

# “DEFENDANT VETO” OR “TOTALITY OF THE CIRCUMSTANCES”? IT’S TIME FOR THE SUPREME COURT TO STRAIGHTEN OUT THE PERSONAL JURISDICTION STANDARD ONCE AGAIN

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## I. INTRODUCTION

Commentators frequently claim that there is no single, coherent doctrine of extra-territorial personal jurisdiction,<sup>1</sup> and unfortunately, they are correct. *International Shoe Co. v. Washington*,<sup>2</sup> commonly (but inaccurately) thought of as the wellspring of the modern form of the doctrine, announced a relatively straightforward, two-factor, four-permutation test that worked well for resolving most cases.<sup>3</sup> In the nearly sixty-year period following *International Shoe*, however, as the Supreme Court expanded and refined the standard, what was once straightforward and uncomplicated became convoluted and arcane. Two general, and generally incompatible, versions of the doctrine competed for dominance. The first, what might best be described as a “totality-of-the-circumstances”<sup>4</sup> view, is essentially a balancing test which weighs the convenience interests of litigants against the sovereignty interests of State and Federal Governments to situate litigation wherever those collective interests are reasonably accommodated. The second, perhaps

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1. See Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 179 n.34 (2001).

2. 326 U.S. 310 (1945).

3. *Id.* at 316-19.

4. The expression comes from Justice Scalia’s opinion for the Court in *Burnham v. Superior Court*, 495 U.S. 604, 604-26 (1990) (plurality opinion) (“Justice Brennan’s approach does not establish a rule of law at all, but only a ‘totality of the circumstances’ test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum’s competence.”). For an example of lower court usage, see *Mulcahy v. Cheetah Learning LLC*, Civ. File No. CIV.02-791 (PAM/RLE), 2002 U.S. Dist. LEXIS 17516, at \*6-7 (D. Minn. Sept. 4, 2002) (“In determining whether a defendant’s contacts are sufficient for an exercise of personal jurisdiction, a court must consider all of those contacts with the forum in the aggregate and examine the totality of the circumstances.”).

best described as a “defendant-veto”<sup>5</sup> view, is a kind of “single-factor” test that permits defendants to escape the extra-territorial reach of a state’s personal jurisdictional power by avoiding certain kinds of purposeful contacts with the state. There is some overlap between these two versions of the doctrine, of course, but also a considerable area of difference, and the two views dictate opposite conclusions when the forum a defendant has studiously tried to avoid is a (or even “the most”) convenient forum.

In the decade or so following *International Shoe*, the competition between the two views remained in relative equilibrium, with neither view gaining a clear upper hand. At the end of that period, in the bookend cases of *Hanson v. Denckla*<sup>6</sup> and *McGee v. International Life Insurance Co.*,<sup>7</sup> the Supreme Court reached opposite results, relying on the defendant-veto view in *Hanson* and the totality-of-the-circumstances view in *McGee*, when the reverse seemed to make more sense.<sup>8</sup> It was as if, after ten years of thinking about it, the Court was no clearer on what form the doctrine should take than it was when it started. The doctrine then sat nearly dormant for about twenty years, during which time the Court made few systematic attempts to restate or reformulate it. It was not until the early 1980s, in a spate of now well-known cases (*Kulko v. Superior Court*,<sup>9</sup> *Worldwide Volkswagen Corp. v. Woodson*,<sup>10</sup> *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,<sup>11</sup> *Helicopteros Nacionales de Colombia, S. A. v. Hall*,<sup>12</sup> *Keeton v. Hustler Magazine, Inc.*,<sup>13</sup> *Calder v. Jones*,<sup>14</sup> *Burger King Corp. v. Rudzewicz*,<sup>15</sup> and *Asahi Metal Industry Co. v. Superior Court*,<sup>16</sup> among others), that the Court got back into the field, mostly to reinforce the defendant-veto view which had been losing ground in the lower federal and state courts. In this

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5. The expression comes from Justice Brennan’s dissent in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 312 (1980) (Brennan, J., dissenting) (“I would also, however, strip the defendant of an unjustified veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances were slow and unpredictable and when notions of state sovereignty were impractical and exaggerated.”).

6. 357 U.S. 235 (1958).

7. 355 U.S. 220 (1957).

8. *Hanson*, 357 U.S. at 251; *McGee*, 355 U.S. at 222.

9. 436 U.S. 84 (1978).

10. 444 U.S. 286 (1980).

11. 456 U.S. 694 (1982).

12. 466 U.S. 408 (1984).

13. 465 U.S. 770 (1984).

14. 465 U.S. 783 (1984).

15. 471 U.S. 462 (1985).

16. 480 U.S. 102 (1987).

important series of cases the Court added considerable sophistication to the doctrine, but introduced a number of confusing elements as well. The confusion was caused principally by the Court's unfortunate propensity to use key concepts to mean more than one thing, to change doctrinal terminology without indicating that it was doing so, to use more than one term to express the same idea, to fail to ground the doctrine adequately in the Constitution (causing many to question its legitimacy), and to mix and match substantive law and jurisdictional concerns in developing doctrinal principles, all the while professing that it was not doing any of these.

Lower federal and state courts were confused by all of this, of course, and began to add confusions of their own, relying sometimes on one part of the Supreme Court's thinking and at other times on other parts. Many courts, for example, all but eliminated the category of general jurisdiction,<sup>17</sup> at least as originally understood and articulated in *International Shoe*,<sup>18</sup> by making its requirements either identical to, or less demanding than, those required for what was intended to be the easier-to-satisfy category of specific jurisdiction.<sup>19</sup> Courts also ignored the distinction between contacts and fairness considerations in the specific jurisdiction standard, and began to treat both types of factors as free-standing jurisdictional tests in their own right. While other courts defined the nexus requirement of specific jurisdiction to include almost any kind of relationship between the defendant's forum contacts and the plaintiff's claim, all but eliminating the defendant's veto right in many instances. These and equivalent doctrinal frolics-and-detours have caused serious problems for litigants, lawyers, and judges, of course, who want to know where suits may be brought and where they will have to defend. The problem is especially serious in periods when the Supreme Court is not taking personal jurisdiction cases, since there is little prospect of reversing erroneous lower court decisions. The lack of a clear standard also exacerbates the pressure on litigants to forum-shop, and forum-shopping, in turn, reinforces the familiar "rule-of-law" criticism of the American judicial system, that its decisions frequently lack legitimacy because they are based more on home court prejudice than on substantive entitlement.

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17. See, e.g., *Helicopteros*, 466 U.S. at 414 n.9 (defining general jurisdiction).

18. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). The Court described the doctrine of general jurisdiction more fully in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-47 (1952).

19. *Helicopteros*, 466 U.S. at 414 n.8 (defining specific jurisdiction). The terms "general" and "specific" jurisdiction were academic rather than judicial inventions, see generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1966), but have since been adopted by the Supreme Court, e.g., *Helicopteros*, 466 U.S. at 414 nn.8-9.

It may be that the Supreme Court is about to get back into the personal jurisdiction business, however, in part to clear up the difficulties described above, and in part to resolve new kinds of problems raised by cases in which the defendant's forum contacts are made over the Internet. The roughly twenty year dormancy period in which the Court, historically, has not taken personal jurisdiction cases is coming to an end, for one thing, and many of the Internet-contacts cases that have now begun to proliferate present interesting questions not easily resolved by existing doctrinal formulations. Early Internet (mostly commercial dealing) cases were not all that different from the telephone contacts and stream-of-commerce pollution contacts cases that were commonplace in the *International Shoe* era,<sup>20</sup> but the newest set of cases, principally those involving libel and intellectual property claims, present questions not easily answered by *International Shoe*-based formulations of the standard, and they have produced a wide variety of not always consistent or satisfactory responses in the lower federal and state courts.<sup>21</sup> In this Article, I hope to sort out some of these confusions, and offer suggestions for how the Court, using the Internet cases, might get the personal jurisdictional doctrine back on track.

## II. THE CORE CONSTITUTIONAL STANDARD: *INTERNATIONAL SHOE* TO *WOODSON* TO *BURGER KING*

### A) *The Beginning*: International Shoe

While *Pennoyer v. Neff*<sup>22</sup> still does some things better,<sup>23</sup> the Supreme Court's decision in *International Shoe* is generally regarded as the origin of the modern personal jurisdiction doctrine, and its well-known *capias ad respondendum* language self-consciously seems to say as much.<sup>24</sup>

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20. See, e.g., *Nat'l Egg Co. v. Bank Leumi le-Israel N.M.*, 504 F. Supp. 305, 309 (N.D. Ga. 1980) (finding personal jurisdiction over defendant whose only significant contact with the forum state was a single telephone call).

21. The doctrine of "general jurisdiction" is as confused as a doctrine can be and still be said to be a doctrine. See discussion *infra* notes 296-347, 474-79 and accompanying text.

22. 95 U.S. 714 (1877).

23. For example, *Pennoyer* does a better job than *International Shoe* of justifying the consideration of state sovereignty interests in the personal jurisdiction calculation, because it is grounded not only in the Due Process Clause of the Constitution, but also on principles of international (or what the Court called "public") law. *Id.* at 722-23. The Due Process Clause protects only the interests of persons, but public (or international) law protects sovereignty interests as well. *Id.* at 722-23, 732-33.

24. *Int'l Shoe*, 326 U.S. at 316. The language reads now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the

Perhaps because it saw itself as starting over from the beginning and thus able to write on a clean slate, the Court in *International Shoe* took the doctrine down to bedrock. It suggested (and later would say directly), that the Due Process Clause of the Fourteenth Amendment to the Constitution is the sole limitation on a state's power to subject an out-of-state defendant to the personal jurisdiction of its courts.<sup>25</sup> Due Process, the Court explained, requires that a defendant "not present within the territory of the forum . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>26</sup> The demands of fair play and substantial justice are met when a defendant's contacts are such that it is "reasonable, in the context of our federal system of government," to require the defendant to defend in that forum.<sup>27</sup> "An 'estimate of the inconveniences'" to the defendant "is relevant in this connection."<sup>28</sup> This is the famous "minimum contacts" standard.<sup>29</sup>

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maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.*

25. *Ins. Corp. of Ir. v. Compagnie des Bauxite de Guinee*, 456 U.S. at 694, 703 n.10 (1982) ("[The Due Process] Clause is the only source of the personal jurisdiction requirement . . ."). This will create difficulties later on when the Court is called upon to justify the consideration of sovereignty concerns in its jurisdictional analysis, since the Due Process Clause protects only the interests of persons and not those of states. See *infra* notes 223-29 and accompanying text.

26. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The "minimum contacts" standard has both a notice and a power dimension. A defendant cannot be subjected to jurisdiction in a forum without reasonable notice that the action has been brought, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950), and sufficient contacts with the forum to make it reasonable for the forum to assert power over the defendant, *Int'l Shoe*, 326 U.S. at 316. *International Shoe*, along with most of the other jurisdictional decisions in the history of the Court, is concerned principally with the power dimension of the doctrine, and I will limit discussion in this Article to that aspect as well.

27. *Int'l Shoe*, 326 U.S. at 317.

28. *Id.* (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930)).

29. Another way to think of the relationships among the various concepts and terms is this: due process equals fair play and substantial justice; fair play and substantial justice equals reasonableness; reasonableness equals minimum contacts; and minimum contacts equals everything that is to follow (in effect, defendant purposeful contacts weighed against federal and state sovereignty interests). Each of the terms is a synonym for each of the other terms at a different level of abstraction.

At this level of abstraction, the concept of “minimum contacts”<sup>30</sup> is hard to use, so the Court translated this synonym for constitutionally sufficient contacts into more operational language, in the form of a two-factor (contacts and nexus), four-permutation test. A defendant’s contacts with a state are sufficient to support jurisdiction when they are either (1) “continuous and systematic” and “give rise to the liabilities sued on,”<sup>31</sup> or (2) “so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those [contacts].”<sup>32</sup> On the other hand, (3) “single or occasional acts” (as well as those that are continuous and systematic but not substantial) that are unconnected to the plaintiff’s cause of action are not sufficient to confer jurisdiction,<sup>33</sup> unless (4) the “nature and quality and the circumstances of their commission” make it fair to render an out-of-state defendant amenable to suit.<sup>34</sup> The first and fourth of these categories came to be called the doctrine of specific jurisdiction, and the second the doctrine of general jurisdiction, in the now generally accepted terminology of von Mehren and Trautman.<sup>35</sup> The third category remains one in which jurisdiction does not exist.<sup>36</sup>

*International Shoe’s* four-part schemata handled most jurisdictional problems pretty well, and if the Court had continued to work with it, tweaking and refining it when necessary, perhaps the history of the personal jurisdiction doctrine would have been different; but this did not happen. Some of the Court’s language needed immediate elaboration, of course. For example, it was not clear what it meant for a defendant’s connections with a forum to “give rise to” a plaintiff’s cause of action (the issue was complicated further when the Court, in the next breath, seemed to use the less restrictive expression “connected with” as a

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30. While it is the principal standard by which long-arm jurisdiction is judged, “minimum contacts” is not the only personal jurisdiction standard. There also are so-called single-factor tests that support jurisdiction in certain instances and excuse a plaintiff from having to show that a defendant has “minimum contacts” with a state. Service of process within a state (so-called transient or tag jurisdiction) is one, see *Burnham v. Superior Court*, 495 U.S. 604, 612-16 (1990) (plurality opinion), and domicile is another, see *Meyer*, 311 U.S. at 463. Certain kinds of “status” determinations (e.g., custody, divorce, guardianship) also can be adjudicated by states responsible for creating the status in the first instance, even if the parties no longer have any contacts with the state. See *Shaffer v. Heitner*, 433 U.S. 186, 201 (1977). I will limit discussion in this Article to “minimum contacts” types of jurisdictional problems, and will not take up questions involving such single-factor tests.

31. *Int’l Shoe*, 326 U.S. at 317.

32. *Id.* at 318.

33. *Id.*

34. *Id.*

35. See von Mehren & Trautman, *supra* note 19, at 1136, 1143-45, 1147.

36. *Int’l Shoe*, 326 U.S. at 318.

synonym for "give rise to").<sup>37</sup> Did this "nexus" requirement, as it came to be called, envision a "but for" or "proximate cause" relationship between a defendant's activities in the forum and the plaintiff's claim?<sup>38</sup> Did there have to be an overlap, in other words, between the facts needed to prove the defendant's contacts and the facts needed to prove the plaintiff's claim, or was it enough that the two sets of facts dealt with the same general subject matter? In addition, the Court needed to explain in greater detail the difference between "continuous and systematic" contacts, which were enough to establish specific jurisdiction, and "substantial" contacts which were needed to establish general jurisdiction. Were substantial contacts just more numerous than continuous and systematic ones, or were they of a different kind altogether? The confusion over the differences between these two concepts would grow exponentially over the years, and prove to be one of the most intractable problems with the doctrine.<sup>39</sup>

It also was not clear what the Court meant by its "nature and quality and . . . circumstances"<sup>40</sup> qualification on the category of single and isolated contacts giving rise to the claim. Was this where the "estimate of inconveniences" to the defendant made its way into the analysis, or was it about something else altogether? And finally, where in this four-part

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37. *Id.* at 317. See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 425-28 (1984) (Brennan, J., dissenting), for an illustration of the problems this alternative phrasing created. Professor Brilmayer's discussion of what it means to give rise to a claim is still the best one available. See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 736-41 (1988) [hereinafter Brilmayer, *A General Look*]; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-88 [hereinafter Brilmayer, *How Contacts Count*]. For more confused discussions, see Sarah R. Cebik, "A Riddle Wrapped in a Mystery Inside an Enigma": *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 6-7, 19-21, 27-28 (1998), and Twitchell, *supra* note 1.

38. See *Yates v. Motivation Indus. Equip. Ltd.*, 38 Fed. Appx. 174, 178 n.6 (4th Cir. 2002) (describing the different nexus tests employed by different circuits); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1085 (C.D. Cal. 2003) (describing how the Ninth Circuit's "but for" test for nexus is broader than those adopted by other circuits, and how the test "must have some degree of proximate causation to be considered for purposes of jurisdiction"); *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203, 207 (D.P.R. 2002) (describing nexus requirement in terms of proximate cause); *Pearl Invs., LLC v. Standard I/O, Inc.*, 224 F. Supp. 2d 277, 282-83 (D. Me. 2002) (discussing the distinction in terms of "cause in fact" and "legal cause"); *EMI Music Mexico, S.A. de C.V. v. Rodriguez*, 97 S.W.3d 847, 859 (Tex. App. 2003) ("[S]ome courts require that conduct within the state must be a proximate cause for the plaintiff's injury, while others hold it sufficient if the conduct within the state is a 'but for' cause of the plaintiff's injury." (citing *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998))).

39. B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1111 (1990).

40. *Int'l Shoe*, 326 U.S. at 318.

schemata did the concerns of “our federal system of government,” the sovereignty interests of the Federal and State Governments caught up in jurisdictional debates, get factored into the equation, and more interestingly, what justified taking such interests into account in the first place? Were they protected by the Due Process Clause, just as a defendant’s liberty and property interests were, notwithstanding that the Due Process Clause refers only to the rights of persons and not states, or did some other source of law justify their consideration?

It was not only what the Court in *International Shoe* left unsaid, but what it said explicitly as well, that created confusion for lower court judges and lawyers. For example, the assertion that the adequacy of a defendant’s contacts to support jurisdiction “cannot be simply [a] mechanical or quantitative” matter, one of just “a little more or a little less,”<sup>41</sup> suggested that some sort of qualitative judgment was involved in personal jurisdiction analysis, but what form that judgment should take was left up in the air. Equally murky was the Court’s indication that the “extent [to which a defendant] exercises the privilege of conducting activities within a state” is relevant to determining amenability to suit.<sup>42</sup> This seemed to make the defendant’s state of mind a factor in the jurisdictional calculus, but the exact nature of this “purposefulness” requirement, as it has come to be known, was left undefined. Are defendants responsible for all reasonably foreseeable consequences of actions they set in motion, or just consequences they willfully intend and personally direct? This decision (in effect) to exclude random, fortuitous, and inadvertent defendant forum contacts from jurisdictional analysis, as well as contacts produced by the actions of third parties not acting as agents for the defendant, has turned out to be one of the most important features of the “minimum contacts” test, and yet in *International Shoe* there was little if any indication that this would be so. While the Court would struggle with these and other such questions for the next half-century, in a sense none of the questions have been resolved fully, and the absence of adequate answers is one of the principal reasons for the doctrine’s present difficulties.

*B) The Specific Jurisdiction Bookends: McGee and Hanson*

After *International Shoe*, except for *Perkins v. Benguet Consolidated Mining Co.*<sup>43</sup> (still the Court’s only major foray into the realm of general jurisdiction),<sup>44</sup> the Court effectively left the “minimum contacts”

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41. *Id.* at 319.

42. *Id.*

43. 342 U.S. 437 (1952).

44. See discussion *infra* Part II.C.

standard alone for over a decade.<sup>45</sup> It was not until its 1957-1958 Term, in *McGee* and *Hanson*, bookend cases that still define the outer limits of specific jurisdiction, that the Court began to develop the standard. For the most part, *McGee* and *Hanson* are "purposefulness" cases, *Hanson* intentionally so and *McGee* by ratification, but they speak to many other issues as well. In *McGee* the Court upheld a California state court's assertion of extra-territorial jurisdiction over a Texas insurer based on the company's action in sending a reinsurance certificate to McGee, a California policy holder.<sup>46</sup> Apart from the reinsurance certificate, which the company sent after it had "assumed [the] insurance obligations" of an Arizona insurer with whom McGee had a policy, the company conducted no business in California.<sup>47</sup> Finding jurisdiction, the Court (through Justice Black) based its unanimous and short opinion on what might best be described as a totality-of-the-circumstances view, and in fact, *McGee* is the high-water mark for this particular view of long-arm jurisdiction. Heralding a "clearly discernible [trend] toward expanding the permissible scope of state jurisdiction over . . . nonresidents . . . attributable to the fundamental transformation of our national economy over the years,"<sup>48</sup> Justice Black suggested that the major concern in personal jurisdiction analysis should be whether the assertion of jurisdiction would be inconvenient to the parties.<sup>49</sup> Since there was "no contention that [International Life] did not have adequate notice of the suit or sufficient time to prepare its defenses and appear,"<sup>50</sup> inconvenience was not a concern in *McGee*, and since there was no inconvenience, there was jurisdiction.<sup>51</sup>

*McGee's* sweeping language, particularly its statement about the "fundamental transformation of our national economy,"<sup>52</sup> makes it a

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45. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is the lone exception to this, *id.* at 311-14. Commonly thought of as a "notice" case, *Mullane* also is one of the few cases to base part of its jurisdictional analysis on substantive law grounds. See discussion *infra* note 248.

46. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223-24 (1957). This is not literally correct. McGee was the beneficiary of an insurance policy issued to her son, Lowell Franklin. *Id.* I describe her as the policy holder to avoid confusion with the case name, and because she functioned in that role in the case. See *id.* This description of the case, focusing on the Company's sending of a reissuance certificate to Franklin in California, comes from *Hanson*, 357 U.S. 235, at 251-52, rather than *McGee* itself, where the purposefulness of sending the reinsurance certificate was not emphasized. See *infra* note 73.

47. *McGee*, 355 U.S. at 221-22.

48. *Id.* at 222.

49. *Id.* at 223-24.

50. *Id.* at 224.

51. See *id.* at 223-24.

52. *Id.* at 222.

favorite of those who think state boundaries should play little or no role in defining the contours of long-arm jurisdiction, but there is little reason to believe that this view is widely held on the Supreme Court, or that *McGee* itself has played any significant role in the development of the personal jurisdiction doctrine over the years. The case appears to be more of a throw-away opinion than a major doctrinal statement, and one in which the difficult issues we now know divided the Court at the time were temporarily put on hold to await the more controversial context of *Hanson*, decided six months later.<sup>53</sup> Ultimately, *McGee* is probably best explained as a “sovereignty” or “state interest” case, in which California’s interest in providing a means of redress for its citizens with small claims against out-of-state insurance companies that they would not pursue if they could not sue in California (because it would cost more to litigate than they could win), turned a weak contacts case into one strong enough to support jurisdiction. The Court mentions this reason in its opinion, though it does not emphasize it.<sup>54</sup> While there are those who love it, *McGee* is not an important personal jurisdiction case, and unless the idea of nationwide service of process comes into widespread favor,<sup>55</sup> it never will be.<sup>56</sup> *Hanson*, on the other hand, is a different story.<sup>57</sup>

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53. *McGee* is a four page, unanimous opinion. *Id.* at 221-24. *Hanson* has a twenty-one page majority opinion and another eight pages of Justices Black and Douglas dissents. *Hanson v. Denckla*, 357 U.S. 235, 238-64 (1958).

54. *McGee*, 355 U.S. at 223. It also was important that California’s interest was the procedural one of providing a forum for its citizens to litigate rather than the substantive one of establishing terms of fair dealing between California citizens and out of state insurers. *Id.* at 224. The latter interest is adequately protected by the State’s ability to pass laws regulating the insurance industry, but the former requires the ability to take jurisdictional authority over out of state parties. It also was important that the State had enacted a special jurisdictional statute for claims like *McGee*’s, thereby acting to assert this procedural interest. *Id.* at 221, 224.

55. *But see* Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 545-50 (1995).

[T]he best way to stem the flood of litigation over personal jurisdiction is to regard due process as requiring only that the forum have some rational basis for wishing to decide the case . . . .

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. . . [W]e will have to reject once and for all the notion that state sovereignty and state lines are important constants in the due process calculus.

*Id.* at 545, 548-49. There are limited instances in which nationwide service of process is available. *See, e.g.,* *Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (discussing section 27 of the Security Exchange Act, 15 U.S.C. § 78, which provides for nationwide service of process over corporations in antitrust actions in any district “where[] the [corporation] may be found”). The Federal Interpleader Statute also provides for service in any district in which “claimants reside or may be found.” 28 U.S.C. § 2361 (2000).

56. This statement admits of one qualification. *McGee*’s paraphrase of the purposeful contacts standard, that the defendant have a “substantial connection” with the

The defendant<sup>58</sup> in *Hanson* had more extensive contacts with the forum state than the defendant in *McGee*, but the contacts were of a different sort, and the difference was critical. The defendant, the Wilmington Trust Company, a Delaware corporation and trustee of a trust instrument executed in Delaware by Dora Browning Donner, continued to administer the trust jointly with Donner after she moved to Florida.<sup>59</sup> When Donner died, two of her daughters, also residents of Florida, contested an inter vivos appointment of \$400,000 she had made under the trust to the children of a third daughter.<sup>60</sup> The validity of the original trust agreement was an issue in the will contest, and thus, in the Court's eyes, the Trust Company was an indispensable party to the Florida suit.<sup>61</sup> The jurisdictional issue arose when the Company objected to Florida long-arm jurisdiction on the ground that it did not do or solicit business in Florida.<sup>62</sup> It acknowledged that it had numerous business contacts with Donner over the years while she lived in Florida, but argued that those contacts were not purposeful in the jurisdictional sense of the term, and the Supreme Court agreed.<sup>63</sup> The reason, said the Court, was that Donner, rather than the Trust Company, was responsible for creating the Company's contacts with Florida; the contacts did not result from a purposeful act by the Company to do business in the State.<sup>64</sup> In the Court's words, there was "no instance in which the trustee performed any acts in Florida that bear the same relationship to the [trust] agreement as the [insurance] solicitation in *McGee* [bore to California]."<sup>65</sup> The Company did not seek to exercise the privilege of doing business in Florida, it simply followed Donner when she went there, so to speak.<sup>66</sup> Failing to sever a relationship with a prior customer

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state, has proved particularly popular. See, e.g., *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002); *Hollis Petroleum LLC v. U.S. Rest. Props. Operating, L.P.*, No. 05-01-00781-CV, 2002 Tex. App. LEXIS 450, at \*4 (Tex. App. Jan. 24, 2002).

57. See, e.g., *Rose v. Firstar Bank*, 819 A.2d 1247, 1252-54 (R.I. 2003) (rejecting *McGee* and applying *Hanson* to a fact situation analogous to both cases).

58. This is not precise terminology. *Hanson* was actually two cases, one in Delaware and one in Florida, both racing to get to the Supreme Court first, and the Denckla sisters were plaintiffs in one and defendants in the other. *Hanson v. Denckla*, 357 U.S. 235, 240-42 (1958). There also were two Delaware trust companies involved. None of this procedural complexity is necessary for our purposes here.

59. *Id.* at 238-39.

60. *Id.*

61. *Id.* at 254.

62. *Id.* at 251-52.

63. *Id.*

64. *Id.*

65. *Id.* at 252.

66. *Id.*

in a new forum, it turned out, was not the same thing, at least not for jurisdictional purposes, as soliciting new customers in that forum.

*Hanson* also reined in much of the sweeping language of *McGee*. It was a mistake, the Court said, “to assume that this trend [toward extending personal jurisdiction, highlighted in *McGee*,] herald[ed] the eventual demise of all restrictions on the [extra-territorial power] of state courts.”<sup>67</sup> Rejecting inconvenience as the principal concern, the Court pointed out that those restrictions were “more than a guarantee of immunity from inconvenient or distant litigation,” they were “a consequence of territorial limitations on the power of the respective States.”<sup>68</sup> “However minimal the burden of defending in a foreign tribunal,” the Court added, “a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”<sup>69</sup> *Hanson* was the Court’s first strong, explicit reliance on the so-called defendant-veto view to justify a jurisdictional decision. In this view, a defendant can literally veto jurisdiction by structuring its operations to avoid doing business in a state.<sup>70</sup> It does not matter that it might have extensive business contacts with the state (the Wilmington Trust Company had extensive business contacts with Florida), or that the state might be a convenient place to litigate (in many ways Florida was as convenient as Delaware for the Wilmington Trust Company). As long as the defendant does not take the initiative in making the connection with the state, it will not be forced to litigate there. In a real sense, the defendant controls the reach of the state’s jurisdictional power.

*McGee* and *Hanson* reached results that are the opposite from what one might have expected. The Wilmington Trust Company did extensive business in Florida and could afford to litigate there, and yet it was not subject to Florida jurisdiction.<sup>71</sup> And the International Life Insurance Company did almost no business in California and probably would have lost money had it been forced to litigate there, and yet it was subject to jurisdiction in California.<sup>72</sup> The two decisions are not inconsistent of

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67. *Id.* at 251.

68. *Id.*

69. *Id.* Because of its similarity to “minimum contacts,” “minimal contacts” was an unfortunate choice of words. “Minimum contacts” in *International Shoe* was a synonym for “constitutionally sufficient contacts,” not “a few” contacts, and the similarity of the two expressions encourages a reader to miss the distinction. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). Imprecise usage like this gave later courts a basis on which to ground their modifications (intentional or otherwise) of the doctrine.

70. *Hanson*, 357 U.S. at 251-52.

71. *Id.*

72. See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

course (accepting *Hanson's* characterization of *McGee*)<sup>73</sup> if the purposefulness of a defendant's contacts with a forum is a critical feature of the personal jurisdiction doctrine, and after *McGee* and *Hanson* it is hard to argue that it is not. In retrospect, the two cases appear to be the first post-*International Shoe* skirmish between the totality-of-the-circumstances and defendant-veto views of personal jurisdiction, with the defendant-veto view coming out the clear winner. (This will prove prophetic of outcomes to come.) Having settled (if only temporarily) this basic policy debate, the Court did not take up another major personal jurisdiction case for more than twenty years,<sup>74</sup> or until 1980,

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73. In summarizing *McGee*, *Hanson* emphasizes the purposefulness of the insurance company's connections with California as a central factor in the *McGee* decision, but in the *McGee* opinion itself, this factor does not receive any particular emphasis. Compare *Hanson*, 357 U.S. at 251-52, with *McGee*, 355 U.S. at 223-24. By any objective standard *Hanson* has to be the more important opinion. Unlike *McGee*, it reflects a full airing of the Court's widely varying views on the due process issue, see *supra* note 53, states those views more as a rule than a policy (also unlike *McGee*), comes later in time, and explicitly rejects the *McGee* view, see *Hanson*, 357 U.S. at 251, as articulated by Justice Black in a dissent, see *id.* at 258-59 (Black, J., dissenting). More importantly perhaps, the Court seemed eager to use *Hanson* to announce a new jurisdictional standard. The due process interests in the case were those of the Wilmington Trust Company, but the Trust Company was not a party to the proceeding, and no other party had standing to raise its interests. See *id.* at 241-42, 244-45. The Court finessed this problem by finding the Company indispensable under its reading of Florida law, see *id.* at 245 & nn. 6-7, but the Supreme Court of Florida, the ultimate authority on Florida law, "found it unnecessary to determine whether" this was so, *id.* at 254. The Florida court's position seems more sensible. The Trust Company had no interests of its own involved in the case. It simply wanted to know to whom to distribute the proceeds of the trust. It was a stakeholder pure and simple, and a stakeholder is not ordinarily an indispensable party. At a minimum, one would have expected the Supreme Court to send the issue back to the Florida Supreme Court for a definitive ruling on the question of Florida law, but the Court seemed more interested in articulating a new due process standard than in resolving the case.

74. At one time, *Shaffer v. Heitner*, 433 U.S. 186 (1977), would have been considered an exception to this statement, but time has not treated *Shaffer* well and the case has no continuing major influence on the personal jurisdiction doctrine that I can discern. The Court in *Shaffer* spoke in bold, sweeping, and authoritative terms, as if pronouncing for all questions of long-arm jurisdiction, for all time, and academic symposia touting the importance of the decision were rampant. See, e.g., *Symposium on Shaffer v. Heitner*, 45 BROOK. L. REV. 493 (1979); *Symposium, The Impact of Shaffer v. Heitner*, 1978 WASH. U. L.Q. 273; see also Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYU L. REV. 1043, 1043-44; Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 34 (1978). But *Shaffer's* well-known formulation of the standard, that "minimum contacts" requires a three-part "relationship among the defendant, the forum, [and] the litigation," seemed to eliminate the category of general jurisdiction, which requires only a two-part relationship between the defendant and the forum. *Shaffer*, 433 U.S. at 204. And its statement that "all" assertions of long-arm jurisdiction were governed by the "minimum contacts" standard seemed to eliminate the so-called single-factor jurisdictional tests, such as transient and status jurisdiction. *Id.* at 207-08. The Court later corrected these mistakes, explaining in *Helicopteros* that it did not mean to do away with general jurisdiction, and making it clear in *Burnham* that at

when it revisited the doctrine with enthusiasm in *Woodson*. *Woodson* was the Court's first great, systematic restatement of the minimum contacts standard, synthesizing all that had happened since *International Shoe*, and with a few, minor, cosmetic changes, it still describes the doctrine as it operates today.

### C) General Jurisdiction: Perkins

Before moving on to *Woodson*, however, it is necessary to take a brief step back to consider the doctrine of general jurisdiction, the second of *International Shoe*'s four contacts-nexus categories, and the one that has turned out to be hardest to define. General jurisdiction permits a court to hear any cause of action against a defendant, no matter what the type, and no matter where it arises.<sup>75</sup> This is the defining feature of the doctrine, that a party can be sued for anything without the plaintiff having to show a relationship between the claim and the forum.<sup>76</sup> Only the defendant's relationship with the forum is relevant.<sup>77</sup> This much is uncontroversial. But difficulties arise when one tries to describe what type of contacts are needed to make general jurisdiction available. *International Shoe* was a specific jurisdiction case, so it did not discuss general jurisdiction at any length, but it made some things clear. For example, the decision differentiated between the two types of jurisdiction, concluding that specific jurisdiction is available when the defendant has "continuous and systematic" contacts with a forum and the contacts "give rise to the liabilities sued upon,"<sup>78</sup> and general jurisdiction is available only when the defendant's contacts are "so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those" contacts.<sup>79</sup> The key difference between these two types of jurisdiction, though it is not always noticed,<sup>80</sup> is between "continuous and systematic" contacts on the one

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least the single-factor test of transient jurisdiction was alive and well. *Burnham v. Superior Court*, 495 U.S. 604, 620 (plurality opinion). *Burnham* also seemed to limit *Shaffer*'s holding to a statement of the due process standard for the attachment form of quasi in rem jurisdiction, see *id.* at 620-21 (plurality opinion), but the Court's failure in *Burnham* to agree on a majority rationale leaves all of its modifications of *Shaffer* in limbo. *Kulko v. Superior Court*, 436 U.S. 84 (1978), also was decided in this twenty-year period, and I take up its contributions to the doctrine in the next Section of the Article. It retains some influence in certain esoteric parts of the doctrine, but is not a major case.

75. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

76. *Id.*

77. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

78. *Int'l Shoe*, 326 U.S. at 317.

79. *Id.* at 318.

80. Including by members of the Supreme Court, from all sides of the political spectrum. For example, see Justice Rehnquist's opinions in *Keeton* and *Calder*, Justice Brennan's in *Burger King*, and Justice White's in *Helicopteros*, each of which discusses the

hand and "substantial" contacts on the other.<sup>81</sup> But explaining the difference between these two terms is where the real difficulties begin.

While there will be hard cases, the idea of "continuous and systematic" contacts, by itself, is not difficult to understand. Contacts are continuous and systematic when they occur at regular intervals, over an extended period of time, and are organized according to some kind of plan or design.<sup>82</sup> Marketing goods or services to retail customers in a state through a network of advertisers, distributors, sales agents, and retail stores is a classic example.<sup>83</sup> But how "substantial" contacts differ is not as easy to explain. There is no sharp difference between the two expressions linguistically, and in certain contexts they could be just different ways of saying the same thing. The nature of the differences must be found, I believe, in the underlying purposes the doctrine of general jurisdiction seeks to advance. The most important such purpose

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concepts of "continuous and systematic" contacts and "substantial" contacts as if they were synonyms. Academic commentators make the mistake at least as majestically as the Court, writing whole articles on the false premise that "continuous and systematic" contacts are the same as "substantial" contacts for purposes of general jurisdiction. See, e.g., Twitchell, *supra* note 1, at 184. Professor Twitchell criticizes the use of a "doing business" standard (which, in context, was a synonym for "systematic and continuous" contacts) for general jurisdiction, but only on policy and principle grounds. *Id.* at 203-04. She never points out that the view also is based on a doctrinal mistake, and on a careless reading of the *International Shoe* and *Perkins* cases. She mentions the concept of "substantial" contacts, but doesn't seem to recognize that it has independent doctrinal significance. See *id.* at 184. And while she shows in considerable detail that continuous and systematic contacts cannot support general jurisdiction, she fails to point out that the Supreme Court has never held that they can. *Id.* at 182-90. She seems unduly impressed by the number of lower courts adopting this view. It is as if she thinks these decisions have a kind of legitimacy by virtue of their number. The decisions are just doctrinal mistakes, however, and arguing against them on policy and principle grounds alone actually breathes a kind of life into them and gives them a legitimacy she otherwise wants to deny. *Id.* at 174, 183-84.

Sarah Cebik makes a more exaggerated version of the same mistake. In addition to getting the quantitative test for general jurisdiction contacts wrong, she adds *Burger King's* "fairness factors" to the test, see Cebik, *supra* note 37, at 9-11, uses "minimum contacts" as an ordinary language expression rather than as a term of art, see, e.g., *id.* at 9, misdescribes the nature of the debate over the definition of nexus in the specific jurisdiction doctrine, see, e.g., *id.* at 2, asserts that *International Shoe* rejected a territoriality based view of personal jurisdiction when it replaced *Pennoyer's* framework with the "minimum contacts" standard, and treats the "reasonably anticipate being haled into court" language as if it stated an independent jurisdictional standard, *id.* at 17-18, all of which are mistaken. Ironically, she criticizes the Court's elaboration of the personal jurisdiction doctrine as incoherent, not realizing that she has introduced most of the incoherence she finds.

81. *Perkins* repeats the distinction, using the same language, but not consistently, and that will become the cause of some difficulty down the road. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952).

82. See *Int'l Shoe*, 326 U.S. at 317-20.

83. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

is to insure that there is at least one place where every individual (including individual corporations) will be answerable to the legal claims of others, and thus within the reach of law.<sup>84</sup> If there was no such default location where someone could always be sued, a sufficiently clever party could violate another's legal rights and remain free from legal recourse, creating a world of rights without remedies.<sup>85</sup>

On the other hand, parties should not be forced to defend in forums where they will not be treated fairly. The Due Process Clause demands as much. Since general jurisdiction presupposes the lack of a relationship between the forum and the plaintiff's claim, it follows that it should be available only in states where defendants are sufficiently present that it is reasonable to expect that they will be treated fairly by local courts and juries. The state of domicile is the most obvious example of such a forum for an individual,<sup>86</sup> and the state where it has its principal place of business is the most obvious example for a corporation.<sup>87</sup> In these and equivalent places, defendants pay taxes, provide employment, perform civic works, and otherwise behave as full citizens of the community. They will be looked upon as "locals," or "insiders" in Professor Brilmayer's terminology,<sup>88</sup> by the state's judicial system, as part of the state family, so to speak, and as a consequence, not be subject to the types of prejudice typically directed at outsiders.<sup>89</sup> It follows that it is not unfair to force them to litigate there.<sup>90</sup> Substantial<sup>91</sup> contacts should be

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

85. For an example of an attempt to do this, see *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 914 (S.D.N.Y. 1965). *Taylor* was a lawsuit against Elizabeth Taylor for disruptions occurring during the filming of the movie *Cleopatra*, when Taylor was living abroad and was a U.S. citizen but not the citizen of any state. *Id.*

86. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) ("General jurisdiction exists when a defendant is domiciled in the forum state . . ."); see also *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

87. *Int'l Shoe*, 326 U.S. at 317.

88. See Brilmayer, *How Contacts Count*, *supra* note 37, at 87.

89. There will be instances when this will not be true, of course. Companies can do things that will give them reputations as bad citizens. But as a general matter, large employers who contribute to the economic well-being of a state are looked upon as insiders and will be protected as such, and doctrinal rules have to operate on generalizations about such factual matters. Some courts express this idea as a "general presence" in the state. See *Aeroglobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, C. A. No. 01C-08-089 (CHT), 2003 Del. Super. LEXIS 3, at \*15 (Del. Super. Ct. Jan. 2, 2003) ("General jurisdiction is the finding of jurisdiction over the non-resident defendant based on his general presence in the State . . .").

90. Professor Brilmayer discusses this idea in terms of the defendant's ability to protect its interests within the state's political rather than judicial processes. Brilmayer, *How Contacts Count*, *supra* note 37, at 87. See also Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1280 (1989), for an elaboration of her concept of "political fairness." I find her argument persuasive, and mean only to add to it. Sarah

seen, then, as the kind of contacts that give defendants the type of presence in a state that will cause them to be regarded as state citizens.<sup>92</sup>

While several Supreme Court decisions mention the doctrine of general jurisdiction,<sup>93</sup> and one discusses it at length,<sup>94</sup> *Perkins* is the only case in which the Court used the doctrine to justify an assertion of jurisdiction. The defendant in *Perkins* was a Philippine gold and silver mining company "[whose] operations . . . were completely halted during the occupation of the [Philippine] Islands by the Japanese" during the

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Cebik argues the same point on the basis of state sovereignty interests, see Cebik, *supra* note 37, at 12, but as we will see, a "fairness" (to the defendant) argument is easier to ground in the Due Process Clause of the Fourteenth Amendment because the Due Process Clause protects individual rather than state interests, see *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

91. For other ways of translating the somewhat abstract concept of "substantial" contacts into more specific, operational language, see Cebik, *supra* note 37, at 31-41, and Twitchell, *supra* note 1, at 207-12.

92. Because it is an option of last resort, general jurisdiction should be limited in availability, see *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1200 (4th Cir. 1993) (concluding that "broad constructions of general jurisdiction should be generally disfavored"), and the most sensible way to provide this limit is to restrict it to a defendant's "home state" so to speak, that is, the state of domicile for an individual, and the state of incorporation and state of principal place of business for a corporation, though large, national, and multinational corporations can present special cases, see *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1083 (C.D. Cal. 2003) ("General jurisdiction . . . requires that defendant's contacts be of the sort that 'approximate physical presence.'" (citation omitted)); see also Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 676 (1988). Once agreeing, Professor Twitchell now has had second thoughts about this view. See Twitchell, *supra* note 1, at 205-12. Professor Stein has described the defendant's "home state" as the state the defendant has adopted as its sovereign. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987). The "home state" view has been adopted by both the Hague Convention for jurisdiction over foreign defendants, and the European Union Convention on Jurisdiction and Enforcement of Judgments (the Brussels Convention). See Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, art. 4, available at [http://hcch.e-vision.nl/upload/wop/jdm\\_drafte.pdf](http://hcch.e-vision.nl/upload/wop/jdm_drafte.pdf); Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, arts. 2, 53, 1990 O.J. (C 189) 1, reprinted in 29 I.L.M. 1413 (limiting general jurisdiction to defendant domicile and stating that corporation's domicile is its "seat"). The American jurisdiction system, limited as it is by due process constraints, assumes that claims ordinarily will be brought in states with which the defendant has some kind of connection, however limited, and admits of exceptions only in the face of a greater unfairness to the plaintiff presented when there is no such state, and thus no place to sue.

93. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Calder v. Jones*, 465 U.S. 783, 788 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984); *Ins. Corp. of Ir.*, 456 U.S. at 694; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

94. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414-19 (1984).

Second World War.<sup>95</sup> The president of the company (who was also its general manager and principal stockholder) returned to his home in Ohio to carry on the “necessarily limited wartime activities of the company.”<sup>96</sup> While in Ohio, the president prepared correspondence, drew and distributed salary checks, conducted directors’ meetings, purchased machinery, maintained bank accounts, and supervised the rehabilitation of mining properties in the Philippines, all on behalf of the company.<sup>97</sup> To the extent that the company continued to exist at all during the war, it did so in the form of the president (and two secretaries), located in Ohio.<sup>98</sup> Perkins sued the company in Ohio state court (after lawsuits in the Philippines, New York, and California had proved unsuccessful),<sup>99</sup> for failure to pay dividends and issue stock certificates she claimed were owed to her.<sup>100</sup> Her claims did not arise in Ohio or have anything to do with the company’s business activities there.<sup>101</sup> The company moved to quash service arguing that, as a foreign corporation, it was not subject to personal jurisdiction in Ohio on a cause of action not arising there.<sup>102</sup> The Ohio Supreme Court agreed,<sup>103</sup> but the U.S. Supreme Court did not.<sup>104</sup>

In language that, in retrospect, may have been a little too casual, the Court first explained that “if [a] corporation carries on . . . continuous and systematic corporate activities” in a state, “those activities are enough to . . . subject that corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.”<sup>105</sup> This was *International Shoe’s* principal test for specific jurisdiction, but as the Court quickly acknowledged, it did not apply in *Perkins*.<sup>106</sup> The problem in *Perkins*, said the Court, “takes us one step further.”<sup>107</sup> Because Perkins’s cause of action did not arise out of the mining company’s activities in Ohio, she must show that the company had “substantial” (not just “continuous and

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95. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952).

96. *Id.* at 447-48.

97. *Id.* at 448.

98. *Id.* at 447-48.

99. *Id.* at 438 n.1.

100. *Id.* at 438-39.

101. *Id.* at 438.

102. *See id.* at 439.

103. *Id.*

104. *Id.* at 449.

105. *Id.* at 445-46.

106. *See id.* at 446.

107. *Id.*

systematic") contacts with the State.<sup>108</sup> As the Court put it, the task was to "consider, in more detail, the issue of whether . . . the business done in Ohio by the . . . mining company was sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action [that] arose from activities entirely distinct from [the company's] activities in Ohio."<sup>109</sup> The key term in this description of the difference between general and specific jurisdiction is "substantial." The Court distinguished clearly (and sensibly) between the type of contacts needed to support jurisdiction over claims arising in Ohio and claims arising elsewhere, and it used the terms "continuous and systematic" and "substantial," to express this distinction.<sup>110</sup> Unfortunately, the Court did not use this terminology as consistently as one would like, and this created problems that I will describe shortly. But "substantial" contacts was the Court's original way of describing the due process requirements for general jurisdiction, and it is still the most sensible way to describe the requirement.

The requirement of "substantial" contacts appears in that part of the *Perkins* opinion describing the legal rule to be applied in the case.<sup>111</sup> Unfortunately, in two other less significant parts of the opinion, the Court muddied the waters somewhat by describing the test for jurisdiction over the mining company as requiring only "continuous and systematic" contacts with the State of Ohio,<sup>112</sup> and these references created some mischief in the case law down the road. In the very first paragraph of the opinion, for example, where it stated the question presented by the case, the Court described the mining company as "carrying on in Ohio a continuous and systematic, but limited, part of its general business."<sup>113</sup> And similarly, at the very end of the opinion, in summarizing the activities supporting jurisdiction, the Court described the company's president as carrying on "in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."<sup>114</sup> In later opinions,<sup>115</sup> the Court has seemed to use this "continuous and systematic" language (sometimes supported by a citation to these peripheral parts of *Perkins*), to describe the due process

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108. *Id.* at 446-47 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945)).

109. *Id.* at 447.

110. *Id.* at 445-46.

111. *Id.* at 446.

112. *Id.* at 448.

113. *Id.* at 438.

114. *Id.* at 448.

115. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984); *Calder v. Jones*, 465 U.S. 783, 786-87 (1984); *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414-16 (1984).

standard for general jurisdiction, and many lower courts, both federal and state, have followed suit.<sup>116</sup> But to interpret the requirement of “continuous and systematic” contacts to mean the same thing as “substantial” contacts is just a mistake, no matter how frequently it is made. *International Shoe* differentiated clearly between the two categories of contacts, *Perkins* maintained the distinction, albeit inarticulately, pointing out that the source of the distinction was *International Shoe*,<sup>117</sup> and a careful reading of the case law as a whole would see the distinction as still intact. General jurisdiction requires substantial defendant contacts with the forum; continuous and systematic contacts support only specific jurisdiction.<sup>118</sup> We will come back to this topic shortly, but for the moment it is time to return to the Court’s development of the due process standard for specific jurisdiction.

D) *The First Restatement: Woodson*<sup>119</sup>

*Woodson* continued the development of the specific jurisdiction test begun in *International Shoe* and refined in *McGee* and *Hanson*. The underlying story in *Woodson* is both tragic and horrific, and the Robinsons—the real parties in interest,<sup>120</sup> who did everything right and still lost big—have as much reason to think the law’s an ass as any character in a Dickens novel.<sup>121</sup> *Woodson* is important doctrinally in large measure because, like *Hanson*, it is one of the limited number of Supreme Court cases to uphold a denial of extra-territorial jurisdiction, and in so doing, to identify one end of the jurisdictional spectrum.<sup>122</sup> It is

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116. See *infra* note 473.

117. See *Perkins*, 342 U.S. at 445-46.

118. See *id.* at 446, 448.

119. At one time many thought that *Shaffer* was the final word on the personal jurisdiction standard, see *supra* note 74, but *Woodson* is a better source than *Shaffer* for an authoritative restatement of the “minimum contacts” doctrine (and will be until *Burger King*), because its animating policy of defendant-veto is still the preferred view, and its two-part formulation of the standard (with some minor cosmetic changes) is still the way the Court organizes the doctrine today.

120. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980). Charles Woodson was the Oklahoma State District Court judge against whom two of the defendants sought a writ of prohibition when their motion to dismiss for lack of jurisdiction was denied. *Id.* at 292.

121. See generally Charles W. Adams, *Worldwide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122 (1993), for a nearly complete history of the case. Adams describes what happened in the case up to the early 1990s. For the final chapters, see *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1268 (10th Cir. 1995) (denying Robinson’s motion to set aside trial verdict on the grounds of fraud), and *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1274 (10th Cir. 1995) (dismissing Robinson’s fraud claims against Volkswagen and its lawyers).

122. *Woodson*, 444 U.S. at 299.

a confusing opinion, stating one test and applying another, and in some ways it is more important for one of its dissenting opinions than for its majority opinion (not a common phenomenon, even in an era when one-liners from early Holmes dissents are a familiar part of popular idiom). But it made major changes in the structure of the "minimum contacts" standard, even if it did not do much to alter the standard's component parts, and the new structure it put in place became the foundation for the Court's final restatement of the doctrine in the *Burger King* case a short five years later.<sup>123</sup> For better and worse, *Woodson* is a landmark in the personal jurisdiction field.

As configured in the Supreme Court, the case involved a products liability claim brought by a New York purchaser of an Audi (Robinson) against a New York State Audi dealer (Seaway) and Audi's northeast regional distributor (World-Wide).<sup>124</sup> The Robinsons were hit from behind while driving the car through Oklahoma in the process of moving to Arizona.<sup>125</sup> The Audi's gas tank ruptured in the accident, its doors jammed, the gas ignited, and the car turned into an incinerator, severely burning Mrs. Robinson and two of the Robinson children.<sup>126</sup> No one died, but over the next several years all of the burned family members on more than one occasion probably wished that they had.<sup>127</sup> Their injuries were gruesome, and the recovery process wasn't that much better.<sup>128</sup> The Robinsons sued Audi and its importer (Volkswagen), in Oklahoma state court on a design-defect theory, and added Seaway and World-Wide as defendants to destroy complete diversity and prevent the case from being removed to federal court.<sup>129</sup> This proved a fateful move when Seaway and World-Wide took the case to the Supreme Court.<sup>130</sup> The case raised doctrinal problems that had been brewing for some time in the lower federal and state courts, though most of the lawyers in the case did not seem to recognize this,<sup>131</sup> and thus gave the Court an opportunity to

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123. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985).

124. *Woodson*, 444 U.S. at 288.

125. *Id.* Procedurally, the case was an appeal from the denial of a petition asking the Oklahoma Supreme Court for a writ of prohibition to prevent the trial court judge from allowing the case to proceed against Seaway and World-Wide after denying their motions to dismiss. *Id.* at 289.

126. *Id.* at 288.

127. See Adams, *supra* note 121, at 1125-26.

128. See *id.*

129. *Woodson*, 444 U.S. at 288. Until they had relocated in Arizona the Robinsons were still citizens of New York. *Id.* at 287.

130. See *id.* at 288 n.3 (noting that Audi and Volkswagen did not contest jurisdiction beyond the trial court).

131. Except for the youngest and most inexperienced lawyer in the case. See Adams, *supra* note 121, at 1130, 1133. See *id.* at 1134-35, for a discussion of how the case almost did not make it to the Supreme Court.

restore order to a field that was becoming increasingly fragmented. It would turn out that the Court was not quite yet ready to do that.

In many ways, the *Woodson* decision was based on a reprise and re-affirmation of the defendant-veto policy underlying *Hanson*.<sup>132</sup> The Court characterized Seaway and World-Wide's contacts with Oklahoma through the Audi automobile as foreseeable rather than purposeful,<sup>133</sup> and "foreseeability alone," as the Court explained, "has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."<sup>134</sup> It reached the same conclusion with respect to Seaway's participation in a national network of Audi dealerships, some of which were located in Oklahoma.<sup>135</sup> The Robinsons' suit was for products liability, not breach of a dealer network agreement, so Seaway's participation in the network was only collaterally related to the plaintiffs' claim; it did not give rise to it.<sup>136</sup> As such, Seaway's activities failed to

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132. *Woodson*, 444 U.S. at 297 (explaining that the rationale underlying the minimum contacts standard is to provide clear notice to a defendant of when it will be subject to suit in a state so that it "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State"). *Woodson* also repeated *Hanson's* objection to the "transformation of the national economy" rationale used in *McGee* to justify the totality-of-the-circumstances view. *Id.* at 294.

133. *Id.* at 295. The Court also discussed the foreseeability/purposefulness distinction in terms of the so-called reasonable anticipation test, that is, whether a defendant "should reasonably anticipate being haled into a court" in the forum state. *Id.* at 297. This test, first introduced by Justice Marshall in *Shaffer*, is completely empty, as Justice Brennan pointed out in his dissent, *id.* at 311 n.18 (Brennan, J., dissenting), and adds nothing to the jurisdictional discussion. To answer the question of whether a defendant should reasonably anticipate being haled into court one must turn to some other test, and that test, rather than the reasonable anticipation test, is the jurisdictional standard. The phrase is just one of *Shaffer's* many infelicities, but unlike most of the others, the Court has not repudiated it, and lower court judges seem to like it. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451 (3d Cir. 2003); *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1134 (D. Nev. 2002); *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203, 209 (D.P.R. 2002); *Carrot Bunch, Inc. v. Computer Friends, Inc.*, 218 F. Supp. 2d 820, 824 (N.D. Tex. 2002); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 834-35 (N.D. Ill. 2000).

134. *Woodson*, 444 U.S. at 295. In doing so, the Court was responding to the Supreme Court of Oklahoma, which used a foreseeability rationale to support its decision to find jurisdiction. *Id.* at 290. Harkening back to *Hanson*, the Court pointed out that it was no doubt foreseeable that Donner would move to Florida and execute a power of appointment there, and yet that was not enough to establish jurisdiction. "[T]he foreseeability that is critical to due process analysis," the Court said, "is not the mere likelihood that a product will find its way into the forum State[,] . . . [but that the] corporation 'purposefully avails itself of the privilege of conducting activities [there].'" *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (citations omitted).

135. *Id.* at 298-99.

136. *Id.*

satisfy the nexus requirement of the specific jurisdiction doctrine.<sup>137</sup> In effect, the Robinsons occupied the same status as the proverbial "third party claiming some relationship with the defendant" who could not, through its unilateral actions, create a contact between the defendants and the forum.<sup>138</sup>

The Court refined the purposefulness requirement further in a discussion of the so-called stream-of-commerce theory of defendant contacts. Borrowed from pollution and noxious substance cases in tort law, the stream-of-commerce theory permits a state to take jurisdiction over a defendant who, while not doing business directly in the state, does so indirectly by placing its product into the "stream-of-commerce," to have it come out of the stream and cause harm in the state.<sup>139</sup> The paradigmatic case is the industrial component manufacturer who sells to other manufacturers rather than retail customers.<sup>140</sup> In a well-known example, a valve manufacturer sold a valve to a boiler manufacturer in another state that in turn incorporated the valve into a boiler sold to a retail purchaser in yet a third state.<sup>141</sup> When the valve failed and the boiler exploded, the injured person wanted to sue both the manufacturer of the valve and the manufacturer of the boiler.<sup>142</sup> But since the boiler manufacturer was the only one who, in the words of the Court, made an "effort[] . . . to serve . . . the market for its product in [the s]tate[],"<sup>143</sup> a "contract" based jurisdictional standard such as "doing business," did not help. Some standard based on a combination of both doing business and producing a tortious effect in the state was needed, and that is where the hybrid stream-of-commerce theory came in.<sup>144</sup> The theory did not apply

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137. *Id.* at 298.

138. *Id.* at 298-99.

139. *Id.* at 297-98. Stream-of-commerce is often an unnecessary doctrinal garnish on an ordinary doing-business case. For an example, see *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 476-80 (6th Cir. 2003).

140. Selling one's products to an independent company which, in turn, sells directly to the public, is another form of indirect marketing in a state. See *Braley v. Sportec Prod. Co.*, No. Civ. 01-333-JD, 2002 WL 1676293, at \*2 (D.N.H. July 16, 2002) (considering a case of a defendant that "sells its products to independent companies and does not supervise, control, or have advance notice of where those companies consequently market [defendant's] products").

141. *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 762 (Ill. 1961).

142. *Id.*

143. *Woodson*, 444 U.S. at 297.

144. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion). There is not yet a majority of the Court on record for a particular stream-of-commerce view of "minimum contacts." *Id.* at 105. Justice O'Connor discussed the issue in considerable detail in *Asahi*, and formulated an "effects-plus" version of the standard, *id.* at 108-14 (plurality opinion), but her opinion did not command a majority of the Court, *id.* at 105. *Asahi* would have been better discussed as a pure torts case. See *infra* notes 384-96 and accompanying text.

in *Woodson*, however, because the Robinsons' Audi left the stream of commerce at the site of its retail sale in Massena, New York.<sup>145</sup> Once in the hands of the Robinsons, the retail purchasers, the automobile was no longer a commercial product, and thus whatever harm it produced in Oklahoma could not be attributed to Seaway and World-Wide, who were mere commercial conduits for the Audi, and not its manufacturer.<sup>146</sup>

More interesting than its discussion of the purposefulness and nexus issues, however, was the Court's restructuring of the "minimum contacts" standard inherited from *International Shoe* (and *Hanson*). Here, the Court made a sizeable transformation in the standard as received, altering *International Shoe's* statement of the doctrine (although mostly just codifying changes already widely accepted) in major ways, and it is these alterations that give *Woodson* its greatest significance. *Woodson's* new formulation of the "minimum contacts" test is difficult to describe because the opinion says one thing and does another, and both what it says and what it does are needed for a complete understanding of its new version of the test,<sup>147</sup> so I will begin with what the opinion says.

After reaffirming its commitment to the idea of "minimum contacts,"<sup>148</sup> the Court, in effect, divided the standard into two parts by discussing it in terms of "two related, but distinguishable, functions."<sup>149</sup> The first was the familiar one of protecting "the defendant against the burdens of litigating in a distant or inconvenient forum."<sup>150</sup> This was *International Shoe's* well-known "estimate of the inconveniences" factor in other language.<sup>151</sup> Following the Court's new terminology, think of

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145. *Woodson*, 444 U.S. at 298.

146. *Id.* The Court's discussion does not always maintain the distinction between contract ("doing business") and tort ("effect" and "effects plus") based theories of long-arm jurisdiction, a distinction that is routinely made in enumerated acts long-arm statutes. See, e.g., N.Y. C.P.L.R. § 302(a)(1) (McKinney 2001) ("transacts any business within the state"); *id.* § 302 (a)(2) ("commits a tortious act within the state"); N.C. GEN. STAT. § 1-75.4(3) (2003) (causing "injury to person or property . . . within . . . this State"); *id.* § 1-75.4(5)(c) ("promis[ing] . . . to deliver or receive within this State . . . goods . . . or other things of value"). The "effects" test has also been codified in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). See also *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978); UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03(1) (withdrawn 1977), 9B U.L.A. 310 (1966) ("transacting any business in this state"); UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03(4) (withdrawn 1977), 9B U.L.A. 310 ("causing tortious injury in this state").

147. Combining the two in a single standard will be one of *Burger King's* principal contributions to the doctrine.

148. *Woodson*, 444 U.S. at 291 ("A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.").

149. *Id.* at 291-92.

150. *Id.* at 292.

151. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

this (for the moment at least) as the "inconvenience" half of the now-bifurcated "minimum contacts" test.<sup>152</sup> A defendant may not be subjected to extra-territorial jurisdiction in a forum in which it would be unreasonably inconvenient for him to defend.<sup>153</sup> The second function of the "minimum contacts" test was the somewhat new<sup>154</sup> one of considering the inconvenience to the defendant "in light of other relevant factors," principally, a variety of state sovereignty and federalism interests affected by the decision to take or deny jurisdiction.<sup>155</sup> Think of this (also for the moment) as the "other factors" half of the test.<sup>156</sup> A defendant may not be forced to defend in a forum, even when convenient, when state sovereignty and federalism concerns all cut the other way.

The problem with this statement of the test, of course, is that it says nothing about the role of defendant contacts with the forum—their extent, whether they were purposefully made, their relationship to the plaintiff's claim, who made them, how they were made, and so on—in assessing the defendant's amenability to jurisdiction. The Court did not ignore contacts altogether. The principal ground for its decision was the conclusion that Seaway and World-Wide's contacts with Oklahoma either were not purposeful (the automobile contact), or did not give rise to the Robinsons' claim (the dealer network contact).<sup>157</sup> But its reformulated "minimum contacts" standard, standing alone, did not authorize the Court to take such purposefulness or nexus considerations into account. Instead, the standard, read literally, limited analysis to a determination of whether it would be inconvenient for Seaway and

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152. *Woodson*, 444 U.S. at 292 ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'"). After *Burger King* the terminology and content of this part of the test will change, and it will become known as the "contacts" half of the test.

153. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *Woodson*, 444 U.S. at 292.

154. Only as stated. The Court had taken such factors into consideration since *Pennoyer*. *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1877).

155. *Woodson*, 444 U.S. at 292. The Court described these concerns as "the forum state's interest in adjudicating the dispute," citing to *McGee*, "the plaintiff's interest in obtaining convenient and effective relief," citing to *Kulko*, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies," again citing to *Kulko*. *Id.* None of these concerns were new with *Woodson*. One can find antecedents for each as far back as *International Shoe*. *Int'l Shoe*, 326 U.S. at 315, 317-19. But *Woodson* codified them, and gave them a greater structural importance than they had simply as the bases for individual prior decisions.

156. After *Burger King* this will become the "fairness factors" half of the test. Since *Woodson* also uses the term "fairness," but in conjunction with the first half of the test and not the second, one can begin to see the difficulties in keeping terminology straight.

157. *Woodson*, 444 U.S. at 298-99.

World-Wide to litigate in Oklahoma, and whether the interests of Oklahoma and New York as states, individually and in combination, cut the other way.<sup>158</sup> One might wonder why the Court thought of this as a *contacts* test at all, though it is clear that at least the majority did. Quoting from *International Shoe*, the Court said, “[T]he Due Process Clause ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.’”<sup>159</sup> In the Court’s mind, contacts was still first among equals of the elements that made up the minimum contacts test.

Since it was clear from the decision that the Court did not mean to eliminate the idea of contacts from the test, the Court’s new version of “minimum contacts” had another, equally serious, problem—one which the Court did not explicitly resolve. The inconvenience considerations and state interest factors listed by the Court as relevant to the jurisdictional decision, while uncontroversial in themselves,<sup>160</sup> were difficult to combine into a single, integrated test. The Court’s description of these factors was more of a laundry list than an algorithm, in the sense that it did not say how much of one type of consideration it would take to outweigh how much of another. Like balancing tests generally, the Court’s reformulation lacked a metric for comparing and contrasting the different (perhaps even incommensurable) parts of the standard, and thus, also like balancing tests generally, it failed to constrain personal jurisdictional analysis to any significant extent. The Court would fix this problem, at least to a limited extent, five years later in *Burger King*, but at the time of *Woodson* it remained a serious concern.<sup>161</sup>

*Woodson* also contained the first<sup>162</sup> explicit attempt by the Court to justify the consideration of state sovereignty and federalism factors in

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158. *Id.* at 295-99.

159. *Id.* at 294.

160. This is only partly true. The Court’s right to rely on state interest factors in making jurisdictional decisions is a hotly contested issue, and the Court itself cannot seem to make up its mind about whether it is entitled to take them into account or not. *See infra* notes 223-29 and accompanying text.

161. In *Burger King* the Court attempted to solve the problem by introducing the concepts of “compelling case” and “lesser showing” standards for comparing one set of factors with the other. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *see also infra* notes 341-47 and accompanying text.

162. In the post-*International Shoe* world, that is. *Pennoyer* grounded the consideration of state sovereignty concerns in jurisdictional analysis in public international law, *see Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877), but when *International Shoe* replaced *Pennoyer*’s public law standard with the “minimum contacts” test, this option no longer was available. The Court revisited the issue several times over the next few years, changing its mind (and position) each time.

personal jurisdiction analysis.<sup>163</sup> The problem, one will recall, is that the Fourteenth Amendment is the sole limitation on the extra-territorial jurisdictional power of the states.<sup>164</sup> But the Fourteenth Amendment, by its own terms, protects the liberty and property interests of "person[s]," not the sovereignty interests of states.<sup>165</sup> How then is the Court justified in taking sovereignty interests into account in a Fourteenth Amendment analysis? What source of law supports this? In this first attempt at an answer, the Court grounded the right to consider state interests on "principles of interstate federalism embodied in the Constitution."<sup>166</sup> As the Court explained, the "Framers also intended that the States retain many essential attributes of sovereignty, including . . . the sovereign power to try causes in their courts."<sup>167</sup> These sovereignty interests, in turn, implied a limitation on the sovereignty interests of all other states—"a limitation [that was] *express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.*"<sup>168</sup> As the Court emphasized in a well-known "even if" paragraph:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . even if the forum State is the most convenient location for litigation, the Due Process Clause, *acting as an instrument of interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment.<sup>169</sup>

There was nothing new in this, according to the Court, since even *International Shoe* had indicated that jurisdiction must be assessed "in the context of our federal system of government," so as to ensure "the

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163. The Court's timing in this regard suggests that it probably was responding to a criticism of the use of sovereignty concerns in jurisdictional analysis in a well-known 1981 article in the *Northwestern University Law Review*. See Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981). The difficulty of justifying the use of sovereignty factors had been recognized for a long time, but the Redish article made the objection too powerful to be ignored any longer. In *Insurance Co. of Ireland*, two years later, the Court would reverse itself and agree with Redish's argument, but without mentioning his article. See *Ins. Co. of Ir. v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702 n.10 (1982). Redish's argument was not without its critics. See Allen R. Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 38-39 (1980) (arguing that the Due Process Clause justifies the consideration of state sovereignty concerns in a personal jurisdiction analysis).

164. *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10; *Woodson*, 444 U.S. at 287, 291.

165. U.S. CONST. amend. XIV, § 1 ("[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

166. *Woodson*, 444 U.S. at 293.

167. *Id.*

168. *Id.* (emphasis added).

169. *Id.* at 294 (emphasis added).

orderly administration of the laws.”<sup>170</sup> But few had suspected such innocent phrases to contain so much hidden meaning. An argument that something is constitutionally authorized is difficult to evaluate under the best of circumstances—constitutional law often seems more like religion than law—but when it is not possible even to say whether the authorization is express or implicit, the argument is particularly difficult to assess.<sup>171</sup> This will not be the Court’s last word on the subject, however, so it is perhaps better to wait until the string has played out before considering the argument.

*Woodson* is also important for one of its dissenting opinions. Justices Brennan, Marshall, and Blackmun dissented separately, but Justice Brennan’s opinion took on added significance when, five years later, he blended parts of it with the *Woodson* majority view to write the opinion for the Court in *Burger King*.<sup>172</sup> Since *Burger King* is the Court’s last definitive statement of the personal jurisdiction doctrine, understanding Brennan’s particular take on the doctrine, as expressed in *Woodson*, helps pave the way for a more complete understanding of the present state of the doctrine, and helps to put the doctrine in richer context.

Justice Brennan argued for a totality-of-the-circumstances view of extra-territorial jurisdiction because he believed, with Justice Black in *McGee*, that jurisdictional rules had to adapt to the “fundamental transformation of our national economy.”<sup>173</sup> Finding it “outdated,”<sup>174</sup> he

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170. *Id.* at 293-94 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317, 319 (1945)). This excerpt is confusing. Read literally, it seems to say that state sovereignty interests are superior to individual liberty interests in personal jurisdiction analysis, but that is almost certainly not what the Court had in mind. In context, the reference to “federalism” restrictions on state power was the Court’s way of describing the need for purposeful defendant forum contacts before jurisdiction could attach. The Court cited to *Hanson*, a contacts opinion, for the proposition, and the excerpt was part of a paragraph in which the principal point was that a state may not make a binding judgment in personam against an individual with whom it has “no contacts, ties, or relations.” *Id.* at 294. Moreover, to the extent that the excerpt elevated state sovereignty interests over litigant liberty interests it would have been modified by *Insurance Co. of Ireland’s* later repudiation of the “instrument of interstate federalism” conception of due process. See *Ins. Co. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (“The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. . . . [T]he Clause . . . makes no mention of federalism concerns.”).

171. *Cf. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (“An essential characteristic of [the federal judicial] system is the manner in which . . . it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.”).

172. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 480, 486 (1985).

173. *Woodson*, 444 U.S. at 308 (Brennan, J., dissenting) (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1980)).

174. *Id.* (Brennan, J., dissenting).

would have "strip[ped] the defendant of . . . veto power over certain very appropriate fora," because communication and travel over long distances were no longer slow, and notions of state sovereignty were no longer "impractical and exaggerated."<sup>175</sup> In "today's world," he continued, a forum is appropriate if the "plaintiff can show that [it] has a sufficient interest in the litigation [and] the defendant . . . cannot show some real injury to a constitutionally protected interest."<sup>176</sup> Minimum contacts must exist, he argued, quoting his dissent in *Shaffer*, "among the parties, the contested transaction, and the forum state,"<sup>177</sup> but these three separate types of considerations exist in a kind of sliding scale relationship with one another, so that as the significance of one diminishes the significance of the others increase.<sup>178</sup> In this "all things considered" kind of analysis, a defendant's forum contacts are "merely one way of giving content to the determination of fairness and reasonableness"<sup>179</sup> required by the Due Process Clause. If litigating in a particular form is not burdensome to a defendant, for example, fewer contacts with that forum are needed to justify jurisdiction,<sup>180</sup> and "the interests of the State and other parties [to the] proceeding" are the type of "other considerations" that could provide such justification.<sup>181</sup> In sharp contrast to *International Shoe*, Justice Brennan believed that defendant forum contacts were not the most important, or perhaps even a necessary, part of the "minimum contacts" standard.<sup>182</sup> In *Asahi* the

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175. *Id.* at 312 (Brennan, J., dissenting).

176. *Id.* (Brennan, J., dissenting). Requiring a three-way relationship for minimum contacts to exist seems to eliminate the category of general jurisdiction, which requires only a two-way relationship (between defendant and forum), as well as several single-factor jurisdictional tests (e.g., tag jurisdiction, status-adjudications, pure in rem, and the like) which also require only a two-way relationship.

177. *Id.* at 310 (Brennan, J., dissenting).

178. *See id.* at 300-10 (Brennan, J., dissenting).

179. *Id.* at 300 (Brennan, J., dissenting).

180. *Id.* (Brennan, J., dissenting).

181. *Id.* (Brennan, J., dissenting).

182. Justice Brennan also would have found jurisdiction over Seaway and World-Wide on a stream-of-commerce theory. *Id.* at 306-07 (Brennan, J., dissenting). Unlike the majority, for whom the retail sale of the Audi brought the vehicle out of the stream of commerce, Justice Brennan thought the sale purposefully injected the Audi into the stream, and that it was still there when the Robinsons drove the car to Oklahoma. *Id.* at 306 (Brennan, J., dissenting). For him, the car did not come out of the stream, so to speak, until the accident in Oklahoma. *See id.* at 306-07 (Brennan, J., dissenting). As he put it:

It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there. In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.

Court would adopt this view for purposes of denying jurisdiction,<sup>183</sup> but no decision of the Court has yet adopted it explicitly to uphold jurisdiction.

E) *The Mid-Course Refinements: Kulko v. Superior Court, Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinee, Keeton v. Hustler Magazine, Inc., Calder v. Jones, and Helicopteros Nacionales de Columbia, S. A. v. Hall*

While the Court's restatement of the "minimum contacts" standard was not to reach a kind of reflective equilibrium for another five years, in *Burger King*, in the period immediately following *Woodson* the Court made a number of what one might think of as "single-factor"<sup>184</sup> additions to the standard, each of which made a distinctive contribution to the *Woodson* restatement.<sup>185</sup> In fact, it is not much of an exaggeration to say that the cases decided during this five-year period are responsible for most of the details of the modern personal jurisdiction standard, and that the early 1980s was the most productive period in the history of the Court for the personal jurisdiction doctrine, at least to date. *Kulko v. Superior Court*,<sup>186</sup> for example, explained what the Court meant by its enigmatic reference in *Woodson* to the so-called "shared interest of the several States in furthering fundamental substantive social policies."<sup>187</sup> This was one of the most unusual of *Woodson's* "other (sovereignty)

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*Id.* (Brennan, J., dissenting) (footnote omitted). Justice Brennan's influence on the subsequent development of this issue has not been nearly as great as his influence on the general structure of the "minimum contacts" test. The issue did not come up in *Burger King*, and was not discussed again by the Supreme Court until the 1987 decision in *Asahi*, where a plurality of the Court again rejected Justice Brennan's chattel-as-agent view. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion).

183. *Asahi*, 480 U.S. at 114, 116.

184. By this I mean that each of these decisions contributed either a new concept to the developing jurisdictional standard, or a new definition or illustration of a familiar concept. I take the term from the expression "single-factor test," often used to describe a category of jurisdictional standard not subject to a "minimum contacts" analysis. These include so-called transient or tag jurisdiction based on personal service of process while in the state, and "status-determination" jurisdiction based on domicile, marriage, or the appointment of a guardian or the like within the state.

185. See Scott M. Hagel, *Civil Procedure—The Stream of Commerce Theory in Minnesota: Does the Shoe Fit?*, 24 WM. MITCHELL L. REV. 231, 235 n.31 (1998).

186. 436 U.S. 84 (1978). While *Kulko* pre-dates *Woodson*, and thus does not literally occur in the period "intervening" between *Woodson* and *Burger King*, it is like the cases from that period discussed in this Section in that it contributes a single distinctive idea to the reconstituted "minimum contacts" test, and thus can fairly be lumped with that body of cases. *Shaffer*, decided at about the same time as *Kulko*, was once thought to be the Court's most important personal jurisdiction opinion, but time has not treated *Shaffer* well. See *supra* note 74.

187. *Woodson*, 444 U.S. at 292.

factors" against which a defendant's contacts were to be measured in determining the reasonableness of jurisdiction. Lower courts had experienced a great deal of difficulty giving the idea a precise meaning, and had applied it in a wide variety of not completely compatible ways.<sup>188</sup> While *Kulko* did not define the outer boundaries of the factor, it gave a mainstream example of what it looked like.<sup>189</sup>

In *Kulko*, a divorced mother of two living in California petitioned a California state court to modify the custody and support provisions of a New York separation agreement between her and her former husband still living in New York.<sup>190</sup> Initially, in accordance with the agreement, the two children lived with their father during the school year and with their mother during vacations.<sup>191</sup> About a year after the separation, the older child asked to reverse this arrangement and her father agreed, buying her a one-way plane ticket to California.<sup>192</sup> Three years later, the younger child told his mother he wanted to reverse the arrangement as well, and, unbeknownst to the father, the mother sent him a plane ticket to come to California.<sup>193</sup> The father contested the jurisdiction of the California state court over the mother's lawsuit, arguing that apart from the children, he had no contacts, ties, or relations with the State of California.<sup>194</sup> The trial court found jurisdiction,<sup>195</sup> however, and the California Supreme Court affirmed, basing its ruling on the "effects" (the refusal to pay increased support after changing the children's custody arrangements) produced by the father in the State;<sup>196</sup> but the U.S. Supreme Court reversed.<sup>197</sup>

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188. See, e.g., *Great Commonwealth Life Ins. Co. v. Banco Obrero de Ahorro y Prestamos de P.R.*, 535 F.2d 331, 332 (5th Cir. 1976); *Thompson v. Ecological Sci. Corp.*, 421 F.2d 467, 469 (8th Cir. 1970).

189. *Keeton* also may be based, in part, on this factor. The shared policy in that case may have been the interest of the several states embodied in the single publication rule for libel. Like *Hanson* and *Woodson*, *Kulko* also denied jurisdiction and thus helps identify one end of the spectrum of the personal jurisdiction doctrine. *Kulko*, 436 U.S. at 100-01.

190. *Id.* at 87-88.

191. *Id.* at 87.

192. *Id.* at 87-88.

193. *Id.* at 88.

194. *Id.* The couple had been married in California, during a three day trip through the State, but the present action was to modify custody and support arrangements. *Id.* at 86-88. The couple was already divorced. *Id.* at 87-88.

195. *Id.* at 88.

196. *Id.* at 101.

197. Cf. *In re the Parental Responsibilities of H.Z.G.*, 77 P.3d 848, 851-52 (Colo. Ct. App. 2003) (finding general jurisdiction over Idaho father in Colorado paternity action for "transacting business" in Colorado by sending mother a letter promising to make monthly support payments), *cert. denied*, No. 03SC433, 2003 WL 22171476 (Colo. Sept. 22, 2003).

The Supreme Court discussed the purposefulness of the father's actions in permitting the children to move to California, and the extent to which he had benefited from the protections of California law, but its analysis of these issues was hurried and unsophisticated.<sup>198</sup> The decision seems most solidly grounded, not on the defendant's lack of purposeful contacts with the forum as the Court said it was,<sup>199</sup> but instead on the finding that the defendant's contacts with the forum were outweighed by the concern of preserving "family harmony."<sup>200</sup> To take jurisdiction, said the Court, would be to "discourage parents from entering into reasonable visitation agreements,"<sup>201</sup> and "would impose an unreasonable burden on family relations."<sup>202</sup> While couched in the language of purposefulness, this rationale was in fact based on a substantive concern from the area of family law,<sup>203</sup> a surprising move given the Court's longstanding and clearly stated position that substantive law concerns are irrelevant to jurisdictional analysis,<sup>204</sup> and even more so considering that the policy in question was used to modify a constitutional rule, but this feature of *Kulko* has not had a lasting effect.

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198. For example, the Court does not differentiate between the different circumstances of the two children moving to California, the first with the father's help, and the second behind his back (with the help of the mother). *Kulko*, 436 U.S. at 87-88. The first contact seems purposeful in any sense of the term, but the second seems more like a *Hanson* or *Woodson* type of contact, in which the connection is brought about by the unilateral actions of third parties (the child and the mother) claiming a relationship with the defendant.

199. *Id.* at 94 ("A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws." (citation omitted)).

200. *Id.*

201. *Id.* at 93.

202. *Id.* at 98.

203. The Court in *Kulko* did not take a position on the merits of the mother's underlying custody and support claim, but that is not the only way substantive concerns can come into the analysis. *Id.* at 97. Preserving family harmony is not a relevant jurisdictional concern even under the "other factors" half of the *Woodson* test, since it is not a procedural interest, and it has nothing to do with the issue of providing a forum for citizens, particularly in light of California's participation in the Uniform Reciprocal Enforcement of Support Act. *Id.* at 98. Moreover, as the Court stated, "California [did] not attempt[] to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute." *Id.*

204. See *Keeton v. Hustler Magazine*, 465 U.S. 770, 780 n.12 (1984) ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."). *Mullane* is another example of substantive law concerns influencing the jurisdictional analysis. See *infra* note 248.

*Kulko* is most important for its discussion of California and New York's "shared substantive social policy" of providing for the modification of custody and support decrees through an interstate compact. Recognizing "California's legitimate interest in ensuring the support of [its] children resident[s] . . . without unduly disrupting [their] lives,"<sup>205</sup> the Court indicated that the mother's proper course for modifying her support decree would have been to file a petition under the State's Revised Uniform Reciprocal Enforcement of Support Act.<sup>206</sup> That Act, to which New York also was a party,<sup>207</sup> permitted the mother to file a petition for modification in California and have the merits of her claim adjudicated in California and New York without either she or her former husband having to leave home.<sup>208</sup> This interstate mechanism would have been undercut if the California state court had taken jurisdiction over Mr. Kulko.<sup>209</sup> California residents who wanted to modify extra-territorial support decrees would simply circumvent the Uniform Act, and take advantage of a home court, by suing directly in California.<sup>210</sup> To preserve the shared policy which underlay the Act, therefore, the Court had to deny jurisdiction. This was an instance in which a strong state sovereignty interest outweighed weak defendant contacts with the forum. While *Kulko* has continuing validity for this limited point, the decision has not otherwise been a major influence in the development of the personal jurisdiction doctrine.<sup>211</sup>

*Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinee*<sup>212</sup> continued the discussion, begun in *Woodson*, of whether it was legitimate for a court to consider state sovereignty interests in the personal jurisdiction analysis.<sup>213</sup> Unlike most personal jurisdiction cases, the procedural posture of *Insurance Corp. of Ireland* was a little unusual.<sup>214</sup>

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205. *Kulko*, 436 U.S. at 98.

206. *Id.* at 98-100.

207. This is true in effect, although not literally. New York was a party to the 1950 Act, and California was a party to the 1968 Act, but as the Court said, the "'two-state' procedure[s]" for obtaining modifications in each of the Acts were similar. *Id.* at 99 n.14.

208. *Id.* n.13 (describing the procedure).

209. *See id.* n.14.

210. *See id.*

211. Perhaps the best evidence of this is the fact that *Kulko* is cited only perfunctorily in *Burnham*, a nearly factually identical case, and the Supreme Court's most recent discussion of the subject. *See Burnham v. Superior Court*, 495 U.S. 604, 626 (1990) (plurality opinion).

212. 456 U.S. 694 (1982).

213. *Id.* at 701-08.

214. But not unique. *See Kluin v. Am. Suzuki Motor Corp.*, 56 P.3d 829, 832 (Kan. 2002), for a similar set of "refusal to comply with jurisdictional discovery" facts.

The plaintiff, a Guinean mining company,<sup>215</sup> sued its business interruption insurers in Pennsylvania federal district court for failing to pay on a policy.<sup>216</sup> The excess-insurers, all of whom were foreign nationals, filed an answer and moved for summary judgment, alleging, inter alia, that the Pennsylvania court lacked personal jurisdiction over them.<sup>217</sup> What made the case unusual was that the defendants also refused to respond to the plaintiff's discovery requests seeking evidence of the defendants' connection with Pennsylvania needed to support the argument for jurisdiction,<sup>218</sup> arguing that they could not be compelled to comply with discovery motions until they were subject to the jurisdiction of the court.<sup>219</sup> Seemingly puzzled by this "chicken-and-egg" problem, the Supreme Court upheld an appeals court finding of jurisdiction based on one or more of four possible rationales, none of which worked perfectly.<sup>220</sup> The lack-of-a-consensus rationale was not a serious concern, however, given the idiosyncratic nature of the problem, the absence of any real disagreement over how the case should come out,<sup>221</sup> and the

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215. *Ins. Corp. of Ir.*, 456 U.S. at 696. The majority owner of the company was a Pennsylvania mining company. *Id.*

216. *Id.* at 696-97.

217. *Id.* at 696.

218. *Id.* at 698-99.

219. *Id.* at 696.

220. As possible bases for the decision, the Court discussed: (1) Federal Rule 37(b)(2)(A) authority to order that facts in issue be taken as established when a party fails to respond to a discovery request, *id.* at 707-09; (2) the failure to comply with a discovery order as the equivalent of failing to file a Rule 12 motion to dismiss, and thus a waiver of any objection to jurisdiction, *id.* at 703-05; (3) the filing of an answer and motion for summary judgment as a submission or consent to the jurisdiction of the court, *id.* at 706-07; and (4) the *Hammond Packing* presumption (from *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909)) authorizing a court to treat the suppression of evidence as an admission against interest and permitting the court to find the allegations at issue to be true, *Ins. Corp. of Ir.*, 456 U.S. at 705. The problem with the first of these rationales is that the Federal Rules, by their own terms, see FED. R. CIV. P. 82 ("[T]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . ."), and under the provisions of the Rules Enabling Act, see 28 U.S.C. § 2072 (2000) (stating that the [federal] "rules shall not abridge, enlarge or modify any substantive right"), may be used against parties over whom a court already has jurisdiction, but not to create jurisdiction in their own right. The waiver and consent arguments were contrary to fact since the defendants had made it clear with their motion for summary judgment that they were not submitting voluntarily to the jurisdiction of the court. *Ins. Corp. of Ir.*, 456 U.S. at 706. And the *Hammond Packing* presumption applied only in situations in which the court already had jurisdiction, and like Rule 37, could not be used to create jurisdiction in the first instance. See *id.* at 705. The Court would have been better off relying on either the presumption that facts alleged in the plaintiff's complaint are true when not rebutted, or the argument that it had jurisdiction to decide jurisdiction.

221. The defendants argued, in effect, that they should be able to avoid the law by violating it. *Id.* at 706-07. Whatever its reason, it is clear that a court cannot accept this argument and continue to function as a court.

likelihood that the problem would not arise frequently in the future. The defendants' argument was based more on wordplay than substance, and was clever more than serious, and not many clients could be expected to pay to make such arguments over and over again.<sup>222</sup>

In the course of resolving this *sui generis* problem, however, the Court added to its ongoing discussion of the role of sovereignty factors in the due process analysis. In a seeming aside in the opinion, the Court acknowledged that the "[personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."<sup>223</sup> Admitting that it had taken the opposite position in *Woodson*, the Court reversed course, stating that the "restriction . . . described in [*Woodson*] . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause,"<sup>224</sup> because "the Clause itself makes no mention of federalism concerns."<sup>225</sup> "Furthermore," the Court continued, "if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty,"<sup>226</sup> and yet individuals can waive their due process right not to submit to the jurisdiction of a court.<sup>227</sup> This concession did not settle the issue, of course; in fact, it made it more complicated, since the Court then needed to explain how sovereignty concerns (e.g., "the forum state's interest in adjudicating the dispute") could be part of the individual liberty interest of litigants. It did not take up this question, however, and with good reason, since there was no obvious answer to it, or at least none that has occurred to the Court since *Pennoyer*.<sup>228</sup> While not a matter of large practical import—the Court has always taken sovereignty concerns into account in personal jurisdiction analysis, it makes sense to do so, and it appears that it always will—the debate over how to justify doing this continues to swirl.<sup>229</sup> The Court will come back to this question a number of times over the years, but never really put it to rest.

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222. See *id.*

223. *Id.* at 702.

224. *Id.* at 703 n.10. In *Woodson* the Court had described the requirement as "reflect[ing] an element of federalism and . . . state sovereignty." *Id.* at 702 n.10.

225. *Id.* at 703 n.10.

226. *Id.*

227. *Id.* at 703.

228. In *Pennoyer* the Court justified the consideration of sovereignty interests by grounding its decision on an analogy to international law as well as the Due Process Clause. See *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1877).

229. See generally Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1046-66 (1983); Terry S. Kogan, A

*Keeton v. Hustler Magazine*<sup>230</sup> and *Calder v. Jones*,<sup>231</sup> libel actions decided on the same day, also added new dimensions to different parts of the “minimum contacts” standard. *Keeton*, like *Kulko*, was a “sovereignty interests” case. Kathy Keeton, the live-in girlfriend of Bob Guccione, publisher of *Penthouse Magazine*, at the time of the lawsuit, sued Larry Flynt and *Hustler Magazine* for publishing crude sexual caricatures of her.<sup>232</sup> She filed the case in New Hampshire federal district court because New Hampshire was the only state in which the statute of limitations had not run on her claim.<sup>233</sup> Both lower courts denied jurisdiction, but the Supreme Court reversed, finding that the “sale of some 10,000 to 15,000 copies of *Hustler Magazine* in [the] State each month” established the defendants’ “minimum contacts” with New Hampshire.<sup>234</sup> Limited solely to Keeton’s New Hampshire libel claim, this decision was not controversial. *Hustler Magazine* sold magazines on a continuous and systematic basis in New Hampshire, and those magazines gave rise to Keeton’s libel claim.<sup>235</sup> Even under *International Shoe*’s original four-part schemata, this presented a straightforward and relatively easy case of specific jurisdiction under the first of *International Shoe*’s four categories.<sup>236</sup> But the case was complicated by a peculiar feature of the substantive law of libel.

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*Neo-federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 269 (1990) (arguing that the key to state court jurisdiction is “the meaning of interstate federalism”); Harold S. Lewis, Jr., *The “Forum State Interest” Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769 (1982); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18-19 (1989) (recognizing state sovereignty concerns in the determination of personal jurisdiction is “mandated by history”); James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 60 (1992) (“[T]he measure of the legitimacy of a state’s assertion of authority over an individual should reflect [a state’s] territoriality.”). The classic discussion, of course, and the one to sound the alarm in a way that could not be ignored, was Martin Redish’s 1981 article in the *Northwestern University Law Review*. See Redish, *supra* note 163, at 1120-37.

230. 465 U.S. 770 (1984).

231. 465 U.S. 783 (1984).

232. See Fred Barbash, *Court Hands Media Defeat on Libel Law*, WASH. POST, Mar. 21, 1984, at A2.

233. *Keeton*, 465 U.S. at 773. Keeton sued first in Ohio, but her claims were dismissed as time-barred. *Id.* at 772 n.1.

234. *Id.* at 772-774.

235. *Id.* at 779-81.

236. *Id.* at 774.

[R]egular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State’s assertion of personal jurisdiction over a nonresident

Under the so-called single publication rule,<sup>237</sup> Keeton was permitted<sup>238</sup> to recover in New Hampshire for all of the damage done to her reputation in every state in which Hustler was sold.<sup>239</sup> The rule was designed to "reduce[] the potential[] serious drain of libel cases on judicial resources,"<sup>240</sup> but one of its secondary effects in Keeton's case was to give the New Hampshire district court jurisdiction over forty-nine libel claims having no connection with the State of New Hampshire, claims the court otherwise could not have heard.<sup>241</sup> It was as if the single publication rule had created a special species of general jurisdiction specifically for libel claims,<sup>242</sup> despite the fact, as the Court has consistently said, that state substantive law provisions cannot be used to modify constitutionally based jurisdictional rules.<sup>243</sup> The Court finessed this problem, as it had in *Kulko*, by turning to another of the sovereignty factors in *Woodson's* statement of the "minimum contacts" test. It was

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defendant be predicated on "minimum contacts" between the defendant and the State.

*Id.*

237. The single publication rule states that  
[a]s to any single publication, (a) only one action for damages can be maintained;  
(b) all damages suffered in all jurisdictions can be recovered in the one action;  
and (c) a judgment for or against the plaintiff upon the merits of any action for  
damages bars any other action for damages between the same parties in all  
jurisdictions.

RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977).

238. "Required" is more accurate, since the failure to raise the claims would bar Keeton from litigating them in any future proceeding. *See id.*

239. *Keeton*, 465 U.S. at 774.

240. *Id.* at 777.

241. *See id.* at 773. Think, for example, of Keeton suing Hustler in New Hampshire for a libel that took place only in Utah. Absent personal service on, or general jurisdiction over Hustler in the State, there would be no basis on which the New Hampshire court could take jurisdiction, since the magazines distributed in New Hampshire would not have given rise to Keeton's claim in Utah.

242. This is not really a general jurisdiction rule, of course, since the defining feature of general jurisdiction is the right to bring any type of claim against a defendant, no matter where it arises, not the right to bring a specific type of claim, no matter where it arises. *See von Mehren & Trautman, supra* note 19, at 1136. Maybe it would be better to refer to what the Court created as a doctrine of "restricted general jurisdiction."

243. *Keeton*, 465 U.S. at 780 n.12 ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."); *see also* *Calder v. Jones*, 465 U.S. 783, 790-91 (1984) (describing how taking substantive law considerations into account in a jurisdictional analysis would "needlessly complicate an already imprecise inquiry"). Like *Kulko* and *Mullane*, *Keeton* seemed to say one thing and do another with respect to this issue. For a more extensive discussion of *Keeton* and *Calder*, and the relationship between the First Amendment and the personal jurisdiction doctrine, see Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 257-71 (1987).

fair, said the Court, “to compel [Hustler] to defend . . . in New Hampshire [for] damages [caused by] all copies of the [magazine], even though only a small portion of those copies were distributed in New Hampshire,”<sup>244</sup> because “New Hampshire . . . has a substantial interest in cooperating with other States, through the ‘single publication rule,’ to provide a forum for efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding.”<sup>245</sup> Restated in *Woodson* terms, the Court said, in effect, that “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,”<sup>246</sup> and the shared states’ interest in their substantive social policies, compensated for Hustler’s lack of purposeful contacts with New Hampshire (in the non-New Hampshire libel cases), and were sufficient in themselves to establish jurisdiction.<sup>247</sup>

What is strange about this conclusion is that it authorized jurisdiction in a situation where the defendants had not just weak contacts with the state, but no contacts at all. With the possible exception of *Mullane v. Central Hanover Bank & Trust Co.*,<sup>248</sup> this is the only time in the history

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244. *Keeton*, 465 U.S. at 775.

245. *Id.* at 777. The Court also might have relied on the “shared interest[s] of the several States in furthering fundamental substantive social policies,” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), since, as the Court points out, “[t]he great majority of the States . . . follow the ‘single publication rule,’” *Keeton*, 465 U.S. at 777 n.8.

246. *Woodson*, 444 U.S. at 292.

247. *Keeton*, 465 U.S. at 776-77.

248. 339 U.S. 306 (1950). *Mullane* involved a petition in New York Surrogate Court for the settlement of common trust funds, many of the claimants to which had no connection with the State of New York, and some of whom did not even know they were claimants. *Id.* at 309-10. The principal issue in the case concerned the type of due process notice due the fund claimants, but in the course of resolving that issue the Supreme Court also took up the question of the State’s power to adjudicate the rights of claimants who had no contact with New York, and who had not submitted to the authority of the Surrogate Court. *Id.* at 307-12. *Mullane* was decided after *International Shoe*, so the Court should have used the “minimum contacts” standard to resolve this jurisdictional question, but it did not. Instead, it grounded its decision on the state substantive law interest of creating and administering common trust funds. *Id.* at 313. The Court said, in effect, that it was legitimate for a state to permit the combination of small trusts into larger economic units to encourage the more efficient use of capital and allow the donors and testators of small and moderately sized trusts to use the services of corporate fiduciaries. *Id.* at 307-09. This interest, said the Court, “is so insistent and rooted in custom as to establish beyond doubt the right of [the State’s] courts to determine the interests of all claimants, resident or nonresident,” *id.* at 313, and a determination of this sort can be made “only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.” *Id.* at 313-14. *Mullane*’s discussion of this personal jurisdiction question is often overlooked because the decision’s principal focus is on the question of notice, but *Mullane* is the first major Supreme Court case to ground a personal jurisdiction decision on substantive law concerns. *Id.*

of the Court, so far as I can tell, that sovereignty interests have been held sufficient in themselves to establish jurisdiction in the absence of defendant contacts with the forum, or put another way, the only time the Court has found "minimum contacts" to exist in the absence of actual contacts. Justices Brennan and Stevens have taken the position over the years that the contacts test is a severable part of the personal jurisdiction standard,<sup>249</sup> and that sovereignty interests alone can establish jurisdiction even in the absence of contacts, but so far as I know the Court has never acted explicitly on that view.<sup>250</sup> *Keeton* has not proved doctrinally troublesome, however, since lower courts do not cite to this feature of the opinion with any frequency. *Calder*, on the other hand, has proved to be a can of worms.

The *Calder* lawsuit grew out of an alleged libel of Shirley Jones, a once popular but now largely forgotten movie and television personality,<sup>251</sup> in an article published in *The National Enquirer* magazine.<sup>252</sup> Jones sued the Florida-based magazine, along with the writer and editor of the article, in California state court.<sup>253</sup> Only the writer and editor (the defendants) contested jurisdiction, arguing that they did all of their work in Florida and had no control over, or economic stake in, the distribution of the magazine in California.<sup>254</sup> The trial court denied jurisdiction, saying that it would have a "'chilling effect' on reporters and editors [who would have] to appear in remote jurisdictions to answer for the content of articles upon which they worked."<sup>255</sup> The

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249. Justice Brennan says this in his dissent in *Woodson*. *Woodson*, 444 U.S. at 300 (Brennan, J., dissenting) ("Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable."). And Justice Stevens says it in his concurring opinion in *Asahi*. *Asahi v. Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 121 (1987) (Stevens, J., concurring in part and concurring in the judgment) ("An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional.").

250. *Mullane* and *Keeton* did not use this rationale directly. The Court has used sovereignty concerns to defeat jurisdiction even in the presence of defendant contacts. See *supra* notes 223-29, and accompanying text.

251. Jones was Marian the Librarian in the movie *The Music Man*, and the mother in the television show *The Partridge Family*. I mention this because most law students ask. Presumably the readers of this Article are an older crowd and remember Shirley Jones.

252. *Calder v. Jones*, 465 U.S. 783, 785 (1984).

253. *Id.* at 784-85.

254. *Id.* at 789. The defendants analogized themselves to welders who make a boiler which explodes in another state. *Id.*

255. *Id.* at 786. Before *Calder* some courts had suggested that the First Amendment imposed significant limitations on the exercise of long-arm jurisdiction when defendants' rights of expression might be compromised. See, e.g., *New York Times Co. v. Connor*, 365 F.2d 567, 573 (5th Cir. 1966). *Keeton* and *Calder* rejected this argument. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.12 (1984); *Calder*, 465 U.S. at 790-91.

California Court of Appeal reversed, finding that the defendants “intended to, and did, cause tortious injury . . . in California.”<sup>256</sup> And the U.S. Supreme Court affirmed, relying on what it described as an “effects” test, but what probably is more accurately described as a new conception of “purposeful contacts.”<sup>257</sup> It is this new conception of purposefulness that makes *Calder* important.

The “effects” test for long-arm jurisdiction first came into widespread use in the 1950s as a kind of tort-law alternative to the contract-law-based “doing business” standard.<sup>258</sup> It was designed to deal with the jurisdictional problem created when an out-of-state defendant caused harm in a state not as a consequence of a commercial transaction.<sup>259</sup> The test was different for single-state torts, those begun and completed in the same state, than it was for multi-state torts, those in which an event set in motion in one state caused harm in another.<sup>260</sup> Multi-state torts, because they represented less of a contact with the forum, were regulated by a more demanding “effects plus” standard, which required a plaintiff to show not just that the defendant had produced a tortious effect in the state, but also that the defendant had one or more of the “plus” characteristics thought to make it fair to subject a party to jurisdiction.<sup>261</sup> Generally, “plus” factors tried to separate large commercial actors who did business across state lines and who reasonably could expect to be sued in other states, from local, mom-and-pop enterprises operating

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256. *Calder*, 465 U.S. at 787. The court mistakenly believed that “continuous and systematic” contacts with California were sufficient to establish general jurisdiction over the defendants in the State, but did not base the decision on this conclusion because it also found that neither defendant had continuous and systematic contacts. *Id.*

257. *Calder* has some strange language on the subject of contacts generally. For example, it adopted *Shaffer’s* problematic formulation of the “minimum contacts” standard, as requiring a three-way relationship between the defendant, the claim, and the forum, *id.* at 788, a phrasing the Court would later repudiate in *Burnham*, see *supra* note 74. It also said that plaintiff contacts with a forum “may be so manifold as to permit jurisdiction when it would not exist in their absence,” *Calder*, 465 U.S. at 788, but did not explain how this statement can be reconciled with the statement in *Keeton* that plaintiff contacts with a forum are relevant only insofar as they “enhance [the] defendant’s contacts with the forum” because of the defendant’s “relationship with the plaintiff,” *id.* at 780. Justice Rehnquist wrote both the *Keeton*, *id.* at 774, and *Calder* opinions, 465 U.S. at 784.

258. See, e.g., *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 209 N.E.2d 68, 72 (N.Y. 1965).

259. Multi-state pollution cases are a common example. See *Gray Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

260. The “single-state/multi-state” distinction is now typically made in so-called enumerated acts long-arm statutes, but at the time of *International Shoe* there was considerable debate over whether such a distinction was needed. Compare *Barnes & Reinecke*, 209 N.E.2d at 77-80, with *Gray*, 176 N.E.2d at 762-66 (1965) (illustrating the debate between Illinois and New York courts on the issue).

261. *Barnes & Reinecke*, 209 N.E.2d at 72.

completely within single states, who could not.<sup>262</sup> The most common "plus" factors, for example, asked if the defendant "derive[d] substantial revenue from interstate commerce," or "derive[d] substantial revenue from [other] goods or services used or consumed . . . [with]in the state."<sup>263</sup> The libel in *Calder* was a multi-state tort, begun in Florida where the article was written, and completed in California (and in every other state) where the article was published and the harm suffered,<sup>264</sup> but this notwithstanding, it would have made little sense for the Court to discuss jurisdiction over the *Calder* defendants in traditional "effects-plus" terms. The defendants did not derive revenue from interstate commerce, for example, or from goods and services consumed in California, because they were not engaged in interstate commerce—they were employees of a business engaged in interstate commerce.<sup>265</sup> And while they produced a tortious effect in California to be sure, the determination of whether that effect was enough to subject them to jurisdiction of necessity had to be based on some type of "plus" factor other than the nature and size of their business.<sup>266</sup> They did not have a business.

The Court concluded that it was fair to subject the defendants to jurisdiction in California because they wrote a story "drawn from California sources," about the "California activities of a California resident," that "impugned [that person's] professionalism" and harmed her career and reputation in California.<sup>267</sup> In sum, the Court said "California [was] the focal point both of the story and of the harm suffered. Jurisdiction over [the defendants was] therefore proper . . . based on the 'effects' of their Florida conduct in California."<sup>268</sup> In

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262. See *Gray*, 176 N.E.2d at 766.

263. N.Y. C.P.L.R. § 302(a)(3)(i)-(ii) (McKinney 2001).

264. *Calder v. Jones*, 465 U.S. 783, 784, 788-89 (1984).

265. *Id.* at 785-86.

266. *Calder* fit into the fourth of the original *International Shoe* categories, a case of single and isolated contacts giving rise to the claim. Under *International Shoe*, this meant that the defendants would be subject to California jurisdiction if the "nature[,] quality and the circumstances of [the contacts'] commission" made it fair to force them to defend there. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318. Given the variety of meanings lower courts have given *Calder*, the Court might have been better off discussing the case in these original terms rather than fashioning a new "targeting" rule.

267. *Calder*, 465 U.S. at 788-89.

268. *Id.* at 789 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)). The Court cited to *Woodson* as authority for this conclusion, but a reference to *Woodson* in this context is difficult to understand. *Woodson* denied jurisdiction, so the case does not stand for any particular rule articulating what it would take to establish jurisdiction, and it was limited to the question of whether Seaway and World-Wide were doing business in Oklahoma. See *Woodson*, 444 U.S. at 299. It did not involve an "effects" based jurisdictional test. Finally, the particular pages referred to in

language that has since come to be identified with *Calder*, the Court explained that the defendants were “not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California . . . [T]hey knew [their article] would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that injury would be felt . . . in [California].”<sup>269</sup>

In developing this so-called targeting test, a kind of super-purposefulness requirement if you will, the Court did not create a completely new kind of standard. In fact, in one sense, “targeting” was just a variation of the familiar “effects-plus” standard. It required both a tortious effect within the state and some additional factor, here an extra measure of purposefulness, to show that it was fair to take jurisdiction over the defendants.<sup>270</sup> The difficulty with the test, however, is that it has proved difficult to give the concept of targeting a precise meaning. How, for example, does a “targeting” test differ from the “foreseeability” standard found wanting in *Woodson*? The defendants in *Calder*, as the Court said, “knew” that their article, if libelous, would harm Jones in California,<sup>271</sup> but the same could be said of Seaway and World-Wide, the defendants in *Woodson*, who knew that their automobile, if defective, could cause harm to the Robinsons wherever the Robinsons took it.<sup>272</sup> The principal difference between the two cases seems to be more the difference between harm caused by an automobile and harm caused by a magazine article, than it does the difference in the respective defendants’ states of mind. Seaway and World-Wide did not set out to harm the Robinsons, of course, but the same could be said of the defendants in *Calder*, at least in the legal sense, and to the extent that is not true, it is relevant to the issue of liability and not to jurisdiction.

While the Court did not define targeting explicitly in *Calder*, it did talk about it,<sup>273</sup> and when it did so it used the language of foreseeability rather than the language of purposefulness.<sup>274</sup> It described the defendants’ states of mind as “knowing” where the harm would be felt rather than as “wantonly, willfully, or maliciously” seeking to harm Jones in California.<sup>275</sup> And this description fit the facts. There was no indication

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*Woodson* discuss the stream-of-commerce version of “minimum contacts,” *id.* at 297-98, but stream-of-commerce theory is a contract-law based version of the jurisdictional standard, and *Calder* involved a tort, *Calder*, 465 U.S. at 789.

269. *Calder*, 465 U.S. at 789-90.

270. *Id.* at 789.

271. *Id.* at 789-90.

272. *Woodson*, 444 U.S. at 297.

273. *Calder*, 465 U.S. at 789.

274. *Id.* at 789-90.

275. *Id.* The Court also describes “targeting” as “expressly aiming” tortious actions at the forum, but it is hard to see how this clarifies the concept. *See id.*

that the defendants searched the United States to learn where Jones lived, and then tailored an article particularly to that market.<sup>276</sup> They wrote an article about Jones, and she just happened to live in California. The Court's failure to provide clearer guidance about what it means to "target" someone presumably was not for a lack of capacity to do so. When it has wanted to describe the difference between purposefulness and foreseeability in the past it has been able to. In *Asahi*, for example, Justice O'Connor described in considerable detail the factors needed to turn foreseeable stream-of-commerce contacts into purposeful ones,<sup>277</sup> and yet, in *Calder* the Court did not do this. The introduction of a "targeting" conception of purposeful contacts has proved particularly troublesome in the lower federal and state courts where it has become a popular but malleable standard, given all kinds of different meanings as situations require.<sup>278</sup>

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276. *Id.* at 785-86 & n.4.

277. *Asahi v. Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987) (plurality opinion).

278. See *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 n.7 (1st Cir. 2001) ("[W]e note that several circuits do not appear to agree as to how to read *Calder*."). The best summaries of the different interpretations are in *Pavlovich v. Superior Court*, 58 P.3d 2, 8-10 & 8 n.1 (Cal. 2002) (describing the various understandings of targeting expressed by the different circuits), and *Griffis v. Luban*, 646 N.W.2d 527, 533-34 (Minn. 2002) (describing how "the 'effects test' approved in *Calder*" has been applied in the various circuits). *Griffis* is a particularly good example of the difficulty of coming up with a non-circular definition of targeting. See *id.* at 533 (noting other courts' determinations that (1) targeting requires "something more" than merely producing an effect in the forum, (2) the something more requirement is satisfied by "express[ly] aiming" at the defendant in the forum, and (3) the "expressly aiming" requirement is satisfied by "targeting a known forum resident," so that targeting, in effect, is defined as expressly aiming, and expressly aiming is defined as targeting (citations omitted)); see also *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998) (describing a three-pronged test for targeting that reduces to "expressly aim[ing] . . . tortious conduct at the forum"). Some courts see targeting as simply an "in-state effects" or "foreseeability" standard, see, e.g., *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (concluding that jurisdiction was proper because "the injury and thus the tort occurred in Illinois"); *Carrot Bunch Co. v. Computer Friends, Inc.*, 218 F. Supp. 2d 820, 826 (N.D. Tex. 2002) (concluding that jurisdiction was proper because defendant registered, used, and maintained infringing domain names "with the knowledge that his actions would likely injure [plaintiff] in Texas"); *Ahadi v. Ahadi*, 61 S.W.3d 714, 720 (Tex. App. 2001) ("[W]hen a nonresident defendant sends false information into a state, . . . there is a foreseeable . . . injury to the resident at its domicile. Therefore . . . it must reasonably anticipate being haled into court there to answer for its actions."), but most define it to require "something more" than mere awareness that one's intentional acts will cause harm in the forum state, see, e.g., *Revell v. Lidov*, 317 F.3d 467, 473, 476 (5th Cir. 2002) (stating that targeting involves a consideration of the "geographic focus" of a libelous article, not just the location of the harm inflicted); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (describing a three-part test and concluding that "there must be 'something more' [than posting on a website] to demonstrate that the defendant has directed his activity toward the forum" (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1998)); *Imo*, 155 F.3d at 265-66

*Helicopteros Nacionales de Colombia, S. A. v. Hall*<sup>279</sup> is the closest the Court has come to clearing up an ambiguity, introduced in *International Shoe*, in the definition of the nexus requirement of specific jurisdiction, and also is the Court's second most important (after *Perkins*) general jurisdiction decision.<sup>280</sup> *Helicopteros* was a wrongful death action brought by the survivors and personal representatives (plaintiffs) of four employees of a Peruvian construction company<sup>281</sup> killed in a helicopter crash while working on an oil pipeline in Peru.<sup>282</sup> The plaintiffs sued the Texas-based joint venture building the pipeline (WSH),<sup>283</sup> its Peruvian alter ego (Consortio), the manufacturer of the helicopter (Bell), also based in Texas, and the Colombian transportation company whose pilot was flying the helicopter when it crashed (Helicol), all in Texas state court.<sup>284</sup> Not surprisingly, only Helicol contested jurisdiction.<sup>285</sup> The trial court denied Helicol's motion to dismiss,<sup>286</sup> the intermediate appeals court reversed,<sup>287</sup> and the Texas Supreme Court did both, first affirming the appeals court decision and then, seven months later, reversing it (and itself).<sup>288</sup> The U.S. Supreme Court broke the tie, so to speak,<sup>289</sup> also by

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(describing a three-pronged analysis for the application of *Calder* targeting); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 837 (N.D. Ill. 2000) ("Simply registering a domain name for a website is not sufficient to create jurisdiction without 'something else.'" (citations omitted)); *Griffis*, 646 N.W.2d at 534-35 ("[S]omething more than defendant's knowledge that the plaintiff is a resident of the forum and will feel the effects of the tortious conduct there must be necessary to satisfy the [*Calder*] test."); see also Richard Garnett, *Dow Jones & Company v. Grutnick: An Adequate Response to Transnational Internet Defamation?*, 4 U. MELBOURNE J. INT'L LAW 196 (2003), available at <http://ssrn.com/abstract=473041> (advocating a targeting rule for locating jurisdiction in international Internet defamation cases).

279. 466 U.S. at 408 (1984).

280. The Court also uses von Mehren and Trautman's "specific" and "general" jurisdiction terminology for the first time in *Helicopteros*, making it clear that it was now doctrinal language. *Id.* at 414-15 & nn. 8-9. Like *Kulko*, *Woodson*, and *Insurance Corp. of Ireland* before it, *Helicopteros* is another in the series of cases that cuts back on the totality-of-the-circumstances view of *McGee* in favor of a defendant-veto view of *Hanson*.

281. *Id.* at 409-10. The company, Consortio, was created solely for the purpose of allowing Williams-Sedco-Horn (WSH), an American joint venture, to enter into a contract with Petro-Peru, the Peruvian state-owned oil company, to construct a pipeline from the interior of Peru to the Pacific Ocean. *Id.* at 410.

282. *Id.*

283. According to the Court, "[t]he participants in the joint venture were Williams International Sudamericana, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and Horn International, Inc., a Texas corporation." *Id.* at 410 n.1.

284. *Id.* at 409-12.

285. *Id.* at 412.

286. *Id.*

287. *Id.*

288. *Id.* at 412-13.

reversing, holding that Helicol was not subject to personal jurisdiction in Texas.<sup>290</sup>

The case in the Supreme Court was pretty much over when the respondents (plaintiffs at trial) conceded that their "claims against Helicol did not 'arise out of,' and [were] not related to, Helicol's activities in Texas."<sup>291</sup> This concession meant that specific jurisdiction was unavailable over Helicol in Texas, and that the plaintiffs would have to establish general jurisdiction if they wanted to keep the case in the State.<sup>292</sup> But to support general jurisdiction they would have to show that Helicol had substantial contacts with Texas, and this was nearly impossible to do for a company that was incorporated, and had its principal place of business, in Colombia, South America.<sup>293</sup> The *Helicopteros* decision is not important for the difficulty of the issues involved, therefore, or the specific outcome reached, but instead for its considered non-application of the doctrine of general jurisdiction. It is only the second Supreme Court case decided on the basis of that doctrine, and unlike *Perkins*, this time the Court denied jurisdiction.<sup>294</sup> Before reaching the general jurisdiction question, however, the Court took up the preliminary question of how to define nexus.

One will recall that the Court created a problem for the doctrine of specific jurisdiction when, in *International Shoe*, it described the nexus requirement in more than one way.<sup>295</sup> These multiple definitions proved confusing over the years and Justice Brennan wanted to use *Helicopteros* to clear up the confusion,<sup>296</sup> but the rest of the Court chose to "assert no 'view' with respect to that issue."<sup>297</sup> *International Shoe* had held that a

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289. The four opinions in the case were evenly split.

290. *Id.* at 418-19.

291. *Id.* at 415.

292. *See id.* at 414-16.

293. *Id.* at 409.

294. Compare *id.* at 418-89, with *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952).

295. *See supra* pp. 106-07, 113-15.

296. *Helicopteros*, 466 U.S. at 424-26 (Brennan, J., dissenting). The basic debate was over whether a "but for" relationship between the defendant's contacts and the plaintiff's claim was enough to satisfy the nexus requirement, or whether a "proximate cause" relationship was needed instead. In *Woodson*, the Court had seemed to reject a "but for" definition of nexus, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 298-99 (stating that financial benefit resulting from the use of defendant automobile dealer's car in Oklahoma creates only a collateral relation with the State because it has only a "but for" relationship with plaintiff's claim, and as such is "far too attenuated" a contact to support jurisdiction), but not so clearly as to put the issue to rest.

297. *Helicopteros*, 466 U.S. at 415 n.10.

We do not address the validity or consequences of such a distinction because the issue has not been presented in this case. Respondents have made no argument

defendant's continuous and systematic activity in a state must "give rise to the liabilities sued on"<sup>298</sup> for specific jurisdiction to be present. There must be some substantive overlap, or nexus, in other words, between the facts needed to prove the defendant's contacts with the forum and the facts needed to prove the plaintiff's claim.<sup>299</sup> Unfortunately, in describing the same requirement later in the opinion, the Court twice paraphrased rather than repeated its "give rise to" (or "arise out of")<sup>300</sup> language,<sup>301</sup> using the expressions "connected with"<sup>302</sup> and "related to"<sup>303</sup> instead, and as Justice Brennan pointed out in his *Helicopteros* dissent, these new phrasings were "substantial[ly] differen[t]" from the "'give rise' to" formulation.<sup>304</sup> The new phrasings seemed to create a less demanding, alternative test for nexus, one requiring only some sort of "significant[] relat[ionship]" between the defendant's forum contacts and the plaintiff's claim.<sup>305</sup> The difference was critical in *Helicopteros* where the plaintiffs' claim "arose" in Peru (not Texas) where the helicopter was negligently piloted,<sup>306</sup> but also was "related to" Helicol's contacts with Texas, since the company purchased and serviced its helicopters in the State, and sent its pilots there for training.<sup>307</sup> On a "but for" understanding of nexus, therefore, jurisdiction was available in Texas, but on a "proximate cause" understanding, it was not. Fortunately for

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that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.

*Id.*

298. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

299. See Brilmayer, *How Contacts Count*, *supra* note 37, at 80-88.

300. *Int'l Shoe*, 326 U.S. at 319-21.

301. "Give rise to" or "arise out of," appear three times in the opinion, *id.* at 319, 320, 321, while the "connected with," *id.* at 317, and "related to," *id.* at 318, paraphrases appear once each.

302. *Id.* at 317. Because it was describing the absence of jurisdiction, the Court's actual term was "unconnected with." *Id.*

303. *Id.* at 318. Again, the Court's actual term was "unrelated to." *Id.*

304. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. at 424-26 (Brennan, J., dissenting).

305. *Id.* at 425 (Brennan, J., dissenting).

306. *Id.* at 409-10.

307. *Id.* at 411. The helicopter maintenance and pilot training in Texas did not provide the needed nexus between the defendants' contacts and the plaintiffs' (Helicol) claims since the plaintiffs' claims were for negligent piloting, not negligent maintenance or training. *Id.* at 412. If present, the latter claims would have been against Bell rather than Helicol, and the Texas court already had jurisdiction over Bell. See *id.* at 414.

the Court, the plaintiffs' concession that their claims neither arose out of, nor were related to, the defendants' contacts with Texas spared it the task of having to choose between the two standards (if in fact they were two standards), and permitted it to leave the issue for another (still to come) day.<sup>308</sup> But this result left lower court confusion on the topic unabated.

The more important part of *Helicopteros*, the Court's discussion of general jurisdiction, began with a familiar but understandable mistake. "[W]hen the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State," said the Court, "due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are *sufficient* contacts between the State and the foreign corporation."<sup>309</sup> This is a tautology, of course, for it says only that contacts are "sufficient" for general jurisdiction when they are "sufficient" for general jurisdiction. In explaining when contacts are sufficient, however, the Court relied on *Perkins* and its discussion of the Benguet Mining Company's activities in Ohio during the Second World War.<sup>310</sup> Unfortunately, the Court quoted the wrong language from *Perkins*. "The exercise of general jurisdiction . . . was 'reasonable and just'" (in *Perkins*), said the Court, because "the foreign corporation . . . 'ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business.'"<sup>311</sup> The Court's choice of this "continuous and systematic" rather than "substantial" contacts language from *Perkins* conflated two separate and distinct tests. *Perkins* had described

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308. *Id.* at 415. The Court described the plaintiffs (through counsel), as having "concede[d]" this point, *id.*, but it might be more accurate to say that the plaintiffs never saw it. They failed to make a "related to" nexus argument, or even mention the "arise out of/related to" distinction, anywhere in the four page argument section of their brief on the merits, see Brief of Respondents at 16-20, *Helicopteros* (1984) (No. 82-1127), notwithstanding that the defendants' brief (filed a month earlier because defendants were the petitioners in the Supreme Court) discussed the issue in detail and argued for an "arise out of" definition of nexus, see Brief for Petitioner at 11-12, *Helicopteros* (No. 82-1127). The plaintiffs made only a general jurisdiction argument, and one based on the probably non-existent (*Shaffer* notwithstanding) doctrine of jurisdiction by necessity, see Brief of Respondents at 16-20, *Helicopteros* (No. 82-1127), but not much else. And in oral argument, after Justice Brennan suggested to defendants' counsel that "related" contacts might satisfy the nexus requirement, counsel for the plaintiffs failed to pick up on this cue and argue the point. See Oral Arguments at 3, *Helicopteros* (No. 82-1127). In a sense, failing to argue a point is one way of conceding it, but to the extent that the Court meant to suggest that plaintiffs' counsel made a conscious and considered judgment to concede the nexus-definition issue, that suggestion is probably an overstatement. Counsel seemed not to be aware of the fact that there was an issue to concede.

309. *Helicopteros*, 466 U.S. at 414 (emphasis added) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

310. *Id.* at 414-15.

311. *Id.* at 415.

“continuous and systematic” in-state activity as the test for specific jurisdiction, and “substantial” in-state activity as the test for general jurisdiction, and yet the *Helicopteros* Court’s casual reading of the opinion effaced this distinction.<sup>312</sup> The misreading was harmless in *Helicopteros* itself, since the Court also concluded, improbably one might add, that the company’s considerable helicopter business in Texas was not sufficiently “continuous and systematic” to support jurisdiction,<sup>313</sup> but the effect on the case law generally has not been as sanguine. Lower courts (and even the Supreme Court, in *Burger King*) routinely quote *Helicopteros* for the proposition that general jurisdiction requires only “continuous and systematic” in-state activity, find this requirement satisfied by some form of doing business in the state, and then routinely take general jurisdiction over corporations carrying on any minimal amount of commercial activity in the state.<sup>314</sup> This is a mistake not only for reasons of policy and principle, as Mary Twitchell argues,<sup>315</sup> but also because it gets the doctrinal standard wrong.

#### F) *The Second Restatement: Burger King*

After the foregoing series of mid-course corrections, the Court revisited the personal jurisdiction doctrine one more time in *Burger King Corp. v. Rudzewicz*,<sup>316</sup> to make what, until the present, is its most comprehensive and sophisticated statement of the “minimum contacts” standard. Coming at the end of the line, *Burger King* was able to incorporate the distinctive ideas of each of the foregoing cases into a new synthesis, and also to resolve some of the issues left open by *Woodson*.

The Burger King Corporation sued one of its Michigan franchisees in federal district court in Florida, alleging a breach of the franchise agreement and infringement of Burger King’s trademark occasioned by the defendants’ continued operation as a Burger King restaurant.<sup>317</sup> The decision itself ultimately rested on a kind of 800-pound gorilla argument, that the defendants could not reap the benefits of a long-term affiliation with an organization as all encompassing and powerful as Burger King,

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312. See *infra* Part II.C.

313. *Helicopteros*, 466 U.S. at 416, 418-19.

314. *Guangzhou Ocean Shipping Co. v. Gulf & Orient Steamship Line*, CIVIL ACTION NO. 97-3918 SECTION: E/3, 1998 U.S. Dist. LEXIS 16162, at \*8 (E.D. La. Oct. 9, 1998); *Arnold v. Cedar Point, Inc.*, No. 5:93:CV:49, 1993 U.S. Dist. LEXIS 13038, at \*4 (W.D. Mich. July 30, 1993); *Capizzano v. Walt Disney Co.*, 826 F. Supp. 53, 55 (D.R.I. 1993).

315. See Twitchell, *supra* note 1, *passim* (describing the policy and principle objections to the use of a “doing business” standard for general jurisdiction).

316. 471 U.S. 462 (1985).

317. *Id.* at 468-69.

which they knew to be headquartered in Florida,<sup>318</sup> "submit[ting] to the national organization's exacting regulation of virtually every conceivable aspect of their operations,"<sup>319</sup> and at the same time claim that they had no purposeful contacts with Florida for purposes of a lawsuit arising out of that affiliation. Put in old-fashioned terms, the defendants were "doing business" on a continuing basis in Florida, not as restaurateurs, but as franchisees, and Burger King's lawsuit was for breach of the franchise agreement, not for selling bad hamburgers.<sup>320</sup> There was not much disagreement over this issue among the members of the Court.<sup>321</sup> Only Justices Stevens and White thought the defendants' contacts were not extensive enough to support jurisdiction.<sup>322</sup>

Doctrinally, however, *Burger King* is a good deal more interesting. The decision not only made a major restatement of the prevailing version of the "minimum contacts" test inherited from *Woodson*, but added some new, significant elements of its own. Like *Woodson*, *Burger King* saw "minimum contacts" as a two-part test, but rather than use the *Woodson* categories of "inconvenience to the defendant" and "other (i.e., state interest) factors," the Court made the first half of the test an inquiry into the nature of the defendant's contacts with the forum, the actual basis of the *Woodson* decision,<sup>323</sup> and moved inconvenience to the defendant into the second "other factors" half of the test,<sup>324</sup> along with the state and federal sovereignty factors discussed in *Woodson* (in *Burger King*, these will come to be called the "fairness factors").<sup>325</sup> In other words, *Burger King* reconstituted the test to include both what *Woodson* said and what it did, and rearranged the various parts of the test to be more in accord with their logical relationships.

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318. *Id.* at 480-81.

319. *Id.* at 465.

320. *Id.* at 468-69.

321. Only the issue of defendant forum-contacts received extensive discussion in the opinion. The Court's treatment of state interest concerns was disposed of with the cryptic and double-negatively phrase, "We cannot conclude that Florida had no 'legitimate interest in holding [Rudzewicz] answerable on a claim related to' the contacts he had established in that State." *Id.* at 482-83 (alteration in original) (citation omitted).

322. *Id.* at 487-90 (Stevens, J., dissenting).

323. *Id.* at 474-75.

324. *Id.* at 476-77. The Court uses the term "burden on" the defendant, *id.* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)), rather than "inconvenience" to the defendant, but the two expressions are used interchangeably throughout the personal jurisdiction case law, see, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994).

325. *Burger King*, 471 U.S. at 476-77; see, e.g., *Brockman v. Kravic*, 779 N.E.2d 1250, 1257 (Ind. Ct. App. 2002); *Builder Mart of Am. v. First Union Corp.*, 563 S.E.2d 352, 355 (S.C. 2002) (describing fairness factors as "fairness prong"). The First Circuit calls them "gestalt factors." *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 6 (1st Cir. 2002).

In addition to these structural changes, *Burger King* also added to the substantive content of the standard, sometimes helpfully and sometimes not. Without self-consciously saying it was doing so, the opinion subdivided the idea of defendant contacts into its quantitative and qualitative dimensions.<sup>326</sup> Quantitatively, the Court said, contacts could be either “single or occasional,” “significant,” or enough to “create a substantial connection with the forum,” or a “continuing obligation[]” with its residents.<sup>327</sup> All but the “substantial connection” language (taken from *McGee*) was uncontroversial, so perhaps it is not surprising that Justice Brennan, writing for the Court, relied on the “substantial connection” language to support jurisdiction over the *Burger King* defendants.<sup>328</sup> The use of the term “substantial” in this context is confusing principally because “substantial” is the same adjective used in *International Shoe* to describe the kind of contacts needed to establish general jurisdiction,<sup>329</sup> and since *Burger King* involved only a question of specific jurisdiction,<sup>330</sup> there was no need to ask whether the defendants’ contacts with Florida were “substantial” in the *International Shoe/Perkins* sense of the term. In using the term, the Court encouraged lower courts to think of “substantial” contacts as interchangeable with “continuous and systematic” contacts, much as *Helicopteros* had done,<sup>331</sup> and in so doing, continued the process that eventually would rob the idea of substantial contacts of any precise meaning and in turn lead to the demise of the doctrine of general jurisdiction.<sup>332</sup>

In addition to their quantitative dimension, a defendant’s contacts with a forum also had to meet certain qualitative requirements. When a question of specific jurisdiction is involved, said the Court, a defendant’s contacts must give rise to the plaintiff’s claim (the nexus requirement), be purposeful rather than foreseeable,<sup>333</sup> not be “‘random,’ ‘fortuitous,’

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326. Not everyone picks up on this. See, e.g., *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203, 209 (D.P.R. 2002) (mixing quantitative and qualitative dimensions of defendant forum contacts together).

327. *Burger King*, 471 U.S. at 475 & n.18, 476.

328. *Id.* at 475, 479; see also *id.* at 487 (Stevens, J., dissenting).

329. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1945).

330. See *Burger King*, 471 U.S. at 464. Following *Helicopteros*, *Burger King* uses the terms “specific” and “general” jurisdiction, see *id.* at 473 n.15, and gives *Perkins* as its example of general jurisdiction, *id.* at 473 n.15.

331. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 416 (1984).

332. The “substantial connection” test is now the most popular way to express the contacts requirement of the specific jurisdiction doctrine. See *supra* note 56.

333. The Court acknowledged that in the unusual case this purposefulness could be manifest through a stream-of-commerce, or be of a “targeted” or “deliberate” nature, in which fewer direct defendant forum contacts would be necessary. *Burger King*, 471 U.S. at 472-77.

or 'attenuated,'<sup>334</sup> and not be the result of the "unilateral activity of another party" who claims some relationship with the defendant.<sup>335</sup> They also must result in the defendant realizing "the benefits and protections of the forum[] [state's] laws."<sup>336</sup> To the extent there are differences among these various phrasings, the requirements were intended to be cumulative. Here, *Burger King* did not so much change the *International Shoe/Woodson* standard as summarize it. Each of the above qualifications was a familiar and uncontroversial one, and just another way of expressing some aspect of the idea of purposeful connection with the forum, the central idea in the defendant-veto view. On *Burger King*'s restatement, once both the quantitative and qualitative requirements of the contacts test are met, so that "a defendant [has] purposefully established minimum contacts within the forum State,"<sup>337</sup> a court then must consider the strength of those contacts in light of the state sovereignty interest and federalism factors identified in *Woodson*.<sup>338</sup> Here again, the Court added a new feature to the test.

*Burger King* is the first opinion in which the Court tried to express the idea of "minimum contacts" as a single, integrated standard. Recall that *Woodson*'s version of "minimum contacts" failed to provide a rule for comparing factors from the first half of the test with factors from the second half.<sup>339</sup> It did not say, for example, how strong a forum state's interest in providing effective relief for its citizens had to be in order to offset the inconvenience to the defendant of having to defend in the forum.<sup>340</sup> *Burger King* was the first to provide a preliminary metric for making this comparison. According to the Court, when a plaintiff makes a weaker showing of defendant contacts "than would otherwise be required,"<sup>341</sup> (what the Court called a "lesser showing of minimum contacts,"<sup>342</sup> an incoherent expression if taken literally)<sup>343</sup> state interest

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334. *Id.* at 475 (citation omitted).

335. *Id.* (quoting *Helicopteros*, 466 U.S. at 417).

336. *Id.* at 476.

337. *Id.* This is an incorrect use of the term "minimum contacts" of course. As coined by *International Shoe*, the term was a synonym for "constitutionally sufficient contacts," not "minimal contacts," or "some" contacts, or even "purposeful" contacts, or any other variation on the idea of defendant connections with a forum. "Minimum contacts" was the label placed on a defendant's contacts case after all of the analysis (including fairness factors) was done and the defendant either had met the constitutional standard or he had not. The expression was a term of art and not an ordinary language expression.

338. *Burger King*, 471 U.S. at 476-77.

339. See *supra* text accompanying notes 148-61.

340. See *supra* text accompanying notes 148-61.

341. *Burger King*, 471 U.S. at 477 (1984).

342. *Id.*

343. See *supra* note 337. What the *Burger King* Court could have had in mind by a "lesser showing of minimum (in the sense of "constitutionally sufficient") contacts" is

and federalism factors may be used to bolster those weak contacts to permit them to support forum-court jurisdiction.<sup>344</sup> Conversely, when a defendant who “purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”<sup>345</sup> While far from perfect, these “lesser showing” and “compelling case” rules gave courts a beginning set of tools for comparing defendant contacts with sovereignty concerns to determine whether to take or deny jurisdiction. For example, if a defendant has weak contacts with a forum, but all other considerations support jurisdiction (think of *McGee*), then a court may take jurisdiction.<sup>346</sup> On the other hand, if a defendant has extensive purposeful connections with a forum (think of *Asahi*), but all other considerations cut against jurisdiction (also *Asahi*), a court may not take jurisdiction. State interest factors can buttress or defeat a jurisdictional claim, in other words, by strengthening a weak contacts case or weakening a strong one, but it is doubtful that they can establish jurisdiction in their own right.<sup>347</sup> While not an algorithm, this “lesser showing-compelling case” rubric refined the idea of “minimum contacts” received from *Woodson*, and moved the development of the standard to a higher level.

Other parts of the Court’s discussion also may have added features to the test, though the Court’s casual use of language, and the role of this language in the opinion as a whole, make this more difficult to determine. For example, the Court suggested that federalism concerns triggered by a jurisdictional dispute “usually may be accommodated through means short of finding jurisdiction unconstitutional.”<sup>348</sup> As examples, it mentioned the use of choice-of-law rules to accommodate

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anyone’s guess. If contacts are sufficient to establish jurisdiction that is the end of the story, and whether they are lesser or greater is beside the point. There are not degrees of constitutional sufficiency, the contacts are either sufficient to establish jurisdiction constitutionally, or they are not. The Court probably meant to say “weak” (rather than “lesser”) showing of defendant “contacts” (or connections) with the forum (rather than “minimum contacts”), and that is how I shall interpret the term.

344. *Burger King*, 471 U.S. at 477.

345. *Id.*; see also *id.* at 477-78 (“[M]inimum requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”).

346. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221-24 (1957).

347. Even Justice Stevens’s concurrence in *Asahi*, which goes as far as any opinion in separating the contacts and sovereignty halves of the test and making each a free-standing standard in its own right, still requires some limited form of defendant contacts with the forum. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment). No one on the Court seems willing to do away altogether with the requirement of contacts, at least not explicitly. *Keeton* and *Mullane* do it in fact, but not explicitly.

348. *Burger King*, 471 U.S. at 477.

clashes between the “substantive social policies” of different states, and change-of-venue rules to soften the inconvenience to defendants of having to litigate in distant forums.<sup>349</sup> Taken literally, this seemed to create a presumption in favor of extra-territorial jurisdiction, which a defendant had to overcome with a “contacts-fairness” argument if jurisdiction was to be denied, or looked at another way, to add a “duty to accommodate” federalism concern as a third step in the jurisdictional analysis.<sup>350</sup> But given the fact that this presumption/duty language appeared only once in the opinion,<sup>351</sup> that it does not appear elsewhere in the personal jurisdiction case law, and that the Court did not use it in deciding the case,<sup>352</sup> it is hard to be certain how seriously the Court intended it to be taken. Lower courts do not use the language with any frequency.

Similarly, the Court may have intended to announce a comparative inconvenience test, rather than one focused exclusively on inconvenience to the defendant, in defining the degree of burden needed to satisfy the reasonableness standard in the second half of the “minimum contacts” standard. The Court’s language—that jurisdictional rules may not be employed to make litigation “‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent”<sup>353</sup>—seemed to state a comparative inconvenience test. But since the Due Process Clause is commonly thought to protect only the defendant’s liberty and property interests—the plaintiff’s interests are protected by the right to choose the forum<sup>354</sup>—it also is hard to know how literally the Court intended this “in comparison” language to be taken.<sup>355</sup> Other parts of the opinion, those suggesting that jurisdictional rules are different for different types of litigants,<sup>356</sup> for example, might reinforce the idea of such a differential standard. Jurisdictional rules, the Court said, may not be used against “‘out-of-state consumers to collect

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349. *Id.* For an example of this duty to accommodate in operation, see *Spherion Corp. v. Cincinnati Fin. Corp.*, 183 F. Supp. 2d 1052, 1057 (N.D. Ill. 2002), which used the transfer rule of 28 U.S.C. § 1404(a) to avoid deciding the jurisdictional issue.

350. *Burger King*, 471 U.S. at 477.

351. *Id.*

352. *Id.* at 487.

353. *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

354. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

355. *Burger King*, 471 U.S. at 478. A few lower courts use the language. *E.g.*, *Miller v. SMS Schloemann-Siemag, Inc.*, No. CIV.A.2:00-0896, 2003 U.S. Dist. LEXIS 2394, at \*18 (S.D. W. Va. Feb. 21, 2003); *Bellino v. Simon*, No. CIV.A.99-2208, 1999 U.S. Dist. LEXIS 18081, at \*24 (E.D. La. Nov. 22, 1999).

356. *Burger King*, 471 U.S. at 486.

payments due on modest personal purchases”<sup>357</sup> when to do so would “render litigation ‘so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court,’”<sup>358</sup> and the commercial actor will “unfairly [be able] to obtain [a] default judgment[.]”<sup>359</sup> (L.L. Bean may not sue me in Freeport if I fail to pay for a pair of socks.) On the other hand, “the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively ‘judgment proof’ for the consequences of obligations they voluntarily assume in other States.”<sup>360</sup> (I may sue L.L. Bean in Baltimore if the socks are torn.)<sup>361</sup> This “default judgment-judgment proof” double-standard for “out-of-state consumers” on the one hand, and “commercial actors” on the other, if that is what it is, is not based on differences in the parties’ “net wealth,” said the Court,<sup>362</sup> but on what would be fair given the parties’ respective connections with, and dealings in, the forum,<sup>363</sup> though it is hard to see how anything other than net wealth could be the defining ingredient of the rule.<sup>364</sup>

The foregoing peculiarities notwithstanding, *Burger King* is perhaps best known for its exhaustive summary of the personal jurisdiction case law, and for its synthesis of the concepts and terminology of the several generations of jurisdictional thinking into a single, relatively comprehensive test. Comprehensiveness can be cumbersome, and at times the opinion has a kind of dictated-but-not-read quality about it. In recounting the various parts of the test, for example, the Court often

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357. *Id.* at 485 (quoting *Burger King Corp. v. Macshara*, 724 F.2d 1505, 1515 (11th Cir. 1984), *rev'd and remanded sub nom.* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

358. *Id.* at 486 (alteration in original) (quoting *M/S Bremen*, 407 U.S. at 18).

359. *Id.*

360. *Id.* (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

361. L.L. Bean would replace the socks, of course, and the issue would not come up in real life.

362. *See Burger King*, 471 U.S. at 483 n.25.

363. *Id.* at 487.

364. *Burger King* also weighs in on the side of *Insurance Corp. of Ireland* in the debate over the right of a court to take state sovereignty interests into account in a due process analysis. *See id.* at 477. The problem arises, one will recall, because the Due Process Clause by its own terms protects the interests of persons, not states, and the Clause is the only limitation on the extra-territorial jurisdictional power of the states. U.S. CONST. amend. XIV, § 1. *Woodson* stated the protection of sovereignty interests was “express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment,” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980), while *Insurance Corp. of Ireland* stated that it had to be “a function of the individual liberty interest preserved by the Due Process Clause [because the Clause made] no mention of federalism concerns.” *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 793 n.10 (1982). Quoting *Insurance Corp. of Ireland*, *Burger King* adopts the latter view. *Burger King*, 471 U.S. at 472 n.13.

describes key concepts more than once, stringing together several different statements of the same point taken from different cases over the history of the doctrine for no ostensible purpose other than seemingly to include every possible way of putting a point.<sup>365</sup> The discussion also often loops back on itself, taking up issues that were disposed of earlier,<sup>366</sup> so that it sometimes looks a little like the memos of several law clerks stuck together, end-to-end. But all is not downside in the Court's attempt to be inclusive and comprehensive. Single-factor tests excepted, there is little to be found anywhere in the case law that is not included in *Burger King* in one form or another. It is as complete and logically organized a statement and history of the "minimum contacts" standard as one can find in the Supreme Court case law, and read carefully, a compendium of just about everything one needs to know to resolve a jurisdictional dispute. Justice Brennan adds an idiosyncratic twist every now and then, but usually in the form of a questionable description of authority more than a misrepresentation of a doctrinal rule.<sup>367</sup> For the most part, *Burger King* is a trustworthy repository of the due process standard.

G) *A Postscript: Asahi and Burnham*

Two California decisions, *Asahi* and *Burnham v. Superior Court*,<sup>368</sup> complete the list of important contributors to the modern "minimum contacts" standard. *Asahi* is generally thought of as an attempt to refine the purposefulness requirement of the specific jurisdiction doctrine, particularly as it applies to commercial actors doing business indirectly in a state,<sup>369</sup> and *Burnham* as identifying a major "single-factor test" qualification on the reach of the "minimum contacts" test generally.<sup>370</sup> But each case also says more and less than it seems.

*Asahi* involved the problem of jurisdiction over a component manufacturer, someone who, by definition, does not do business directly

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365. *Burger King*, 470 U.S. at 474-76 (describing the "purposefulness" requirement in three different ways).

366. *Id.* at 474, 476 (reintroducing foreseeability topic after having read it out of discussion earlier).

367. See Justice Brennan's overstatement of *Helicopteros*, *id.* at 472, his attempt to revive *McGee*, *id.* at 474, his one-sided view of *Kulko*, *id.* at 473-74, his attempts to water down the defendant veto idea by equating "significant contacts" and contacts that create a "substantial connection" with the forum with purposeful contacts, *id.* at 475-76, and his attempt to reintroduce the idea of foreseeable contacts as sometimes the same as purposeful ones, after having just acknowledged that *Woodson* made the two mutually exclusive, *id.* at 475 n.18.

368. 495 U.S. 604 (1990).

369. *E.g.*, Weintraub, *supra* note 55, at 538-40.

370. *E.g.*, *id.* at 551-52.

in a state, but whose products make their way into the state incorporated into the products of other manufacturers.<sup>371</sup> The case presented the difficult question of whether a tort or contract-based contacts standard was more appropriate for assessing the availability of jurisdiction in such cases.<sup>372</sup> The Asahi Metal Company, a Japanese corporation, made valves for motorcycle tires.<sup>373</sup> It sold one of its valves to Cheng Shin Rubber Company, a Taiwanese corporation, which in turn incorporated the valve into a motorcycle tire it manufactured.<sup>374</sup> The tire was then added to a motorcycle purchased by Gary Zurcher.<sup>375</sup> The tire exploded while Zurcher was riding the bike, injuring him, and ultimately causing him to file a products liability action against Cheng Shin (and others).<sup>376</sup> Cheng Shin, in turn, cross-complained for indemnity against Asahi.<sup>377</sup> Zurcher settled all of his claims against the defendants, leaving only the indemnity claim between Cheng Shin and Asahi for the court to decide.<sup>378</sup> The trial court denied Asahi's motion to quash service for lack of personal jurisdiction,<sup>379</sup> the California Court of Appeal reversed,<sup>380</sup> the California Supreme Court reversed the Court of Appeal,<sup>381</sup> and to complete the straight, the U.S. Supreme Court reversed the California Supreme Court.<sup>382</sup>

At first glance, *Asahi* looks like a garden-variety stream-of-commerce case, and the lower courts discussed it in those terms.<sup>383</sup> This was not surprising since stream-of-commerce was one of the most popular rubrics at the time for resolving the special jurisdictional problem presented by the component manufacturer defendant who markets indirectly in a state. Seen in this light, the key issue in the case, and the one on which the Court split down the middle, was "whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between

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371. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106, 108 (1980) (plurality opinion).

372. *See id.* at 114-15.

373. *Id.* at 106.

374. *Id.*

375. *Id.*

376. *Id.* at 105-06.

377. *Id.* at 106.

378. *Id.*

379. *Id.* at 106-07.

380. *Id.* at 107. It did this in effect. Literally, it granted a writ of mandate ordering the trial court to quash service. *Id.*

381. *Id.* at 108.

382. *Id.*

383. *Id.*

the defendant and the forum State."<sup>384</sup> Put in more familiar terms, the issue was whether a component manufacturer's forum-contacts must be purposeful for jurisdiction to attach, or whether merely foreseeable contacts are enough.<sup>385</sup> Justices O'Connor and Brennan, each speaking for themselves and three other justices, reached opposite conclusions on this issue,<sup>386</sup> and while Justice Brennan seemed to have the better of the argument (he at least gave reasons for his view),<sup>387</sup> each side was equally adamant. Justice Stevens, writing separately, expressed perhaps the most sophisticated position, arguing that the "line . . . between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market," often does not exist.<sup>388</sup> If "the volume, the value, and the hazardous character of the components" are great enough, said Justice Stevens, a defendant would be hard put to deny that it had purposefully exploited the market for its product in the state, even if it had done nothing directly in the state to sell the product.<sup>389</sup> One ought to be able to prove purposefulness circumstantially, in other words, in situations where defendants try to have it both ways by doing business in a state, but professing not to.<sup>390</sup>

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384. *Id.* at 105. The Court also repeated the "substantial connection" language of *Burger King* to describe the test for specific jurisdiction, thereby perpetuating the confusion this particular use of "substantial" causes in distinguishing specific jurisdiction from general jurisdiction. *Id.* at 112 (plurality opinion).

385. Compare *id.* (plurality opinion), with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-97 (1980).

386. *Asahi*, 480 U.S. at 108-13 (plurality opinion); *id.* at 116-17 (Brennan, J., concurring in part and concurring in the judgment).

387. *Id.* at 116-17 (Brennan, J., concurring in part and concurring in the judgment).

As long as a participant in [the stream of commerce] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

*Id.* (Brennan, J., concurring in part and concurring in the judgment). Compare Justice O'Connor's reason for reaching the opposite conclusion. *Id.* at 112 (plurality opinion) ("We now find [the purposefulness] position to be consonant with the requirements of due process.").

388. *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

389. *Id.* (Stevens, J., concurring in part and concurring in the judgment).

390. For an example of the converse of this, proving non-purposefulness circumstantially through a paucity of business activity in the forum, see *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203, 209 (D.P.R. 2002) (stating that "infinitesimal sales-figures are not enough to constitute the requisite 'minimum contacts'"). See also *Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998) ("Just as widespread circulation of a publication indicates deliberate action, thin distribution may indicate a lack of purposeful contact.").

The Court has not yet resolved this purposefulness/foreseeability debate for stream-of-commerce contacts, and lower courts pretty much just choose sides.<sup>391</sup>

Looked at in another way, however, *Asahi* is perhaps not a stream-of-commerce case after all. *Asahi's* valve was a commercial product to be sure, but *Asahi* sold the valve to a tire manufacturer in Taiwan, not a retail valve purchaser in California, and arguably the valve came out of the stream of commerce, much like the Audi automobile in *Woodson*, at the point of that sale. On this view, once the valve was on the motorcycle tire it was a potentially dangerous instrumentality more than a commercial product (for purposes of suing *Asahi*), and when it caused harm, the harm was more in the nature of a tort than a breach of contract.<sup>392</sup> Since the valve was manufactured in Japan and caused harm in California, in jurisdictional terms the claim against *Asahi* was for a multi-state tort, and the traditional "minimum contacts" standard for a multi-state tort is the "effects plus" standard.<sup>393</sup> Rather than ask whether *Asahi* purposefully marketed its valve in California through a stream of commerce (a doing-business question), therefore, the Court perhaps would have been better off asking if it had produced a tortious effect in the State, and if so, whether it also satisfied one of the "plus" factors typically used in "effects-plus" tests to separate interstate commercial actors from local, intrastate businesses.<sup>394</sup> Had the Court used such a test, it almost certainly would have found *Asahi* subject to jurisdiction in California, since the company was a major multi-national corporation, and would have satisfied any of the most commonly used "plus" factors.<sup>395</sup> While it is true that the Court looked to a set of quasi "plus"

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391. For a list of cases choosing sides, see *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 479 (6th Cir. 2003).

392. In this sense, the case was closer to *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 762 (Ill. 1961), than *Burger King*. *Woodson* and *Keeton* also were cases in which the plaintiff's claim was based in tort and the Court's discussion of defendant's contact was framed in contract (i.e., doing business) terms. In *Keeton* this made sense, since the defendant's sale of magazines gave rise to a libel, but in *Woodson* it did not, since the defendant's sale of an automobile gave rise to a breach of warranty more than a product liability claim (at least against the defendant contesting jurisdiction).

393. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

394. Recall that the most common "plus" factors were "derive substantial revenue from interstate commerce," and "derive revenue from other goods and services consumed in the state." The California long-arm statute was not an "enumerated acts" statute, however, and thus did not list specific plus factors *Asahi* would have to satisfy. Instead, it authorized the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 2004). As a consequence, it would have been appropriate to use any of the standard plus factors already determined to be constitutionally acceptable.

395. See *Weintraub*, *supra* note 55, at 550-51 (arguing that *Asahi* "would have come out differently" if an effects-based torts standard of personal jurisdiction had been used).

factors in applying the stream-of-commerce standard, it was a different and more difficult-to-satisfy set of factors than that required for a multi-state tort.<sup>396</sup> This is an instance, then, in which the failure to keep tort and contract based formulations of the "minimum contacts" standard separate not only added to the confusion in the doctrine generally, but also may have changed the outcome in a particular case.

In the end, however, *Asahi* is almost certainly more of a "fairness factors" case than a contacts one. All of the justices but one<sup>397</sup> agreed that it would have been unfair to make a Japanese company defend against an indemnity claim of a Taiwanese company in a California state court,<sup>398</sup> and it was on this basis that the Court decided the case.<sup>399</sup> Going through *Woodson's* list of "other factors" against which a defendant's contacts must be weighed, the Court concluded that "these factors . . . clearly reveal[] the unreasonableness of the assertion of jurisdiction over *Asahi*, even apart from the question of the placement of goods in the stream of commerce."<sup>400</sup> Put in *Burger King* language, the Court said, in effect, that *Asahi* had made a "compelling case that the presence of some other considerations . . . render[ed] jurisdiction unreasonable."<sup>401</sup> The implications of this conclusion are substantial. Among other things, it means that a defendant's forum contacts do not need to be considered in making the decision to deny personal jurisdiction.<sup>402</sup> A court may deny jurisdiction on the basis of sovereignty and convenience factors alone.<sup>403</sup>

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396. The "additional conduct" required to show that *Asahi's* contact with California was purposeful included

designing the product [i.e., the valve] for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

*Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion). It is not surprising that *Asahi* did not satisfy any of these factors since it was principally a component manufacturer and its clients were other manufacturers and distributors, not retail purchasers.

397. Justice Scalia would have held that the lack of purposeful stream-of-commerce contacts, by itself, was enough to defeat jurisdiction, *Asahi*, 480 U.S. at 112-13, and that it was not necessary to consider any of the sovereignty factors in the second half of the *Burger King* test, *id.* at 105.

398. *Id.* at 115 (noting that it was not clear what law governed the indemnity action). California law might have governed, but apart from this possibility, there was nothing in the case that had anything to do with California. *Id.*

399. *Id.* at 116. Eight justices agreed with part II-B of the opinion expressing this conclusion. *Id.* at 105. No more than four justices agreed with any other part of the opinion. *See id.*

400. *Id.* at 114.

401. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

402. *See Asahi*, 480 U.S. at 116.

403. *See id.* at 113-14.

The Court treated the contacts and fairness-factors halves of the “minimum contacts” standard as two separate tests in other words, and not as a single, two-part test, at least for purposes of denying jurisdiction.<sup>404</sup> Justice Stevens was the most explicit in this regard. “An examination of minimum contacts,” he said, “is not always necessary to determine whether a state court’s assertion of personal jurisdiction is constitutional.”<sup>405</sup> A majority of the Court has never said this, though Justice Stevens thought Justice Brennan’s rendition of the “minimum contacts” standard in *Burger King* supported this view.<sup>406</sup> While *Asahi*’s influence has been limited mostly to stream-of-commerce cases, its potential implications are more far-reaching. The absence of a majority opinion is the only thing that keeps it from being a major doctrinal decision.

*Burnham* is an important case, not so much for what it adds to the “minimum contacts” standard—it was about “transient” or what also is called “tag” jurisdiction<sup>407</sup>—but for how it summarizes that standard and describes its relationship to “single-factor” jurisdictional tests. Factually, the case looked a lot like *Kulko*, with divorce rather than child support the principal issue in dispute.<sup>408</sup> The Burnhams were married in West Virginia and lived together in New Jersey for ten years before deciding

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404. See *id.*

405. *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment) (citing *Burger King*, 471 U.S. at 476-78). This is another example of failing to treat the “minimum contacts” expression as a term of art. Understood as a synonym for constitutionally sufficient contacts, which is how *International Shoe* used the term, it would be incoherent to say, as Justice Stevens in effect does, that examining the constitutional sufficiency of the defendant’s contacts is not always necessary in determining whether the assertion of jurisdiction over the defendant is constitutional. *Id.* (Stevens, J., concurring in part and concurring in the judgment). What he probably meant to say is that an examination of the defendant’s connections with the forum is not always necessary in determining whether the assertion of jurisdiction is constitutional. In his concurrence in the judgment in *Insurance Corp. of Ireland*, Justice Powell predicted that the fairness factors half of the minimum contacts standard eventually would become a free-standing test in its own right, and that a defendant’s forum contacts would become an optional feature of the standard. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713-14 (1982) (Powell, J., concurring in the judgment). The prediction has come true, at least for Justice Stevens, and also probably for Justice Brennan.

406. See *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part and concurring in the judgment). (Justice Stevens gives a “*See Burger King*” citation for his statement). Justice Brennan first expressed the view in his concurrence in *Keeton*, where he argued that state interest concerns were not part of the due process analysis needed to determine personal jurisdiction. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 782 (1984) (Brennan, J., concurring in the judgment).

407. *Burnham v. Superior Court*, 495 U.S. 604, 610-12 (1990) (plurality opinion). “Tag” or “transient” jurisdiction is produced by personally serving (“tagging”) the defendant in the forum state. *Id.* (plurality opinion).

408. *Id.* at 607-08.

to separate.<sup>409</sup> Mrs. Burnham moved to California with the couple's two children where, it was agreed, she would file for divorce on the ground of irreconcilable differences.<sup>410</sup> At some point, Mr. Burnham changed his mind about the California proceeding and filed a divorce action of his own in New Jersey, alleging that Mrs. Burnham had deserted him.<sup>411</sup> Unable to convince Mr. Burnham to abide by their agreement, Mrs. Burnham filed her own divorce action in California.<sup>412</sup> She served Mr. Burnham with process while he was in California on a business trip, after he returned their oldest child to her following a weekend trip to San Francisco.<sup>413</sup> Mr. Burnham contested jurisdiction, arguing that "his only contacts with California were a few short visits to the State for the purposes of conducting business and visiting his children,"<sup>414</sup> and that none of these contacts had given rise to Mrs. Burnham's divorce claim.<sup>415</sup> But the trial court denied his motion to quash, and the state appellate court denied mandamus relief.<sup>416</sup> The Supreme Court affirmed.<sup>417</sup>

The Court could have sustained jurisdiction over Mr. Burnham on a number of different grounds<sup>418</sup>—all of the justices agreed that jurisdiction was available<sup>419</sup>—including a "minimum contacts" analysis, but instead it

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409. *Id.* at 607.

410. *Id.*

411. *Id.*

412. *Id.* at 607-08. The agreement provided that Mrs. Burnham would file on the ground of irreconcilable differences, but Mr. Burnham preempted this by filing on the ground of desertion. *Id.* at 607. The New Jersey proceeding went nowhere since Mr. Burnham never attempted to serve Mrs. Burnham with process. *Id.*

413. *Id.* at 608.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 628.

418. Justice Brennan thought Mr. Burnham's connections with California were sufficient to support specific jurisdiction on traditional "continuous and systematic" contacts grounds. *See id.* at 636-39 (Brennan, J., concurring in the judgment). Perhaps Mr. Burnham's continuing relationship with Mrs. Burnham and their children in California was like the franchisee's relationship with Burger King in Florida, and his participation in the children's decision to move to the state a form of purposefully connecting with it. The marriage relationship is at least as consuming as the one between franchisee and franchisor. Or, perhaps the agreement to have Mrs. Burnham file the divorce action in California was a waiver of Mr. Burnham's due process rights and a submission to the jurisdiction of the California court. A colleague of mine, and an experienced parent, suggests that sending a child to a state is roughly equivalent to shipping a defective product or dangerous instrumentality into the state, and thus might support jurisdiction on an "effects-plus" rationale similar to the one used in *Gray*. He was not serious.

419. *Id.* at 628, 640. It is not that clear why all of the justices thought the case was easy. Why is it fair, for example, to permit a California court to dissolve a West Virginia and New Jersey marriage, and determine custody and support obligations, perhaps in

chose the simplest and most controversial rationale. It held that personal service on Mr. Burnham in California made it unnecessary to examine the extent of his contacts with the State, or the relationship of those contacts to Mrs. Burnham's divorce action.<sup>420</sup> "The short of the matter," said Justice Scalia speaking for the Court, "is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"<sup>421</sup> This conclusion was controversial principally because the Court had said several years earlier, in *Shaffer*, that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"<sup>422</sup> and this seemed to require a "minimum contacts" analysis for "all" types of jurisdictional issues. But the plurality opinion for the Court in *Burnham* disagreed. Relying on a close reading of *Shaffer*, and an extended examination of the English and American origins of the personal jurisdiction doctrine, it limited *Shaffer's* particular holding to what used to be called the "attachment" version of

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accordance with its own very different laws on the subject (depending upon how it resolves the choice of laws questions involved), when neither of the parties bargained for that in entering the marriage? Fairness is not a concern for Justice Scalia when the defendant is served in the state, *id.* at 639 n.14 (Brennan, J., concurring in the judgment), but why none of the other justices were troubled by these issues is confusing. Perhaps they were upset at Mr. Burnham for reneging on his agreement to let Mrs. Burnham file in California, or perhaps they thought he had no one but himself to blame for getting served in California, since there was no evidence that he had been induced into the State by force or fraud. See *id.* at 608.

420. *Id.* at 619 (plurality opinion).

421. *Id.* (plurality opinion).

422. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). There are other concerns one might have about justifying a rule principally on the basis of tradition without any concern for whether it is fair in contemporary terms. *Burnham*, 495 U.S. at 621 (plurality opinion) ("[Tag jurisdiction's] validation is its pedigree."). Tradition is just another time period's definition of fairness, for example, not a timeless notion handed down from on high, and there is no more reason to fossilize another era's policy judgment in a jurisdictional standard than there is in any other area of the law. Even "traditional notions," as the Court acknowledges, "can be . . . offended by the perpetuation of ancient forms that are no longer justified." *Id.* 621-22 (plurality opinion). Moreover, if *Shaffer* could reject the traditional distinction between quasi in rem and in personam jurisdiction, *id.* at 621 (plurality opinion), for example, (and *Burnham* makes it clear that this much of *Shaffer* is still good law), *id.* (plurality opinion), why could *Burnham* not reject the traditional distinction between "tag" and "minimum contacts" jurisdiction? If the answer is that tradition is an objective standard of legitimacy, and fairness is a subjective one, what evidence is there that this is so? A conception of fairness used to justify a judicial decision must be found in the due process case law, not the personal preferences of the individual justices, and arguments about the content of a tradition are hardly easy or uncontroversial. *Burnham* itself is proof of this. The Court's opinion is also fuzzy on how it would handle the force and fraud objections to a tag rule.

quasi in rem jurisdiction,<sup>423</sup> and concluded that *Shaffer's* more general language announced a rule for "jurisdiction over an *absent defendant*," not a defendant physically present in the forum.<sup>424</sup> *Shaffer*, like *International Shoe*, Justice Scalia asserted, was a rule for novel (i.e., post Due Process Clause) forms of jurisdiction, not traditional ones.<sup>425</sup>

While *Burnham* is a "minimum contacts" case in only an indirect sense, its summary of that standard repeated some familiar mistakes. For example, while professing to "express no view[]" on the matter, it described the "special rule" for general jurisdiction as requiring only "continuous and systematic" rather than "substantial" contacts with a forum.<sup>426</sup> It based this description on *International Shoe*, which admittedly used both terms but not as synonyms, rather than on *Perkins*, but the mistake is the same no matter the source.<sup>427</sup> The mistake was harmless in *Burnham* itself, since the decision rested on Mr. Burnham's being "tagged" in California, and not on his contacts with the State,<sup>428</sup> but as the last major Supreme Court pronouncement on the matter, *Burnham* is a favorite citation for lower courts looking for a statement of the personal (specific and general) jurisdiction standard, and it does not help that it continues to get half of that standard wrong.<sup>429</sup>

It is also surprising that *Burnham* did not make more use of *Kulko*. The two cases were close factually and implicated many of the same policy concerns, yet there is only one "cf." reference to *Kulko* in the *Burnham* opinion, and it was used simply to illustrate a factual point rather than support a legal conclusion.<sup>430</sup> Mr. Kulko had more extensive contacts with California than Mr. Burnham, and yet he was not subject to jurisdiction in the State because the Court was not willing to construe the "minimum contacts" standard so as to "discourage parents from entering

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423. *Id.* (plurality opinion). *Pennoyer* is the classic example of an "attachment" version of a quasi in rem action. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Ownership of property in such an action is not the explicit issue in dispute. The property involved (e.g., Neff's land in Oregon), is simply an asset against which a prevailing plaintiff hopes to collect, and a link through which the plaintiff hopes to establish the defendant's contacts with the forum state. In a pure quasi in rem action, the parties are fighting directly over competing ownership claims to property.

424. *Burnham*, 495 U.S. at 620 (plurality opinion).

425. *Id.* at 621 (plurality opinion).

426. *Id.* at 610 n.1 (plurality opinion).

427. *Id.* (plurality opinion).

428. *Id.* at 628 (plurality opinion).

429. *Id.* (plurality opinion). *Burnham* also raises the possibility that the doctrine of general jurisdiction might apply "only to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person,'" but "express[es] no views on [this] matter[]." *Id.* at 610 n.1 (plurality opinion) (citation omitted).

430. *Id.* at 626 (plurality opinion).

into reasonable visitation agreements.<sup>431</sup> When Mr. Burnham, acting as a good father, visited one of his children, however, the result was different.<sup>432</sup> Why the same concern for “family harmony” did not play a similar role in his case was not explained. The Court may have been trying to signal, by omission, that substantive law policies cannot be used to shape the content of jurisdictional rules. This had always been its espoused view until *Mullane*, *Keeton*, and *Kulko* suggested otherwise,<sup>433</sup> and perhaps the Court was returning to traditional values in more than one way.

Justice Brennan’s concurring opinion in *Burnham* contains what is perhaps the most aggressive statement of the totality-of-the-circumstances test for “minimum contacts” jurisdiction to be found anywhere in the case law. Building on Justice Black’s “transformation of our national economy” opinion in *McGee*,<sup>434</sup> his own “foreseeable contacts” dissent in *Woodson*,<sup>435</sup> and his hybrid opinion for the Court in *Burger King*,<sup>436</sup> Justice Brennan blended together an odd mixture of arguments based on “tradition,” “reasonable expectations,” “benefits and protections of [the] laws,” and “lack of inconvenience,” to conclude that “as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process.”<sup>437</sup> He did not disagree that California had jurisdiction over Mr. Burnham, he objected only to what he characterized as Justice Scalia’s view that “traditional rules of jurisdiction [were], *ipso facto*, forever constitutional.”<sup>438</sup> He thought an inquiry into the fairness of taking jurisdiction was always necessary, even when traditional rules were involved.<sup>439</sup>

In many ways, Justice Brennan’s opinion consisted of adding up zeros to get one. For example, he argued that Mr. Burnham should have expected to be subject to jurisdiction in California if he was served there, because that is “our common understanding *now*, [of what is reasonable,]

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431. *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978).

432. *Burnham*, 495 U.S. at 608, 628.

433. With the possible exception of *Mullane*. See *supra* note 248.

434. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

435. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299-302 (1980) (Brennan, J., dissenting).

436. *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

437. *Burnham*, 495 U.S. at 637-39 (Brennan, J., concurring in the judgment).

438. *Id.* at 629 (Brennan, J., concurring in the judgment). Justice Brennan engages Justice Scalia in the history debate, challenging the idea that the transient jurisdiction rule was strongly implanted in our jurisprudence at the time of the adoption of the Fourteenth Amendment. *Id.* at 633-35 (Brennan, J., concurring in the judgment).

439. *Id.* at 629 (Brennan, J., concurring in the judgment).

fortified by a century of judicial practice."<sup>440</sup> "If I visit another State," he continued, "I knowingly assume some risk that the State will exercise its power over my property or my person while there."<sup>441</sup> The strength of this argument, however, is the traditional rule, based on "a century of judicial practice, . . . that jurisdiction is often a function of geography,"<sup>442</sup> as Justice Brennan put it, and not the fact that a defendant should expect such a rule to be enforced.<sup>443</sup> "Justice Brennan's long journey is a circular one," said Justice Scalia, "leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition."<sup>444</sup> Ironically, it was Justice Brennan himself who first pointed out the circularity of the "reasonable expectations" argument in his *Woodson* dissent.<sup>445</sup>

The argument based on the benefits and protections of California law is equally unavailing. In the three days he was in California prior to being served, Mr. Burnham traveled on California's "roads and waterways," had his "health and safety . . . guaranteed by the State's police, fire, and emergency medical services[,] . . . enjoy[ed] the fruits of the State's economy," and had the "right of access to [the State's] courts."<sup>446</sup> With these benefits, Justice Brennan argued, came the corollary burden of having to answer to a claim by a California citizen in a California court.<sup>447</sup> Apart from the fact, as Justice Scalia pointed out, that three days worth of such benefits seems "powerfully inadequate to establish . . . that it is 'fair' for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the [ten] years of his marriage, and the custody over his children,"<sup>448</sup> the benefits and protections in question had nothing to do with Mrs. Burnham's divorce claim, and this was a crucial omission.<sup>449</sup> The expression "benefits and protections of the law" is not a free-standing test. It comes originally

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440. *Id.* at 637 (Brennan, J., concurring in the judgment).

441. *Id.* (Stevens, J., concurring in the judgment) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)).

442. *Id.* (Brennan, J., concurring in the judgment).

443. *Id.* (Brennan, J., concurring in the judgment).

444. *Id.* at 625 (plurality opinion).

445. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 n.18 (1980) (Brennan, J., dissenting) ("The Court suggests that [it is critical that the defendant should reasonably anticipate being haled into court in the forum] but [this] reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.").

446. *Burnham*, 495 U.S. at 637-38 (Brennan, J., concurring in the judgment).

447. *Id.* at 637-39 (Brennan, J., concurring in the judgment).

448. *Id.* at 623 (plurality opinion).

449. *Id.* at 607-08 (plurality opinion).

from the specific jurisdiction requirement that a defendant “purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>450</sup> It is purposeful activity in the state that is the key jurisdictional feature in this statement of the test, not the benefits and protections of the state’s law, and the relevant benefits and protections are only those flowing from that purposeful in-state activity. People who never enter a state can benefit from the protection of its laws, and yet that is not a basis for the state taking jurisdiction over them. Any other rule would create a new, all-encompassing category of general jurisdiction based on forum-provided benefits and protections, and in the process would make the doctrine of specific jurisdiction obsolete.

Justice Brennan’s final argument also harkened back to *McGee*. The potential burdens on a transient defendant such as Mr. Burnham are slight, he argued, because “[m]odern transportation and communications have made it much less burdensome for a party sued to defend himself in a State outside his place of residence.”<sup>451</sup> The fact that Mr. Burnham had journeyed to California at least once before, said Justice Brennan, also was “an indication that suit in the forum likely would not be prohibitively inconvenient.”<sup>452</sup> The problem with this argument, of course, as Justice Scalia pointed out, is that it justifies “jurisdiction over *everyone, whether or not* he ever comes to California.”<sup>453</sup> It would extend the reach of a state’s extra-territorial jurisdictional to the point where it would be almost limitless. On Justice Brennan’s view, it is hard to know what kind of claim Mr. Burnham could not be sued on in California, or who could not be sued in California.<sup>454</sup>

#### H) *The Errors Collected and Augmented*

*Burnham* brings to an end the string of Supreme Court cases principally responsible for defining the content of the modern personal jurisdiction doctrine, and like Dorothy and her companions, the doctrine

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450. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

451. *Burnham*, 495 U.S. at 638 (Brennan, J., concurring in the judgment) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957))).

452. *Id.* at 638-39 (Brennan, J., concurring in the judgment).

453. *Id.* at 624 (plurality opinion).

454. Interestingly, Justice Brennan does not discuss the role of state sovereignty concerns in the decision to take jurisdiction. West Virginia, where the Burnhams were married, and New Jersey, where they acquired their joint property, *id.* at 607, would seem to have some interest in the case, particularly given the fact that they do not have a system of community property, unlike California.

has now come a long way from Kansas (or Missouri). What started as an uncomplicated two-factor, four-permutation test, designed to deal with the relatively simple telephone-and-automobile-connected world of the 1950s, has grown exponentially into an elaborate, multi-factor, pseudo algorithmic, balancing test, designed to deal with the electronically linked world of the twenty-first century. Unfortunately, the development of the doctrine has not always been linear, cumulative, consistent, or clear. In now more than half a century, the Court's efforts through different authors<sup>455</sup> to adjust the doctrine to changing times, circumstances, and views has produced as many contradictions, dead-ends, opacities, and mistakes as it has intellectual breakthroughs and doctrinal epiphanies. And lower court judges have compounded the problem by taking advantage of the doors left open by the Court to add additional layers of confusion of their own.

The difficulties with the doctrine are now well-known. By using the two terms interchangeably and indiscriminately, the Court has muddled *International Shoe's* relatively clear distinction between "continuous and systematic" contacts needed for specific jurisdiction, and "substantial" contacts needed for general jurisdiction,<sup>456</sup> thereby undercutting, if not destroying, the idea of "substantial" contacts as a separate and distinct jurisdictional standard (e.g., *McGee*, *Keeton*, *Calder*, *Helicopteros*, and *Burger King*). This, in turn, has so watered down the corollary doctrine of "general" jurisdiction that it is now often easier to satisfy its requirements than it is to satisfy the requirements of what was intended to be the less restrictive rule of specific jurisdiction.<sup>457</sup> The Court also

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455. The Court seems to have had difficulty over the years finding a justice whose way of expressing the personal jurisdiction standard represents a consensus view. Even during the activist period of the early 1980s, when the makeup of the Court did not change from one term to the next, no justice wrote two personal jurisdiction opinions in a row (with the exception of Justice Rehnquist, who wrote *Keeton* and *Calder*, since the two cases were argued and decided together), and few wrote more than one at all. It was as if no one ever passed the audition for getting the standard right. Shifting the opinion-writing assignment around like this created a little bit of a "pride-of-authorship" problem, however, in the sense that each justice, paraphrasing the received standard in her or his own way, changed it ever so slightly in the process, and introduced a layer of ambiguity or imprecision that lower court judges exploited to loosen the standard even further. The overall cycle is a variation on the telephone game problem.

456. The Court has even failed to use the term "minimum contacts" in a consistent fashion, sometimes substituting "minimal" for "minimum," for example, so as to require only a few contacts with the forum, rather than constitutionally sufficient contacts. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

457. For a brief time, it even looked like the Court wanted to eliminate general jurisdiction explicitly, as when *Shaffer* described the "minimum contacts" standard as requiring a three-part relationship among the defendant, the claim, and the forum. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Subsequent opinions of the Court used this formulation of the test, although in situations where only specific jurisdiction was

has stated the “purposefulness” requirement for defendant forum contacts in such a wide variety of ways (e.g., “stream-of-commerce” in *Woodson* and *Asahi*;<sup>458</sup> targeting, “intentionally direct[ing],” “expressly aim[ing],” and “causing the effects” in *Calder*;<sup>459</sup> “reasonably anticipate being haled into court” in *Woodson*;<sup>460</sup> and exercise the “privilege of conducting activities” in *Hanson*<sup>461</sup>), that there is now a purposefulness argument for just about every situation, and what was once the bulwark of the defendant-veto view of personal jurisdiction is now more often than not just a minor obstacle in the path of a totality-of-the-circumstances argument. By using these various formulations of purposefulness interchangeably, the Court also has failed to maintain the historical distinction between contract (“doing business”) and tort (“effects,” “effects plus”) based versions of the “minimum contacts” standard, a distinction codified in the long-arm statutes of many states,<sup>462</sup> and this in turn has created unnecessary interpretive difficulties for courts applying those statutes.

In addition, by suggesting that the “minimum contacts” test is not as strict for individual consumers suing large corporations about modest personal purchases as it is for corporations suing consumers in return, the Court has introduced (and denied that it has introduced at the same time) the possibility of a wealth-based double-standard into due process analysis, and wealth-based double-standards are difficult to reconcile with “traditional notions of fair play and substantial justice.”<sup>463</sup> Such standards also license result-oriented lower court judges to take a Robin-

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involved, and it wasn’t until *Burnham* that the Court explained that it had meant no such thing. *Burnham*, 495 U.S. 619-20 (plurality opinion).

458. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

459. *Calder v. Jones*, 465 U.S. 783, 787, 789-90 (1984).

460. *Woodson*, 444 U.S. at 297.

461. *Hanson*, 357 U.S. at 253.

462. For examples of such statutes, see *supra* note 146. Some courts also do a good job of maintaining the distinction. *E.g.*, *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 10 (1st Cir. 2002) (“Ordinarily, the personal jurisdiction analysis for tort claims differs from that for contract claims.”); *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999) (describing the differences); *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (stating that “application of the purposeful availment prong differs depending on whether the underlying claim is a tort or contract claim” (citing *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995))); *Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 594 (E.D. Va. 2003) (discussing doing business contacts separately from contacts caused by directing tortious activity toward the forum). Others do not. *E.g.*, *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1135-36 (D. Nev. 2002) (discussing Internet defamation claim based on a combination of doing business and effects-plus (“something more”) standards).

463. *Milliken v. Meyer*, 311 U.S. 454, 457 (1940) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

Hood perspective on jurisdictional questions and to "do the right thing" no matter the cost in doctrinal clarity or predictability, though so far, few lower courts seem to have exercised this option.<sup>464</sup> Further, by refusing to resolve (in *Helicopteros*) the "arise out of/related to" debate over the meaning of the nexus requirement in the doctrine of specific jurisdiction, the Court has left lower courts free to pick and choose between the two definitions, producing a pattern of uneven and inconsistent results from state to state. In one sense, it is not even clear that a contacts requirement remains a part of the due process standard at all. The Court has suggested, and sometimes said explicitly, that defendant forum contacts and state sovereignty interests are independent and separate jurisdictional standards, each capable of authorizing or denying jurisdiction in its own right (e.g., *Asahi*, *Keeton*, *Mullane*). And yet, at other times, it has described these different types of considerations as two halves of a single test, both of which are necessary for a complete "minimum contacts" analysis (e.g., *Woodson*, *Kulko*, *Burger King*). Again, lower courts left free to choose, do so unevenly.<sup>465</sup> Compounding this problem is the difficulty of explaining how a constitutional analysis grounded in the Due Process Clause can authorize the consideration of state sovereignty interests at all. The Court has tried to explain how this is justified several different times, only to repudiate each explanation the next time it revisits the issue (e.g., *Pennoyer*, *International Shoe*, *Woodson*, *Insurance Corp. of Ireland*, *Burger King*).<sup>466</sup>

Moreover, the Court's decision to drop (or just stop using) *International Shoe's* "nature and quality and . . . circumstances"<sup>467</sup> rubric for analyzing specific jurisdiction cases involving single and isolated

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464. *But see* *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (basing decision on the fact that plaintiff did not bring "suit in Ohio 'to collect a small amount of user fees from a Texas resident who, while seated at his computer terminal, became a member of the CompuServe network.' [Plaintiff was] an entrepreneur who purposefully employed CompuServe to market his computer software product."); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997) ("When a consumer logs onto a server in a foreign jurisdiction he is engaging in a fundamentally different type of contact than an entity that is using the Internet to sell or market products or services to residents of foreign jurisdictions.").

465. *See, e.g.,* *Jeffers v. Wal-Mart Stores*, 152 F. Supp. 2d 913, 923-24 (S.D. W. Va. 2001) (stating that fair play considerations "cannot . . . make up for a nearly complete lack of purposeful contact" (citing *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770, 778 (D. S.C. 1999); *Regent Lighting Corp. v. Am. Lighting Concept, Inc.*, 25 F. Supp. 2d 705, 712-13 (M.D. N.C. 1997))).

466. The Court's confused views on this topic have not proved as troublesome to lower courts. Most lower courts miss this legitimacy problem altogether, and those that see it seem more concerned about the practical political consequences of their decisions than concerns of doctrinal integrity.

467. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

contacts giving rise to the claim has created a conceptual rift between *International Shoe* and later single-contact cases (e.g., *Woodson*), making it that much easier for lower courts to stretch (and shrink) this category of specific jurisdiction well beyond its original shape. The failure to retain *International Shoe*'s language also has denied the Court what might have been a better analytical framework for evaluating fairness and justice considerations in single-contact cases.<sup>468</sup> In addition, in describing the type of inconvenience relevant to the reasonableness determination in the "other (or fairness) factors" half of the "minimum contacts" test, the Court has said one thing and done another, both restricting such analysis to defendant inconvenience, while at the same time saying that the comparative inconvenience of both plaintiff and defendant may be taken into account (*Burger King*).<sup>469</sup> And finally, while insisting that questions of substantive law should be kept separate from questions of jurisdictional power, the Court has used substantive law policies to modify jurisdictional rules when it wanted to, and ignored them when it did not want to, without acknowledging that it was doing this (*Mullane, Keeton, Kulko*), again both confusing lower court judges and implicitly authorizing them to freelance in the same way on their own.

The "minimum contacts" standard is a constitutional doctrine, and one of the strengths of a constitutional doctrine is its ability to adapt to changing conditions and views, the laments of textualist interpreters (both old and new)<sup>470</sup> to the contrary notwithstanding. This is even more the case when the doctrine is grounded in an idea as malleable and context-specific as that of "fair play and substantial justice."<sup>471</sup> So a certain amount of change in the content of the "minimum contacts"

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468. For examples of self-described purposefulness cases that might have been better discussed in terms of the nature, quality, and circumstances of the defendant's forum contacts, see *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F. Supp. 2d 203, 208 (D.P.R. 2002), and *SIG Air Holding II LLC v. Novartis Int'l, AG*, 192 F. Supp. 2d 1195, 1202 (D. Colo. 2002). For cases that do a "nature, quality, and circumstances" analysis in effect, but do not call it that, see *Quality Pork International v. Rupari Food Servs., Inc.*, 675 N.W.2d 642, 649-51 (Neb. 2004), and *Wenger Tree Service v. Royal Truck & Equipment, Inc.*, 853 So.2d 888, 896 (Ala. 2002). For cases calling it that, see *Lang v. Capital Resource Investment*, 102 S.W.3d 861, 865-66 (Tex. 2003), and *Plant Mechanical Services, Inc. v. Drivecon Corp.*, No. CIV. A. 01-0993, 2001 WL 1002413, at \*2 (E.D. La. Aug. 23, 2001).

469. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483-84 (1985).

470. William Eskridge is usually given credit for identifying the difference between new and old forms of the textualist interpretive method, focusing principally on the different role each approach accords enactment-history materials in the determination of constitutional and legislative intent. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626-56 (1990).

471. *Int'l Shoe*, 326 U.S. at 316.

standard could have been expected (and even welcomed) over time, and if all the Court had done was keep the standard current there would be little if anything to get excited about. But the problems with the Court's development of the standard run well beyond those built into the process of trying to stay doctrinally up to date. The Court's personal jurisdiction decisions over the past half-century have been characterized more by a lack of analytical discipline than a ready willingness to change with the times. The inconsistencies, contradictions, and confusions introduced into the doctrine are often not so much the unavoidable consequences of inevitable change as the results of poor research, careless analysis, pride of authorship, and competing agendas. The Court has not done a good job, as an institution, of seeing to it that the doctrine has grown in coherent and consistent ways, and this pattern has not been lost on lower court judges charged with implementing the Court's vision.

Like children imitating the mannerisms of their parents, lower court judges "don't take after strangers."<sup>472</sup> Often, they mimic and sometimes even improve upon the Court's errors, sometimes in exaggerated fashion, to create their own peculiar forms of doctrinal incoherence. For example, the overwhelming preponderance of lower federal and state courts adopt *Helicopteros's* "continuous and systematic" phrasing of the contacts requirement for general jurisdiction, rather than the "substantial" contacts test first articulated in *International Shoe*, and repeated in *Perkins*.<sup>473</sup> "Continuous and systematic" contacts need only be regular, however, not substantial, so it is not surprising that lower courts often find general jurisdiction present when a defendant has engaged in just about any kind of regular business in a state, no matter

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472. I heard Wordsworth's dictum expressed this way at a little league baseball game, when the son of a particularly irascible coach threw a tantrum after striking out. The person sitting next to me on the bleachers leaned over and said very matter-of-factly, "You know, they don't take after strangers." For the original, see WILLIAM WORDSWORTH, *My Heart Leaps Up When I Behold*, in WILLIAM WORDSWORTH: THE MAJOR WORKS 246 (Stephen Gill ed. 2000) ("My heart leaps up when I behold A Rainbow in the sky: So was it when my life began; So is it now I am a Man; So be it when I shall grow old, Or let me die! *The Child is Father of the Man*, I could wish my days to be Bound each to each by natural piety." (emphasis added)). The dictum is only partly correct, of course. See WILLARD GAYLIN, HATRED 158 (2003) (explaining how children identify with and model their behavior after both parents and "other idealized figures").

473. *E.g.*, *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002) ("General jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'" (citation omitted)); *Adams v. Riverview Healthcare Ass'n*, No. A3-02-135, 2003 U.S. Dist. LEXIS 4253, at \*5 (D.N.D. Mar. 17, 2003); *Hunter v. Mendoza*, 197 F. Supp. 2d 964, 969 (N.D. Ohio 2002); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002) ("General jurisdiction is present when a defendant's contacts with a forum are 'continuous and systematic . . .'" (citation omitted)).

how minimal.<sup>474</sup> The ultimate effect of this misunderstanding is to make the mainstream tests for specific jurisdiction (“doing business”) the principal test for general jurisdiction as well, and to permit plaintiffs to sue defendants who do any kind of business in a state on any claim, whether connected to that business or not.

In one sense, of course, this is an understandable mistake.<sup>475</sup> *Helicopteros* was a general jurisdiction case; it used the adjectives “continuous and systematic” to describe the type of contacts required for general jurisdiction, and it is the latest in time of the Court’s major discussions of general jurisdiction.<sup>476</sup> But a careful reading of the decision also reveals that the defendant helicopter company had continuous and systematic business contacts with Texas in the ordinary sense of those terms, and yet those contacts were not enough for the Texas court to take general jurisdiction over it. Something more than merely “doing business” in a state is needed if a company is to be required to defend there against a claim arising in another state or country. This notwithstanding, many lower courts now treat *Helicopteros* as authority for the proposition that doing business in a state is enough to support general jurisdiction.<sup>477</sup>

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474. *E.g.*, *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002) (finding general jurisdiction based on brokerage services offered over the Internet in forum state); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95-96 (2d Cir. 2000) (finding general jurisdiction based on maintenance of Investor Relations office in forum state); *Mich. Nat’l Bank v. Quality Dinette Inc.*, 888 F.2d 462, 466 (6th Cir. 1989) (finding general jurisdiction based on mail-order solicitations and sales in forum state); *Cresswell v. Walt Disney Prods.*, 677 F. Supp. 284, 286-87 (M.D. Pa. 1987) (finding general jurisdiction based on advertising in forum state, sending representatives to encourage forum-state citizens to visit Disney World, conveying honorary Disney World citizenship on Mayor of Philadelphia, broadcasting the Disney Channel in forum state, providing a toll-free number for forum state residents to call, and visiting a forum-state junior college to recruit employees); *In re the Parental Responsibilities of H.Z.G.*, 77 P.3d 848, 851-52 (Colo. Ct. App. 2003) (finding general jurisdiction in paternity action based on letter to forum state promising to make monthly support payments), *cert. denied*, No. 03SC433, 2003 WL 22171476 (Colo. Sept. 22, 2003); *Adams v. Harrah’s Md. Heights Corp.*, 789 N.E.2d 436, 440 (Ill. App. Ct. 2003) (finding general jurisdiction based on casino advertising in the forum state); *Ahadi v. Ahadi*, 61 S.W.3d 714, 721 (Tex. App. 2001) (finding general jurisdiction based on providing twenty-three loan guarantees in the forum state). Courts are not the only ones to make this mistake. *See Twitchell, supra* note 92. *But see Bird*, 289 F.3d at 873-74 (maintaining a website “not in any way ‘substantial’” contacts and cannot support general jurisdiction); *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002).

475. *See Twitchell, supra* note 1, at 173-79 (describing how commentators extract a “doing business” standard from Supreme Court case law on general jurisdiction).

476. *Burger King, Asahi, and Burnham* post-date *Helicopteros* and repeat its description of the general jurisdiction standard, but they do not add anything to it.

477. *See, e.g., Gorman*, F.3d at 509-10. *But see, e.g., Bird*, 289 F.3d at 874 (stating that doing business with state residents “does not permit general jurisdiction”); *Behagen v. Amateur Basketball Ass’n of the United States*, 744 F.2d 731, 733 (10th Cir. 1984)

Related to this error, since it affects the frequency with which lower courts turn to the general jurisdiction doctrine,<sup>478</sup> is the practice of defining the "nexus" requirement of specific jurisdiction in either "arise out of" or "related to" terms. Many lower courts treat these alternative definitions as equally acceptable, and act as if they are free to choose between them without having to justify the choice.<sup>479</sup> Some courts seem

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("Colorado courts have applied *Perkins* in holding that when a defendant has substantial, continuous contacts with the forum state, 'jurisdiction may be found even when the cause of action does not arise out of the forum related activity.'" (quoting *Waterval v. Dist. Court*, 620 P.2d 5, 9 (Colo. 1980))); *EMI Music Mex. v. Rodriguez, S.A.*, 97 S.W.3d 847, 855 (Tex. App. 2003) ("General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas, a more demanding minimum contacts analysis than for specific jurisdiction."); *Magic House AB v. Shelton Beverage L.P.*, 99 S.W.3d 903, 909 (Tex. App. 2003) ("[T]he minimum contacts analysis for general jurisdiction . . . demands a showing of substantial activities in the forum state."); *Blair Inv. Banking Corp. v. Reardon*, 97 S.W.3d 269, 275 (Tex. App. 2002) ("The minimum-contacts analysis for general jurisdiction is more demanding than for specific jurisdiction and requires a showing that the defendant conducted substantial activities within the forum."). Still other courts use a hybrid test, combining both the "continuous and systematic" and "substantial" contacts requirements into a single standard. *E.g.*, *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997) ("[T]he threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction."); *Spherion Corp. v. Cincinnati Fin. Corp.*, 183 F. Supp. 2d 1052, 1055 (N.D. Ill. 2002) ("If defendant's contacts with the forum state are sufficiently 'substantial[,] . . . continuous and systematic,' personal jurisdiction may exist for a cause of action unrelated to those contacts." (alteration in original) (citation omitted)); *Leventhal v. Harrelson*, 723 So. 2d 566, 569 (Ala. 1998) ("General jurisdiction applies where a defendant's activities in the forum state are 'substantial' or 'continuous and systematic,' regardless of whether those activities gave rise to the lawsuit.").

478. Courts routinely discuss both general and specific jurisdiction in all cases, as if they were "paired in the voting." Perhaps this is because lawyers routinely argue for both types of jurisdiction, whether warranted or not.

479. See, e.g., *Bird*, 289 F.3d at 875 (stating that the nexus requirement "'does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities'" (quoting *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (1968))); *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1322 (9th Cir. 1998) ("We must determine if the plaintiff . . . would not have been injured 'but for' the defendant[s] . . . conduct directed toward [plaintiff] in California); *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995) ("[T]he relatedness requirement is not met merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state."); *Adams v. Riverview Healthcare Ass'n*, No. A3-02-135, 2003 U.S. Dist. LEXIS 4253, at \*8-9 (D.N.D. Mar. 17, 2003) ("providing healthcare to patients in North Dakota [which did not] commence until after [plaintiff's] termination" from defendant company was "not related to or connected with [plaintiff's] cause of action" for wrongful termination); *Mulcahy v. Cheetah Learning LLC*, No. CIV.02-791 (PAM/RLE), 2002 U.S. Dist. LEXIS 17516, at \*3-4 (D. Minn. Sept. 4, 2002) (holding that claim for copyright infringement of test-preparation course materials related to advertising and selling seats to test-preparation course in forum state,

to think *Helicopteros* stands for this proposition, probably because it used both expressions to describe the idea of nexus,<sup>480</sup> notwithstanding that the question of how to define nexus was explicitly taken out of that case by the parties.<sup>481</sup> Other courts seem to prefer the freedom to define nexus in more than one way because they like having the flexibility to take jurisdiction in circumstances where they think it would be wise to do so, and to decline it when they think it would not, and a “related to” standard has more play in the joints than its “arise out of” alternative. Whatever the reason, interpreting *International Shoe* as articulating two equally acceptable definitions of nexus is an implausible reading of the case on both linguistic and policy grounds. Linguistically, if the Court meant to require only a “related to” relationship between the defendant’s forum-contacts and the plaintiff’s claim, there would have been no need for it to use the expression “arise out of”—“arise out of” is simply a lesser included category of “related to”—and presumably everything said in the opinion was intended to be given effect.<sup>482</sup> But more importantly, requiring only “some significant relationship” between the defendant’s contacts and the plaintiff’s claim undercuts the defendant-veto policy that historically has been the animating force behind the “minimum contacts” standard. It is much harder for a defendant, particularly a corporate defendant of any size and with more

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even though course never given); *Plant Mech. Servs., Inc. v. Drivecon Corp.*, No. CIV.A.01-0993, 2001 U.S. Dist. LEXIS 13671, at \*11 (E.D. La. Aug. 23, 2001) (holding that “place of contractual performance” is where claim for breach of contract arises); *Lang v. Capital Res. Inv.*, 102 S.W.3d 861, 866 (Tex. App. 2003) (concluding that a claim by company investor against director and employee for breach of fiduciary duty in managing company did not “arise from” and was not “directly related to” company’s sales of securities to forum residents); *Magic House*, 99 S.W.3d at 910 (stating that a cause of action for fraudulent transfer of assets “has nothing to do with the quality of the beverage[]” sales connecting defendant to the state); *EMI Music*, 97 S.W.3d at 859 (describing the “split in the federal circuit courts on the standard to be applied in determining if a tort claim ‘relates’ to the defendant’s contacts within a state[,]” and adopting the “substantial connection” standard).

480. *E.g.*, *Carrot Bunch Co. v. Computer Friends, Inc.*, 218 F. Supp. 2d 820, 824 (N.D. Tex. 2002) (“[S]pecific jurisdiction . . . permits the exercise of personal jurisdiction over a nonresident defendant only when the nonresident defendant’s contacts with the forum state arise from, or are directly related to, the cause of action.” (citing *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 n.8 (1984))).

481. *See Helicopteros*, 466 U.S. at 415 n.10. If the Court thought nexus required only a “related to” relationship between claim and contacts *Helicopteros* should have been decided differently, the parties’ error in not arguing the issue notwithstanding, and yet there is no indication in the opinion that the Court was dissatisfied with the outcome.

482. In a statutory context this admonition comes from what is commonly referred to as the “Surplusage” canon. *See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 833* (3d ed. 2001) (illustrating “The Rule to Avoid Surplusage”); *WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 266-68* (2000) (describing “The Rule Against Surplusage”).

than one kind of product or service, to avoid contact of any kind with a forum, than it is for it to avoid doing a particular kind of business there, and yet under a "related to" conception of nexus only the first option is available if the defendant wants to exercise its veto right. It almost seems as if lower courts do not believe the Supreme Court when it repeatedly reasserts the primacy of the defendant's right to control the jurisdictional issue, or if they believe the Court, they do not accept its decision.<sup>483</sup>

Most lower courts also repeat the Court's post-*International Shoe* habit of not using the term "minimum contacts" as a term of art, regularly finding "minimum contacts" present (or absent), before completing their jurisdictional analysis.<sup>484</sup> Such a conclusion would have been a contradiction in terms under *International Shoe's* original formulation of the due process standard, where "minimum contacts" was a synonym for

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483. Combining an expansive definition of both nexus and general jurisdiction, many lower courts treat specific jurisdiction as a doctrine for dealing with only single-contact cases, and reserve general jurisdiction for cases involving multiple contacts of any frequency and regularity. See, e.g., *Brockman v. Kravic*, 779 N.E.2d 1250, 1256-57 (Ind. Ct. App. 2002) ("[T]he defendant's isolated contacts with a state that are not enough to establish general personal jurisdiction may be sufficient to allow jurisdiction over any incidents related to those contacts."). The effect of this decision is to move the jurisdiction/no-jurisdiction line on the contacts spectrum (defined by no contacts at one end and substantial contacts at the other), an order of magnitude in the direction of the taking-jurisdiction end of the spectrum, and cause an exponential and unrecognized expansion in the scope of the jurisdictional power of courts.

484. See, e.g., *Interlease Aviation Investors II (ALOHA) L.L.C. v. Vanguard Airlines, Inc.*, 262 F. Supp. 2d 898, 911 (N.D. Ill. 2003) (finding that the defendants "have established minimum contacts with Illinois" before considering the effect of the "fairness" considerations); *Adams*, 2003 U.S. Dist. LEXIS 4253, at \*4-5 ("Even if the defendant has purposefully established the necessary 'minimum contacts' within the forum state, consideration of 'fair play and substantial justice' may nevertheless defeat the reasonableness of jurisdiction."); *Carrot Bunch*, 218 F. Supp. 2d at 824 (stating that two conditions needed for personal jurisdiction are "minimum contacts" and "fair play and substantial justice"); *Bassett v. Sinterloy Corp.*, No. 01C3141, 2002 U.S. Dist. LEXIS 15178, at \*14 (N.D. Ill. Aug. 13, 2002) ("Because minimum contacts with Illinois have been established, the court addresses whether exercising jurisdiction over [the defendant] is reasonable and does not violate traditional notions of fair play and substantial justice."); *Brale v. Sportec Prods. Co.*, No. CIV.A.01-333-JD, 2002 WL 1676293, at \*5 (D.N.H. July 16, 2002) (finding that "[plaintiffs] have met their burden of showing that [defendant] has sufficient minimum contacts with New Hampshire" before considering the "reasonableness of jurisdiction"); *Plant Mech. Servs., Inc. v. Drivecon Corp.*, No. CIV.A. 01-0993, 2001 U.S. Dist. LEXIS 13671, at \*4-5 (E.D. La. Aug. 23, 2001) ("The exercise of personal jurisdiction over a nonresident defendant satisfies due process when (1) the defendant has . . . establish[ed] 'minimum contacts' with that state; and (2) exercising personal jurisdiction over the defendant does not offend 'traditional notions of fair play and substantial justice.'" (citations omitted)); *EMI Music*, 97 S.W.3d at 855 ("Upon finding that the nonresident defendant purposefully established minimum contacts with the forum state, we must then determine if the exercise of *in personam* jurisdiction comports with fair-play and substantial justice.").

“constitutionally sufficient contacts” to take jurisdiction.<sup>485</sup> Under *International Shoe*, when a court had “minimum contacts” it had jurisdiction at the same time, and not before. When modern courts purport to weigh a defendant’s “minimum contacts” against the sovereignty, efficiency, and convenience factors in the second half of the “minimum contacts” test, in fact they are weighing a defendant’s “purposeful contacts” against such factors.<sup>486</sup> “Minimum contacts” exist only after a court has found purposeful contacts not outweighed by fairness considerations.<sup>487</sup> The failure to use “minimum contacts” as a term of art is as widespread a mistake as is the practice of mis-describing the general jurisdiction and nexus standards in the fashion illustrated above, perhaps even more widespread, but because it does not result in as many strange outcomes its consequences are not as harmful. The problem is more one of a lack of doctrinal integrity than ill-advised results.

Lower court paraphrases of *Burger King*’s two-part statement of the “minimum contacts” standard also often undo the clear and logical ordering that statement imposed upon what had become a pretty confused doctrinal world. Now, there are dozens of idiosyncratic formulations of the “minimum contacts” standard, all of which rearrange, subtract from, and add to the elements listed in *Burger King*, mixing and matching considerations of contacts, sovereignty, efficiency, and convenience in what often seems to be a random and haphazard manner.<sup>488</sup> These modifications vary in their levels of error, of course; some are fundamentally mistaken, some are incomprehensible, and some are just silly, but all of them create doctrinal nightmares for lawyers charged with the task of arguing jurisdictional issues to courts bound not

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485. See discussion *supra* note 69.

486. See discussion *supra* note 468.

487. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-78 (1985).

488. See, e.g., *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322-24 (9th Cir. 1998) (describing seven-factor reasonableness test of *Burger King*); *Waitt v. Speed Control, Inc.*, 212 F. Supp. 2d 950, 956 (N.D. Iowa 2002) (describing five-factor test for “minimum contacts” leaving out sovereignty and state interest considerations); *Brockman v. Kravic*, 779 N.E.2d 1250, 1257 (Ind. Ct. App. 2002).

Factors to consider when evaluating the defendant’s contacts with the forum [are]: (1) whether the claim arises from the defendant’s forum contacts; (2) the overall contacts of the defendant or its agent with the forum state; (3) the foreseeability of being haled into court in that state; (4) who initiated the contacts; and (5) whether the defendant expected or encouraged contacts with the state.

*Id.* *Builder Mart of Am., Inc., v. First Union Corp.*, 563 S.E.2d 352, 355 (S.C. Ct. App. 2002) (describing personal jurisdiction as “subject to a two-step analysis: (1) the power prong and (2) the fairness prong”); *Ahadi v. Ahadi*, 61 S.W.3d 714, 721 (Tex. App. 2001) (requiring a fairness factors analysis in a general jurisdiction case).

only by what the Supreme Court has said on the subject, but by what local circuit and appeals courts have said as well. When operative legal standards compete in this way, court decisions become more difficult to predict, the costs of legal argument increase, and client uncertainties multiply. And the legal system as a whole, which at the best of times is a difficult to understand regime of rules and policies, becomes truly incomprehensible.

In the way that a half-an-inch misalignment in a golf grip can produce a fifty-yard change in location down the fairway, lower courts running with the Supreme Court's errors have produced extreme doctrinal consequences from small, initial mistakes. And lawyers manipulating the imprecision and confusion in the Court's varying formulations of the doctrine have made jurisdictional arguments they must have known made no sense (i.e., any reasonable person would have known they made no sense),<sup>489</sup> billed clients (who could not know any better) for making these arguments, forced courts to waste valuable judicial time and resources responding, and in the process reinforced the cynicism about the nature and purposes of law and legal practice that is widespread among lawyers, judges, and citizens generally.

If these and other such consequences are to be avoided, the Supreme Court must begin to be more scrupulous about, and give more attention to, the manner in which it defines the personal jurisdiction doctrine. It must use doctrinal language more consistently, hold the meaning of concepts constant over time, work with and refine received conceptual frameworks rather than routinely jettison them for pride of authorship reasons, describe prior cases accurately when relying on them as precedent, clarify rather than repeat ambiguous or misleading principles,

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489. See, e.g., *Waite*, 212 F. Supp. 2d at 957 (arguing for general jurisdiction over third-party defendant lawyer based on the lawyer's single trip to the forum); *Litman v. Walt Disney World Co.*, No. CIV.A.01-CV-3891, 2002 U.S. Dist. LEXIS 5115, at \*8-9 (E.D. Pa. Mar. 26, 2002) (arguing that Pennsylvania promotional activities of companies related to defendant were a sufficient basis for Pennsylvania jurisdiction over a negligence claim against an employee of the defendant for injuries caused in an automobile accident in Florida); *In re Williams*, 264 B.R. 234, 241 (Bankr. D. Conn. 2001) (arguing for general jurisdiction over defendants based on its "correspondence sent . . . via post and fax" to plaintiff in forum); see also *Hunter v. Mendoza*, 197 F. Supp. 2d 964, 971 (N.D. Ohio 2002) (arguing that the "exercise of personal jurisdiction . . . over one defendant . . . automatically confer[s] jurisdiction] over all defendants pursuant to 28 U.S.C. § 1367, through supplemental jurisdiction"). This latter concept, commonly referred to as "pendent personal jurisdiction," is popular among the circuits. See, e.g., *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180-81 (9th Cir. 2004) (latest court adopting the doctrine); *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (noting that "every circuit court of appeals to address the question [has] upheld the application of pendent personal jurisdiction"). The Supreme Court has yet to approve of it.

and maintain doctrinal continuity by finding preferred formats (and authors) for expressing the due process standard and staying with those formats (and authors). The Court must also be willing to monitor and revisit the doctrine on a regular basis to let lower courts know when they have gone off track. A constitutional doctrine grounded in fair play and substantial justice is not self-explanatory, or self-executing. In fact, because it deals with matters of morality and politics in context-specific fashion, it is more susceptible than most doctrines to changing views about how it should be understood and expressed, and if it is to have a consistent and coherent meaning over time the Court will need to attend to it regularly. The present time is an instance in which some attention is needed.

III. MINIMUM CONTACTS AND THE INTERNET: "NOW THAT THE AUTOMOBILE AND TELEPHONE HAVE GIVEN WAY TO THE INTERNET SERVICE PROVIDER AND PEER-TO-PEER SHARING"<sup>490</sup>

A new and growing body of personal jurisdiction case law characterized principally by Internet-based forum contacts (through websites, chat rooms, newsgroups, and the like) does not fit easily into the doctrinal categories inherited from the *International Shoe-Burger King* line of decisions, and provides the Court with both a reason and an opportunity to reconstitute the "minimum contacts" standard.<sup>491</sup> In the

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490. *Cf. Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.*

491. For some courts, Internet jurisdiction cases seem to present the prospect of a "brave new world" into which only the most innovative and intrepid dare venture. *See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) ("The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages."). The court in *Zippo* based this view on the well-known claim that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." *Id.* (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)). Strangely, it took this language from *Hanson* rather than *McGee*, where the language first appeared. *Hanson* did not uphold jurisdiction, and immediately following the above quotation it went on to say that it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.

virtual world there are all kinds of nonstandard ways of "doing business,"<sup>492</sup> "producing tortious effects,"<sup>493</sup> and "exercising the privilege of conducting activity"<sup>494</sup> in a state, as well as multiple notions of what it means to put a product into a "stream of commerce," or "target" (or "expressly aim at") an individual with defamatory or libelous comments.<sup>495</sup> And in cyberspace the relevant geographical boundaries, both for commercial and non-commercial purposes, are as often those between nation-states as those between states of the Union.<sup>496</sup> While aware of the problem, lower courts have not had much success in adapting the "minimum contacts" standard to these different conditions

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*Hanson*, 357 U.S. at 251 (citation omitted). Apparently, the *Zippo* court was in a bind. It preferred the sentiments of *McGee*, but the authority value of *Hanson*, and so it quoted *Hanson* (selectively) quoting *McGee*.

492. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 450 (3d Cir. 2003) (noting a Spanish website not set up to process U.S. addresses); *Graduate Mgmt. Admissions Council v. Raju*, 241 F. Supp. 2d 589, 591 (E.D. Va. 2003) (selling practice questions for the Graduate Management Admissions Test through an India-based Internet website, by having customers order the questions from an offshore email address provided online, transfer payment to Western Union, and receive delivery at a requested address); *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901-08 (N.D. Cal. 2000) (distributing file-sharing software via an Internet website that allows parties in different states to log-on to the Napster system and share MP3 music files directly in a peer-to-peer network with users in other states also logged on to the system); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 829 (N.D. Ill. 2000) (describing Irish retailer with an interactive website stating "Goods Sold Only in the Republic of Ireland," but that permitted purchaser to list U.S. address as a shipping and billing address).

493. See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002) (discussing Internet service provider enabling website owner to post photographs on the Internet allegedly in violation of photograph owner's copyright); *Panavision Int'l*, 141 F.3d at 1321-22 (registering company trademarks as domain names as part of a scheme to force the companies to purchase the domain names); *Pavlovich v. Superior Court*, 58 P.3d 2, 10-13 (Cal. 2002) (posting source code for de-encryption software on website accessible in the forum state); *Griffis v. Luban*, 646 N.W.2d 527, 530 (Minn. 2002) (describing libel during an online newsgroup conversation).

494. *Int'l Shoe*, 326 U.S. at 319.

495. See, e.g., *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (rejecting the posting of a news article on a journalism website as sufficient for jurisdiction); *Pavlovich*, 58 P.3d at 11-13 (finding posting of source code for program to circumvent video encryption technology on website not sufficient for jurisdiction); see also *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002) (finding the posting of a general news story about Virginia prison conditions on paper's website not sufficient for jurisdiction); *Panavision Int'l*, 141 F.3d at 1321-22 (registering plaintiff's trademarks as Internet domain names to extort money not sufficient for jurisdiction); *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1138 (D. Nev. 2002) (posting defamatory comments on [ragingbull.com](http://ragingbull.com), an interactive website reporting financial news and maintaining information on publicly traded companies insufficient for jurisdiction); *Pavlovich*, 53 P.3d at 8 n.1.

496. See, e.g., *Raju*, 241 F. Supp. 2d at 597 (finding jurisdiction over a foreign national with U.S. contacts enough to satisfy the Due Process Clause, even though foreign national did not have sufficient contacts with any particular state).

of the new electronic order.<sup>497</sup> In fact, the dominant pattern in the case law at the present time resembles the pattern dominant during the period between *Hanson* and *Woodson*, when the Supreme Court approached the subject of personal jurisdiction from one doctrinal perspective (defendant-veto), and most lower federal and state courts approached it from another (totality-of-the-circumstances). If the response in *Woodson* is indicative of things to come, it should not be long before the Court intervenes once again to re-impose doctrinal order and, if it follows its past practice, construct a defendant-veto version of the “minimum contacts” that takes into account the changed context of cyberspace.

Whether it makes sense for the Court to reconstitute “minimum contacts” in the same way it did in *Woodson* is not so clear, however, since it is more difficult to give effective meaning to the idea of defendant-veto in a virtual world than in a physical one. In the latter, one had only to avoid making contracts, renting offices, hiring employees, maintaining inventory, advertising, shipping dangerous products, and other such activities in a forum state for jurisdiction not to attach. Defendants controlled these choices since the technology used in the pre-Internet world to extend one’s reach into other states—the telephone, automobile, railroad, airplane, and the like—could be pointed in single directions, so to speak, and did not automatically go everywhere at the same time.<sup>498</sup> But the Internet is not organized geographically along the lines of sovereign states, and it is easier to control the level of access to it than the location from which such access is obtained.<sup>499</sup> The policy of defendant-veto may be somewhat of an anachronism, therefore, in a world where simultaneous connection with all parts of the globe, known and unknown, intended and unintended, is almost instantaneous, and the more flexible “totality-of-the-circumstances” standard might be better adapted to determining when jurisdiction should attach. On the other hand, an open-ended and discretionary jurisdictional standard like “totality of the circumstances” lends itself to manipulation and abuse, often becoming no more than the embodiment of an individual judge’s subjective notions of what it means to be fair and just, and if the Court

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497. Veronica M. Sanchez, *Taking a Byte out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes*, 46 UCLA L. REV. 1671, 1673-74 (1999).

498. Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1828 (2003).

499. *But see Internet Jurisdiction Fears Affecting Global Business Strategy, Experts Say*, 72 U.S.L.W. 2614, 2614 (April 13, 2004) [hereinafter *Internet Jurisdiction Fears*] (finding that sixty-nine percent of North American respondents to a survey on the use of technological tools to influence jurisdictional outcomes use techniques to block access to users hailing from specific geographical locations).

decides to modify the personal jurisdiction standard to accommodate the Internet-contacts cases, it must do so in a manner that avoids this "rule-of-law" criticism.

Lower federal and state courts have recognized the need for an updated version of the "minimum contacts" standard for some time, and a few have taken turns at trying to produce one, but the most popular revision (by an overwhelming margin),<sup>500</sup> the so-called sliding scale test from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>501</sup> falls well short of the standards for finished work. *Zippo* was a tort action based principally on trademark infringement.<sup>502</sup> The case was brought in Pennsylvania federal district court by the Zippo Manufacturing Company (Zippo), a Pennsylvania-based maker of a well-known line of tobacco lighters, against Zippo Dot Com (Dot Com), a California-based operator of an Internet news service.<sup>503</sup> Zippo objected to Dot Com's use of the term Zippo on its several domain names, its website, and in the headings of the messages posted to its various newsgroups.<sup>504</sup> Dot Com had 3,000 subscribers in Pennsylvania (out of 140,000 total subscribers), and agreements with seven Pennsylvania Internet service providers to provide these subscribers with access to its news services.<sup>505</sup> Apart from these contacts, however, it had no other connections with Pennsylvania.<sup>506</sup>

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500. For a sample of cases following *Zippo*, see *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002), *Mink v. AAAA Development, LLC*, 190 F.3d 333, 336 (5th Cir. 1999), *Carrot Bunch Co. v. Computer Friends, Inc.*, 218 F. Supp. 2d 820, 824-25 (N.D. Tex. 2002).

501. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

502. *Id.* at 1121. The plaintiff also pleaded dilution and false designation claims under the Federal Trademark Act, and state claims under the Pennsylvania trademark act. See *id.* at 1121.

503. *Id.* Subscribers to the news service were able to post and receive messages to and from other subscribers through the various newsgroups made accessible on the company's website. *Id.*

504. *Id.* The company used the domain names of *zippo.com*, *zippo.net*, and *zipponews.com*. See *id.*

505. *Id.*

506. *Id.*

Finding the “traditional framework”<sup>507</sup> for analyzing personal jurisdiction questions inadequate, the court concluded that the availability of jurisdiction based exclusively on Internet contacts should be “directly proportionate to the nature and quality of [the] commercial activity that an entity conducts over the Internet.”<sup>508</sup> According to *Zippo*, a defendant’s forum contacts exist on a “sliding scale,” or “spectrum.”<sup>509</sup>

At one end of the spectrum are situations where a defendant clearly does business over the Internet. [Here] personal

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507. The court’s description of this framework was reasonably accurate. While it made the familiar mistake of describing general jurisdiction in terms of “systematic and continuous” contacts, *id.* at 1122 (citing *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414-16 (1984)), its “three-pronged test” for specific jurisdiction tracked familiar ground, *see id.* at 1122-23. Strangely though, it also seemed to imply that only specific jurisdiction was part of the “minimum contacts” standard. *See id.* at 1122 (“In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant . . . where the ‘relationship between the defendant and the forum falls within the “minimum contacts” framework’ of *International Shoe* . . . and its progeny.” (citation omitted)).

508. *Id.* at 1124. At first glance this might seem to be a form of *International Shoe*’s “nature, quality, and circumstances” test for evaluating single and isolated contacts giving rise to the claim, *see supra* notes 35-41 and accompanying text, but the court in *Zippo* did not use it this way, *see Zippo*, 952 F. Supp. at 1124.

509. Use of the expression “sliding scale” in this context does not fit easily within either the historical or contemporary meanings of the term. Typically, a sliding scale is a “scale or standard . . . which rises or falls in proportion to, or conversely to, the rise or fall of some other standard.” 15 THE OXFORD ENGLISH DICTIONARY 702 (2d ed. 1998). In other words, the expression describes the movement of one variable up or down on a scale in relation to some other variable outside the scale. But in the *Zippo* court’s use of the term, the relevant “other” variable (defendant contacts with a state) is the same as the variable represented on the scale. There is only one variable involved, in other words, and that is the extent of the defendant’s connection with the state. In reality then, the *Zippo* court created a “level of interactivity,” or “spectrum” test, more than a “sliding scale” test, but given the open-endedness and lack of algorithm in such a standard, it probably is more accurate to say that it simply came up with a new paraphrase of the “totality of the circumstances” test. Looked at in this way, however, the “sliding scale” test is just another in a long line of devices used surreptitiously by courts to subvert the defendant veto view of personal jurisdiction under the guise of enforcing it. (That the court would use the test in a tort action, where a defendant’s level of commercial activity in the state would seem to be beside the point, is more evidence of that fact.) There is nothing new in a “sliding scale” test, therefore, just as there is nothing new in Internet-based, “doing-business” contacts with a forum. Commercial dealing over the Internet is not different in any significant respect from telemarketing generally, and it does not require a new form of the minimum contacts standard anymore than did telemarketing. Internet contacts are sometimes different in certain specialized kinds of tort claims, however, particularly those based on what used to be called “random, fortuitous, or isolated” forum contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), but what now might be better described as “impulsive, impetuous, and spontaneous” forum contacts. Whether the latter are the legitimate offspring of the former, and if so, whether they should be treated in the same way, are difficult questions that the *Zippo* court does not take up.

jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on [a passive] Internet Web site[, and here there are] not grounds for the exercise of personal jurisdiction.<sup>510</sup>

In the all-important middle category, "where a user [is able to] exchange information [(i.e., 'interact')] with [a] host computer[, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."<sup>511</sup> If the interactivity is great enough, jurisdiction attaches.<sup>512</sup> Applying this, in effect, "level of commercial activity"<sup>513</sup> test to the facts before it, the court concluded that "Dot Com [did] more than create an interactive Web site through which it exchange[d] information with Pennsylvania residents . . . [Instead it] conduct[ed] . . . electronic commerce with Pennsylvania residents [so as to] constitute[] the purposeful availment of doing business in Pennsylvania," and thus was subject to jurisdiction in the State.<sup>514</sup>

There is an immediate problem with this analysis if one thinks of it in traditional "minimum contacts" terms. Zippo argued for specific jurisdiction over Dot Com, conceding that general jurisdiction was not available.<sup>515</sup> Consequently, the court had to determine whether Zippo's claims arose from Dot Com's Pennsylvania Internet contacts.<sup>516</sup> Such a

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510. See *Zippo*, 952 F. Supp. at 1124 (citation omitted). The court is not always consistent in its usage of scale or spectrum. *Id.*

511. *Id.* The court's three categories reduce to its final one, of course, since "doing business" and "posting information" are just different "levels of interactivity."

512. *Id.* at 1124-25.

513. This paraphrase combines the two distinct features of the court's statement of the standard, "interactivity" and "commercial nature of the exchange." *Id.* at 1124.

514. *Id.* at 1125-26. Perhaps not surprisingly, given the extent to which the concept is not understood, some courts even find that an interactive website is sufficient in itself to support general jurisdiction. See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078-82 (9th Cir. 2003) *vacated reh'g granted en banc*, 366 F.3d 789 (9th Cir. 2004); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002). *But see* *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (holding that the maintenance of a website is "not in any way 'substantial'" contact and cannot support general jurisdiction); *Bird v. Parsons*, 289 F.3d 865, 873-74 (6th Cir. 2002). Taken literally, the *Ameritrade* rule would permit a plaintiff to bring any kind of claim against a party in a state in which that party has an accessible interactive website, even if the claim has no connection with the state or the website. Since websites are usually accessible everywhere, this means that a defendant with an interactive website could be sued on anything, everywhere. In the brave new world of cyberspace, so it seems, personal jurisdiction knows no bounds. For a rejection of the "jurisdiction everywhere" argument, see *Pavlovich v. Superior Court*, 58 P.3d 2, 8 (Cal. 2002).

515. *Zippo*, 952 F. Supp. at 1122-23 ("[Zippo] Manufacturing does not contend that we should exercise general personal jurisdiction over Dot Com.").

516. *Id.*

nexus relationship, one will recall, is the defining feature of specific jurisdiction.<sup>517</sup> Zippo sued Dot Com for trademark infringement, however, a tort, and not for breach of a commercial agreement.<sup>518</sup> Zippo was not a Dot Com subscriber and it did not have any other contractual relationships with the company.<sup>519</sup> Given this, the court's use of what, in effect, was a "doing business" standard (i.e., "the level of commercial activity conducted over the Internet") for determining the availability of jurisdiction was confusing.<sup>520</sup> An "effects plus" test, the standard for multi-state torts, would have been a more understandable choice. The court should have asked whether Dot Com's Internet activity produced a tortious effect in Pennsylvania, and whether the company's business activities as a whole satisfied any of the so-called plus factors<sup>521</sup> designed to insure that taking jurisdiction would be fair.

The court's conclusion, stated later in the opinion, "that [Zippo's] cause of action [arose] out of Dot Com's forum-related conduct [because] 'a cause of action for trademark infringement occurs where the passing off [of the trademark] occurs,'<sup>522</sup> serves to underscore this point. It was Dot Com's "passing off" of the Zippo trade name on its website that gave rise to the plaintiff's claim, not its commercial activity in the State, and this "passing off" occurred whenever Dot Com used the Zippo name.<sup>523</sup> The level of the company's commercial activity in Pennsylvania was relevant only for the purpose of establishing the existence of such "passing off."<sup>524</sup> If Dot Com used the Zippo name to solicit business in the State but was unsuccessful, for example, the "passing off" standard still would have been met. The court's mistake here, that of mixing and matching tort and contract-based formulations of the "minimum contacts" standard, is not a new one, of course, but it is a particularly troublesome one in an Internet jurisdiction case because Internet cases are where most of the difficult issues of this sort arise, and where the greatest doctrinal clarity is needed.

A more serious but equally familiar problem with the *Zippo* "sliding scale" test is its susceptibility, in the hands of a willful judge, to being

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517. See *supra* notes 37-38.

518. See *Zippo*, 952 F. Supp. at 1121.

519. *Id.*

520. Zippo had to show that Dot Com did business using the Zippo name to establish infringement, but not that it did business with Zippo. See *id.* at 1124-25.

521. For an illustration of such "plus" factors, see *supra* note 263 and accompanying text.

522. *Zippo*, 952 F. Supp. at 1127 (quoting *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994) (citing *Tefal, S.A. v. Products Int'l Co.*, 529 F.2d 495, 496 n.1 (3d Cir. 1976))).

523. *Id.* at 1121-22.

524. *Id.* at 1125-26.

turned into a kind of all-purpose balancing test. Its open-ended and flexible terms permit a judge to take all types of factors into account in ruling on a jurisdictional question, and to weigh and compare those factors in whatever fashion the judge thinks appropriate, without necessarily having to rank the factors or make any one of them (e.g., the purposefulness of the defendant's forum contacts) first among equals.<sup>525</sup> When used in this fashion, the *Zippo* standard does little more than reinstate the discredited totality-of-the-circumstances policy of *McGee* under the guise of a "sliding scale" algorithm, the same policy the Supreme Court rejected in *Hanson*, *Woodson*, *Kulko*, and the rest of its modern personal jurisdiction case law. In fact, if the Court has made one thing clear in the last twenty-five years, it is that a defendant can avoid the extra-territorial jurisdictional reach of a state by avoiding purposeful contacts with it.<sup>526</sup> A sliding scale test permits, and may even encourage, a retreat from that commitment.

This does not mean that the *Zippo* standard is useless.<sup>527</sup> It works perfectly well for Internet cases raising claims in the nature of a breach of contract. In such cases, the jurisdictional question will usually turn on how the defendant configures its website, both in the kind of information it makes available on the site and the extent of the interaction it makes permissible for customers. When customers can do everything on a website they can do in a store, a defendant's forum contacts are "virtually" indistinguishable from the contacts created by establishing a store in the state and transacting business in person.<sup>528</sup> If a defendant does not want this kind of contact with a particular state, it has only to make its website inaccessible to customers in that state.<sup>529</sup> For claims based on economic transactions, therefore, questions about cyberspace jurisdiction are not essentially different from the questions considered in *International Shoe*, and it follows that they can be resolved by using

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525. See TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 527-30 (2004).

526. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980).

527. Not everyone feels this way. See Patrick J. Borchers, *Internet Libel: The Consequences of a Non-rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 478-81 (2004) (arguing that we should forget about *Zippo*). Much of the time the question of *Zippo's* influence will be moot, since the issue of jurisdiction will be controlled by a forum selection clause in the parties' agreement. There is no necessary incompatibility between the "sliding scale" test and such a clause. See, e.g., *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (accepting *Zippo* test but enforcing forum selection clause).

528. *But see Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452-54 (3d Cir. 2003) (requiring "something more" than a fully interactive website to sustain jurisdiction).

529. This is becoming increasingly easier to do. See *Internet Jurisdiction Fears*, *supra* note 499 (describing "jurisdiction avoidance mechanisms . . . to pinpoint the geographic location of specific users and block access by users hailing from that jurisdiction").

*International Shoe* type standards. For certain kinds of tort actions, however, where the focus is on the “effects” a defendant produces in the forum, the issues are not as simple. It is relatively easier to libel someone inadvertently or fortuitously over the Internet, for example, impulsively, on the spur of the moment, usually in reaction to another’s comments, with consequences everywhere,<sup>530</sup> than it is in a world where one must first think about the libel, “write it up” in a magazine article or newspaper story, and then get it published, and inadvertent and fortuitous forum contacts have never been enough to support long-arm jurisdiction.<sup>531</sup> If the *Calder* concepts of “effects-plus,” “target,” and “expressly aim” are to be used to resolve questions of Internet-based long-arm jurisdiction, therefore, as it seems they must,<sup>532</sup> they will need some modification.<sup>533</sup>

Whether every impulsive chat room comment<sup>534</sup> should subject a speaker to litigation in a distant forum raises different concerns than the question of whether Larry Flynt should be required to travel to New Hampshire to defend his well-considered caricature of Kathy Keeton distributed in 10,000 copies of the March issue of *Hustler Magazine*,<sup>535</sup> or whether a writer and editor of *The National Enquirer* should be required to travel to California to defend their conscious trashing of Shirley Jones

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530. Typically by bad-mouthing the person during an argument in a chat room or newsgroup. When argument fails, epithet is often there to take up the cause.

531. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-99 (1980). Another way to think of this is to see the Internet as eliminating *International Shoe*’s category of “single and isolated” contacts. No matter how limited the action of a defendant, if that action is taken on the Internet there is little possibility of being connected to only one jurisdiction, or for only a single instance.

532. *Calder* is the key case for long-arm libel jurisdiction, since it is the only Supreme Court libel case to rely on a tort based formulation of the “minimum contacts” standard. See *Griffis v. Luban*, 646 N.W.2d 527, 532 (Minn. 2002). *Keeton* also involved a libel claim, but the Court analyzed the jurisdictional issue on a “doing business” standard for the New Hampshire claim, and a substantive law policy (the “single publication rule”) for the claims arising in the forty-nine other states. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984).

533. Many courts have had a go at this task. See, e.g., *Revell v. Lidov*, 317 F.3d 467, 470-72 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002); *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1137-38 (D. Nev. 2002); *Griffis*, 646 N.W.2d at 533-35. For an excellent summary and discussion of the case law in Internet libel jurisdiction, see Borchers, *supra* note 527, at 481-89.

534. Or even an essentially local newspaper story, posted on the paper’s website, which allegedly libels someone from another state in passing, and then is read by that person in his home state. See *Young*, 315 F.3d at 258, 260 (describing a story about Connecticut policy of subcontracting incarceration of Connecticut state prison inmates to Virginia prison system that describes Virginia prison warden in an unfavorable light).

535. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772 (1984).

in 600,000 copies of one week's edition of the paper.<sup>536</sup> Flynt and the *Enquirer* writers thought about their comments over an extended period of time,<sup>537</sup> knew the risks involved in publishing them,<sup>538</sup> and were capable of defending themselves (with the help of company lawyers), in the New Hampshire and California forums. But the same will not always be true for every impetuous chat room flame thrower.

Consider the case of Marianne Luban.<sup>539</sup> In an extended exchange in an Internet news group,<sup>540</sup> Marianne Luban told Katherine Griffis, an adjunct professor in the University of Alabama at Birmingham's Department of Special Studies, that she (Griffis) got her degree "from a 'box of Cracker Jacks,'" and otherwise criticized her credentials and reputation as an Egyptologist.<sup>541</sup> Griffis and Luban traded comments for about six months, until Griffis's attorney sent a letter to Luban demanding that she retract her statements and refrain from attacking Griffis's character and professional reputation in the future.<sup>542</sup> The attorney threatened legal action if Luban failed to do this.<sup>543</sup> Luban may or may not have stopped criticizing Griffis (the evidence was mixed), but several months later Griffis filed a defamation action against Luban in Alabama state court.<sup>544</sup> Luban, a Minnesota resident, failed to appear to defend,<sup>545</sup> and the Alabama court entered a default judgment against her.<sup>546</sup>

When Griffis tried to enforce the judgment in Minnesota, however, the Minnesota Supreme Court refused to give it full faith and credit.<sup>547</sup>

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536. *Calder v. Jones*, 465 U.S. 783, 785 (1984).

537. Even more, they worked diligently at researching the article in question, and at expressing their comments in the most persuasive form they could devise.

538. *Calder*, 465 U.S. at 789-90; *Keeton*, 465 U.S. at 781.

539. *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002).

540. The group was *sci.archeology*. *Id.* at 530.

541. *Id.* Griffis taught noncredit courses in ancient Egyptian history and culture at the university and had her own consulting business. *Id.* Luban also asserted "that Griffis obtained membership in the International Association of Egyptologists and inclusion on other lists of Egyptologists by misrepresenting her qualifications, that [she] was a liar, was not affiliated with the University of Alabama, did not have a juris doctor degree, and that [her] consulting business was not legitimate." *Id.*

542. *Id.*

543. *Id.*

544. *Id.* Griffis alleged that Luban continued to post comments, but the record before the court did not include any such statements after the date of the attorney letter. *Id.*

545. *Id.* She did this on the advice of her lawyer. *See id.*

546. *Id.* The court also ordered Luban to pay Griffis \$25,000 in damages. *Id.*

547. *Id.* at 537. The actual procedure involved was more complicated. Luban filed a motion to vacate the Alabama judgment, the Minnesota trial court concluded that Alabama had personal jurisdiction over Luban, denied Luban's motion, and then ordered entry of the judgment against Luban. *Id.* at 530-31. On appeal, the Minnesota Court of Appeals vacated the trial court's order. *Id.* at 531. Luban renewed her motion to vacate

Viewing the issue as controlled by *Calder*, the court held that Alabama lacked personal jurisdiction over Luban.<sup>548</sup> Acknowledging that there was a dispute among the circuits over the meaning of *Calder*,<sup>549</sup> the Minnesota Supreme Court adopted the Third Circuit's paraphrase of the *Calder* standard as articulated in its *Imo Industries* decision.<sup>550</sup>

According to *Imo Industries*, *Calder*

requires the plaintiff to show that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm . . . in the forum . . . ; and (3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity.<sup>551</sup>

Applying this standard, the Minnesota Supreme Court concluded that while "Luban's statements were intentionally directed at Griffis" in Alabama, they were not "expressly aimed" at the State,<sup>552</sup> and thus did not support jurisdiction.<sup>553</sup> This seems a strange, perhaps contradictory, conclusion—how does one aim at a person in a state without aiming at the state<sup>554</sup>—but the strangeness is not in the Minnesota Supreme Court's choice of *Calder* terminology. *Calder* used the concept of "expressly

the Alabama judgment, the trial court once again found that Alabama had jurisdiction over Luban, and entered judgment against Luban. *Id.* This time the Minnesota Court of Appeals affirmed. *Id.* Then the Minnesota Supreme Court reversed. *Id.* at 537.

548. *Id.* at 534, 536-37.

549. *Id.* at 533-34. The Seventh Circuit interpreted *Calder* to announce a broad "effects test," permitting tort victims to sue in any state in which they suffered the effects of an injury. *Id.* at 533. The Fifth, Eighth, Ninth, and Tenth Circuits adopted a narrower interpretation, holding that *Calder* required "something more" than "mere effects" for jurisdiction to attach. *Id.* For example, the Ninth Circuit found that "express[ly] aiming" tortious conduct at a party in the forum satisfied the "something more" requirement. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). The Ninth Circuit defined the concept of "expressly aiming" in terms of "targeting," thereby clarifying one vague term in terms of another. *Id.* *Calder* did the same thing. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (explaining that "petitioners are not charged with mere untargeted negligence"). For another excellent summary of the split among the circuits, see *Pavlovich v. Superior Court*, 58 P.3d 2, 7-9 (Cal. 2002).

550. See *Griffis*, 646 N.W.2d at 534 (quoting *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998)). One might legitimately wonder about the extent to which there are any real differences of substance among the various circuits' tests. Since a party intends the natural and logical consequences of his acts one might ask how producing a foreseeable, tortious harm to someone in a state is a qualitatively different type of intentional act than "expressly aiming" harm at that same person; and yet the second activity supports jurisdiction and the first does not.

551. *Id.*

552. *Id.* at 535.

553. *Id.* at 536.

554. See Borchers, *supra* note 527, at 487-88 ("It is hard to see how [Luban's] statements could be more clearly 'aimed' at [the state of Alabama] . . .").

aim[]"<sup>555</sup> to describe a type of behavior that could provide an extra measure of purposefulness sufficient to establish jurisdiction over an out-of-state defendant in a multi-state defamation action when the defendant had no contact with the state other than the defamatory comments.<sup>556</sup> The difficulty with the Minnesota Supreme Court's paraphrase of *Calder*, and with all opinions using this *Calder* language, is in knowing what it means to "expressly aim at" (or "target") a defendant or a state.<sup>557</sup> The concept is not self-explanatory, and while *Griffis* provides one of the best attempts to parse the term, in the end it comes up short.<sup>558</sup>

The Minnesota Supreme Court seemed to interpret the expression as primarily a substantive concept, concerned with the content of what is said rather than where it is said, or perhaps even where it has its principal effect, though the court's view on this latter point is less clear.<sup>559</sup> Building on language in *Woodson* (and also *Burger King* and *Asahi*, though the court did not cite to these cases), the court concluded that Luban had to do more than "know" that Griffis was a resident of Alabama, or "foresee" that she would feel the effects of the tortious comments there, for the comments to be expressly aimed at the State.<sup>560</sup> "[T]he Supreme Court," it said, "did not 'carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state.'"<sup>561</sup> But then, curiously, since it seems to describe a "foreseeable effects" test of the

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555. *Calder v. Jones*, 465 U.S. 783, 789 (1984). It also described the concept as "targeting." *Id.* ("[P]etitioners are not charged with mere untargeted negligence.").

556. *Id.* at 786, 789-90.

557. It also is hard to know whether it is the defendant or state (or both) that must be targeted. It would seem that the object of the libel also would have to be the target of the tortious conduct for jurisdictional purposes, but the *Griffis* court's view on this issue is not that clear.

558. There are several recent Internet and newspaper libel cases adopting *Calder*'s "targeting" standard, and one could use any of them as a basis for the discussion in this section. See, e.g., *Revell Lidov*, 317 F.3d 467, 473, 476 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256, 262-63 (4th Cir. 2002). Each has distinctive attributes that permit discussion of issues not raised by *Griffis*, and distinctive weaknesses that illustrate other difficulties with the concept of targeting. I use *Griffis* because it contains one of the best descriptions of the circuit split over the meaning of *Calder*, and the most fully developed description of what one might call the "geographical" conception of targeting, what the California federal district court refers to as "geo-targeting," *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1086 (C.D. Cal. 2003), a conception that is rapidly becoming the most popular one, see, e.g., *Revell*, 317 F.3d at 475; *Young*, 315 F.3d at 262-63; *Remick v. Manfredy*, 238 F.3d 248, 258-59 (3d Cir. 2001); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1119-20 (6th Cir. 1994).

559. See, e.g., *Griffis v. Luban*, 646 N.W.2d 527, 535-36 (Min. 2002).

560. See *id.* at 532, 536-37.

561. *Id.* at 535 (quoting *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998)).

sort just explicitly rejected, the court characterized the critical question in the case as whether Alabama was the “focal point” of Luban’s tortious activity.<sup>562</sup>

Part of the answer, it said, depended upon the content of Luban’s remarks, and another part depended upon whether the effects of those remarks were felt principally in Alabama.<sup>563</sup> It was significant, said the court, that “[t]he newsgroup on which Luban posted her statements was organized around the subjects of archeology and Egyptology, not Alabama or the University of Alabama academic community,” and that there was no “unique relationship” between these two academic fields and the State.<sup>564</sup> Had Luban disparaged Griffis in Alabama argot, so it seems, or in terms of her Alabama behavior, the outcome might have been different.<sup>565</sup> It also was important, according to the court, that Griffis did “not present[] evidence that any other person in Alabama read [Luban’s] statements,” and that “readers most likely [were] spread all around the country—maybe even around the world—and not necessarily in the Alabama forum.”<sup>566</sup> This combination of factors—that

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562. *Id.*

563. *Id.* at 534.

564. *Id.* at 535-36. *Contra* Pavlovich v. Superior Court, 58 P.3d 2, 12 (Cal. 2002) (refusing to adopt an expansive interpretation of the effects test that would find jurisdiction just because the industry affected by defendant’s tortious conduct is centered in the forum state).

565. In applying this concept of “geo-targeting,” the court pointed out that Luban posted “only two messages . . . on the *sci.archeology* newsgroup . . . that identifi[ed] the Alabama forum in any way.” Griffis, 646 N.W.2d at 535 n.3. In one posting she said “that Griffis was ‘from the great state of Alabama,’” and in the other she asked about the “special studies” program at the University of Alabama. *Id.* Taking the concept of geo-targeting to new distances, the Ninth Circuit has held that an act in one state, directed at a second state, can be considered “expressly aimed” at yet a third state if the plaintiff lives there. *See* Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1088 (9th Cir. 2000) (drafting and mailing letter from Georgia to official domain name register in Virginia, challenging plaintiff’s use of *www.masters.com* domain name, held to be expressly aimed at California because plaintiff lived there). *But see* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004) (placing ad containing likeness of plaintiff in Ohio newspaper without plaintiff’s permission held to be expressly aimed at Ohio rather than California, even though plaintiff lived in California, because purpose of ad was to convince Ohio readers to lease automobiles from defendant).

566. *Id.* at 536. *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (stating that it is an “insurmountable hurdle[] to the exercise of personal jurisdiction [that] the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states”); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (stating that in order to determine whether the defendant newspapers “manifest an intent to target and focus on Virginia readers[, a court must] turn to the pages from the newspapers’ websites . . . and . . . examine their general thrust and content [to see if they are] aimed at a Virginia audience”); *Remick v. Manfredy*, 238 F.3d 248, 258 (3d Cir. 2001) (stating that the allegations that the defamatory comments had been distributed

Luban's comments were not about Alabama and that they were not read by Alabamians—proved that the State was not the "focal point" of the defamation, at least as the court saw it, and this, in turn, meant that Luban had not "targeted" Griffis in the State.<sup>567</sup>

The court's waffling on the question of whether tortious effects, by themselves, can establish jurisdiction (i.e., rejecting an "effects" test in principle but applying a version of it in practice) illustrates the difficulty of giving precise meaning to the concept of targeting, and it also shows how that standard does not do much to constrain a court that has made up its mind about whether jurisdiction is available. Moreover, the court's failure to explain why defamatory comments that mention, or are about, the forum state should count for more jurisdictionally than comments that defame the plaintiff in more generic terms, only adds to the confusion. Defamatory comments destroy a person's reputation whether they mention the forum state or not, and whether residents of that state read them or not. The "focal point" of a defamation is usually where the defamed person has the most highly developed reputation (because that is where there is the greatest potential for reputational harm to be done), and typically that is the person's home state. A test which focuses on the content of the defamation confuses a substantive law concern with a jurisdictional one. Jurisdiction is about contacts with a forum, not comments about it, and comments do not have a greater connection with a forum simply because they mention or discuss it (or fail to). Such comments may be of greater interest to forum residents, but this is relevant to determining the nature and extent of the harm done rather than the degree of connection between the forum and the comments.<sup>568</sup>

The problem becomes more complicated if one changes the facts in *Griffis* to make the exchange a little more spontaneous and a little more Alabama-specific. Suppose Luban disparaged Griffis in the same

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throughout the "boxing community" were insufficient because there was no assertion that Pennsylvania had a "unique relationship with the boxing industry"); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994) ("[T]he [allegedly defamatory] press release [dealt with the plaintiff's] activities in Monaco, not Ohio."); *Novak v. Benn*, No. 2020466, 2020848, 2004 Ala. Civ. App. LEXIS 249, at \*12 (Ala. Civ. App. Apr. 2, 2004) (posting of a single comment on an Internet forum for people interested in pet fish and that is accessible in Alabama is not "an action . . . purposefully directed toward' Alabama").

567. See *Griffis*, 646 N.W.2d at 535-36.

568. Limiting the conception of targeting to comments that are about both the forum and the plaintiff also restricts jurisdiction to states likely to have the greatest sympathy for the plaintiff and greatest antipathy for the defendant, or in other words, states in which the plaintiff has the best chance of winning on its claim. But this conception of targeting reinstates a version of the "plaintiff always gets to sue at home" view the *Griffis* court said the Supreme Court had rejected. *Id.* at 535. Here, the Court seems to have looped back on and contradicted itself.

*sci.archeology* newsgroup, but this time did so impulsively, on the spur of the moment, in the exaggerated language of someone who is angry at, or frustrated by, the way the conversation is going. And suppose that she also disparaged the State of Alabama at the same time by adding that “all of Alabama and its rinky-dink University come from the same Cracker Jacks box as your degree” (and hyperbolic variations thereon). Suppose she said this just once, felt sorry for it almost instantly, and apologized in a day or two after the tone of the conversation had calmed down. Her comments were not carefully planned, she did not deliberate about or edit them until they expressed her opinion in its most powerful form, and she did not search carefully for the best publisher. But suppose also that the comments were circulated widely among the faculty and staff (i.e., Griffis’s peers, friends, and colleagues) of the university in the perversely curious way that such comments tend to be. If the Minnesota Supreme Court’s (and Third Circuit’s) conception of targeting is to be followed, and it is the most popular view,<sup>569</sup> Luban would then seem to have to answer to a defamation action in Alabama even though, in many ways, what she did had less connection with the State than her comments in the actual case.

If targeting requires a kind of “geographical marker” in a defendant’s defamatory comments, as *Griffis* seems to say it does, it is difficult to understand how this feature satisfies *Calder*’s “super-purposefulness” requirement. A geographical reference does not invariably evidence a willful or malicious state of mind, or give comments a greater presence or accessibility in a forum than they would have had without such a reference. The idea of “forum contact” has always been used to describe some sort of link to a state, either the carrying out of an activity, or the production of an effect, in it, and yet a defamatory comment that harms a state resident’s reputation has the same degree of connection with, or effect in, the state whether it refers to the state or not. The content of a comment adds nothing to its degree of forum accessibility or connectedness. On a “geographical” conception of targeting, however, a reference to the state is taken to change the “connecting” nature of the comment altogether. One could legitimately wonder what such a conception has to do with “fair play and substantial justice.”<sup>570</sup> It seems accurate to say, then, that the idea of targeting as a jurisdictional

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569. See *Revell*, 317 F.3d at 473; *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 397 F. Supp. 2d 1154, 1167 (W.D. Wis. 2004); *Levin v. Harned*, 304 F. Supp. 2d 136, 142 (D. Mass. 2003).

570. The geo-targeting concept is well-intended. Some limitation on the idea of tortious forum effects is needed if inadvertent chat room comments are not, by themselves, to establish jurisdiction wherever they are read, and if they are, this would introduce a form of the “jurisdiction everywhere” problem. See *supra* note 514. But it will take more than good intentions to satisfy the Due Process Clause.

standard remains an elusive concept at best and is in need of considerable development<sup>571</sup> before it can serve as a workable modern embodiment of the idea of "minimum contacts."<sup>572</sup>

571. Some of this will involve explaining the role of *Burger King's* "fairness factors" in the targeting standard. Targeting is mostly a test for measuring the level of purposefulness of a defendant's contacts with a forum, but purposeful contacts are just one part of the "minimum contacts" standard. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980). Contacts must be "considered in light of" the institutional and systemic concerns that make up the "fairness factors" part of the test before one can say whether jurisdiction exists. *Id.* at 292. *Calder* does not discuss these factors to any great extent, but libel litigation may be an area of law in which fairness factors will play a disproportionately large role.

572. One could argue the opposite, that a "geo-targeting" test, applied literally, provides a defendant with the greatest possible control over the issue of jurisdiction—since a sufficiently clever defendant should have no difficulty expressing defamatory comments in a geographically acontextual manner—and as such, is the strongest modern embodiment of the defendant veto view of "minimum contacts." But this does not settle the question of whether the defendant veto view should any longer be taken as valid. As the modern world becomes ever more communitarian, the relevant social unit for legal regulatory (including jurisdictional) purposes seems increasingly to be the group as much as the individual. Think of the plaintiffs in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), for example, who were held to have agreed to a forum selection clause they neither knew about, read, nor understood, simply because the clause was fair in the aggregate to all of the parties and institutions involved in the dispute, as well as to consumers generally. See *id.* at 590.

[A] . . . forum clause in a form contract . . . well may be permissible [because] a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. [The] clause . . . dispel[s] any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions . . . . Passengers . . . benefit in the form of reduced fares.

*Id.* at 593-94 (citation omitted). The due process right to fair (jurisdictional) treatment may slowly be becoming a collective right, in other words, as much as an individual one. Perhaps the old *New Yorker* cartoon of a parent explaining to a child that a multi-person statute illustrates that "there are no great men anymore, only great committees," has finally come true. See generally Donald G. Gifford, *The Assault upon the Citadel of Individual Causation* (Aug. 16, 2004) (unpublished manuscript, on file with the author) (describing trend in common law tort doctrine toward defining causality in terms of collective plaintiffs and collective defendants); Charles A. Sullivan, *The Under-theorized Asterisk\** Footnote 17-18 (unpublished manuscript, on file with the author) (describing "explosion" of communal work in law and other areas of the academy).

If so, this change is not necessarily all for the good. If individual defendants no longer have veto power over extra-territorial jurisdiction, states will be on an equal footing to compete for litigation, and this is likely to result in an unseemly race to the blandishment bottom. The absence of individualist based obstacles to jurisdiction will permit courts everywhere to emulate courts in Harris County, Texas; Cook County, Illinois; Dade County, Florida; and others (the names change on a daily basis), in promising the "largest damage awards," and the "greatest likelihood of plaintiff success on the merits." See Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1851-54, 1865-70 (2002) (study of the correlation

The confusions and contradictions evident in the “sliding scale” and “targeting” standards of *Zippo* and *Griffis* are symptomatic of the state of affairs in modern personal jurisdiction case law.<sup>573</sup> These two tests are the most popular reformulations of *International Shoe’s* original “minimum contacts” standard for contract and tort based claims respectively, and yet each lacks the coherence and clarity one has a right to expect from a due process standard. Neither concept is very well-defined, neither is intuitive or possessed of clear heuristic value, and both can be used to justify different and sometimes even opposite results on the same facts. Moreover, neither has any explicit linguistic connection with the original language and policies of the personal jurisdiction doctrine, and each permits lower federal and state courts to turn jurisdictional analysis into a free-wheeling, black-box process in which whatever particular judges happen to think is correct becomes the operational standard. “Sliding scale” and “targeting” reduce the complex conceptual and political legacy of several generations of personal jurisdiction doctrine to amorphous, nondescriptive aphorisms, and move the analysis of jurisdictional questions away from the realm of fair play and substantial justice to the realm of idiosyncratic private judicial vision. It is not an overstatement to say that the cacophony which surrounds the personal jurisdiction doctrine is now out of control. The doctrine has come so far, so to speak, that it has seemingly disconnected from itself, or like a very confused snake, has begun to

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between population demographics and jury verdicts); Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 J. LEGAL STUD. 283, 332-34 (1999) (describing the differences in punitive damages awarded by courts in California; Cook County, Illinois; metropolitan St. Louis; Harris County, Texas; and New York State); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 445-49 (1992) (describing the impact of geography on claim disputes); Laurie P. Cohen, *Southern Exposure: Lawyer Gets Investors To Sue GE, Prudential in Poor Border Town*, WALL ST. J., Nov. 30, 1994, at A1 (describing why Eagle Pass, Texas, “may be the most pro-plaintiff county in America”). Litigation will become more geographically concentrated as some states win in this race for the most plaintiff-friendly reputation and others lose, and the effect on litigants will be equally uneven. Both individual and corporate parties will become more vulnerable to extra-territorial jurisdiction, of course, since both individuals and corporations can be defendants as easily as plaintiffs, but overall, corporations will be better able than individuals to turn the uncertainties and expenses of these new conditions to their benefit. In a world where individual interests can be outweighed by collective ones, bigger fish cut a wider swath.

573. Courts also have had difficulty adjusting the concept of “minimum contacts” to developments in Internet technology. The best example is the California federal district court’s discussion of the application of the standard to peer-to-peer networking in the *Grokster* MP3 file sharing case. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1088-95 (C.D. Cal. 2003), where the court’s discussion of the standard reads like a compendium of every formulation ever used.

swallow its own tail. Only the Supreme Court can hope to prevent it from self-destructing, and it should.

#### IV. CONCLUSION

Since the middle of the last century the Supreme Court has made a major refinement of the "minimum contacts" standard about once every twenty years, usually in response to widespread lower court confusion and disagreement over what the standard has come to mean. It has been twenty years since the decision in *Burger King*, the last of the Court's major personal jurisdiction decisions,<sup>574</sup> and confusion and disagreement are the order of the day. Examples are not hard to come by. General jurisdiction has become a crazy-quilt pattern of jurisdictional policies and standards that no longer resembles its historical antecedents or has any unifying principle, consistency, or predictive capability. It is perhaps as confusing a concept as any in the long history of due process jurisprudence. And specific jurisdiction is not much clearer. Lawyers and judges seem to understand that specific jurisdiction requires some sort of relationship between a defendant's forum contacts and a plaintiff's claim, but they rarely agree on what that relationship must be, or what kind of evidence it would take to satisfy it. In what now has all of the outward appearances of a deeply embedded rhetorical ritual, lawyers and judges routinely combine an argument for specific jurisdiction with one for general jurisdiction as if the two were "paired in the voting," thinking that one or the other must apply, but darned if they know which one. And given the case law, who can blame them?

In addition, the problem of whether courts are entitled to take institutional and systemic interests, including sovereignty interests, into account in resolving jurisdictional disputes has never been adequately resolved. Here, the doctrine is predictable; the Court definitely will take such interests into account, but a serious question remains as to the legitimacy of doing so. Similarly, in many jurisdictions it is no longer clear whether defendant forum contacts are a necessary condition for extra-territorial jurisdiction. The "fairness factors," codified in *Woodson* and refined in *Burger King*, have become an independent jurisdictional test for many courts, while for others they may be used only to bolster or weaken a defendant's purposeful contacts with the forum. But whatever their role, they lack an internal structure and order of their own so that it is not possible to tell whether some factors are more important than others, if so, which ones, how much of one factor it takes to offset how

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574. *Burger King* was the Court's last major discussion of the "minimum contacts" standard. *Burnham* post-dates *Burger King*, but it was about transient jurisdiction.

much of another, and whether this analysis is different for rich and poor defendants.

Finally, modern formulations of the purposefulness requirement, an essential ingredient of all types of jurisdictionally relevant forum contacts,<sup>575</sup> are all over the lot. Individual courts seem to have an almost limitless number of ways of expressing the idea, some treating it as a synonym for purely foreseeable defendant connections with a forum, and others seeing it as a requirement of willful and consciously directed in-state activity on the part of a defendant. Whatever their form, however, these definitions do little more than delegate discretion to individual judges to find purposefulness (or its absence) wherever they want to, causing what was once a central unifying feature of the defendant-veto view of personal jurisdiction to lose all doctrinal power. The “minimum contacts” standard was once a wonderfully simple two-factor, four-permutation formula that gave clear guidance in almost all cases, but in the years since *International Shoe* it has become almost fractal—rough, irregular, and fragmented—constantly reproducing itself at increasingly smaller levels of scope and usefulness, and no longer representable by any classical formula. Benoit Mandelbrot might welcome this development,<sup>576</sup> but litigants and lawyers need more than irregular shapes and vague shadows to find their way through the maze of the American jurisdiction system, and only the Supreme Court can show the way. It is time for the Court to clear up the personal jurisdiction standard once again.

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575. Even contacts used to support general jurisdiction are purposeful, though courts do not discuss them in this way, since it is not possible to be domiciled or incorporated in a state by accident, or establish a principal place of business in a non-purposeful way.

576. See generally JOHN BRIGGS, *FRACTALS* (1992); BENOIT B. MANDELBROT, *FRACTALS AND CHAOS* (2004); BENOIT B. MANDELBROT, *THE FRACTAL GEOMETRY OF NATURE* (1983); DIETRICH STAUFFER & H. EUGENE STANLEY, *FROM NEWTON TO MANDELBROT: A PRIMER IN THEORETICAL PHYSICS WITH FRACTALS FOR THE PERSONAL COMPUTER* (2d ed. 1996); see also Press Release, Yale University, Yale Mathematician Benoit Mandelbrot Elected to the American Philosophical Society (June 7, 2004), <http://www.yale.edu/opa/newsr/04-06-07-04.all.html> (June 7, 2004) (describing election of “father of fractals,” mathematician Benoit Mandelbrot, to the American Philosophical Society).