fact that these jurisdictions have positioned themselves as hospitable forums for the litigation of nationwide products liability cases has created substantial legal business. Many lawyers—and many judges—are supported by the steady filing of cases, and the restriction of the scope of personal jurisdiction therefore constitutes a significant threat to the status

interpreted consistent with federal due process to extract broad consent to jurisdiction, then the question becomes one of federal law and hybrid removal again becomes appropriate.

193. See *supra* note 82–83 and accompanying text.

194. Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 51–53 (1998).

195. 2017/2018 Executive Summary, JUDICIAL HELLHOLES, <http://www.judicialhellholes.org/2017-2018/executive-summary> (last visited Sept. 26, 2018) (identifying St. Louis, Missouri and Madison County, Illinois as “judicial hellholes”).

quo. To the extent that the judges themselves are motivated to preserve that status quo, they may seek to undermine that threat through narrow interpretation or outright defiance. In short, what underlies much of the hybrid removal activity that has been observed recently may be a lack of trust in the willingness of state court judges to fully implement the Supreme Court's recent personal jurisdiction decisions.

Distrust is a provocative hypothesis to explain the rise of hybrid removals, but it is also a vexing one. To begin, it is difficult to prove. Lawyers involved in these cases may speak casually about their motivations and strategies but are not eager to do so formally. There are hints—prior to *BMS*, why would Bayer continue to file hybrid removals given their paltry record of success?—but little that rises beyond conjecture. Moreover, even if proof for the hypothesis existed, it is not clear that it should have any implications for the doctrinal analysis explored here. To be sure, the provision of removal jurisdiction may be viewed as a way to make federal courts available based on concerns about the ability of state courts to provide a neutral forum for the adjudication of particular disputes.¹⁹⁶ Even so, removal jurisdiction has traditionally been viewed narrowly,¹⁹⁷ and is responsive to systemic concerns rather than individualized suspicions. For that reason, distrust as an underlying motivation may be worth investigating further, but it should play no role in the case-by-case determination of whether a hybrid removal should be granted.

V. CONCLUSION

The jurisdictional landscape has shifted in recent years, and litigation strategy is shifting in response. Defendants now have additional tools that can be leveraged to frustrate the plaintiff's choice of forum and preferred party structure. This Article has described those tools and has particularly focused on a specific way that those tools are being deployed. Hybrid removal is a direct if unintended consequence of our ongoing jurisdictional revolution. In limited circumstances, it may have a useful role in promoting intersystemic expediency, but its use must be tempered by considerations of judicial federalism.

196. Hines & Gensler, *supra* note 143, at 817 (“The historical reason for removal of diversity suits is to afford out-of-state defendants the refuge of a supposedly less biased federal forum.”).

197. See *supra* note 157 and accompanying text.