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A 21st Century Approach to Personal Jurisdiction

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A 21st Century Approach to Personal Jurisdiction

ROBERT E. PFEFFER*

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I. INTRODUCTION

Personal jurisdiction doctrine plays a major role in many civil disputes in the United States.¹ When the defendant resides in, is incorporated or headquartered in (in the case of a corporation or other business), or is otherwise found in the particular state where suit is brought, personal jurisdiction generally is found to exist and is unproblematic. Major personal jurisdiction issues usually arise when a plaintiff sues the defendant in a state other than the one in which the defendant is located.²

In many cases involving parties located in different states, *where* a suit takes place is as extensively litigated an issue as the underlying dispute that led to the litigation in the first place.³ In the last seventy

¹ Personal jurisdiction concerns the authority of a particular court to adjudicate the rights of a particular party. Personal jurisdiction is generally an issue only with regard to a defendant, because a plaintiff submits to the jurisdiction of a given court by filing suit there. In contrast, subject-matter jurisdiction concerns a court's competency to litigate a particular type of suit (e.g. a contract dispute under state law, as opposed to a federal civil rights claim or a dispute over child custody), and cannot be determined by the desires or actions of either party to submit to that particular court.

² The typical personal jurisdiction dispute arises where parties from two different states have a dispute and the plaintiff sues in his or her own state. For example, suppose that an Illinois resident buys a computer from a seller located in California by visiting the seller's website. The seller ships the computer to the buyer in Illinois who finds that the computer frequently crashes and does not perform as promised. If the buyer were to sue in California, there would almost surely be no personal jurisdiction dispute. But if the buyer were to sue in Illinois – a likely scenario – then the defendant might argue that it was not subject to the personal jurisdiction of Illinois' courts. In some cases, as will be discussed below, a plaintiff sues in a court that is neither its nor the defendant's home state. *See* discussion *infra* Part II.

³ Under current doctrine, the issue of whether a court in a given state—including a federal court located there—has personal jurisdiction over a given defendant is both a statutory and constitutional matter. All states have long-arm statutes that state the extent to which its courts may exercise jurisdiction over out-of-state defendants. The Federal Rules of Civil Procedure provide that generally federal courts should follow the long-arm rules of the states in which they are located, although there are some federal rules and statutes that allow more extensive jurisdiction in these cases. *See* FED. R. CIV. P. 4(k). Whatever a state or federal jurisdictional statute provides, however, is also evaluated as a constitutional matter, primarily under the Due Process Clauses of the United States Constitution,

years, most personal jurisdiction disputes have been litigated under the famous minimum contacts standard first articulated in *International Shoe v. Washington*.⁴ There is little dispute about what the Court said in that case. But the Supreme Court's inability to cogently explain and consistently apply the standard announced in *International Shoe* has confounded litigants and lower courts alike. Predicting whether a particular state court has jurisdiction can be frustrating. Parties and courts are hard pressed to know whether jurisdiction in a particular forum will be upheld.

The problem is not that personal jurisdiction has not been given sufficient attention; it is that it has gotten too much attention. Although I recognize the irony of writing an article about a topic while decrying the focus on that topic, my hope is that this article might nonetheless ultimately make personal jurisdiction doctrine simpler, more predictable, and therefore less important.

Within the more than fifty jurisdictions in the United States, where a suit takes place really should not matter very much. Modern travel and communication makes suits throughout the country relatively easy for most parties. Federal and various state judicial systems are more alike than different. And, even though substantive law may vary from state to state, modern conflict of law approaches allow the application of appropriate substantive law irrespective of the location of litigation.

The reason that personal jurisdiction has become so important is that modern case law made it so. The Court's jurisprudential approach, which focuses on due process, state lines, and minimum contacts, assumes that personal jurisdiction involves a highly complex, constitutionally important area of law. But, it is not that personal jurisdiction is inherently complex or important. It is only that the Court's unfortunate approach has made it so.

Personal jurisdiction should be, and can be, straightforward, low drama, and simple. For defendants who are located in the United

located in the 5th and 14th Amendments, and in fact most states' jurisdictional statutes allow the exercise of jurisdiction to the fullest amount allowed under the Constitution. This article's critique focuses primarily on constitutional limits on personal jurisdiction.

⁴ 326 U.S. 310 (1945).

States,⁵ personal jurisdiction should be primarily a matter of state policy, with minor policing by the Supreme Court and Congress. This article argues that a state-focused approach to personal jurisdiction is both theoretically sound and practically superior to the current minimum contacts approach.

Section II of this article provides a critical history of personal jurisdiction. Section III provides an organized critique of the current landscape. With Section II having provided detail of the cases from *International Shoe* through the Court's case law in its most recent term, Section III hones in on what is fundamentally wrong with the current approach. Section IV delineates a new approach to personal jurisdiction. With prior sections arguing that due process and minimum contacts are both a practical hindrance and a theoretical mismatch, this Section advocates for a non-constitutional approach to personal jurisdiction grounded primarily in state legislative policy choices. Section V evaluates the new proposal by considering how common personal jurisdiction scenarios will play out under the proposed approach. It demonstrates that if left primarily to state policy makers, with minor federal constitutional and legislative involvement, the resultant doctrine will be consistent with both constitutional and systemic structural norms. It will also result in fairer, more logical, and easier standards to apply than the current minimum contacts approach.

II. CRITICAL HISTORY OF PERSONAL JURISDICTION

A. *International Shoe*

Current personal jurisdiction doctrine traces its origins to *International Shoe Company v. Washington*.⁶ Prior to that case,

⁵ Because defendants located outside of the United States can be forced to answer for judgments only by means of comity or agreement between nations, personal jurisdiction over those defendants requires a separate analysis outside the scope of this article. The Supreme Court has essentially applied the analysis that it uses for domestic defendants to defendants located abroad, with some added frills. For that reason, this article analyzes several Supreme Court cases involving international defendants, but only to aid in formulating a sound doctrine for purely domestic purposes.

⁶ 326 U.S. 310 (1945).

personal jurisdiction doctrine was rooted in a territorial theory as expressed in the famous case, *Pennoyer v. Neff*.⁷ Put simply, *Pennoyer* held that, with a few narrow exceptions, personal jurisdiction existed only if a defendant or the defendant's property could be found and served with process or in the case of property, attached in the forum state.⁸ This cramped view of jurisdiction conflicted with the realities of modern commerce and mobility.⁹ For that reason, in the years following *Pennoyer*, courts created various fictions to allow the exercise of jurisdiction in cases involving conflicts between plaintiffs and out-of-state defendants.¹⁰ *International Shoe* sought to create a theory of jurisdiction that dispensed with these fictions.

The facts of *International Shoe* case are well known. In short, Washington State brought suit in its own courts to recover taxes owed based on the sales-related activities of a Missouri-based corporation in Washington.¹¹ The Court concluded that Washington had personal jurisdiction.¹² In doing so, it delineated the famous minimum contacts test. Under this test, whether a court has personal jurisdiction requires that the defendant "have certain minimum contacts with [the forum state] such that the maintenance of suit does not violate notions of fair play and substantial justice."¹³ The Court also emphasized that the source and limitation of a court's jurisdictional authority was the Due Process Clause.¹⁴

The Court provided little guidance on the nature and extent of contacts necessary to satisfy jurisdictional requirements. Rather, it painted with broad strokes and created two categories of jurisdiction: one in which the dispute arose from the defendant's contacts, and

⁷ 95 U.S. 714 (1877); see also Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 754 (2003) ("American constitutional law of personal jurisdiction largely began in 1877 with the Supreme Court's decision in *Pennoyer v. Neff*").

⁸ *Id.* at 720. If the defendant was found in the forum state then jurisdiction was deemed *in personem*; if an out-of-state defendant's property was attached, jurisdiction was deemed *in rem*. *Id.*

⁹ See McFarland, *supra* note 7, at 755.

¹⁰ *Id.*

¹¹ *Int'l Shoe*, 326 U.S. at 312.

¹² *Id.* at 321.

¹³ *Id.* at 320 (internal quotation marks omitted).

¹⁴ *Id.* at 319.

another in which the contacts were unrelated to the dispute.¹⁵ The former category required less in terms of quantity and/or extent of contacts than the latter.¹⁶ In essence, however, the test was circular. Personal jurisdiction depended upon satisfying due process criteria. The Court's test for whether these criteria were satisfied turned upon contacts sufficient to satisfy substantial justice and fair play, which is essentially a synonym for due process.

International Shoe thus melded personal jurisdiction, due process, and territoriality, but replaced the defendant's presence as the keystone of the territoriality—the central point of *Pennoyer*—with minimum contacts.¹⁷ Although the *International Shoe* Court

¹⁵ *Id.* at 320.

¹⁶ The Court then delineated four scenarios in which jurisdiction might or might not be found. *See id.* at 317–18; *see also* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate about "Class Action Fairness,"* 58 SMU L. REV. 1313, 1337–39 (2005) (“To illustrate and give meaning to the new test, the Court in *International Shoe* collected many of its prior decisions and grouped them into four categories.”). Specifically, jurisdiction would be found when a defendant had “continuous and systematic contacts [that] also give rise to the liabilities sued upon[.]” *See Int’l Shoe*, 326 U.S. at 317. In addition, certain singular acts “because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.” *Id.* at 318. Conversely, for suits not arising from a defendant’s forum contacts, “the casual presence of the corporate agent or even his conduct of a single or isolated item of activities in a state in the corporation’s behalf are not enough to subject it to suit.” *Id.* at 317. But, in some cases a defendant has “continuous corporate operations within a state . . . so substantial and of such a nature as to justify suit against it on causes of actions arising from dealings entirely distinct from those activities.” *Id.* at 318. Eventually, the terms “specific jurisdiction” and “general jurisdiction” came to be used to refer to suits arising from defendants’ contacts and those not so arising, respectively. *See Helicopteros Nacionales v. Hall*, 466 U.S. 408, 414 n.8 (1984) (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966) as the original source of the terms “specific jurisdiction” and “general jurisdiction”).

¹⁷ *Cf.* Glenn S. Koppel, *Paper Symposium: Making Sense of Personal Jurisdiction after Goodyear and Nicaastro: The Function and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicaastro*, 16 LEWIS & CLARK L. REV. 905, 909–10 (2012) (“*International Shoe*’s two-part minimum contacts test married the formalist minimum contacts test of ‘purposeful availment’ which requires the non-resident defendant to target his claim-related activities at the forum state, with the functionalist ‘fairness’ assessment, which entails balancing a variety of factors, including forum interest and party convenience.”).

had criticized the defendant's presence as begging the question, so too did its due process-*cum*-minimum contacts test. The Court presented a vague and circular concept of what contacts were necessary, saying that the minimum required would be those contacts necessary to satisfy "traditional notions of substantial justice and fair play."¹⁸ Moreover, the Court did not say whether contacts were the primary concern as an end in themselves, or simply to be used in service of the overarching concept of fairness. The Court also did not explain why due process required a geographic nexus between the forum state and the defendant.

The frequency with which the due process/minimum contacts formula has been unquestionably repeated by the Supreme Court and other courts might lead one to believe that due process necessarily requires some type of geographic relationship between defendant and state. Upon closer examination, due process actually concerns whether the defendant had an opportunity to defend himself and received fair treatment in whatever court adjudicated his claim, rather than the relationship between the defendant and the jurisdiction prior to suit. To the extent case law prior to *International Shoe* held that due process required *presence*, the Court's conclusion that due process now only required minimum contacts seems analytically suspect. The language of the Due Process Clause had not changed, so, if under *Pennoyer* due process had previously required presence, it made no sense to conclude, as in *International Shoe*, that it now required only minimum contacts. Similarly, if inherent limits to state power restrict jurisdiction to defendants present or served within a state, economic and societal changes alone would not justify the transformation to a minimum contacts test if prior jurisdictional limits inhered in the nature of the states as political entities.

B. *Shoe's Progeny*

International Shoe changed the direction of the law by setting out broad outlines for personal jurisdiction.¹⁹ In so doing, the Court

¹⁸ *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁹ See Terry S. Kogan, *A Neo-Federalist Take of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 268-69 (1990) ("[T]he Court has on occasion employed a paradigm-

left open the question of exactly how courts should incorporate both minimum contacts and notions of fairness in deciding particular cases.²⁰ It was left to subsequent Supreme Court decisions to tidy up the mess into which *Shoe* had stepped.

Since *International Shoe*, the Supreme Court has decided twenty cases in which the minimum contacts test played a major role in the decision: *Mullane*, *Travelers Health*, *Perkins*, *McGee*, *Hanson*, *Shaffer*, *Kulko*, *World-Wide*, *Rush*, *Insurance Corp.*, *Calder*, *Keeton*, *Helicopteros*, *Burger King*, *Asahi*, *Burnham*, *J. McIntyre*, *Goodyear*, *Walden*, and *Bauman*.²¹

This section provides a tour through *International Shoe*'s progeny to the Court's most recent term. As the discussion will serve primarily to set the framework for critique of the current approach, this section will emphasize those cases that strongly demonstrate the characteristics, including the flaws, of the current personal jurisdiction jurisprudential framework. Other cases will only be mentioned in passing.

1. *The Early Fairness/Common Sense Approach*

The Supreme Court found the existence of personal jurisdiction in the first four minimum contacts cases that it decided following *International Shoe*: *Mullane v. Cent. Hanover Bank & Trust Co.*,²² *Travelers Health Ass'n v. Virginia*,²³ *Perkins v. Benguet Consol. Mining Co.*,²⁴ and *McGee v. Int'l Life Ins. Co.*²⁵ In each, the Court essentially took the position that so long as the chosen forum was an arguably sensible place to litigate, given the connection between the forum and the parties, as well as witnesses and evidence, that

seeking case [T]he Court does not set forth a single, narrow, drawn standard Rather, the Court utilizes the paradigm-seeking case to invite future courts to enter into a dialogue concerning the impact (if any) of the constitutional events on the particular doctrinal area.”)

²⁰ See generally *Int'l Shoe*, 326 U.S. at 310.

²¹ These cases do not include those in which personal jurisdiction was evaluated based on forum selection clauses, which is treated as more of a contractual, rather than a jurisdictional issue. This list also does not include class action cases.

²² 339 U.S. 306 (1950).

²³ 339 U.S. 643 (1950).

²⁴ 342 U.S. 437 (1952).

²⁵ 355 U.S. 220 (1957).

jurisdiction would be valid. Furthermore, absent a burden upon the defendant²⁶ that was so great that it would deprive the defendant of a meaningful opportunity to litigate and protect its rights, the Court found jurisdiction proper.²⁷

For example, in *Mullane* the Court held that New York courts could exercise jurisdiction to adjudicate the property rights of out-of-state trust beneficiaries without any regard to their forum contacts.²⁸ In so doing, the Court focused purely on fairness and the reasonableness of adjudication in New York. The Court, speaking through Justice Jackson, stated that “the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its *procedure accords full opportunity to appear and be heard*.”²⁹ Adding that, “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”³⁰ Thus, the Court focused on making sure that the affected parties—in this case the trust beneficiaries; while in most other cases the defendants—would have a fair opportunity to adjudicate their rights in the forum. Leaving no doubt that the Court was wrenching personal jurisdiction away from its formalistic moorings of the nineteenth century, the Court explicitly rejected *Pennoyer’s* focus on categories of *in personam* and *in rem*

²⁶ In *Mullane*, the affected parties were technically not defendants, but instead numerous trust beneficiaries in a suit to settle a large trust. 339 U.S. at 307. Settling the trust meant addressing and putting to rest any issues in trust management during a given time period. *Id.* at 311. Once the trust was settled for a given timeframe, all claims that trust beneficiaries would have against the trustee for misfeasance or nonfeasance during that time frame would be extinguished. *Id.* For this reason, the settlement of the trust impacts beneficiaries’ property rights by means of a suit brought by someone else, here the trustee, and they are thus akin to defendants.

²⁷ *Mullane*, 339 U.S. at 314.

²⁸ *Id.* at 312–13.

²⁹ *Id.* at 313 (emphasis added).

³⁰ *Id.*

jurisdiction.³¹ Instead, the Court held that jurisdiction was proper because it made sense to hold the proceeding in New York, and the parties' rights would not be unfairly impinged so long as all affected received sufficient notice and an opportunity to respond.³²

The Court took a similar fairness/common sense approach in *Travelers Heath*,³³ *Perkins*,³⁴ and *McGee*.³⁵ Thus, the Court's early approach combined a presumption of jurisdiction so long as the chosen forum did not appear arbitrary or absurd considering all the factors involved in the litigation, and the chosen forum did not so burden the defendant that it amounted to a denial of due process.

2. *Hanson*

Only a few months passed before the Court's next jurisdictional foray, *Hanson v. Denckla*,³⁶ but the world of personal jurisdiction

³¹ See *Mullane*, 339 U.S. at 312 (“Distinctions between actions *in rem* and those *in personam* are ancient. . . . But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend on classification for which the standards are so elusive and confused generally.”).

³² *Id.* at 320; see Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 559 n.69 (2012) (“[Justice Jackson’s analysis in *Mullane*] reflected the hard-nosed, commonsense pragmatism traditionally associated with the procedural due process inquiry.”) (citing Martin H. Redish, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 936 (1995)).

³³ See 339 U.S. at 646–47 (holding that a state could exert jurisdiction over an out-of-state insurer who sold certificates within the state).

³⁴ See 342 U.S. at 445 (holding that the state of Ohio had general jurisdiction over a Philippine corporation when the president/owner of the company had moved to Ohio during WWII and effectively ran the company from that state, stating that “[t]he essence of the issue . . . at a constitutional level . . . [is] one of general fairness to the corporation.”).

³⁵ See 355 U.S. at 221–22 (holding that California could exercise jurisdiction over a Texas insurance company who insured a man who died in California despite the lack of formal contacts between the insurer and California, and stressing, among other things, state interest and location of witnesses—and noting that the defendant insurer would not be so burdened that requiring it to defend in California would amount to a denial of due process).

³⁶ 357 U.S. 235 (1958).

would change drastically with this decision,³⁷ although in many ways it was returning to the world of sovereignty and state borders that characterized the *Pennoyer* era. *Hanson* broke with the common sense approach that the Court had taken in its initial post-*Shoe* cases. In particular the Court disparaged *McGee's* observation that “the trend of expanding personal jurisdiction over nonresidents. . . [because] technological progress has increased the flow of commerce between States. . . . [and] progress in communication and transportation has made the defense of suit in a foreign tribunal less burdensome.”³⁸ Even though “[t]here [was] no suggestion that the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings or denied them an opportunity to be heard in defense of their interests[,]”³⁹ due process still prohibited adjudication in the plaintiffs’ chosen forum of Florida due to the lack of physical contacts between the defendants and Florida.⁴⁰ Famously—or infamously—the Court said:

[I]t is a mistake to assume that this trend [which *McGee* had highlighted] heralds the eventual demise of all restrictions on 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 limitation on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimal contacts” with the State that are a prerequisite to its exercise of power over him.⁴¹

³⁷ See Andrews, *supra* note 16, at 1340 (“The most important development in the [specific jurisdiction] line of cases was [*Hanson's*] ‘purposeful availment’ factor.”).

³⁸ *Hanson*, 357 U.S. at 250–51.

³⁹ *Id.* at 245 (footnotes omitted).

⁴⁰ *Id.* at 251.

⁴¹ *Id.* (citations omitted).

The Court's personal jurisdiction focus was on state power and sovereignty, with fairness reduced to secondary status.⁴² The connection between due process and state sovereignty was left unexplained.⁴³ It had been so in *International Shoe*, but that incongruity could be explained away by the possibility that *Shoe*'s concern with contacts was as a proxy for fairness, not an end in itself required by notions of sovereignty as in a *Pennoyerian* world.

Justice Black dissented, joined by Justices Burton and Brennan who carried the mantle for a more permissive fairness-based jurisdiction for most of the next thirty years.⁴⁴ Justice Black emphasized that logic dictated that the litigation take place in Florida, and allowing that certainly was not going to interfere with the ability of affected parties to reasonably protect their interests.⁴⁵

3. *The Late 1970s through 1990: After an Almost Two Decade Break, the Court Reenters the Personal Jurisdiction Fray*

Hanson proved to be a bell-weather. While the post-*Shoe* pre-*Hanson* cases focused on fairness rather than contacts and found jurisdiction present in a variety of circumstances, *Hanson* shifted the equation following which the Court decided no personal jurisdiction cases for almost two decades.⁴⁶ Then "in a flurry of cases [eleven to

⁴² See *id.* at 254 ("[Florida] does not acquire [] jurisdiction by being . . . the most convenient location for litigation."); see also Freer, *supra* note 32, at 560 ("In *Hanson*, we see no concern for the state's interest or relative convenience of the parties. . . . [T]he focus is narrowly on whether the *defendant itself* had created sufficient ties with that state." (emphasis added)).

⁴³ See Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 575 (1995) [hereinafter "Borchers, *Jurisdictional Pragmatism*"] ("Many commentators have criticized [the] approach [that focuses on protecting state power], and even the Court now seems to agree that these considerations have nothing to do with personal jurisdiction. Suffice it to say that extending the ambit of a clause that protects 'persons' to states has not survived close scrutiny." (footnotes omitted)).

⁴⁴ *Hanson*, 357 U.S. at 256 (Black, J., dissenting). Justice Douglas authored a separate dissent.

⁴⁵ *Id.* at 258 ("The beneficiaries of the appointment, some of whom live outside Florida, and the Delaware trustee were defendants. They had timely notice of the suit and an adequate opportunity to obtain counsel and appear.").

⁴⁶ The Court did decide several cases during this time involving the enforcement of forum selection clauses. Those cases were analyzed primarily in terms of

be precise] . . . *Hanson's* focus on defendant-initiated contact with the forum came to dominate."⁴⁷ In the eleven cases between 1977 and 1990, the Court found jurisdiction lacking in six, by holding "that there was no relevant contact" between the defendant and forum state in five of these cases.⁴⁸

The first two cases decided in this era were *Shaffer*⁴⁹ and *Kuklo*.⁵⁰ The former dealt with the relatively esoteric subject of *quasi-in-rem* jurisdiction, which requires no additional discussion here. *Kuklo* applied the minimum contacts test to individuals in a domestic dispute, finding that a wife could not force her husband to litigate a domestic dispute in a state with which his only contacts were the fact that his minor children were living their with the wife (their mother).⁵¹ This case is notable because thirteen years later, in *Burnham v. Superior Court*,⁵² the Court reached the opposite result on almost identical facts because of minor technical differences that played an outsized role under the minimum contacts test.⁵³

(a) *World-Wide (and Rush)*

In 1980, the Court issued two minimum contacts opinions on the same day, *World-Wide Volkswagen Corp. v. Woodson*,⁵⁴ and *Rush v.*

contract law, rather than personal jurisdiction doctrine, so are not given full treatment in this article. *See, e.g.*, *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (approving a contractual appointment of agent in New York State for service of process); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (upholding parties' contractual agreement to litigate disputes in London); *see also* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause contained in a passenger's cruise ticket).

⁴⁷ Freer, *supra* note 32, at 562.

⁴⁸ *Id.* The exception was *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102 (1987), in which the Court split 4-4 on whether the contacts were sufficient, while an 8-0 majority found jurisdiction lacking due to other considerations, which entered the analysis in the early to mid 1980s as a separate component apart from contacts. *See infra* part II.B.3.e.

⁴⁹ *Shaffer v. Heitner*, 433 U.S. 186 (1975).

⁵⁰ *Kulko v. Super. Ct. Cal.*, 436 U.S. 84 (1978).

⁵¹ *Id.* at 101.

⁵² 495 U.S. 604 (1990).

⁵³ *See* discussion *infra* Part II.B.3.g.

⁵⁴ 444 U.S. 286 (1980).

Savchuk.⁵⁵ *World-Wide* is truly heartbreaking both for those who care about civil procedure and those who care about human beings. If *McGee* represented the high point for a fairness-based common sense approach to jurisdiction then *World-Wide*, along with *Hanson* twenty-two years earlier⁵⁶ and *J. McIntyre v. Nicastro*⁵⁷ thirty-one years later, is the high point (or low point) of a jurisdictional analysis rooted in rigid notions of sovereignty and the magic of state lines.

In 1976, Harry and Kay Robinson purchased an Audi in New York from Seaway Volkswagen.⁵⁸ A year later, while moving with their children to a new home in Arizona, Kay was driving the Audi, with the couple's daughter and oldest son through Oklahoma when tragedy struck.⁵⁹ Actually, what struck the rear of the Audi was a 1971 Ford Torino driven by a drunk driver.⁶⁰

Upon impact, a fire started.⁶¹ Although the impact did not cause injury itself, it had caused all the doors to jam, making the car a fire trap.⁶² All three passengers suffered severe burns, with Kay Robinson suffering the worst.⁶³ She suffered burns over forty-eight percent of her body (thirty-five percent were third degree burns), had most of her fingers amputated, and had to endure thirty-four surgeries.⁶⁴ The two children traveling with her also received disfiguring burns requiring extensive treatment and rehabilitation.⁶⁵

Because the family was receiving this extensive treatment in Oklahoma, Harry hired a local attorney.⁶⁶ This attorney ultimately brought a claim on the Robinson's behalf.⁶⁷ Because the car turned

⁵⁵ 444 U.S. 320 (1980).

⁵⁶ See discussion *supra* Part II.2.

⁵⁷ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011); see discussion *infra* Part II.B.3.g.

⁵⁸ See Charles W. Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 NEB. L. REV. 1122, 1123 (1993). This article provides a fascinating account of the facts and legal history of the case.

⁵⁹ Harry and the couples' other son were several yards in front in a rented U-Haul. See *id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1124.

⁶³ *Id.* at 1125–26.

⁶⁴ See Adams, *supra* note 58, at 1126.

⁶⁵ *Id.* at 1125–26.

⁶⁶ *Id.* at 1126.

⁶⁷ *Id.* at 1129.

into a tinderbox upon impact, there was good reason to believe that the car was defective.⁶⁸

The Robinsons filed suit in Oklahoma state court, naming the German company, Volkswagen, its American importer, the local New York area distributor, and the New York based dealer from whom the Robinsons bought their car.⁶⁹ The plaintiffs were temporarily located there, and could not easily travel.⁷⁰ Most of the witnesses and physical evidence were also there.⁷¹ Moreover, the defendants were scattered in different places, so Oklahoma seemed as good a location as any.⁷² The two defendants who objected to jurisdiction, the distributor and the car dealer, would surely not suffer any inconvenience or burden litigating in Oklahoma.⁷³ In fact, there was reason to believe that based purely on fairness, that Oklahoma was preferable.⁷⁴ The Court, therefore, had to squarely face how to reconcile the concept of contacts as an end in themselves (as had been the focus in cases like *Hanson*) with the notion that personal jurisdiction was about due process and fairness in a case where fairness and contacts pointed in opposite directions. Additionally, the Court had to address how to apply the minimum contacts test in a product's liability case.

Realizing that on the facts it could not equate contacts with fairness, the Court tried a new tact through a 6-3 opinion authored by

⁶⁸ See *World-Wide*, 444 U.S. at 288.

⁶⁹ Adams, *supra* note 58, at 1129.

⁷⁰ *Id.*

⁷¹ See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 96 (1990) [hereinafter Borchers, *Death of the Constitutional Law*].

⁷² See *id.*

⁷³ The German manufacturer and its American sister company did not object to jurisdiction. See *World-Wide*, 44 U.S. at 288 n.3.

⁷⁴ See *id.* ("In fact, the truly 'convenient' forum for all concerned was probably Oklahoma because the bulk of the evidence, particularly the wrecked car, was in that state. Certainly, the Supreme Court's solution, litigating against the manufacturer in Oklahoma and against the seller and retailer in New York, was not 'convenient' by any standard." (footnote omitted)). There were additional tactical concerns. If these two New York defendants were included then complete diversity—and therefore federal—jurisdiction would be lacking, since the plaintiffs were still New York domiciliaries. *Id.* at 96–97. Discussion of how diversity drives tactics is beyond the scope of this article.

Justice White.⁷⁵ The Whizzer⁷⁶ stated that the minimum contacts/due process approach had a dual purpose.⁷⁷ In addition to ensuring fairness to the defendant, the “Due Process Clause [also] act[s] as an instrument of interstate federalism, [and] may sometimes act to divest the State of its power to render a valid judgment. . . . [e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate [there] . . .”⁷⁸ As such, the Court concluded that “[t]he concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”⁷⁹ The Court thereby continued its quixotic quest to meld sovereignty and due process.⁸⁰

In terms of what this meant in practice, the Court separated the personal jurisdiction analysis into two prongs, with one prong corresponding to interstate federalism, and the other to fairness.⁸¹ One would expect that one prong would involve contacts and the other on fairness. Yet the Court even botched implementing this two-part approach. Rather than contacts, the Court said that the “burden on the defendant [is] always a primary concern,” which then can be considered in light of other factors.⁸² Despite articulating the

⁷⁵ *World-Wide*, 444 U.S. at 287.

⁷⁶ Prior to entering law school, Justice Byron White was an All-American running back at the University of Colorado, where he acquired the nickname Whizzer; he also twice led the NFL in rushing yards. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

⁷⁷ *World-Wide*, 444 U.S. at 291–92.

⁷⁸ *Id.* at 294.

⁷⁹ *Id.* at 291–92.

⁸⁰ See Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1029 (1995) (“[Pennoyer had initially] lump[ed] together the two disparate ideas of sovereignty and fairness, but ever since the two have coexisted uneasily in the realm of jurisdiction.”).

⁸¹ See Andrews, *supra* note 16, at 1340 (“In 1980, the Court in *World-Wide* [] separated the minimum contacts test for specific personal jurisdiction into two parts, each correlating to a separate function of the minimum contacts test.”).

⁸² *World-Wide*, 444 U.S. at 292. These factors are “the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and

two prongs as *fairness* to the defendant and other policy concerns, in applying its test to the facts before it, the Court focused almost entirely on the defendants' *lack of contacts* with the forum state.⁸³

In *World-Wide*, the Court took a large step in the ever-changing concept of minimum contacts as facilitator of due process/fair play. In *International Shoe* it was unclear whether fair play or contacts themselves were the jurisdictional touchstone.⁸⁴ Then, as per *Hanson*, contacts mattered most of all because sovereignty still mattered.⁸⁵ Now, with *World-Wide*, contacts and fairness both mattered, as traditional due process considerations as well as interstate federalism (read: sovereignty) remained important.⁸⁶

effective relief . . . 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." *World-Wide*, 444 U.S. at 292 (citations omitted) (citing *McGee*, 355 U.S. at 223; *Kulko*, 436 U.S. at 92–93; *Shaffer*, 433 U.S. at 211 n. 37). In the Court's formulation, although contacts fall into one category, and the secondary (so-called fairness factors) fall into another, in application the Court seems to equate contacts with fairness to the defendant, even though in practice contacts would seem to be more appropriately an instrument for furthering the sovereignty interest. *Id.* In *Burger King Corp. v. Rudzewicz*, the Court amended this analysis, placing fairness to the defendant along with the other secondary fairness considerations to be considered separately and apart from contacts. 471 U.S. 462, 476 (1985). See also Freer, *supra* note 32, at 566 ("[T]he majority makes clear, as the Court strongly implied in *Hanson*, that a court must assess contacts first. Without a relevant contact, there simply can be no jurisdiction, even if the forum would not be unfair." (footnotes omitted)); John T. Parry, Symposium, *Making Sense of Personal Jurisdiction After Goodyear and Nicastro: Introduction: Due Process, Borders, and the Qualities of Sovereignty – Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 834 (2012) ("Justice White's majority opinion in *World-Wide* . . . accepted the importance of the general inquiry into reasonableness, and he set out five factors to guide that part of the inquiry, with the burden on the defendant being the chief factor. But he also insisted that personal jurisdiction analysis require a specific inquiry into defendant's contacts with the forum." (footnotes omitted)).

⁸³ See Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 CAL. L. REV. 55 (2012) ("[T]he majority makes clear . . . that a court must assess contacts first. Without a relevant contact, there simply can be no jurisdiction, even if the forum would not be unfair." (footnotes omitted)).

⁸⁴ See discussion *supra* pp. 68–71.

⁸⁵ See discussion *supra* pp. 75–77.

⁸⁶ See Andrews, *supra* note 16, at 1347 ("The Court in *World-Wide Volkswagen* articulated [that] . . . a state must not exceed its sovereignty. . . . [The] Court [later]

Although the Court drew on these two concepts, it did not explain why it was now parsing them to create a two-part analysis.

The Court then had to face an additional issue: how to evaluate contacts when the defendant's product, rather than the defendant itself, had contact with the state. The Court rejected the plaintiff's argument that because the car's mobility made it foreseeable for the car to end up in Oklahoma, that jurisdiction would be valid there.⁸⁷ Rather, for jurisdiction based upon the defendant's product, harm in a state would require affirmative efforts by the defendant to serve the forum state, which the Court concluded had not been shown here as to the dealer and distributor.⁸⁸

Exactly what would satisfy the Court's standard in terms of knowledge of the product's destination or volume of sales in a given state is an issue the Court still struggles with today.⁸⁹ In general terms, the Court in *World-Wide* concluded cryptically that foreseeability of whether a product would end up in a given state did not matter. Rather what mattered was whether the defendant's contacts (via a product or otherwise) made it foreseeable that the defendant would be subject to jurisdiction in the forum.⁹⁰ This formulation of contacts was circular because as long as the jurisdictional rules were announced in advance, a defendant meeting the criteria could foresee being subject to jurisdiction.⁹¹ In short, the

clarified that this aim is a function of due process rather than an aspect of federalism . . ." (footnotes omitted)).

⁸⁷ *World-Wide*, 444 U.S. at 295.

⁸⁸ *Id.* at 298.

⁸⁹ See discussion of *J. McIntyre* *infra* Part II.B.3.g.

⁹⁰ See *World-Wide*, 444 U.S. at 297.

⁹¹ See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 576 ("The idea appears to be that due process allows only for 'foreseeable' exercises of jurisdiction . . . There is some surface appeal to this argument, but it is ultimately circular. State court exercises of jurisdiction become foreseeable when they are well-established or when the state announces its intention to exercise jurisdiction in a long-arm statute."). Consider the criminal procedure case *United States v. Katz*, where Justice Harlan issued a concurring opinion stating that in order to merit Fourth Amendment protection, a defendant had to have both an objective and subjective expectation of privacy. 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). Justice Harlan later retreated from the subjective prong, since it meant that the government could thwart Fourth Amendment protections by pervasively engaging in a practice of surveillance or simply announcing in advance that certain expectations of privacy would not be respected, thereby

Court continued *Hanson's* focus on purposeful availment and added to the analysis the foreseeability that defendant could anticipate being haled into court in the forum as the key components of the minimum contacts leg.⁹² Contacts, of course, were central, but the additional fairness factors were also considered.

Justice Brennan dissented.⁹³ As Hugo Black had done in his *Hanson* dissent, which Brennan had joined, Brennan argued that jurisdiction depended on an overall assessment of all interests affected by the litigation as well on the burden on the defendant in litigating in the forum, rather than upon the contacts qua contacts between defendant and forum state.⁹⁴ Contacts, while relevant, should diminish in importance in the face of other factors.⁹⁵ In particular for Brennan, minimum contacts served as a proxy for the burden on the defendant to litigate in the forum.⁹⁶

thwarting any subjective expectation of privacy. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (“But Mr. Justice Harlan himself [dissenting in *United States v. White*, 401 U.S. 745, 786 (1971)] later expressed second thoughts about this conception, and rightly so. . . . [T]he government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance.”).

⁹² See Freer, *supra* note 32, at 566 (“[I]n assessing contact, the court is to look to purposeful availment and foreseeability. The former, of course, was injected by *Hanson* . . . Foreseeability is new [with the *World-Wide* opinion].” (footnote omitted)).

⁹³ *World-Wide*, 444 U.S. at 299 (Brennan, J., dissenting).

⁹⁴ *Id.* at 299–300 (“The Court’s opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant.”); *id.* at 300 (“The clear focus in *International Shoe* was on fairness and reasonableness.”).

⁹⁵ *Id.* (“Surely *International Shoe* contemplated that the significance of contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable.”); see also Freer, *supra* note 32, at 567 (“Interestingly, Brennan here conceded that there must be a relevant contact. But his concept is broader than the majority’s. For Brennan, contact may be ‘among the parties, the forum, and the litigation,’ so as to make the forum reasonable.” (citing *World-Wide Volkswagen*, 444 U.S. at 312)).

⁹⁶ *World-Wide*, 444 U.S. at 300–01 (Brennan, J., dissenting) (“Another consideration is the actual burden a defendant must bear in defending the suit in the forum. Because lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts.” (citing *McGee*, 355 U.S. at 223)).

World-Wide marked the emergence of two patterns. First, the Court was engaging in a strained logic that insisted on the primacy of sovereignty.⁹⁷ This approach would continue to result in more complex explanations and split decisions, often without a majority, thereby retarding the development of a workable personal jurisdiction jurisprudence.⁹⁸ Second, personal jurisdiction disputes started to become more tactical. In a case involving life-altering injuries, defendants who faced no burden litigating in Oklahoma disputed personal jurisdiction for several rounds in that forum and at the Supreme Court, arguing that it would be improper to force litigation in the plaintiff's forum.⁹⁹ That the defendants in this case, as well as defendants in future cases, had the resources and ability to litigate personal jurisdiction in the forum raises the question of how their due process rights would be violated by alternatively requiring them to simply litigate the merits in that court system.¹⁰⁰

Rush,¹⁰¹ issued the same day as *World-Wide*, involved the somewhat unusual situation in which a plaintiff sought to obtain jurisdiction based on the citizenship of the tortfeasor's insurer.¹⁰² Although important to that specific issue, *Rush* did not play a major role in the development of personal jurisdiction doctrine.

(b) *Insurance Corp.*

⁹⁷ See Koppel, *supra* note 17, at 956 (“[T]he Court’s personal jurisdiction jurisprudence moved further toward the formalist end of the continuum in *World-Wide*.”).

⁹⁸ Russell J. Weintraub, Symposium, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 536 (1995) (“[*World-Wide*’s focus on federalism made] state lines . . . invisible but formidable barriers to basic change.”); Parry, *supra* note 82, at 834 (“[*World-Wide*] created a . . . tension that continues to structure the debate over specific personal jurisdiction doctrine.”).

⁹⁹ In *World-Wide*, the ultimate litigation was still ongoing as of 1992, fifteen years after the accident. Much of that time involved litigation against the defendants that occurred after the Supreme Court found jurisdiction lacking over *World-Wide* and *Seaway*. Even so, the personal jurisdiction issue dragged on for three years, at which point, because no other aspects of the case had been addressed, the remaining parties had to begin litigating the merits. See Adams, *supra* note 58, at 1152.

¹⁰⁰ See discussion *infra* Part III.

¹⁰¹ 440 U.S. 320.

¹⁰² *Id.* at 322.

Two years after *World-Wide*, the Court, in *Insurance Corp. of Ireland v. Compaignes Bauxites de Guinee*,¹⁰³ had to confront *World-Wide*'s precedent that personal jurisdiction involved concerns of state sovereignty and federalism and not merely the due process.¹⁰⁴ Even before *Insurance Corp.*, *Hanson*, and *World-Wide*, diminished the burden on the defendant in favor of a focus on federalism created a tension with the established personal jurisdiction doctrine.

Insurance Corp. involved a diversity suit filed in Pennsylvania¹⁰⁵ by a company that operated African bauxite mines.¹⁰⁶ When the company experienced operating problems it sought indemnity from its insurers, who refused to pay.¹⁰⁷ The plaintiff sued and argued that jurisdiction was proper in Pennsylvania based upon the defendants' relationship with that state.¹⁰⁸

When the defendants failed to respond to discovery sought in connection with the jurisdictional dispute, the trial court imposed a sanction whereby "for the purposes of this litigation the Excess Insurers are subject to the *in personam* jurisdiction of this Court due

¹⁰³ 456 U.S. 694 (1982).

¹⁰⁴ See Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Inds. Co. v. Superior Court*, 39 S. C. L. REV. 729, 763 (1988) ("The adoption of the sovereignty function or branch of the minimum contacts test in *World-Wide* set off a firestorm of academic protest, and the Supreme Court attempted to clarify its view of sovereignty two years later in *Insurance Corp.*" (footnote omitted)).

¹⁰⁵ *Ins. Corp.*, 456 U.S. at 698.

¹⁰⁶ *Id.* at 696. Although the suit took place in federal court, because the case did not involve a federal jurisdictional statute allowing nationwide service, the Court's personal jurisdiction analysis was the same as it would be had the matter been in state court. The Court followed this practice—treating jurisdiction in cases in federal court with no governing federal personal jurisdiction statute akin to those in state court—due to the strictures of *Erie R. Co. v. Tompkins*, 340 U.S. 64 (1938). That case required federal courts to follow state law on matters of substance absent a controlling federal statute. Moreover, the Federal Rule of Civil Procedure 4(k) (Rule 4(f) at the time of *Insurance Corp.*) provided that federal courts have the same jurisdictional reach as the courts of the state in which they are located, with exceptions not applicable in that case. That this rule effectively incorporates a limitation based upon state lines to cases in federal courts raises questions that will be addressed in Part III.

¹⁰⁷ *Ins. Corp.*, 456 U.S. at 697.

¹⁰⁸ *Id.* at 698.

to the their business contacts with Pennsylvania.”¹⁰⁹ The defendants claimed that the trial court could not create jurisdiction by sanction if the court lacked jurisdiction in the first place.¹¹⁰ Yet, because the personal jurisdiction defense can be forfeited by not properly asserting it or otherwise not complying with procedural requirements,¹¹¹ the court’s sanction made sense. Indeed, that is what the Supreme Court ultimately held in *Insurance Corp.*¹¹² If personal jurisdiction was about ensuring fairness to the defendant, then this result makes sense. Parties can waive or forfeit (by inaction) even fundamental constitutional protections. But, if personal jurisdiction also acted to “function [as] an instrument of interstate federalism,”¹¹³ it is hard to understand how sovereign power could wax or wane due to the inaction of a private party in asserting its rights.¹¹⁴

The Court had twisted itself into knots. Upholding jurisdiction here was logical, but the sovereignty component introduced in *Hanson* and *World-Wide* created a barrier, allowing the defendant to waive or forfeit the claim that personal jurisdiction was lacking.¹¹⁵

¹⁰⁹ *Id.* at 699 (internal quotations omitted).

¹¹⁰ *Id.* at 696.

¹¹¹ *Id.* at 705.

¹¹² *See Ins. Corp.*, 456 U.S. at 704–05 (“[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray [personal jurisdiction] for what it is—a legal right protecting the individual. . . . The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. . . . A sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has . . . the same effect [of waiver].”).

¹¹³ *See World-Wide*, 444 U.S. at 294. Starting with *World-Wide*, the Court began using the term “interstate federalism” in personal jurisdiction cases. This odd phrase—since federalism generally refers to the relationship between the federal and state governments—was clearly meant as a synonym for respecting the sovereignty of co-equal states.

¹¹⁴ *See Ins. Corp.*, 456 U.S. at 703 n.10 (“Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.”).

¹¹⁵ *See* Robert J. Condlin, “*Defendant Veto*” or “*Totality of the Circumstances*”? *It’s Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 87 (2004) (“[The Court’s] concession [that the liberty interest of the defendant was the sole limitation on personal jurisdiction] did not settle the issue, of course; in fact, it made it more

Addressing, or merely ducking, this dilemma, Justice White, writing for the Court, held that forfeiture of one's personal jurisdiction defense was consistent with *World Wide's* concern with minimum contacts and state boundaries, and that it was not reversing course.¹¹⁶ The Court stated that all it was doing was adding another way to establish minimum contacts.¹¹⁷ This position is strained. If minimum contacts themselves were central, then it would seem that the contacts must be found by looking at the relationship between the defendant and the forum state. The fact that the defendant did not follow adequate procedures would not create or increase the contacts between the defendant and the state.

Moreover, the Court emphasized that the sole source of authority limiting personal jurisdiction was the Due Process Clause. In language as notable as its interstate federalism parlance in *World-Wide* (and actually more notable due to the contrast) the Court said:

The restriction on state sovereignty power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. *That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.* Furthermore, if the federalism concept operated as an independent restriction on sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement.¹¹⁸

Even so, the Court did not jettison the primary role of minimum contacts in favor of a general fairness analysis – indeed the Court said it was not changing course at all.¹¹⁹ By holding onto minimum

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.'').

¹¹⁶ *Ins. Corp.*, 456 U.S. at 702.

¹¹⁷ *Id.* at 703 n.10.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ See *Andrews*, *supra* note 16, at 1347 ("Although the Court in [*Insurance Corp.*] clarified that [sovereignty limitations on jurisdiction are] a function of due process

contacts, which *World-Wide* and *Hanson* said flowed from the state sovereignty or horizontal federalism, while asserting that due process was the sole constitutional regulator of personal jurisdiction, the Court crossed the line from vague to illogical.¹²⁰ Prior to *World-Wide*, the debate in the Court seemed to be between those who believed that personal jurisdiction was primarily about due process and fairness to the defendant,¹²¹ and those who asserted that the primary concern was state authority.¹²² *World-Wide* tried to satisfy both camps, putting a primary emphasis on contacts and sovereignty while giving a walk-on part to fairness and common sense, though not explaining how to use this new arsenal on a case-by-case basis.¹²³ Later in *Insurance Corp.*, the Court explicitly but cryptically said that the sole concern was due process, but that somehow the Due Process Clause is a vehicle for state sovereignty.¹²⁴ This clearly represented a shift of the Court's entire personal jurisdiction focus

rather than an aspect of federalism, the Court did not remove the sovereignty component from jurisdictional analysis. The defendant has a due process right to have states act only within the limits of their sovereignty.” (footnotes omitted)); *cf.* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1067.1 (3d ed. 2014) (“Notwithstanding the *Insurance Corporation of Ireland* footnote, it does not seem plausible to read territoriality and sovereignty concerns entirely out of the minimum contacts analysis.”).

¹²⁰ Some have tried to characterize the Court's approach in *Insurance Corp.* as a valid explanation of how contacts protect the defendant's due process rights. *See, e.g.,* John N. Drobek, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1047 (1983) (“*Ireland* demonstrates that minimum contacts with the forum are necessary to protect the defendant's own interest in freedom from an unrelated sovereign. On the other hand, *World-Wide Volkswagen* asserts that minimum contacts are necessary to preserve federalism. . . . As the Court said in *Ireland*, the federalism theme in personal jurisdiction cannot be an independent restriction on the sovereign power of a court; otherwise, waiver would not be possible. That does not mean, however, that the federalism theme is dead. Federalism is preserved by personal jurisdiction as a by-product of the application of the doctrine to protect the defendant.”).

¹²¹ *E.g., World-Wide*, 444 U.S. at 299 (Brennan, J., dissenting); *Hanson*, 357 U.S. at 256 (Black, J., dissenting); *McGee*, 355 U.S. at 221 (Black, J., writing for the majority).

¹²² *E.g., World-Wide*, 444 U.S. at 287 (White, J., writing for the majority); *Hanson*, 357 U.S. at 236 (Warren, J., writing for the majority).

¹²³ *See World Wide*, 444 U.S. at 292–94.

¹²⁴ *See Ins. Corp.*, 456 U.S. at 714.

from *Hanson* through *World-Wide*, wrapped in the majority's protest that nothing had changed.¹²⁵

The majority's opinion in *Insurance Corp.* drew a sharp rebuke from Justice Powell.¹²⁶ He saw that the Court had clearly shifted its position and was now adopting an internally inconsistent theory.¹²⁷ He stated that the Court's theory that personal jurisdiction concerned only due process, rather than fundamental limits on a Court's power, represented "a sweeping but largely unexplained revision of judicial doctrine. . . . [which] could encompass not only the personal jurisdiction of federal courts but 'sovereign' limitations on state jurisdiction as identified in *World Wide*"¹²⁸ Powell did not buy the Court's assertion that citing the Due Process Clause as the sole limitation of a court's personal jurisdiction reach did not fundamentally undercut *World-Wide's* statement that personal jurisdiction served two purposes, one of which was protecting sovereignty interests within the American federal system.¹²⁹

The Court had taken another step toward complicating personal jurisdiction analysis. It had traveled from minimum contacts to promote fairness,¹³⁰ to a focus on fairness,¹³¹ to a focus on

¹²⁵ See *id.* at 714 (Powell, J., concurring in judgment) ("Before today, of course, our cases had linked minimum contacts and fair play as *jointly* defining the 'sovereign' limits on state assertion of personal jurisdiction over unconsenting defendants. The Court appears to abandon the rationale of these cases in a footnote. *But it does not address the implications of its action.*" (citations omitted) (second emphasis added)). *But see* Conklin, *supra* note 115, at 87 ("Admitting that it had taken the opposite position in [*World-Wide*], the Court reversed course [in its footnote in *Insurance Corp.*]").

¹²⁶ See *Ins. Corp.*, 456 U.S. at 715 (Powell, J., concurring in judgment) (concluding that the record contains sufficient evidence of minimum contacts to support the exercise of jurisdiction based on the standards that Court had applied in previous cases).

¹²⁷ *Id.* at 715–16.

¹²⁸ *Id.* at 710.

¹²⁹ See *id.* at 714 ("Before today, of course, our cases had linked minimum contacts and fair play as *jointly* defining the 'sovereign' limits on state assertion of personal jurisdiction over unconsenting defendants. The Court appears to abandon the rationale of these cases in a footnote." (emphasis in original) (citing *Ins. Corp.*, 456 U.S. at 702–03 n.10 (majority opinion); *World-Wide*, 444 U.S. at 292–93; *Hanson*, 357 U.S. at 251)) (emphasis in original) (citing *Ins. Corp.*, 456 U.S. at 702–03 n.10 (majority opinion); *World-Wide*, 444 U.S. at 292–93; *Hanson*, 357 U.S. at 251)).

¹³⁰ See *Int'l Shoe*, 326 U.S. at 320.

contacts,¹³² to a focus on both but with contacts being primary,¹³³ to saying that fairness and the defendant's liberty interest was all that matter, all while implicitly continuing to endorse sovereignty by pretending that it was merely applying settled law, rather than reworking it.¹³⁴ The doctrinal web that the Court was spinning by insisting on the inclusion of sovereignty concerns while also saying that due process was the personal jurisdiction North Star was hard to understand. The Court has never truly made an effort to adequately explain the inconsistent elements of this doctrine.¹³⁵

(c) *Keeton, Calder & Helicopteros*

In 1983, the Supreme Court decided three personal jurisdiction cases: *Keeton v. Hustler Magazine Inc.*,¹³⁶ *Calder v. Jones*,¹³⁷ and *Helicopteros Nacionales de Columbia S.A. v. Hall*.¹³⁸ These cases will be discussed briefly.

Keeton and *Calder*, were issued on the same day. Each involved defamation claims, the former against reporters and editors; the latter against a magazine itself.¹³⁹ In *Keeton*, Kathy Keeton, one of the publishers of the magazine Penthouse, alleged that Hustler magazine had defamed her.¹⁴⁰ Keeton lived in New York, while Hustler¹⁴¹ was an Ohio corporation with its principal place of business in California.¹⁴² Yet, Keeton sued in New Hampshire, because that

¹³¹ See *McGee*, 355 U.S. 220; *Perkins*, 342 U.S. 437; *Travelers*, 339 U.S. 643; *Mullane*, 339 U.S. 306.

¹³² See *Hanson*, 357 U.S. 235.

¹³³ See *World-Wide*, 444 U.S. 286.

¹³⁴ See *Ins. Corp.*, 456 U.S. 694.

¹³⁵ See Condlin, *supra* note 115, at 87–88 (“[T]he Court has always taken sovereignty concerns into account in personal jurisdiction analysis . . . and it appears that it always will—the debate over how to justify doing this continues to swirl. The Court will come back to this question a number of times over the years, but never really put it to rest.” (footnote omitted)).

¹³⁶ 465 U.S. 770 (1984).

¹³⁷ 465 U.S. 783 (1984).

¹³⁸ 466 U.S. 408 (1984).

¹³⁹ *Calder*, 465 U.S. at 785.

¹⁴⁰ 465 U.S. at 772.

¹⁴¹ An interesting take of Hustler's history as a Cincinnati, Ohio company is presented in the 1996 movie *THE PEOPLE VS. LARRY FLINT* (Sony Pictures 1996).

¹⁴² *Id.*

was the only state's whose statute of limitations had not expired at the time of suit.¹⁴³ Keeton's only connection to New Hampshire was the fact that Penthouse was circulated there, a fact that the Court noted but treated as irrelevant to the personal jurisdiction analysis.¹⁴⁴

The sole basis for Keeton's arguing for jurisdiction in New Hampshire was the fact that Hustler's monthly circulation of about fifteen thousand copies of its magazine in that state.¹⁴⁵ Although that was certainly a small percentage of Hustler's national circulation, under the single publication rule, the plaintiff could recover for damages for defamation throughout the country in any state having jurisdiction.¹⁴⁶

The Supreme Court concluded that New Hampshire's court—in this case, the federal district court—could exercise personal jurisdiction over Hustler because “[Hustler's] regular circulation of magazines in the forum state is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.”¹⁴⁷ Although common sense counseled against jurisdiction in New Hampshire, which the plaintiff obviously chose for tactical reasons, the Court nevertheless allowed the case to go forward there merely because the technical requisites of the minimum contacts test had been met.

In *Calder*, the Court held that California had personal jurisdiction over the two National Enquirer employees, a reporter and an editor, both of whom lived in Florida.¹⁴⁸ The Court did not look at the fact that the magazine had California circulation, but rather that the party alleging injury lived and worked in

¹⁴³ *Id.* at 773; *see also id.* at 778 n.10 (noting that “[u]nder traditional choice-of-law principles, the law of the forum State governs on matters of procedure . . . and [i]n New Hampshire, statutes of limitations are considered procedural. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); *Gordon v. Gordon*, 387 A.2d 339, 342 (N.H.1978); *Barrett v. Boston & Maine R.R.*, 178 A.2d 291 (N.H. 1962)).

¹⁴⁴ *Keeton*, 465 U.S. at 772.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 773 (citing RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977)).

¹⁴⁷ *Keeton*, 465 U.S. at 773–74.

¹⁴⁸ *Calder*, 465 U.S. at 791.

California.¹⁴⁹ The Court thus concluded that jurisdiction was proper because plaintiff's claim, if proven, would mean that defendants intended to injure the plaintiff in California, i.e., their actions would have knowing effects in that state. Therefore, the Court had to contrast this case with unintentional tort cases like *World-Wide* since there is no evidence that the defendants purposefully availed themselves of the forum states privileges, the standard that the Court had emphasized in *World-Wide* and *Hanson*.¹⁵⁰ In concluding that the defendants had satisfied this requirement, the Court took little account of what would seem central to a due process assessment, the burden that might be placed on individuals having to litigate three thousand miles from their homes.

Helicopteros was the second case ever presented to the Supreme Court in which a plaintiff attempted to assert general, as opposed to specific, jurisdiction i.e., where the cause of action did not arise from the defendant's in-state contacts.¹⁵¹ Because general jurisdiction

¹⁴⁹ *Id.* at 789–90. The suit was brought by the actress, Shirley Jones, who was famous for her roles in musicals, as well as for playing the mother on television's Partridge Family.

¹⁵⁰ It would be odd to say that a party committing an intentional tort purposefully availed itself of the privilege of harming the plaintiff in the forum state. That is why the Court spoke in terms of effects in California, although this contrasted with *World-Wide*'s conclusion that the felt effects of the car dealer and distributor's unintentional tort in Oklahoma was insufficient to confer jurisdiction. See Parry, *supra* note 82, at 837 n.44 (“[I]n *Calder* . . . , a unanimous court further threatened the rule of *World-Wide Volkswagen*. The Court rejected the defendants' reliance on that case in the course of crafting the plaintiff-centered ‘effects test’ as an alternative to purposeful availment in intentional tort cases. The Court cited *World-Wide* for the proposition that the defendant must reasonably anticipate being haled into the courts of the forum state, but it did not refer to purposeful availment.”) (citations omitted).

¹⁵¹ The Court did not actually undertake a full examination of how closely related the contacts had to be to the cause of action for the jurisdictional argument to be considered *specific* as opposed to *general*—and thereby subject to a lesser degree of contacts under *International Shoe*. See discussion *supra* note 16. The court had previously said that a cause of action must *arise out of the contacts* for specific jurisdiction, *Int'l Shoe*, 326 U.S. at 319. Justice Brennan, in dissent, argued that even a claim that did not *arise out of* the defendants contacts, if the dispute was *related to* those contacts, the Court should apply a specific jurisdiction analysis. *Helicopteros*, 466 U.S. at 425 (Brennan, J., dissenting). The majority, concluded, however that the plaintiff had conceded that her claims did not arise out of and were not related to defendant's contacts with Texas. *Id.* at 415.

plays a secondary role to specific jurisdiction, the case did not have major implications for the evolution of personal jurisdiction doctrine.¹⁵² In finding general jurisdiction lacking, the Court cited general language from *Shoe* and its progeny, and distinguished the facts from *Perkins* where it had found general jurisdiction, in order to reach its holding.¹⁵³ It did not explain how the outcome furthered the goals of fairness, sovereignty, or any other interest wrapped upon the personal jurisdiction skein.

(d) *Burger King*

*Burger King Corp. v. Rudzewicz*¹⁵⁴ represents the only contract case that the Court has analyzed purely in terms of minimum contacts.¹⁵⁵ As Justice Brennan was finally able to garner a majority, the Court did make a partial shift towards fairness, but still made contacts the primary jurisdictional test.¹⁵⁶

The case arose out of a franchise agreement for a Burger King restaurant between two Michigan businessmen and Florida-based

¹⁵² See Stravitz, *supra* note 104, at 771 (“General jurisdiction raises fundamentally different concerns than does specific jurisdiction.”). The present article’s prescription would eliminate the distinction between specific and general jurisdiction. See discussion *infra* Part IV.

¹⁵³ See *Helicopteros*, 466 U.S. at 413–19.

¹⁵⁴ 471 U.S. 462 (1985).

¹⁵⁵ See *Ins. Corp.*, 456 U.S. at 695 (examining the case purely in terms of whether a trial court could conclude that personal jurisdiction existed as a sanction for discovery violations, and not asking whether the contract itself created sufficient contacts between the defendant and the forum state for the exercise of personal jurisdiction). The Court has also examined personal jurisdiction in cases involving contractual choice of forum clauses. In those cases the Court has required some relationship between the litigation and the chosen forum before allowing enforcement of the clause, but has not examined minimum contacts between the defendant and the forum state using the *International Shoe* standard. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

¹⁵⁶ Brennan’s overall fairness approach had failed to gain a majority in his prior attempts, and he apparently had come to accept that defendant contacts would continue to play the primary role in Supreme Court personal jurisdiction decisions. Of the personal jurisdiction cases on which Brennan sat (twelve in all), it is ironic that in the case in which he finally was able to write a majority opinion that there was good reason to think that it would be unfair to subject the defendant to suit in the plaintiff’s chosen forum.

Burger King Corporation.¹⁵⁷ Rudzewicz and his partner, who did not bring his jurisdictional challenge to the Supreme Court, negotiated for a Burger King franchise in Michigan.¹⁵⁸ The contracts were negotiated with Burger King's Florida headquarters, although Burger King's Michigan office also had some involvement.¹⁵⁹ Rudzewicz himself did not travel to Florida.¹⁶⁰ The contract contained a clause that said all disputes were to be decided under Florida law, but lacked a forum selection clause.¹⁶¹

Soon afterward, the relationship between the parties soured, as each side apparently insisted on having things its way.¹⁶² Burger King brought suit against both defendants in Florida federal court, invoking diversity jurisdiction.¹⁶³ Rudzewicz challenged personal jurisdiction in Florida.¹⁶⁴

The Court, per Justice Brennan, concluded that the Florida federal court could exercise personal jurisdiction.¹⁶⁵ One senses that Justice Brennan wanted to determine the outcome purely on fairness concerns, but given the Court's jurisdictional framework, which emphasized contacts as an end in themselves and not simply a proxy for fairness, he could not do so.¹⁶⁶ Instead, he engaged in an extensive rehearsal of the Court's personal jurisdiction cases from *International Shoe* onward in six pages.¹⁶⁷ This portion of the opinion serves as a compendium of personal jurisdiction catch phrases, like "purposeful direction," "foreseeability," "fair play,"

¹⁵⁷ See *Burger King*, 471 U.S. at 464, 466.

¹⁵⁸ *Id.* at 466–67.

¹⁵⁹ *Id.* at 467.

¹⁶⁰ *Id.* at 479.

¹⁶¹ *Id.* at 482 n.24.

¹⁶² *Id.* at 467–68.

¹⁶³ *Burger King*, 471 U.S. at 468.

¹⁶⁴ See *id.* at 469–70.

¹⁶⁵ *Id.* at 487.

¹⁶⁶ Interestingly, Brennan did not rely upon *Insurance Corp.*, whose emphasis that personal jurisdiction served solely to protect the defendant's due process rights would seem to provide an opening, highlighted by Justice Powell's concurrence in that case, for a pure fairness based analysis.

¹⁶⁷ See *Burger King*, 471 U.S. at 471–78; see also Condlin, *supra* note 115, at 106–07 ("*Burger King* is perhaps best known for its exhaustive summary of personal jurisdiction case law. . . . [But] the discussion also often loops back on itself, taking up issues that were disposed of earlier, so that it sometimes looks a little like the memos of several law clerks stuck together, end-to-end.>").

and “litigation arising out of the defendant’s in-state activities.”¹⁶⁸ The opinion then attempts to explain these in terms of a series of policy justifications such as fair warning to the defendant, predictability in the legal system, fairness both to the defendant and plaintiff by not allowing the defendant to escape legal liabilities created in the forum state, and the forum state’s interest in affording resolution of disputes to its residents.¹⁶⁹

Brennan stated that although protecting the defendant and other interests are important to personal jurisdiction, minimum contacts themselves provide the touchstone as to whether jurisdiction will lie.¹⁷⁰ This argument brought him back to the conundrum that the Court faced the *Insurance Corp.* Court: minimum contacts did not square entirely with the defendant’s due process rights, yet the due process clause seemed to be the sole constitutional limitation on the geographic range of a court’s power.¹⁷¹ Brennan therefore combined these factors. Instead of presenting a unifying theory as he and Black had in sundry dissents, Brennan split the criteria into two parts, similar to what Justice White had done in waiting for the Court in *World-Wide*.¹⁷²

Applying its test, the Court upheld jurisdiction in Florida.¹⁷³ In terms of contacts, Brennan’s opinion seemed to be most driven by the fact that the franchisee defendant chose to enter into an arrangement with a Florida corporation.¹⁷⁴ The defendant therefore received some benefit from contracting with a Florida corporation and/or allegedly caused harm in Florida when he breached the

¹⁶⁸ *Burger King*, 471 U.S. at 471–78.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 476.

¹⁷¹ *See* discussion *supra* Part II.B.3.b.

¹⁷² *See* Stravitz, *supra* note 104, at 775 (“Justice Brennan created not a synthesis or merger of prior doctrine into a unified conceptual sphere, but rather a forced linkage of two very separate doctrines that are not easily harmonized.”).

¹⁷³ *Burger King*, 471 U.S. at 487.

¹⁷⁴ *See id.* at 479–80 (“Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately [reached] out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.” (quotation marks omitted) (alteration in original)).

contract.¹⁷⁵ To be sure, Rudzewicz sought some benefit from a transaction with a company that was located in Florida, but it is hard to see how this alone implicates Florida's interest. In any contract between two parties, each party will seek benefit from the other party, and if the contract is breached or one party commits a tort, then there is potential harm to the other party in the other party's home state.

Followed to its logical conclusion, Brennan's reasoning would satisfy the contacts prong of the test in almost any contract case and in almost all tort cases.¹⁷⁶ Since Brennan took a diminished view of contacts, perhaps this was his stealth intent. Even so, it is surprising that he was able to garner a six-justice majority from a Court chary about extending jurisdiction,¹⁷⁷ particularly in a case where the surface appeal for finding jurisdiction was weak.

Ultimately, the outcome in *Burger King* is probably sensible, assuming that the defendant really could litigate in Florida without

¹⁷⁵ See *id.* at 480 ("In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters . . . Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injury to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.") (citing *Keeton*, 465 U.S. at 774; *World-Wide*, 444 U.S. at 299; *Hanson*, 357 U.S. at 253)).

¹⁷⁶ See Stravitz, *supra* note 104, at 782 ("Notwithstanding the grudging acknowledgement that jurisdiction may be divested by the fairness branch, the opinion seems deliberately crafted to expand rather than restrict the ambit of state court personal jurisdiction. Certainly, Justice Brennan's first observation concerning the relationship between the two branches suggested that he envisaged the fairness branch as increasing opportunities for jurisdiction by a *McGee*-like, multiple-interest balance process. . . . This . . . is not surprising considering that the author of the *Burger King* opinion has consistently been the Court's leading advocate of jurisdiction expansion."); Condlin, *supra* note 115, at 105 ("Taken literally, [*Burger King*'s analysis] seemed to create a presumption in favor of extra-territorial jurisdiction.").

¹⁷⁷ See McFarland, *supra* note 7, at 774–75 (2003) ("[It] is [not] surprising that Justice Brennan creates what amounts to a two-step test: he advocated such a sharp change in personal jurisdiction standards in earlier dissents. What is surprising is that he gathered the votes of five other Justices to sign on to his previously idiosyncratic view that the test should be fractured into two parts." (footnote omitted)).

unfair disadvantage.¹⁷⁸ Precedent and the apparent unwillingness of a sufficient number of justices to get on board from using the overall fairness approach that he had advocated in prior cases, foreclosed Brennan. Hemmed in as he was, he had to push the facts of this case through the doctrinal strainer that jurisdictional jurisprudence had become.¹⁷⁹

If *McGee* represented the high point of an overall fairness-based expansive view of jurisdiction, *Burger King* looks like *McGee*'s little brother in retrospect. While not going as far as the earlier case, *Burger King* brought in fairness factors such as a counter-balance to contacts, even if only as a secondary consideration. Moreover, the Court, more so in any case since *McGee*, seemed to be in favor of finding jurisdiction valid absent a strong showing to the contrary. This was the last gasp for this type of approach, and strangely, the next case would use the fairness factors to cut against finding jurisdiction, an issue that Brennan noted was possible but probably did not expect to happen.¹⁸⁰

(e) *Asahi*

Two years after *Burger King*, the Court decided *Asahi Metal Indus. v. Superior Ct.*¹⁸¹ In *Asahi*, an allegedly defective tire sold by a Taiwanese manufacture, Chein Shin, containing a valve made by a Japanese company, Asahi, blew out, seriously injuring a man and killing his wife, while the two were riding a motorcycle in

¹⁷⁸ See Stravitz, *supra* note 104, at 772 (“Although the result in *Burger King* . . . was understandable, the manner in which the Court reached its decision was decidedly unexpected.” (footnote omitted)).

¹⁷⁹ Justice Stevens, joined by Justice White, issued a brief dissent, focusing on the unfairness of requiring a franchisee with little bargaining power to litigate against its much stronger contractual counterparty in the latter’s state, especially where the franchisee dealt directly with Burger King’s local office in his home state. *Burger King*, 471 U.S. at 487–90 (Stevens, J., dissenting). It is odd that Justice White joined this opinion, given the disdain that he expressed for fairness in his *Word-Wide* opinion.

¹⁸⁰ See Stravitz, *supra* note 104, at 782 (“Undoubtedly, *Burger King* was intended to expand jurisdiction. It is therefore ironic that in *Asahi*, the Court’s first post-*Burger King* jurisdictional case, Brennan’s two-branch due process analysis was invoked to overturn the assertion of jurisdiction. . . . Even more ironic, perhaps, was the Court’s reliance on the fairness branch to reach its decision.”).

¹⁸¹ 480 U.S. 102 (1987).

California.¹⁸² The injured man sued Chien Shin in California.¹⁸³ The company cross-claimed against Asahi.¹⁸⁴ All the plaintiff's claims were disposed of early on, leaving an unusual situation: a Taiwanese company essentially suing—technically seeking contribution from—a Japanese company in a California state court.¹⁸⁵ Asahi objected to jurisdiction.¹⁸⁶

The two-part *World-Wide/Burger King* personal jurisdiction test would come into full relief in this dispute. The contacts here were through the sale of a product.¹⁸⁷ *World-Wide* had addressed, but not resolved, the extent to which a defendant could be haled into court based upon contacts between its product and the state.¹⁸⁸ Even if contacts were established, the strange posture of the case, a Taiwanese company seeking contribution from a Japanese company with no American party left in the litigation, required an assessment of considerations beyond contacts.

The case for finding contacts sufficient was stronger here than in *World-Wide*. Asahi regularly sold valves to the Taiwanese tire manufacturer with the knowledge that some of those tires would end up in California.¹⁸⁹ *World-Wide* stated that a seller of a product may not be subject to jurisdiction in a given state merely because the consumer-purchaser of the product brings the product to that state, even if the seller could have foreseen this happening.¹⁹⁰ The *World-Wide* Court theorized that it would be improper for sellers to be subject to jurisdiction in a forum without having intentionally directed its product there.¹⁹¹ But *World-Wide* had suggested that a defendant who delivers goods into the stream-of-commerce, a phrase borrowed from the famous and influential state court case,¹⁹² *Gray v.*

¹⁸² *Id.* at 105–06.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 106.

¹⁸⁵ *Id.*

¹⁸⁶ *Asahi*, 480 U.S. at 106.

¹⁸⁷ *Id.* at 105.

¹⁸⁸ See discussion *supra* Part II.B.3.a.

¹⁸⁹ *Asahi*, 480 U.S. at 107.

¹⁹⁰ *World-Wide*, 444 U.S. at 298.

¹⁹¹ See *id.* at 297.

¹⁹² See Stravitz, *supra* note 104, at 790–91 (“Although only an Illinois Supreme Court decision, *Gray*, which upheld jurisdiction over a domestic component part

Am. Radiator & Std. Sanitary Corp.,¹⁹³ with the expectation that they will end up in a given state, can be subject to jurisdiction there if the product causes injury. Therefore, the Court was required to determine just how powerful the flow of goods into a given state must be before the good is considered to be part of the stream-of-commerce.

Justice O'Connor authored a plurality opinion for herself and three other justices that concluded that the fact that Asahi sold tire valves to Cheng Shin, knowing that Chen Shin would sell some of those tires in California, was insufficient to confer jurisdiction.¹⁹⁴ In reaching that conclusion, O'Connor stated that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."¹⁹⁵ Additional conduct would be required whereby the defendant directed its activities toward the forum state, like designing its product for the forum state or advertising there.¹⁹⁶

O'Connor's opinion does not explain why due process would require acts particular to the forum state like advertising or incorporating state-specific design. Those acts might show a greater interest in the state's market, but also would depend on factors unrelated to the defendant's desire to serve the state. For some products there may be no need for state specific design as uniform specifications might be adequate for the entire country. Furthermore, tire valves are not the type of product that would be advertised to the end user. Even without California specific activity, Asahi both clearly benefitted from the California market and took affirmative steps that would necessarily cause its valves to end up there.¹⁹⁷

manufacturer, has on at least two occasions been cited with approval by the Supreme Court [in *Calder* and *World-Wide*].").

¹⁹³ 176 N.E.2d 761 (Ill. 1961).

¹⁹⁴ See *Asahi*, 480 U.S. at 105, 107; *id.* at 114 (O'Connor, J., plurality opinion).

¹⁹⁵ *Id.* at 112 (O'Connor, J., plurality opinion).

¹⁹⁶ *Id.*

¹⁹⁷ Cf. Stravitz, *supra* note 104, at 790–91 ("The O'Connor plurality view is . . . at odds with [Gray,] the seminal stream-of-commerce case of the post-*International Shoe* era Significantly, Justice O'Connor failed even to mention *Gray*.").

Justice Brennan, also wrote an opinion for four justices.¹⁹⁸ He argued that additional activity beyond placement of the product into the stream of commerce should not be required because “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”¹⁹⁹

Justice Stevens²⁰⁰ concurrence, however, best demonstrated, maybe unintentionally, that the Court’s entire personal jurisdiction approach did not really make sense in terms of firm concepts like due process and sovereignty, instead consisting of arbitrary line drawing. He noted that “[t]he plurality seems to assume that an unwavering line can be drawn between ‘mere awareness’ that a component will find its way into the forum State and ‘purposeful availment’ of the forum’s market.”²⁰¹ Indeed, whether a defendant has purposefully availed itself of a market does not depend upon the volume or nature of its product, as those factors would only affect the degree of the defendant’s availment. Moreover, volume would be highly dependent upon the nature of the products, with certain items, like tire valves probably being sold in higher volume than, for example, a custom designed swimming pool. These variations do not vary the fairness of requiring the defendant to litigate in a particular forum, or affect whether a given state has sovereign authority to adjudicate a particular claim.

A second aspect of *Asahi* was a majority opinion (8-0) also written by Justice O’Connor. In that opinion, joined by all the justices except Scalia, the Court concluded that even if minimum contacts existed in this case, it would be unreasonable to allow California to exercise jurisdiction.²⁰² In this section, the Court

¹⁹⁸ *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring the judgment).

¹⁹⁹ *Id.* at 117.

²⁰⁰ Stevens concurred in part and in the judgment in an opinion joined by Justices White and Blackmun. *Id.* at 116.

²⁰¹ *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment).

²⁰² *See id.* at 114 (O’Connor, J., plurality opinion) (“A consideration of [several] factors [apart from minimum contacts] in the present case clearly reveals the

examined the so-called second-leg factors originally discussed in *World Wide*²⁰³ and emphasized in *Burger King*.²⁰⁴ “[T]he burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. . . . [as well as] ‘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.’”²⁰⁵

Both parts of *Asahi* are notable. The Court’s failure to reach a majority on whether *Asahi* had put its valve in the stream of commerce is telling and important because products liability claims often lead to fights over personal jurisdiction when the product was manufactured or distributed by an out-of-state defendant. The failure of the Court to reach a majority here, and twenty-three years later in *J. McIntyre*,²⁰⁶ presents lower courts with a challenge in deciding products liability cases, and limits parties’ ability to plan either their pre-litigation or post-litigation affairs.

The Court’s split demonstrates the lack of coherence of the minimum contacts analysis. The two pluralities split on whether selling goods, knowing that they would end up in the forum, qualified as purposeful availment, thereby allowing the defendant to anticipate being haled into court there—which both opinions agreed was the relevant minimum contacts standard.²⁰⁷ This failure to agree on a fundamental point indicates a lack of coherence as to the goals

unreasonableness of the assertion of jurisdiction over *Asahi*, even apart from the question of the placement of goods in the stream of commerce.”).

²⁰³ See discussion *supra* Part II.B.3.a.

²⁰⁴ See discussion *supra* Part II.B.3.d.

²⁰⁵ *Asahi*, 480 U.S. at 102; *id.* at 113 (O’Connor, J., plurality opinion) (quoting *World-Wide*, 444 U.S. at 292) (citations omitted in original).

²⁰⁶ See Koppel, *supra* note 17, at 960 (“The plurality and dissenting opinions in *Asahi* parallel the plurality and dissenting opinions in *Nicastro*.”); see also discussion *infra* Part II.B.3.g.

²⁰⁷ Compare *Asahi*, 480 U.S. at 112 (O’Connor, J., plurality) (“The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”), with *id.* at 117 (Brennan, J., concurring in part and concurring in judgment) (“The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”).

of minimum contacts test.²⁰⁸ Yes, the justices agreed upon the verbiage of the standard: “minimum contacts manifested by purposeful availment” but this agreement was illusory.²⁰⁹ O’Connor’s opinion focuses on targeting the state, and reads “purposeful availment” as manifesting the defendant’s intention to submit to a sovereign, which is quite *Pennoyer*-like.²¹⁰ Brennan’s focus on the defendant’s awareness of its product entering the state and the fact that it causes harm there, harkens back to *McGee* with assuring fairness to all concerned. His emphasis was on the fact that the product ended up in the forum and caused harm there, not with whether the defendant chose to subject itself to that state’s authority.

The 8-0 agreement on the secondary factors is also interesting, even though the Court has since generally ignored this part of the test.²¹¹ That a defendant who would not be subject to jurisdiction in a given state despite contacts because of overall fairness factors, begs the question “why not?”. If contacts are a proxy for fairness,

²⁰⁸ See Stravitz, *supra* note 104, at 793 (“The two power branch pluralities are irreconcilable.”). The failure to reach a majority is particularly unfortunate here because a central component of the Court’s enunciated doctrine is the defendant’s reasonable expectations, something that is hard to gauge when there is no consistent majority rule.

²⁰⁹ See *Asahi*, 480 U.S. at 108–09 (O’Connor, J., plurality) (“[T]he Constitutional touchstone’ of the determination whether an exercise of personal jurisdiction comports with due process ‘remains whether the defendant purposefully established minimum contacts’ in the forum state.”) (quoting *Burger King*, 471 U.S. at 474 (quoting *Int’l Shoe*, 326 U.S. at 316)); *id.* at 117–18 (Brennan, J. concurring) (although not using the words “purposeful availment,” finding that contacts were met based on criteria equivalent to that concept by noting that “[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,” while favorably citing *World-Wide*, 444 U.S. at 295, a case in which the purposeful availment standard played a central role).

²¹⁰ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 77 (“*Asahi* . . . demonstrated the incredible durability of the notion that ‘federalism’ plays a role in evaluating the constitutionality of state court assertions of jurisdiction.”). Judge McIntyre’s plurality would continue to emphasize this sovereignty theme. See discussion *infra* Part II.B.3.g.

²¹¹ Cf. Freer, *supra* note 32, at 576 (“Because of the unusual facts and international wrinkle, it is not clear that *Asahi* gives much, if any, solace to a defendant trying to defeat jurisdiction in the domestic context . . .”). Justice Sotomayor has revived this portion of personal jurisdiction doctrine in her solo concurring opinion in last term’s *Daimler AG* case. See discussion *infra* Part II.B.3.g.

then why is there a separate fairness leg? If the whole matter is an issue of state sovereignty, then how can secondary factors weaken that sovereign authority? The Court did not explain.²¹² Personal jurisdiction had become even more uncertain and confusing.²¹³

(f) *Burnham*

By 1990, personal jurisdiction law had evolved, even if that evolution was not good. Not only had the Court not reached a consensus on how to apply minimum contacts in all circumstances, it was unclear exactly what understanding the justices' had about the essence of personal jurisdiction. The Court had been very clear that due process was the only constitutional limit on personal jurisdiction.²¹⁴ It had been just as clear that state lines remained relevant, and that a lack of burden on the defendant to litigate in the forum was not alone sufficient for the exercise of jurisdiction.²¹⁵ The tension thus remained as to whether jurisdiction was proper in cases where the defendant was not found physically in the forum but easily could defend there in a regime where sovereignty-driven jurisdiction still had life.

Also left unanswered was the question of whether jurisdiction could be exercised over a defendant who might find it burdensome to litigate in the forum, but for whom the sovereignty element was met because the service was effected upon the defendant while fortuitously within the state. *Pennoyer* itself said that jurisdiction under these circumstances was fine. In fact, this was pretty much the only basis for jurisdiction in *Pennoyer's* view.²¹⁶ But after *International Shoe*, with its homage to fair play, one might question whether the defendant's presence in the forum at the time of service alone would be sufficient for the exercise of jurisdiction.

²¹² See Stravitz, *supra* note 104, at 794 (“Part II-B of [Justice O’Connor’s majority] opinion, containing [her] fairness analysis, is wooden and overly conclusory.”).

²¹³ *Id.* at 803 (lamenting that “[t]he confusion emanating from the splintering of the Court in *Asahi* leaves the state of personal jurisdiction seriously unsettled.”).

²¹⁴ See *Ins. Corp.*, 456 U.S. 694.

²¹⁵ See *World-Wide*, 444 U.S. 286.

²¹⁶ See discussion *supra* Part I.

Famously, at least for law school hypotheticals, after *International Shoe* had been decided, a federal district court held in *Grace v. McArthur* that jurisdiction could still be exercised in this *Pennoyer*-like way, so-called “tag service,” even if the defendant’s only connection with the state was service upon him during a short time when he was in the state’s airspace.²¹⁷ In 1990 in *Burnham v. Superior Ct.*,²¹⁸ the Supreme Court would be forced to address the question of whether *International Shoe*’s holding that in-state service was not *necessary* for the exercise of jurisdiction so long as other contacts and fairness factors were present, meant that in-state service was no longer alone *sufficient* for finding the existence of personal jurisdiction.

Burnham represents a baffling case that so divided the Court that no majority opinion was reached, even though all the justices agreed upon the conclusion that jurisdiction existed.²¹⁹ The case involved in-state service of process, and in that regard fell squarely within the rule of *Pennoyer*. Beyond that, the facts were almost identical to *Kulko*, a California wife suing her husband, who lived in New Jersey for divorce (in *Kulko* the husband lived in New York, and the suit was solely over child support, the parties already being divorced).²²⁰ One would think that with these straightforward facts, the Supreme Court, which had decided over a dozen cases under the *International Shoe* framework, would at least be able to garner a majority on the basic analytical approach to the case, especially where there was unanimous agreement on the outcome.

Burnham, a New Jersey resident, was served process during a three-day visit to California.²²¹ The suit was brought by his wife who was living in California after the couple had separated and sought a divorce.²²² All the justices agreed that if Burnham had not

²¹⁷ 170 F. Supp. 442 (E.D. Ark. 1959).

²¹⁸ 495 U.S. 604 (1990).

²¹⁹ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 79 (“Like *Asahi*, *Burnham* produced a unanimous result with splintered reasoning.”).

²²⁰ See Condlin, *supra* note 115, at 116 (“It is . . . 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.”).

²²¹ See *Burnham*, 495 U.S. at 608 (Scalia, J.) (plurality opinion).

²²² *Id.*

been served while he was visiting the state, he lacked the requisite contacts with California to be forced to defend there.²²³ This tag service,²²⁴ however, would be clearly sufficient to subject Burnham to jurisdiction in California under *Pennoyer*.

The issue thus became whether *Pennoyer* survived *International Shoe*. This was not important so much for deciding cases where tag service was involved, although folks like Burnham would disagree. Rather, the decision would say much about what the minimum contacts test represented in terms of personal jurisdiction; as an expansion of the range of state court jurisdictional reach yet still effecting sovereignty principles, or rather an entirely new look at jurisdiction, with sovereignty having been scrapped.²²⁵

The way that *Burnham* divided the Court underscored the dysfunctional nature of the Court's personal jurisdiction jurisprudence. The attempts of the primary *Burnham* opinions—Scalia's plurality and Brennan's concurrence in judgment—to situate the facts of that case within *International Shoe's* personal jurisdiction paradigm demonstrated the fallacy and uncertainty of the minimum contacts test. Specifically, the Justices attempt to explain

²²³ *See id.* The case generated four opinions. Justice Scalia wrote the plurality, which was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice White in part; Justice White wrote his own opinion, concurring in part and concurring in the judgment; Justice Brennan wrote an opinion concurring in the judgment, which Justices Marshall, Blackmun, and O'Connor joined. Justice Stevens wrote his own opinion, concurring in the judgment. This opinion was two sentences long, saying that he concurred because the defendant was served while in California. Therefore, one cannot know what his reasoning was, but presumably it did not agree with any of the other opinions, none of which he joined.

²²⁴ Tag service involves serving (or tagging) an out-of-state defendant while he or she is in the forum state and basing jurisdiction purely on the fact that service was obtained while the defendant was within the state. This practice was seemingly approved by *Pennoyer* in discussing why service outside the forum state would not confer jurisdiction and had a long pedigree.

²²⁵ In *Shaffer*, 433 U.S. 186, the Court had indicated that *International Shoe's* minimum contacts did not just add an alternate way to find jurisdiction, but rather replaced the test regarding in-state attachment of property when it came to *quasi-in-rem* jurisdiction. That exercise of adjudicatory power affected a person's property rights, and therefore required a due process (i.e. minimum contacts) analysis. Now the question was whether a defendant who was served in the state too could argue that jurisdiction was improper because he or she lacked minimum contacts therewith and/or whether or not the in-state service alone constituted sufficient contacts.

how the test would apply to a defendant who was served within a state, but had very little contact, and therefore lacked minimum contacts. These attempts actually demonstrated that the Court's personal jurisdiction jurisprudence neither effected the goals of fairness reflected in due process nor supported a jurisdictional standard rooted in notions of state sovereignty and federalism.

Writing for a plurality consisting of four justices—although one of these, Justice White, only joined part of his opinion—Justice Scalia concluded that tag service requires no minimum contacts analysis.²²⁶ Instead, he concluded that because this form of obtaining jurisdiction was both of ancient origin and remained widely practiced in the decades after *International Shoe*, those facts alone satisfied the Due Process Clause.²²⁷ There was no additional inquiry into the logic or effect of forcing a defendant to litigate in the state's courts that he was passing through when served with process.²²⁸

Justice Scalia's opinion most clearly demonstrates that the problem with the approach in *International Shoe* is that personal jurisdiction really does not concern due process. He specifically criticized Justice Brennan's concurrence for concluding the long-standing practice made tag jurisdiction fair. Scalia stated that what

²²⁶ *Burnham*, 495 U.S. at 619 (Scalia, J.) (plurality opinion) (“The short of the matter 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.’”).

That is, Scalia concluded not that tagging the defendant establishes that the defendant had minimum contacts. *Id.* Instead, where a defendant is tagged within the state, minimum contacts simply have no relevance. *Id.*

²²⁷ *Id.* Scalia noted that almost all—if not all—states did, and continued to allow tag jurisdiction at the time *Burnham* was decided. *Id.* at 613–15.

²²⁸ *Id.* Justice Scalia's opinion tacitly admits that the answer to this question would be that it was not fair using the *International Shoe* criteria. *See id.* at 623 (stating that, regarding Justice Brennan's argument that the defendant benefitted by being in California for three days, “[t]hree days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is ‘fair’ for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of marriage, and the custody over his children. We daresay a contractual exchange swapping those benefits for that power would not survive the ‘unconscionability’ provision of the Uniform Commercial Code.”).

Brennan called fairness, was really just tradition.²²⁹ But, that something is long-standing and commonly practiced does not necessarily make it fair.²³⁰ Due process implies the process that one *ought* to get, not merely what one has traditionally been afforded. Thus, Scalia, while not explicitly saying so, was implicitly endorsing the view of *Hanson*, that personal jurisdiction primarily concerns notions of federalism, territoriality, and power, not due process or fairness.

Moreover, Justice Scalia's opinion not only shows that personal jurisdiction and due process are an uneasy fit, it elucidates—albeit unintentionally—a fundamental flaw in the minimum contacts standard. If the bounds of a court's geographic reach are to be determined based on rigid conceptions rooted in long-standing practice divorced from fairness, then how could the Court in *International Shoe* authorize expanding jurisdiction merely because it comports with fair play. Combining the *Burnham* plurality with *International Shoe* yields the following unwieldy doctrine: due process requires that personal jurisdiction be exercised only when the defendant has minimum contacts with the forum state sufficient to make the exercise of jurisdiction comport with fair play and substantial justice, or if the defendant happens to be served within the state, irrespective of how burdensome or fair it is to require the defendant to litigate there.

The problem is that Scalia does not go far enough. What he says about tag service not ensuring fairness is true about minimum contacts generally. His critique should not be limited to criticizing Justice Brennan for finding jurisdiction fair through the act of tagging the defendant in the forum. Minimum contacts *might* in some cases indicate that it is fair to require the defendant to litigate in the forum, just as tag jurisdiction *might*, but neither tag jurisdiction nor contacts alone *ensures* fairness to the defendant. And, as has been demonstrated from almost seventy years of

²²⁹ See *Burnham*, 495 U.S. at 624 (“By formulating it as a ‘reasonable expectation’ Justice Brennan makes that seem like a ‘fairness’ factor; but in reality, of course, it is just tradition masquerading as ‘fairness.’”).

²³⁰ The practice in *Shaffer* allowing jurisdiction solely on the presence of property in the forum state, which the plurality opinion unsuccessfully tried to distinguish, also had a long-standing history and was still used in several states when *Shaffer* pruned that form of jurisdiction.

personal jurisdiction cases under the *International Shoe* regime, determinations as to whether minimum contacts have been satisfied to an extent that the exercise of jurisdiction is fair in a given case is tricky. Neither tagging nor contacts has a meaningful connection to what is typically thought of as due process.

Justice Brennan, whose approach to personal jurisdiction in most cases represents the most logically sound application of the minimum contacts test in the *International Shoe* era, actually took a more illogical approach than Scalia.²³¹ Brennan concluded that *International Shoe's* minimum contacts test did apply to tag service the same as it would to out-of-state service, but the fact that the defendant was tagged within the state would alone almost always satisfy the minimum contacts requirements.²³² That Brennan and Scalia so strenuously disagreed on this theory while agreeing on the outcome is notable. In a sense, it is not entirely clear whether they actually disagree about anything, or whether the minimum contacts test is so difficult to understand that they are simply arguing over language that lacks inherent meaning.²³³

Justice Scalia believed that in-state service meant that no-minimum contacts analysis was required, thereby maintaining a central portion of *Pennoyer*.²³⁴ Justice Brennan believed that a tagged defendant still had to be shown to have minimum contacts, but that the tagging itself would almost always satisfy the contacts. What are the differences between Scalia and Brennan's *Burnham* opinions? How is finding that in-state service requires the dispensing of any analysis of contacts (Scalia) different from concluding that the in-state service requires and satisfies the contacts (Brennan)? In reality, this spat demonstrates that the Court does not really know what purpose the minimum contacts test serves. Scalia thinks that it serves as a *de facto* expansion of the state's territory, so

²³¹ See Condlin, *supra* note 115, at 117 ("In many ways, Justice Brennan's opinion consisted of adding up zeroes to get one.").

²³² *Burnham*, 495 U.S. at 629, 637–38 (Brennan, J., concurring in judgment).

²³³ Cf. E.B. WHITE, MY DAY, ONE MAN'S MEAT (1944) ("There is nothing more likely to start disagreement among people or countries than an agreement."); GEORGE R.R. MARTIN, A GAME OF THRONES 98 (1996) ("Different roads sometimes lead to the same castle.").

²³⁴ See Koppel, *supra* note 17, at 958 ("Justice Scalia's plurality opinion . . . breathed life into *Pennoyer* by affirming the continued viability of *Pennoyer's* 'presence' principle.").

that someone served outside the state may, with sufficient contacts, be treated as being served within the state. Brennan sees contacts as ensuring that the defendant's rights be protected, although strangely he thinks that the sole contact of being handed papers within the state, instead of without, meaningfully protects the defendant.

Looking more closely at Brennan's *Burnham* opinion further underscores the weakness of the minimum contacts approach, at least as understood by Justice Brennan. In arguing that that tag service generally satisfies minimum contacts, Brennan stresses three points. First, because tag service is so widely used, potential parties have notice that they will be subject to suit if they are served within a state.²³⁵ Second, by being in the state in which they are tagged, defendants are necessarily enjoying some benefits of the state, however briefly they are there, like police protection, use of roads etc.²³⁶ Third, the burden on *Burnham* to defend in California was slight due to modern transportation and as evidenced as the fact that he had traveled there before.²³⁷

The first and third points prove too much. So long as a state clearly announced that it had a given long-arm statute, then that would give a potential parties notice of the types of activities that might subject it to suit in that state.²³⁸ This argument does not

²³⁵ *Burnham*, 495 U.S. at 635–37 (“I find the historical background relevant because . . . the fact that American courts have announced the rule for perhaps a century . . . provides a defendant voluntarily present in a particular State today ‘clear notice that [he] is subject to suit’ in the forum.” (quoting *World-Wide*, 444 U.S. at 297) (alteration in original)).

²³⁶ *Burnham*, 495 U.S. at 637–38 (“By visiting the forum State, a transient defendant actually ‘avail[s]’ himself of significant benefits provided by the State. His health and safety are guaranteed by the State’s police, fire, and emergency medical services; he is free to travel on the State’s roads and waterways; he likely enjoys the fruits of the State’s economy as well.” (citing *Burger King*, 471 U.S. at 476) (alteration in original)).

²³⁷ *Burnham*, 495 U.S. at 638.

²³⁸ See *Burnham*, 495 U.S. at 624–25 (Scalia, J.) (plurality opinion) (“The only reason for charging Mr. *Burnham* with the reasonable expectation of being subject to suit is that the States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory.”); see also Borchers, *Death of the Constitutional Law*, *supra* note 71, at 91 (“If a defendant can be charged with knowing the history of jurisdictional

specifically support tag jurisdiction so much as almost any exercise of jurisdiction that is widely known. As far as the ease of travel and lack of burden, that would be true of many, if not most, defendants in the twentieth (now twenty-first) century. If one were to take Justice Brennan at his word, it would “justify the exercise of jurisdiction over *everyone, whether or not he ever comes to California.*”²³⁹

The second point depends only upon the defendant’s having been within the state at some point, not on his having been served process there. A defendant who is served one minute or six months after leaving the state has enjoyed the benefits of the state as surely as one who was tagged while present therein.²⁴⁰ Almost all the personal jurisdiction cases in the Supreme Court and elsewhere involve defendants who derived *some* benefit from a state, whether from being there at some point, or having sold a product to, or contracted with, a party within that state. Also, Justice Brennan does not seem to root his opinion in the fact that Burnham had been in California for three days when he was served as opposed to three minutes – the latter would also seem to suffice for Justice Brennan, even though Mr. Burnham would likely have incurred no benefit in that situation.²⁴¹

Burnham had upheld the type of service allowed in *Pennoyer*. But the Justices could not agree why. Personal jurisdiction was in a sorry state, with a confusing doctrine and a badly divided court

practice in the United States for the last century or so, however, he can be charged with knowledge of a state’s long-arm statute.”).

²³⁹ *Burnham*, 495 U.S. at 624 (Scalia, J.) (plurality opinion) (emphasis added); see also Condlin, *supra* note 115, at 118–19 (“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.”).

²⁴⁰ See *Burnham*, 495 U.S. at 624 (Scalia, J.) (plurality opinion) (“[E]ven if one agreed with Justice Brennan’s conception of an equitable bargain, the ‘benefits’ we have been discussing would explain why it is ‘fair’ to assert general jurisdiction over Burnham-returned-to-New-Jersey-after-service only at the expense of proving that it is also ‘fair’ to assert general jurisdiction over Burnham-returned-to-New-Jersey-without-service—which we know does not conform with ‘contemporary notions of due process.’” (emphasis in original)).

²⁴¹ See *id.* at 625 (“Suppose, for example, that a defendant in Mr. Burnham’s situation enjoys not three days’ worth of California ‘benefits,’ but 15 minutes’ worth.”); see also Condlin, *supra* note 115, at 117 (“The argument based on the benefits and protections of California law are equally unavailing.”).

leaving lower courts, litigants, and anyone planning personal or business affairs in the dark.²⁴² The Court would allow things to worsen by not addressing and cleaning up this mess for the next two decades. Then the Court would make things even worse by trying to clean up their mess.

(g) *J. McIntyre*

In 2010, the Court granted certiorari in *J. McIntyre Machinery, Ltd. v. Nicaastro*,²⁴³ and *Goodyear Dunlop Tires Operations, S. A. v. Brown*.²⁴⁴ Despite the fact that at this time the Court still examined the defendant's contacts as ends in themselves, the Court's decisions in the mid to late 1980s had seemingly tempered the most rigid aspects of the sovereignty-based approach apparent in *Hanson* and *World-Wide*.²⁴⁵ These grants of certiorari therefore raised expectations that the Court would revisit and simplify the most problematic aspects of the minimum contacts doctrine.²⁴⁶ These hopes were dashed.²⁴⁷

²⁴² See Condlin, *supra* note 115, at 119 (“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.”).

²⁴³ 131 S.Ct. 2780 (2011).

²⁴⁴ 131 S.Ct. 2846 (2011).

²⁴⁵ See Parry, *supra* note 82, at 840 (“[B]efore [J. McIntyre], and with the exception of Justice Scalia’s plurality opinion in *Burnham*, which dealt with presence in the forum, it seemed settled that personal jurisdiction questions turned on the two-part analysis derived from *International Shoe*. [*World-Wide*’s] endorsement of purposeful availment was the closest thing the Court had to a controlling precedent on the question of how to apply the *International Shoe* test, but *Burger King* and *Asahi* had thrown the precise definition of that term into doubt. The Court had also rejected the federalism/state sovereignty rationale advanced by [*World-Wide*] as justification for the minimum contacts test, in favor of the claim that the focus of the personal jurisdiction inquiry is on the due process liberty interests of the defendant who contests personal jurisdiction.”); Freer, *supra* note 32, at 579 (“At the end of the century, then, the two-step approach from [*World-Wide*] seemed to be in place.”).

²⁴⁶ See Patrick J. Borchers, Symposium, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245

J. McIntyre, the more important of the two cases to jurisdictional jurisprudence, involved a suit against the U.K. manufacturer, McIntyre (UK), of a scrap metal machine that injured Nicastro, the employee of a New Jersey company (Curcio), which bought the device.²⁴⁸ McIntyre (UK) sold the machine to its exclusive American distributor, McIntyre (US), which was based in Ohio.²⁴⁹ Nicastro's employer bought the machine from McIntyre (US) at a Las Vegas trade show, and it was shipped from Ohio to Curcio's New Jersey location.²⁵⁰ McIntyre (UK) and McIntyre (US) were entirely separate companies.²⁵¹ Moreover, McIntyre (UK) had no offices or employees in New Jersey, did not directly sell into or

(2011) [hereinafter "Borchers, *Incoherence of the Minimum Contacts Test*"] ("[*J. McIntyre* and *Goodyear*] marked for the first time in almost a quarter of a century that the United States Supreme Court engaged in an extended discussion of the minimum contacts test. . . . Law professors who teach Civil Procedure and related subjects waited eagerly for the new cases. . . . Of more practical significance, the bench and bar were hoping for guidance on . . . difficult issues that have bedeviled the subject.").

²⁴⁷ Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 868 (2012) ("The Supreme Court's recent decision in [*J. McIntyre*] had the potential to resolve nearly two decades of confusion in personal jurisdiction doctrine. . . . [But] the Court produced a fractured 4-2-3 opinion that resolved little The academic community met the [*J. McIntyre*] decision with almost unanimous disapproval, decrying the Court's inability to resolve the stream of commerce theory in particular and to articulate a coherent theory of personal jurisdiction in general."); Koppel, *supra* note 17, at 916 ("The Supreme Court's grant of certiorari in [*J. McIntyre*] gave it the opportunity to finally resolve the confusion over the *Asahi* Court's 'four to four division on the proper scope of the stream of commerce principle [that] has left matters somewhat of a muddle.' Missing this opportunity, the Court splintered along formalist-functionalist lines, as it did in *Asahi*." (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.4, at 497 (3d ed. 2002))); *id.* at 958 ("[The] doctrinal split [which has existed since *Hanson*] would appear once again in [*J. McIntyre*], which would fail to resolve the question whether the minimum contacts principle is primarily a sovereign limitation of the power of States or a standard of reason and fairness." (quotation omitted)); Parry, *supra* note 82, at 841 ("[*J. McIntyre*] compounds the uncertainty that *Asahi* and *Burnham* fostered.").

²⁴⁸ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010).

²⁴⁹ *Id.* at 578. McIntyre Machinery of America, Inc. was not part of the case as it was insolvent.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 579.

solicit business in that state, and had no physical presence there.²⁵² The record indicates that this was the only product of McIntyre (UK) that was sold to a resident of, or made its way into, New Jersey.²⁵³

In October 2001, the machine severed several of Nicaastro's fingers.²⁵⁴ In 2003, he sued in New Jersey state court.²⁵⁵ The case then made its way through the courts for years on the personal jurisdiction issue. The trial court granted McIntyre (UK)'s motion to dismiss for a lack of personal jurisdiction.²⁵⁶ Then New Jersey's appellate court reversed and remanded for jurisdictional discovery.²⁵⁷ Following discovery, the trial court again granted McIntyre (UK)'s motion to dismiss for a lack of jurisdiction, which the intermediate appellate court again reversed.²⁵⁸ The matter was then appealed to the New Jersey Supreme Court, which, in a divided opinion affirmed the lower appellate Court's ruling that New Jersey had jurisdiction over McIntyre (UK).²⁵⁹

The New Jersey Supreme Court concluded that by selling its machine to an exclusive distributor who was given the mission of selling throughout the United States, McIntyre (UK) could reasonably anticipate that this product might end up in New Jersey, and cause injury there if defective.²⁶⁰ Under those circumstances, jurisdiction would be exercised absent the defendant's showing an undue burden,²⁶¹ thereby invoking the second-branch fairness considerations that the Court had implemented in *Burger King*.²⁶²

²⁵² *Id.*

²⁵³ *See J. McIntyre*, 131 S. Ct at 2786. The record indicates the possibility, but not the certainty, that three additional machines made their way into New Jersey. This discrepancy had no effect on any of the various opinions issued in this case, and it is of no significance.

²⁵⁴ *Nicaastro*, 987 A.2d at 577.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 578.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 579–80.

²⁵⁹ *Id.* at 577.

²⁶⁰ *Nicaastro*, 987 A.2d at 593.

²⁶¹ *Id.*

²⁶² *Id.*; *see also* Koppel, *supra* note 17, at 915 (“The New Jersey Supreme Court’s opinion also reflects Justice Brennan’s shift of emphasis, expressed in his [*World-Wide*] dissent, from the majority’s threshold purposeful availment requirement, which, in Brennan’s view, ‘focuses tightly on the existence of contacts between the forum and the defendant,’ to the fairness prong of the minimum contacts

Given that various high-level employees of McIntyre (UK) had traveled to the United States for various reasons, the company could not make that showing.²⁶³

Notably, the New Jersey Supreme Court misunderstood the stream-of-commerce test as a substitute for minimum contacts, rather than a means of establishing them.²⁶⁴ This observation is not a swipe at this highly respected State high court.²⁶⁵ Instead, it is evidence of how abstruse personal jurisdiction doctrine has become.²⁶⁶

The Supreme Court granted certiorari, and on the last day of the 2010-2011 term, ten years after the accident and eight years after the initial suit, reversed and held that McIntyre (UK) was not subject to jurisdiction in New Jersey.²⁶⁷ This decision was a major disappointment. The outcome was as illogical and unfair as any previous Supreme Court personal jurisdiction decision. Despite a

doctrine, which focuses on the forum state's interest in providing a convenient forum for local residents." (quoting *World-Wide*, 444 U.S. at 299)).

²⁶³ *Nicastro*, 987 A.2d at 593.

²⁶⁴ *See id.* at 582 ("We do not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction."); *see also J. McIntyre*, 131 S.Ct. at 2790–91 ("It is notable that the New Jersey Supreme Court appear[ed] to agree, for it could not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case. The court nonetheless held that petitioner could be sued in New Jersey based on a stream-of-commerce theory of jurisdiction. As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures." (quotations omitted)). Of course, minimum contacts itself is a metaphor, so it is piling metaphor upon metaphor to insist that stream-of-commerce is a form of minimum contacts as opposed to an independent way for establishing personal jurisdiction.

²⁶⁵ *See* Colleen O'Dea, *Have Politics, Power Struggles Tarnished the Reputation of NJ's Judiciary*, NJ SPOTLIGHT (Apr. 4, 2014), <http://www.njspotlight.com/stories/14/04/04/have-politics-power-struggles-tarnished-reputation-of-nj-s-judiciary/> ("New Jersey's judiciary [is] nationally recognized for its independence and important legal precedents.").

²⁶⁶ *See* Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 246, at 1247 ("The fundamental doctrinal confusion is evident in the Supreme Court's most recent efforts, particularly *J. McIntyre*[']s . . . splintered and muddled opinion.").

²⁶⁷ *J. McIntyre*, 131 S. Ct. at 2791 (plurality opinion).

major change in personnel from the *Asahi* and *Burnham* decisions,²⁶⁸ the Court remained as fractured as in those cases, with no majority. And the opinions that were issued continued to strain logic, with the plurality's analysis and reasoning being particularly frustrating.²⁶⁹

J. McIntyre suffered from the process and inefficiency infirmities that characterize so much of personal jurisdiction disputes. The suit wound through four courts—two of them twice—over eight years, just to decide that jurisdiction did not exist, thereby draining time and resources in this procedural dispute. Not only did this leave the parties to restart the litigation elsewhere, but the defendant who claimed to be immune from suit in New Jersey, paradoxically spent years in New Jersey—and in Washington D.C.—arguing that it should not have to litigate in that State.²⁷⁰

Justice Kennedy's plurality decision, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, was the worst of the three opinions issued by the justices in this case. Kennedy emphasized that jurisdiction depended upon whether a defendant had freely chosen to submit to a sovereign. He used the term "sovereignty," or a variation of the word, seventeen times²⁷¹ and gave state lines a level of importance that had not been enjoyed since at least *Hanson*, and perhaps *Pennoyer*.²⁷² Yet, relying on *Insurance*

²⁶⁸ Only two justices, Scalia and Kennedy, remained from *Burnham*, with only Scalia remaining from the *Asahi* case.

²⁶⁹ See Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 246, at 1245–46 ("The Supreme Court performed miserably. Its opinion in *J. McIntyre* . . . is a disaster. As in its 1987 *Asahi* decision, the Court produced no majority opinion, but the plurality opinion attempted to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before.").

²⁷⁰ *But see* Parry, *supra* note 82, at 844 ("The new approach [in *J. McIntyre*] would lower the cost of litigation, apparently because it would allow a low-cost dismissal of suits against defendants of this kind in other states, or deter the filing of such suits altogether.").

²⁷¹ See Koppel, *supra* note 17, at 917 ("To make the primary role of sovereignty in limiting state-court jurisdiction unmistakably clear, the plurality opinion mentioned the word 'sovereign' or 'sovereignty' seventeen times, and referred eight times to the requirement that the defendant submit to the power of a sovereign.").

²⁷² See, e.g., *J. McIntyre*, 131 S.Ct. at 2787 (plurality opinion) ("A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign."); *id.* at 2788 ("The principal inquiry in cases of this sort is

Corp., Justice Kennedy maintained that the Due Process Clause remained the sole limitation on the exercise of jurisdiction.²⁷³ This illogic persisted through much of personal jurisdiction jurisprudence, as far back as *Hanson*, and certainly since *Insurance Corp.* However, following that case, the Court had finessed the issue. Never had an opinion served as such a paean to sovereignty, while simultaneously insisting that in so doing it was fulfilling the demands of due process as did Kennedy's *McIntyre* plurality.²⁷⁴

whether the defendant's activities manifest an intention to submit to the power of a sovereign."); *id.* at 2789 ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."); *see also* Freer, *supra* note 32, at 581 ("Professor Rhodes points out [that] the Court had never employed the term [submission] for personal jurisdiction under *International Shoe*, and had limited it to cases of consent to jurisdiction."); Koppel, *supra* note 17, at 916 ("Two-thirds of [the] six-justice majority was comprised of a plurality opinion that is solidly grounded in the concept of state sovereignty, the formalist pedigree of which dates back to *Pennoyer* and the agrarian economy of the mid-nineteenth century."); Parry, *supra* note 82, at 860 ("By characterizing the defendant's relationship to a court as submission to a sovereign, Justice Kennedy asserts, first, the formality of judicial power as something not invoked lightly or accidentally and, second, its majesty as a manifestation of sovereignty."); *cf.* Freer, *supra* note 32, at 580 ("[Kennedy's plurality opinion] seems to signal a return to the assertion in [*World-Wide*] that personal jurisdiction operates to guard interstate federalism.").

²⁷³ *J. McIntyre*, 131 S. Ct. at 2789 ("Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power." (quoting *Insurance Corp.*, 456 U.S. at 702)).

²⁷⁴ In fact, in the sentence right after Kennedy states that personal jurisdiction depends upon whether the defendant had "followed a course of conduct" that would allow a "sovereign . . . to subject the defendant to the judgment concerning that conduct," he states: "Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power." *J. McIntyre*, 131 S. Ct. at 2789 (quoting *Insurance Corp.*, 456 U.S. at 702). Kennedy then shifts back to discussing sovereignty. *Cf.* Parry, *supra* note 82, at 848-49 ("Justice White's reliance on sovereignty [in *World-Wide*] arose from constitutional structure and the concrete facts of federalism. Justice Kennedy's use of sovereignty, by contrast, arises from traditional ideas of judicial power that may be consistent, but are not necessarily interwoven with the structure of the Constitution or the federal system more generally. . . . Justice Kennedy's approach

Kennedy's opinion laid bare the flaws of linking personal jurisdiction, due process, sovereignty, and contacts as comprising a neat package. Clearly, McIntyre (UK) did not affirmatively choose to submit itself to New Jersey's adjudicatory authority. Then again, the same could be said of pretty much all of the defendants since *International Shoe* over whom the Court found personal jurisdiction. Can one say that the magazine writer and editor located in Florida who wrote about California resident Shirley Jones in *Calder*, or the Michigan franchisee who entered into a contract with a company that happened to be located in Florida, *Burger King*, chose to submit to the jurisdiction of the states in which they were sued any more than McIntyre (UK) did with New Jersey?²⁷⁵

The problematic nature of treating personal jurisdiction as only appropriate when a defendant has freely submitted to the sovereign authority of a state is further reinforced by the fact that the defendant here was from the U.K. Sovereignty in personal jurisdiction had previously been discussed in terms of interstate federalism, not in allowing one state to impinge on another state's area of authority.²⁷⁶ To be sure, one might think in terms of New Jersey's authority not overreaching into the U.K.'s realm. But here it was conceded that McIntyre (UK) was subject to jurisdiction in the United States, including, if allowed by federal statute, a New Jersey federal court.²⁷⁷ From the standpoint of U.K. sovereignty, how could it

therefore lays itself open to the charge that it serves no particular material or constitutional interests and instead represents formalism for its own sake or, at best, for the sake of tradition.”).

²⁷⁵ See discussion *supra* Parts II.B.3.c–II.B.3.d.

²⁷⁶ See Koppel, *supra* note 17, at 959 (“The key issue confronting the Court in [*J. McIntyre*]*—*and unresolved since *Asahi**—*is whether state sovereignty within the federal system makes sense in the international context.” (footnote omitted)).

²⁷⁷ See *J. McIntyre*, 131 S. Ct. at 2789 (Kennedy, J., plurality opinion) (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular state.”). Not that Kennedy was limiting his overall analysis to international defendants. *Id.* at 2790 (“It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequence of Justice Brennan’s approach in *World-Wide* are no less significant for domestic producers.”); see *id.* at 2798 (Ginsburg, J., dissenting) (“New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among the States of the United States, the State in which the

make any difference if it was a New Jersey state court, an Ohio state court, or a New Jersey federal court that sought to adjudicate the rights of a corporation located in the UK? They would either all violate or all not violate UK sovereignty. As the latter two courts concededly could constitutionally exercise jurisdiction, it is hard to understand how sovereignty concerns would come into play only with the New Jersey state court. This posture demonstrates that Kennedy was not merely incorrect on how things played out in *J. McIntyre*. Rather, it shows the problem of thinking of personal jurisdiction in terms of sovereignty at all, because even the most extensive jurisdictional reach would implicate only the rights of the defendant, and not the sovereign concerns of another state or country.

Justice Kennedy also proffered hypothetical cases in which allowing jurisdiction over McIntyre (UK) might allow jurisdiction to be extended to distant defendants in cases where doing so would result in unfair burden. The examples he gave were situations where one might validly argue that due process would compel finding jurisdiction lacking like “a small Florida farm [that] sell[s] crops to a large nearby distributor . . . [the farmer could then] be sued in Alaska or any number of other States’ courts without ever leaving town.”²⁷⁸ But the standard for deciding jurisdictional issues that Kennedy indorsed does not provide a meaningful device for distinguishing fair from unfair exercises of jurisdiction. A small business owner or farmer might sell one or a handful of items directly to someone located in a distant state, through mail order or, more likely in the 21st century, a website. That would establish jurisdiction under the contacts/sovereignty approach that Kennedy approved. In fact, an overall fairness/burden approach is more likely to protect the small farmer or business person from distant litigation than Kennedy’s sovereignty approach, while allowing it go forward in an appropriate case, like one against a major international corporation like McIntyre (UK).

All of the problems with Kennedy’s opinions can be said to be by-products of his—and the Court’s—longstanding attempt to link

injury occurred would seem most suitable for litigation of a products liability tort claim.”).

²⁷⁸ *Id.* at 2790.

personal jurisdiction with both sovereignty and due process. As Kennedy's opinion notes, McIntyre (UK) did not choose to submit or did not even implicitly submit to New Jersey's sovereignty.²⁷⁹ Yet, in what sense would its due process rights be violated by allowing the case to proceed there? If one accepts the conclusion that a lack of submission to a sovereign means that the exercise of personal jurisdiction violates the defendant's due process rights, then by means of circular reasoning, that assertion appears to stand up because the conclusion is assumed to be correct. But this case demonstrates in spades the flaw of that assumption. There would be nothing unfair or particularly burdensome about requiring McIntyre (UK) to adjudicate in New Jersey, wherein the plaintiff and much of the evidence was located.²⁸⁰ It was essentially conceded that McIntyre (UK) could be required to litigate in Ohio, although that would presumably be harder. Ohio is further away, though only slightly. But because little or no evidence or witnesses were there, adjudication there would make it harder for McIntyre (UK) to mount a meritorious defense.²⁸¹ Yet for Kennedy, sovereignty trumps all, even while he claimed that his approach furthers due process concerns.²⁸²

²⁷⁹ See *id.* ("Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.").

²⁸⁰ Justice Kennedy's opinion said that fairness was beside the point and that it was incorrect to look at that factor, even though he also urged that the Due Process Clause was the sole criteria on which personal jurisdiction was to be judged. Compare *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) ("The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains [cases like] *Burnham*."), with *id.* ("Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty'") (quoting *Insurance Corp.*, 456 U.S. at 702). How can personal jurisdiction both be a matter of authority and not fairness, while also being a matter of due process and not sovereignty?

²⁸¹ Of course, if the evidence did not help J. McIntyre, then it might have a better chance of winning in Ohio, but surely that is not an interest that due process law should protect.

²⁸² Parry, *supra* note 82, at 844–45 ("Justice Kennedy . . . suggested scenarios that confirm his intention to create a relatively restrictive rule for personal jurisdiction. . . . [U]nder Justice Kennedy's approach, there is no fairness inquiry at all. . . . [H]e relied heavily on Justice Scalia's opinion in *Burnham* and never suggested that ideas of fair play and substantial justice have any meaningful and separate role in personal jurisdiction." (footnote omitted)).

In particular, the attempt to meld due process and sovereignty shows that the approach in Kennedy's opinion and much of personal jurisdiction law since the mid-20th century misapprehends the nature of what is at stake in civil litigation: an allocation of property between two private parties, not state action vis-à-vis the defendant. Nicastro claimed he was hurt, that it was McIntyre (UK)'s fault, and that therefore the company should pay him money. McIntyre (UK) disagreed. Some adjudicatory body must decide. Requiring that decision to be undertaken by a New Jersey court, where McIntyre's machine found its way, however indirectly, no more violates its due process rights or undermines sovereignty concerns, than to require plaintiff Nicastro to have to travel to Ohio, Nevada or the UK for adjudication.²⁸³

In short, it makes no sense to say that personal jurisdiction is limited only by the strictures of the Due Process Clause while simultaneously maintaining that jurisdiction also requires a finding that the defendant freely submitted itself to the sovereignty of the forum state, and should not turn upon fairness considerations. The problem of course is not of Kennedy's making, but a result of his attempt to hold onto the myriad fragments of three-quarters of a century of strained personal jurisdiction jurisprudence. The most generous thing that one might say about Kennedy's opinion was offered by Justice Ginsburg's dissent: "I take heart that the plurality opinion does not speak for the Court, for that opinion would take a

²⁸³ See Koppel, *supra* note 17, at 962–63 ("As a result of the majority's ruling that due process requires an alien manufacturer's contacts to target specifically the forum state's market to justify subjecting the manufacturer to the jurisdiction of the state's courts, Nicastro, injured in his home state of New Jersey by a machine targeted by the British manufacturer at the U.S. market, may have to seek redress in Ohio, where the McIntyre UK's American distributor did business, or in Nevada, the site of the trade convention attended by the manufacturer. . . . [A]s noted by the New Jersey Supreme Court, 'defending the product-liability action in Ohio . . . or in Nevada . . . would be no more convenient, [to McIntyre (UK)] than in New Jersey' which, of course, is closer to Britain." (quoting *Nicastro*, 987 A.2d at 593)); Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 246, at 1247 ("[Kennedy's opinion] overlooked the obvious point that fairness to the plaintiff in providing a realistic forum is at least as important as protecting a foreign defendant.").

giant step away from the ‘notions of fair play and substantial justice’ underlying *International Shoe*.²⁸⁴

Justice Breyer, writing for himself and Justice Alito, concurred in the judgment that jurisdiction should not be found, but believed that this case could easily be decided under existing precedent, because in his view on the facts of this case jurisdiction could not be found under either of the two plurality opinions in *Asahi*.²⁸⁵ In Breyer’s view, the fact that this involved a single, isolated sale compelled the result under existing case law that jurisdiction did not exist over McIntyre (UK).²⁸⁶ He felt that the plurality went too far in reaching a result that might apply to a different set of facts. By citing the fact that a single sale was insufficient, Breyer implied that a larger volume of similar type sales might merit the extension of jurisdiction.²⁸⁷ Moreover, the plurality’s requirement that the defendant “target” the forum state before being required to submit to its jurisdiction presents an analytically suspect approach when applied to modern forms of marketing and sales, such as web-based sales and consignments to online intermediaries like Amazon.com.²⁸⁸

While Breyer identifies a problem with the plurality’s approach, his argument misunderstands Kennedy’s opinion as being primarily

²⁸⁴ *J. McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting); see also Parry, *supra* note 82, at 830 (“[The] failure [to achieve a majority] may turn out to be the best thing about [*J. McIntyre*]. . . . [B]ecause the [*J. McIntyre*] opinions collectively undermine more personal jurisdiction doctrine than they create, the door is open for rethinking the scope of and reasons for constitutional limitations on personal jurisdiction.”).

²⁸⁵ *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) (citing both Justice O’Connor’s *Asahi* opinion and Justice Brennan’s *Asahi* concurrence).

²⁸⁶ *Id.* at 2792. In making this argument, “Breyer overlooked *McGee* [which upheld jurisdiction based upon one contact by the defendant].” Freer, *supra* note 32, at 582. “Moreover, the Court has upheld jurisdiction in tort cases based on a single contact at least three times: in *Hess v. Palowski*, *Calder*, and *Keeton*.” See *id.*

²⁸⁷ See *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring) (noting that basing jurisdiction on a stream of commerce required a finding of a “regular flow or regular course of sales” in the forum state) (quotation omitted).

²⁸⁸ See *id.* at 2793 (“But what do [the plurality’s] standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders?”).

incoherent only because it is overly broad in possible application. Breyer aptly recognizes that targeting, or submission to, a sovereign as the touchstone of jurisdiction makes little sense when applied to modern marketing arrangement, or when involving a single sale. But he fails to recognize that the plurality's approach, much like the jurisprudence it is based on, is problematic, period.²⁸⁹

Like Kennedy, Breyer presents hypotheticals involving defendants who might be burdened if summoned to a distant state. He cites an "Appalachian potter"; "a small Egyptian shirt maker"; and a "Kenyan coffee farmer, selling [their] products through international distributors."²⁹⁰ Like Kennedy, Breyer misapprehends the problems presented as rooted in the plurality's narrow approach. He overlooks that personal jurisdictional law itself has so lost sight of its basic purpose of determining an appropriate location for resolution of a dispute between two private parties, that it cannot appropriately distinguish between allowing suit over a major international corporation, with frequent and strong connections to the United States—even if lacking formal presence—and a distant bit player, whose product finds its way here through intermediate channels, and who could not properly defend in a particular forum.²⁹¹

Justice Ginsburg, with Justices Sotomayor and Kagan on board, dissented. She believed that the overriding concern of due process

²⁸⁹ See Parry, *supra* note 82, at 851 ("[A]lthough Justice Breyer's approach to the case may be defensible on pragmatic grounds, as a kind of muddling through within the existing doctrinal structure, it does nothing to solve the problems of personal jurisdiction doctrine that were created by the very cases that he embraces. Although he reached a result and made assertions about fairness and connections with the forum, those claims were not grounded in any specific theory of the interests that personal jurisdiction serves.").

²⁹⁰ *J. McIntyre*, 131 S. Ct. at 2793–94 (Breyer, J., concurring).

²⁹¹ See Freer, *supra* note 32, at 583–84 ("The most remarkable thing about the opinion by Kennedy and Breyer is the lengths to which each justice goes to conclude that there was no relevant contact. Each supports his conclusions with hypotheticals worthy of a classroom. . . . The answer to these hypotheticals is not to strain to find that there is no contact. By finding no contact, the Justices rule out jurisdiction even in convenient venues. When Kennedy concludes that the Florida farmer selling through a distributor has no contact with Alaska, he must also conclude that the farmer has no contact with Alabama. And Breyer's Appalachian potter who has no contact with Hawaii also must have no contact with the state next door to his Appalachian home." (footnote omitted)).

was fairness, and that it was clearly fair to require McIntyre (UK) to litigate in New Jersey, since it targeted the entire United States and caused injury in New Jersey.²⁹² Moreover, she concluded, in contrast to Justice Breyer, that jurisdiction *was proper* under existing precedent, whether either Justice Brennan's or Justice O'Connor's views of stream-of-commerce, as expressed in their competing *Asahi* pluralities, controlled.²⁹³ In sharp contrast to Kennedy's plurality, Ginsburg said that personal jurisdiction under *International Shoe* "gave prime place to reason and fairness" and not sovereignty.²⁹⁴

Justice Ginsburg had thus taken up where Justice Brennan left off in *Burger King* and *Asahi*.²⁹⁵ She clearly thought that a fairness-type assessment more properly comports with the goals of due process than does the Court's fetish with contacts and state lines, and that in a modern economy the latter approach foils important fairness considerations.²⁹⁶ Even so, she did not feel the need to advocate for a complete rework of the personal jurisdiction standard to return it to a pre-*Hanson*, *McGee*-like approach. Instead, the basic current structure of the doctrine could fulfill her visions, as Brennan had

²⁹² See *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

²⁹³ See *id.* at 2803.

²⁹⁴ *Id.* at 2800; see also *id.* at 2799 ("[T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful."); *Id.* at 2795 ("[The plurality's approach] turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." (quoting Weintraub, *supra* note 98, at 555)).

²⁹⁵ See Koppel, *supra* note 17, at 913 ("[The New Jersey Supreme Court's] flexible application of the minimum contacts standard, echoed in Justice Ginsburg's [*J. McIntyre*] dissent, derived doctrinally from Justice Brennan's version of [*World-Wide's*] stream-of-commerce test [that was also] articulated in his *Asahi* concurrence." (footnote omitted)).

²⁹⁶ See *id.* at 916 ("The dissenting justices countered with a functionalist approach that gave prime place to reason and fairness, rather than state sovereignty." (quotation omitted)); Parry, *supra* note 82, at 849 ("Justice Ginsburg's dissent . . . comes very close to the fairness-based approach to jurisdiction that Justice Brennan outlined in his [*World-Wide*] dissent. She insisted that the personal jurisdiction inquiry is entirely about reasonableness, and she made no separate, free-standing inquiry into contacts."); *id.* at 847 ("Justice Ginsburg never used the phrase 'minimum contacts.'").

demonstrated in his *Burger King* opinion for the Court, even though Ginsburg also endorsed Brennan's view that *International Shoe's* defendant-focus might be outdated.²⁹⁷

Once again the Court left behind a fractured opinion. Although the Court has since issued additional opinions, including one decided on the same day as *McIntyre*, which have garnered near unanimity, those cases dealt with unusual facts. Lower courts remain prisoner to a jurisprudence that lacks a coherent approach when having to decide commonly occurring personal jurisdiction disputes.²⁹⁸

(h) Goodyear

This case was issued on the same day as *Nicastro*.²⁹⁹ The suit was brought against the foreign manufacturers of tires that were allegedly defective and resulted in injury and death to several Americans traveling in France.³⁰⁰ The plaintiffs were all residents of North Carolina.³⁰¹ They brought suit in that state based on the fact that defendants sold several hundred thousand tires there, even though that activity had nothing to do with the bus crash.³⁰² Thus, this case was based upon so-called general jurisdiction. The North Carolina courts agreed with the plaintiff that jurisdiction was proper.³⁰³

²⁹⁷ See Koppel, *supra* note 17, at 918 (“[Ginsburg’s] dissenting opinion’s emphasis on second-prong fairness also evokes Justice Brennan’s functionalist observation that *International Shoe’s* ‘almost exclusive focus on the rights of defendants, may be outdated’ and that ‘the model of society on which the *International Shoe* Court based its opinion is no longer accurate’ in light of the ‘nationalization of commerce.’” (quoting *World-Wide*, 444 U.S. at 307–09)).

²⁹⁸ See Parry, *supra* note 82, at 851 (“The two principal opinions reject [the] two-part [*Burger King*] analysis that has been crumbling for years and perhaps deserves demolition. . . . The justices may have torn down the two-part test, but they left behind only the incomplete foundations of incompatible structures. . . . Nor is there any obvious way to combine [the various *J. McIntyre* approaches] . . . for compromise is inconsistent with the positions that Justice Kennedy and Justice Ginsburg have marked out.”).

²⁹⁹ *Goodyear*, 131 S. Ct. at 2850.

³⁰⁰ *Id.* at 2851–52.

³⁰¹ *Id.* at 2850.

³⁰² *Id.* at 2852.

³⁰³ *Id.*

The Supreme Court, per Justice Ginsburg, unanimously reversed in only the third general jurisdiction case that it ever decided. The outcome was uncontroversial under existing precedent.³⁰⁴

(i) *Walden v. Fiore*

During the 2013-2014 session, the Supreme Court returned to the personal jurisdiction arena with two cases, *Walden v. Fiore*³⁰⁵ and *Daimler AG v. Bauman*.³⁰⁶ *Walden* has the greater relevance for this article.

Walden arose when a Covington, Georgia police officer, Walden, who was deputized as a federal DEA agent, stopped two Nevada residents at an Atlanta airport.³⁰⁷ Walden's search uncovered a large amount of cash, which he seized, believing that it represented the proceeds of drug sales.³⁰⁸ The Nevada residents sued in federal court in Nevada, claiming that this seizure violated the Fourth Amendment.³⁰⁹ They argued that jurisdiction was proper in Nevada because Walden knew that the plaintiffs were Nevada residents when he seized the cash, thereby allowing Nevada jurisdiction under *Calder*.³¹⁰

The Supreme Court reversed. To do so it had to distinguish the seemingly directly-on-point *Calder* decision, where the Court held that Florida-based defendants could be subject to jurisdiction in California when they intentionally defamed a California resident.³¹¹ The theory in *Calder* was that the defendants purposely directed their activity toward that state when they wrote false things about

³⁰⁴ See Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 246, at 1246 (“[Although it is not] nearly as bad as *J. McIntyre* . . . [i]t remains to be seen whether [*Goodyear* presents] a workable test . . . but at least it is a test, of sorts, supported by a majority of the Court.”). See discussion *infra* Part II.B.3.j. This description is included here for the sake of completeness because the article ultimately takes the view that a proper personal jurisdiction jurisprudence will not distinguish between general and specific jurisdiction.

³⁰⁵ 134 S. Ct. 1115.

³⁰⁶ 134 S. Ct. 746.

³⁰⁷ *Walden*, 134 S. Ct. at 1119.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1120.

³¹⁰ *Id.* at 1124.

³¹¹ See *Calder*, 456 U.S. 783.

one of its residents, thereby causing her to suffer harm there. According to Justice Thomas's majority opinion, in contrast, the harm in *Walden* that the defendant allegedly caused the plaintiffs by depriving them of their money while they were travelling to and living in Nevada was only fortuitously connected with that state.³¹² This appears to be a distinction without a difference.

The fact that this case was brought in federal court on a federal claim also demonstrates the major flaws in the minimum contacts standard from both a due process/fairness standpoint, as well as in terms of the reach of state power. Purely in terms of fairness, wherever the suit was brought it would be within the same judicial system—i.e., federal court—and decided under federal law. So, the only relevant fairness or traditional due process issue would be whether it would be unduly burdensome for Walden to have to litigate in Nevada, a factor that the Court never considered. Moreover, the federal system allows the transfer of cases to an appropriate district for the purposes of convenience, efficiency, and other relevant considerations, thereby allowing court flexibility to ensure the best location for all concerned, a point emphasized in *Burger King*.³¹³

To be sure, even though the Supreme Court has consistently discussed personal jurisdiction in terms of due process, it has always considered state lines to have a special place in this analysis to one degree or another. That is, the Court has gone to great lengths to hold that somehow the relationship between the defendant and the state is important in deciding whether due process will allow the personal jurisdiction in a given forum—that somehow by requiring the defendant to litigate in a state with which the defendant lacks contacts thwarts meaningful rights irrespective of how easy or hard it would be for the defendant to litigate there.³¹⁴

This case shows that this focus on state lines is misguided, even if one omits traditional due process analysis. Whether in Nevada or in Florida, Walden would be litigating a federal law issue in federal court. That those courts happen to be located in those states has nothing to do with the source of those courts' authority. Congress

³¹² See *Walden*, 134 S. Ct. at 1123.

³¹³ See discussion *supra* Part II.B.3.d; see also *Burger King*, 471 U.S. at 486.

³¹⁴ See *Hanson*, 357 U.S. 235; *World-Wide*, 444 U.S. 286.

could have authorized suit anywhere in the United States.³¹⁵ That it has not chosen to do so does not mean that this choice represents a constitutional limitation. Specifically, Fed. R. Civ. P. 4(k)(1) provides that in a suit in federal court personal jurisdiction exists so long as the defendant would be subject to personal jurisdiction in the courts of the state where the federal court is located.³¹⁶ And the Nevada long-arm statute allows jurisdiction to the extent allowed by the United States Constitution.³¹⁷

By circular reasoning, the Supreme Court has concluded that the constitutional limit of the federal court is determined by Nevada state lines because a federal rule instructs federal courts to limit their personal jurisdictional reach—except as otherwise allowed by rule or statute—to the reach of the courts of the state in which it sits. Nevada’s long arm statute says that jurisdiction may be exercise to the full extent allowed by the United States Constitution. The Court concluded that a constitutional standard should be determined by looking to a federal rule that looks to a state rule that itself then looks to the Constitution. Even though it is hard to understand what this approach actually means, it is easy to recognize that it is illogical.

Not only does the Court’s analysis make no sense as a constitutional (as opposed to a statutory) limit on federal court power, but it also demonstrates the problem of applying state lines and minimum contacts in any case in our federalist system, whether in state or federal court. In a system where federal and state courts often have concurrent jurisdiction, each mandated to apply consistent substantive law,³¹⁸ the limits on the sovereignty of either court system being defined by state lines strains both logic and reason.

³¹⁵ See *Andrews*, *supra* note 16, at 1375 (“Since the early nineteenth century, the Supreme Court has suggested that a different standard governs personal jurisdiction in federal court than in state court, and that Congress may authorize federal courts to serve process anywhere in the United States.” (citing *Toland v. Sprague*, 37 U.S. 300, 328 (1838))).

³¹⁶ It also authorizes jurisdiction as authorized by federal statute. No federal statute governs a *Bivens* suit, the type of claim that the plaintiff brought in *Walden*.

³¹⁷ See *Walden*, 134 S. Ct. at 1121.

³¹⁸ See *Erie*, 304 U.S. 64 (requiring federal courts in diversity to apply state substantive laws in diversity cases).

(j) *Daimler AG v. Bauman*

*Daimler AG v. Bauman*³¹⁹ presents facts sufficiently exotic that only brief mention is necessary. Several Argentines brought suit in federal court in California against the German-based automaker, Daimler AG, seeking recovery under federal, state, and Argentine law for the automaker's Argentine subsidiary's alleged support for Argentina's dirty war.³²⁰ The plaintiffs conceded that the suit did not arise out of the defendant's contacts with California, but argued that general jurisdiction was valid based upon the extensive contacts of the German automaker's American subsidiary under an agency theory.³²¹ The Court, in an 8-0 opinion written by Justice Ginsburg, found jurisdiction lacking, relying primarily on *Goodyear*.³²²

III. ANALYSIS OF CURRENT PERSONAL JURISDICTION DOCTRINE

Having discussed some of the shortcomings of personal jurisdiction in the historical record above, this section organizes and critiques those shortcomings in terms of several important criteria. The shortcomings in the personal jurisdiction have both practical and theoretical components. Although problems in either area alone would be troublesome, that the Court's approach fails on both accounts truly justifies change. A doctrine that fails in practice and also lacks a sound theoretical basis, has little to recommend it. This section traces the practical and theoretical problems inherent in the

³¹⁹ 134 S. Ct. 746.

³²⁰ *Id.* at 751.

³²¹ *Id.* at 752.

³²² Justice Sotomayor concurred. In her view, the facts as accepted by the Supreme Court were sufficient for the exercise of general jurisdiction in California federal court. She chided the majority for not simply limiting itself to examining the extent of contacts between defendant and the forum state, rather than concluding that the defendant was not home in the forum because it had more extensive contacts elsewhere. *See id.* at 763–73 (Sotomayor, J., concurring). She makes a good point. If personal jurisdiction depends on forum contacts sufficiently extensive that it is fair to require defendant to answer to suit there, that the defendant has other, even more extensive contacts elsewhere, should not change the calculus from either a sovereignty or due process perspective. Clearly, the connection between personal jurisdiction doctrine, and policy and theory, remains strained.

Court's due process and minimum contacts rooted approach to personal jurisdiction.

A. *Practical Shortcomings*

While often discussed in terms of deep theory and frequently the subject of scholarship, personal jurisdiction doctrine also has important consequences for litigants, and is not just the stuff of abstract concern and meaningless tactical forays.³²³ The practical flaws of personal jurisdiction doctrine can be separated into two baskets. First, the *outcomes* of personal jurisdiction cases are often troubling on several fronts. Second, the *manner in which decisions are reached* is often wasteful of judicial and party resources and time.³²⁴ I shall call these “outcome flaws” and “process flaws,” respectively.

1. *Outcome Flaws*

The flaws in the outcome of personal jurisdiction disputes fit into three categories. First, defendants are often able to duck jurisdiction in states where they would face no unfairness to defend, even when doing so works unfair advantage to the plaintiff, while raising inconvenience and costs due to the location of witnesses and evidence. Second, plaintiffs can hale defendants into particular fora based upon arbitrary criteria, where the defendants may well suffer inconvenience. Third, there are sets of cases where although it is not

³²³ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 101 (“A suit at law is not a children’s game, but a serious effort on the part of adult human beings to administer justice.” (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947))); Rex R. Persbacher, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. Davis L. Rev. 513, 521–11 (1995) (“[T]he effect of jurisdictional rules is not restricted to academic debate; the rules appear to have real consequences, especially when a litigant is standing at the courthouse door deciding whether to enter.”).

³²⁴ Other commentators have noted the fact that the practical problems with the current personal jurisdiction approach that the Supreme Court employs creates problems in terms of both outcomes and the time-consuming, and expensive manner in which those outcomes are reached. For example, Borchers has referred to these two types of problems as internal costs and external costs. See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 584–89.

apparent that any single case was incorrectly decided in terms of the interests that attend personal jurisdiction, taken collectively the outcomes cannot be squared with each other.³²⁵ That is, if one or some of the cases in this group is deemed to be correctly decided, the outcomes of other cases cannot withstand logical and policy scrutiny.³²⁶

The first set, those cases in which the unfairness and illogic of defendants avoiding personal jurisdiction is most apparent in *Hanson*, *World-Wide*, and *J. McIntyre*. Each of those cases denied personal jurisdiction while conceding that the defendant would suffer no hardship in being required to adjudicate in the forum in question.³²⁷

The *Hanson* defendants were trustees of two Delaware trusts that stood neither to lose nor gain any beneficial interest in property.³²⁸ The real dispute was between two sets of parties who themselves had no objection to jurisdiction in the Florida forum.³²⁹ Moreover, there would have been very little burden on two trust companies sending representatives from Delaware to Florida.³³⁰ The outcome simply cannot withstand practical scrutiny.³³¹

World-Wide and *J. McIntyre* each involved suits brought by injured plaintiffs in the place where they were injured and/or lived.³³² In the former, the plaintiffs had suffered serious injury, and therefore would have been hard-pressed to travel elsewhere, at least

³²⁵ See McFarland, *supra* note 7, at 779 (“Not only has the Court over the past half-century been unable to create a consistent, coherent law of personal jurisdiction, but also it has issued some opinions that are flatly inconsistent with others. . . . The situation is not . . . one of differing views of what the law should be. The rub is that opinions appear to be inconsistent from inadvertence and confusion, not crafty analysis and writing.”).

³²⁶ See, e.g., Borchers, *Death of the Constitutional Law*, *supra* note 71, at 102 (“Certainly, [the results of personal jurisdiction cases] are nothing that one would seek to emulate if creating jurisdictional rules from scratch.”); see generally Weintraub, *supra* note 98, at 531–32, 540–45.

³²⁷ See Weintraub, *supra* note 98, at 531–32 (“[D]eference to the convenience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states.”).

³²⁸ See discussion *supra* Part II.B.2.

³²⁹ See *id.*

³³⁰ See *id.*

³³¹ See *id.* (discussing *Hanson* in more detail).

³³² See discussion *supra* Part II.B.3.a; discussion *supra* Part II.B.2.g.

at the time suit was filed.³³³ In *J. McIntyre*, the injured plaintiff lived and was injured in New Jersey, where he sued.³³⁴

In both cases, much of the evidence, physical and witnesses, were located in the forum state, meaning that the defendants would have had to travel there to examine evidence and to take depositions, no matter where the trial was held.³³⁵ The defendants themselves certainly had the resources to litigate in these fora, demonstrated by the fact that they each spent more time litigating the personal jurisdiction issue in the objectionable forum than they would have spent litigating the merits there.³³⁶ In neither case would litigation elsewhere been easier for anyone.³³⁷ In *World-Wide*, two of the defendants had dropped any opposition to litigation in Oklahoma, and some of the parties would have had to travel to a state not their own, no matter where the litigation was held.³³⁸ Therefore, prohibiting jurisdiction in Oklahoma, where the evidence and plaintiff was located, made no sense.³³⁹

In *J. McIntyre*, New Jersey made more sense than Ohio for adjudication, where the defendant was almost surely subject to jurisdiction under the Court's approach.³⁴⁰ Neither party was located in Ohio, and most of the evidence was probably in New Jersey.³⁴¹ Moreover, even if the plaintiff could have traveled to the UK to litigate, why would that make *more* sense than requiring the defendant to come to New Jersey? As a logical and practical matter, it is hard to defend prohibiting the case from going forward in the plaintiff's chosen forum of New Jersey. More generally, the current minimum contacts approach, advertised as a means to protect a defendant's due process rights, often allows defendants to avoid adjudication even in a forum where the defendant would suffer no unfairness or inconvenience, while leaving only jurisdictions that would be illogical and often unfair to others as possible fora. *J.*

³³³ See discussion *supra* Part II.B.3.a.

³³⁴ See discussion *supra* Part II.B.3.g.

³³⁵ See *id.*

³³⁶ See *id.*

³³⁷ See *id.*

³³⁸ See *id.*

³³⁹ See discussion *supra* Part II.B.3.a (discussing *World-Wide* in greater detail).

³⁴⁰ See discussion *supra* Part II.B.3.g.

³⁴¹ New Jersey was actually was slightly closer to the defendant's UK home than Ohio.

McIntyre, like *World-Wide*, provides an example of this type of outcome in which real fairness and logic is sacrificed for illusory fairness for the defendant. Perhaps, at least, *J. McIntyre's* outcome is sufficiently troublesome that it will increase the pressure on the Court to reevaluate the minimum contacts approach to personal jurisdiction.³⁴²

The second group of outcome problems involves cases where defendants have had to defend in places where it is arguably burdensome or unfair to require them to do so. The current regime has been less problematic in terms of allowing jurisdiction where it should not—i.e., this second group of cases—than it has in excluding jurisdiction where it should allow jurisdiction. Even so, some cases in this category bear mention. Most noteworthy is *Burger King*.³⁴³ There, the individual defendant lacked any meaningful connection with the forum state that was several thousand miles away.³⁴⁴ Yet the Court found jurisdiction in that case without truly analyzing whether the defendant would be burdened by having to litigate in Florida, instead focusing on the formality of the defendant's contacts through the contract with a Florida-based company.³⁴⁵

The third set of outcome flaws can be seen by comparing some of the Court's personal jurisdiction cases. Doing so, demonstrates how illogical the results of the current approach are. First, consider

³⁴² See Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 246, at 1247 (“[*J. McIntyre* is] further, and unfortunate, evidence that the Court should abandon the idea that the Constitution limits state-court jurisdiction, except in the most extreme of circumstances in which the defendant's opportunity to mount a defense is realistically compromised.”). Some commentators had previously been less than sanguine that the Court would engage in a major reworking of its focus on contacts, which has proven true so far. See Linda J. Silberman, “Two Cheers” for *International Shoe* (and None for *Asahi*): an Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 766 (1995) (“Obviously, the Supreme Court is not going to unravel its long history of constitutional jurisdiction jurisprudence. But some shift is possible.”); see also discussion *supra* Part II.B.3.g (discussing *J. McIntyre* in greater detail).

³⁴³ *Burger King*, 471 U.S. 462; see also discussion *supra* Part II.B.3.d (further discussing *Burger King*).

³⁴⁴ See generally *Burger King*, 471 U.S. 462.

³⁴⁵ See *id.*; see also discussion *supra* Part II.B.3.d.

*Mullane*³⁴⁶ in contrast to *Hanson*.³⁴⁷ Both involved trusts. In the former, because the trust was located in New York, the Court held that the meaningful rights of beneficiaries throughout the United States could be determined there even without those parties consenting to that state's jurisdiction.³⁴⁸ That outcome can probably be defended. But then how can a Florida court be deprived of jurisdiction to adjudicate the status of a trust whose settler lived and died in Florida, and where all parties who stood to benefit or lose by a Florida court's ruling lived there, or were otherwise subject to jurisdiction in Florida, merely because nominal parties had not purposefully directed their activities toward the state, as the Supreme Court held in *Hanson*?³⁴⁹ The cases cannot be reconciled.

Next compare *Kulko*³⁵⁰ and *Burnham*.³⁵¹ Both involved East Coast husbands being sued by their wives in California.³⁵² Both cases concerned domestic relation issues such as child support.³⁵³ Yet jurisdiction was found proper only in the latter case merely because the defendant was handed papers while he happened to be within California's borders.³⁵⁴ How do the outcomes in these cases comport with any sense of logic, fairness, or other practical concern? Even in terms of sovereignty, it is hard to understand how California could have sovereign authority over one defendant but not the other, where the only difference between the two was where they were handed process papers.³⁵⁵ These groups of cases should all come out the same way, save if there was some showing of burden of fairness that would compel a different result.

2. Process Flaws

³⁴⁶ 339 U.S. 306; *see also* discussion *supra* Part II.B.1 (discussing *Mullane* in greater detail).

³⁴⁷ 357 U.S. 235; *see also* discussion *supra* Part II.B.2 (discussing *Hanson* in greater detail).

³⁴⁸ *See Mullane*, 339 U.S. 306.

³⁴⁹ *See* discussion *supra* Part II.B.2.

³⁵⁰ *See* discussion *supra* Part II.B.3.f (discussing *Kulko* in greater detail).

³⁵¹ *See* discussion *supra* Part II.B.3.f (discussing *Burnham* in greater detail).

³⁵² In *Kulko*, the spouses were already divorced, although that was immaterial to the cases.

³⁵³ *See generally Burnham*, 495 U.S. 604; *Kulko*, 436 U.S. 84.

³⁵⁴ *See* discussion *supra* Part II.B.3 and Part II.B.3.f.

³⁵⁵ *See* discussion *supra* Part II.B.3.f.

Beyond the ultimate dispositions in personal jurisdiction cases, the inefficiency, cost,³⁵⁶ and unpredictability³⁵⁷ of how those dispositions are reached also creates major problems. The Court's doctrines are overly complex.³⁵⁸ The Court has also often changed course, making it difficult to predict how a given case will turn out if it does reach the Supreme Court.³⁵⁹ Moreover, the fact that the Court has been unable to muster a majority on major personal jurisdiction cases, combined with the fact that its major opinions rest on shifting justifications, makes it difficult for lower courts to implement the doctrine.³⁶⁰ In addition, the Supreme Court's ungainly personal jurisdiction jurisprudence³⁶¹ has resulted in case outcomes turning upon minute factual differences as each new case obscures rather than clarifies,³⁶² and has also caused division among

³⁵⁶ See McFarland, *supra* note 7, at 795 n.181 ("The transaction costs of the current minimum contacts/fair play test are high.").

³⁵⁷ See Effron, *supra* note 247, at 868 ("The critiques leveled against the Supreme Court's jurisdictional jurisprudence are well-known: that the doctrine is fuzzy, malleable, and highly case specific, and that the Court has been either unable or unwilling to provide comprehensive and coherent legal and political theory underlying the exercise of personal jurisdiction over defendants in a forum state.").

³⁵⁸ See Weintraub, *supra* note 98, at 531 ("[T]he Supreme Court has added layer upon layer of complexity to the due process test for personal jurisdiction.").

³⁵⁹ See Wendy Collins Purdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991) ("[E]very few years, the Court's description of personal jurisdiction is inconsistent with its recent prior precedent.").

³⁶⁰ See Parry, *supra* note 82, at 828 ("[T]he Supreme Court allowed the law of personal jurisdiction to fester as lower courts and commentators struggled to make sense of cases such as *Asahi* [and] *Burnham*"); *id.* at 852 ("Various majorities and pluralities of the Court have advanced ever more complicated variations on the theme of purposeful availment. . . . But the specific results of the search for clarity and limits do not add up to a sensible doctrine."); Weintraub, *supra* note 98, at 545 ("[T]he issue of the due process limits of state-court jurisdiction not only is one of the most frequently litigated issues on the civil side of the docket, but also repeated litigation of the same fact pattern does not increase predictability. Courts cannot agree on how specific facts should influence the result.").

³⁶¹ See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) ("Ambiguity and incoherence have plagued the minimum contacts test.").

³⁶² See Parry, *supra* note 82, at 851–52 ("Tension may be inherent in personal jurisdiction doctrine. But doctrinal tensions ought to grow out of the effort to accommodate or balance interests that are actually present in specific cases.

different lower federal and state courts, thereby adding to the jumble.³⁶³

That personal jurisdiction should muck up litigation is unfortunate. Personal jurisdiction *should not* be as important as it has become.³⁶⁴ It does not involve inherently contentious issues, like abortion, racial preferences, or the death penalty, matters about which jurists and individuals in general have deeply held beliefs that merit drawn out debate.³⁶⁵ Rather, personal jurisdiction generally involves which courtroom within the United States a case is to be tried in,³⁶⁶ which should be a relatively straightforward determination given the philosophy the modern of American justice system.³⁶⁷ Personal jurisdiction should be secondary to the main event—substantively resolving the dispute—rather than a central

Current doctrine fails to meet this standard.”); Weintraub, *supra* note 98, at 558 (“[L]itigating the same situations over and over does not increase predictability.”).

³⁶³ See Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 411 (“Lower courts have struggled in their attempt to apply the Supreme Court’s pronouncements, especially to new forms of conducting business such as the Internet.” (footnote omitted)).

³⁶⁴ See Weintraub, *supra* note 98, at 558 (“It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated.”).

³⁶⁵ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 102–03 (“Intense judicial supervision, complicated doctrine, and unpredictable results are a necessary cost if the social consequences are extremely important. Personal jurisdiction, however, is not one of those areas in the law in which the stakes are so high.” (footnote omitted)).

³⁶⁶ True, technically a court in one state is part of a different sovereign than a court in another state. Even so, the states are not completely independent sovereigns in the sense that the United States and China are, procedures are generally uniform, and courts are now adept at being able to determine the content of the law of another jurisdiction. Travel across state lines requires no special effort. And, in many cases, a single system, the federal system, is available to parties, so that often one is not even talking about different sovereigns, but merely location.

³⁶⁷ See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) (“When the Federal Rules were promulgated, in 1938, they embodied a justice-seeking ethos. As has been recognized repeatedly by the Supreme Court, [the people who wrote them] believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.”).

matter that wastes time and other valuable resources.³⁶⁸ Unfortunately, personal jurisdiction often relegates the underlying litigation to the undercard.³⁶⁹

The process flaws can be grouped into two categories. First, the unpredictability in personal jurisdiction doctrine create barriers to parties' ability to plan their affairs in general, and also after litigation is contemplated, in terms of deciding where to sue, or whether they have a sound personal jurisdiction defense. Second, the current complexity invites tactical maneuvers, thereby draining resources from the parties and courts, and allows cases to be decided based on clever lawyering rather than merit.

As a result of the doctrinal disarray in personal jurisdiction parties have difficulty planning their affairs prior to and at the outset of litigation.³⁷⁰ The current complex standard makes it difficult for parties who suspect a future suit to predict where they may be subject to suit. When a dispute arises, the complexity of current doctrine means that plaintiffs cannot be sure where they can bring a suit, and defendants will not know whether they will have legitimate jurisdictional arguments.

³⁶⁸ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 102 ("Worse than the strange results, however, is the lack of predictability and the resources consumed litigating the most elementary of questions: Where can I file suit?"). Between 1960 and 1983 that there were at least 3900 *reported* personal jurisdiction cases in the United States, and presumably many more unreported ones. *See id.* at 102-03.

³⁶⁹ See Weintraub, *supra* note 98, at 531 ("As a result [of the Court's complex minimum contacts jurisprudence], the threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts.").

³⁷⁰ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("[A]nother obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law."); Weintraub, *supra* note 98, at 540 ("It is a commonplace that the results of [the minimum contacts] analysis are fact driven; minor changes in circumstances can change the result. That alone would make prediction in a particular case difficult, but the task is even more formidable because courts cannot agree on which facts matter. A court surveying decisions on a specific recurring jurisdictional issue is likely to find 'the case law in a muddle.'" (quoting *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 208 (1st Cir. 1994) (footnote omitted)).

Second, once a plaintiff decides to sue, the complexity of the doctrine leads to prolix litigation. Cases often wind through several levels of courts over the better part of a decade purely on the jurisdictional issue. This may be the result of tactical attempts by parties, but may happen even if both parties are simply pursuing what they think is the proper jurisdictional approach.³⁷¹ This post-litigation turmoil itself will absorb litigation and judicial resources, and delay resolution of the merits.³⁷²

The waste of resources due to tactics and delay is nicely demonstrated by both *World-Wide* and *J. McIntyre*, where defendants objected to personal jurisdiction in states where it probably would have been easier for them to litigate than where suit would otherwise be brought.³⁷³ Moreover, these defendants spent time and money litigating the personal jurisdiction issue through multiple rounds in the very locations where they sought to avoid litigation on the merits.³⁷⁴ These personal jurisdiction squabbles

³⁷¹ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 103 (“The real social costs are a consequence of the convoluted doctrine that engenders expensive litigation before the parties even get to the starting gate.”); *cf.* Parry, *supra* note 82, at 852 (“[M]any considerations play a role in [a plaintiff’s] choice of forum. They range from such things as a simple desire to sue either in the plaintiff’s home jurisdiction or where the harm took place, to obtain the benefit of favorable law, all the way to the desire to burden or prejudice the defendant. Defendants understandably seek to frustrate plaintiff’s choice and to substitute a more favorable forum.”).

³⁷² See Bruce Posnak, *The Court Doesn’t Know Its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 896 (1990) (“[T]he trial of the jurisdictional issue [will] often consume more time and resources than the trial on the merits.”).

³⁷³ To be fair, in *World-Wide* the plaintiff was also seeking a tactical advantage by naming defendants who would destroy federal subject matter jurisdiction. See Adams, *supra* note 58, at 1139 (“*World-Wide* and *Seaway Volkswagen* were merely “straw defendants” joined by the Robinsons’ attorney to prevent removal from Creek County state court to the federal court in Tulsa.”).

³⁷⁴ In *World-Wide*, the personal jurisdictional issue was litigated through two levels within Oklahoma in addition to the United States Supreme Court over a three-year period. See *World-Wide*, 444 U.S. at 288–91. In *J. McIntyre*, three levels of courts in New Jersey—two of the courts twice—plus the U.S. Supreme Court were involved in the personal jurisdiction dispute over an eight-year span. See *J. McIntyre*, 131 S.Ct. at 2786 (plurality opinion). Regarding *World-Wide*, Borchers commented on the harm that this delay caused: “It is bad enough to tell the [plaintiffs in *World-Wide*] that their suit cannot be brought in the most logical

drain attorney and judicial resources. They also delay adjudication on the merits, which reduces the likelihood of the correct outcome, as memories fade, witnesses die or otherwise become unavailable, and evidence is lost. Moreover, the resources used to resolve these personal jurisdiction matters are diverted from other cases in an already overworked American judicial system. From a practical and utilitarian standpoint, the Court's current approach to personal jurisdiction falls short in many ways.

B. *Doctrinal/Theoretical Shortcomings*

Practical problems alone might not be a sufficient impetus for a major doctrinal shift. Certain constitutionally compelled standards may result in outcomes that are frustrating in particular cases.³⁷⁵ But if those outcomes do not follow from sound constitutional theory, and in fact are contrary to it there is reason to rethink the Court's current approach. Moreover, the utilitarian failures of personal jurisdiction very much result from the theoretical flaws in the Court's approach,³⁷⁶ rather than merely being the detritus of a well-

and sensible forum; it is worse yet to tell them so only after three levels of appellate review, with the result of flipping back and forth as each new court reviews the case." Borchers, *Death of the Constitutional Law*, *supra* note 71, at 102; *see id.* at 96–97 ("Often, the asserted 'inconvenience' is a Trojan horse. . . . [I]n *World-Wide* the real reason for the defense motion to dismiss the dealer and the retailer was to create complete diversity.").

³⁷⁵ For example, the broad protections that the First Amendment provides to freedom of expression means that society often must tolerate speech that most people would rather not hear. *See, e.g.,* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 213 (1972) ("There are certain harms, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on [such expressions]"). The Fourth Amendment's requirement that most searches be supported by probable cause thwarts authorities in certain cases to the benefit of those engaged in criminal wrongdoing. *See e.g.,* *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) ("[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."). Because these constitutional protections further larger goals, the tradeoffs are accepted as the price of living in a representative democracy that takes rights seriously.

³⁷⁶ *See* Effron, *supra* note 247, at 868–69 ("[The problems with the minimum contacts approach] can be attributed to a lack of a coherent theory underlying the exercise of personal jurisdiction at all.").

reasoned model. In short, having already argued that the minimum contacts approach fails *in practice*, the article now posits that this doctrine is also a theoretical failure.

The personal jurisdiction doctrine and its underlying theory has many modes of expression. Cases mention nebulous concepts like “substantial justice and fair play”³⁷⁷ and purposeful availment.³⁷⁸ They consider various factors like “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.”³⁷⁹ These factors might defeat jurisdiction even if minimum contacts were satisfied, or, conversely, might allow the exercise of jurisdiction on a lesser showing of contact.³⁸⁰ In addition, the Court has mentioned tradition,³⁸¹ foreseeability,³⁸² submission to the sovereign,³⁸³ and the Due Process Clause serving as a vehicle of interstate federalism.³⁸⁴ The Court has thus applied a medley of terms and concepts to this area of law.³⁸⁵ One might think that the inability to even identify the Court’s personal jurisdiction doctrine and its underlying theory(ies) presents a considerable barrier to providing a meaningful critique.³⁸⁶ But once one plows through the thicket of formulae and metaphors,

³⁷⁷ See *International Shoe*, 326 U.S. at 316.

³⁷⁸ See *Hanson*, 357 U.S. at 253.

³⁷⁹ See *World-Wide*, 444 U.S. at 292.

³⁸⁰ See *Burger King*, 471 U.S. at 477–78.

³⁸¹ See *Burnham*, 495 U.S. at 619 (Scalia, J., plurality opinion).

³⁸² See *World-Wide*, 444 U.S. at 297.

³⁸³ See *J. McIntyre*, 131 S.Ct. at 2789 (Kennedy, J., plurality opinion).

³⁸⁴ See *World-Wide*, 444 U.S. at 294.

³⁸⁵ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 78 (“The Court has listed a huge number of factors in its modern jurisdictional cases, but without ascribing any particular weight to any of the factors. . . . [As an example], [i]n the space of twenty-nine years the Court has accepted, then rejected, then accepted, then rejected, and then accepted the ‘federalism’ or ‘sovereignty’ factor in the jurisdictional calculus.” (footnotes omitted)).

³⁸⁶ See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 583

(“Constitutionalized personal jurisdiction . . . is a doctrine created by implication and accident, as opposed to, for instance, the Court’s deliberate effort to constitutionalize defamation law. Lacking any clear foundation, the Court has constantly reversed itself on such fundamental questions as whether personal jurisdiction is a personal right or whether it implicates federalism and sovereignty concerns.” (footnotes omitted)).

the core of the problem in the Court's approach can be easily identified.

The above noted panoply is the symptom, not the root, of the doctrinal wreck. Terms like "purposeful availment" or "foreseeability" are used in personal jurisdiction disputes to concretize the nebulous minimum contacts standard within the due process framework. The problem however is not with the implementation, but rather the underlying attempt to ground personal jurisdiction in the Due Process Clause, and to then to use minimum contacts to midwife the doctrine to the facts of particular cases.

The Court has linked personal jurisdiction, due process, and minimum contacts for so long that it *sounds* correct to merge these three concepts—although some commentators have challenged this.³⁸⁷ But these concepts are incompatible. Specifically: 1) due process does not make sense as the primary source of limitation on the geographic reach of state courts; 2) even if due process were to play that role, minimum contacts would not be the appropriate vehicle for furthering due process goals; and 3) even if due process is the wrong agent for defining personal jurisdiction limits, minimum contacts would not be an appropriate standard for limiting personal jurisdiction under any other theory either.

1. *The (lack of) Connection Between Personal Jurisdiction and Due Process*

Due process is not entirely irrelevant to personal jurisdiction matters. The problematic use of due process in personal jurisdiction cases involves the use of that clause as the primary geographic determinant of a state court's personal jurisdiction reach, something that the Court has taken for granted since at least the time of *Pennoyer*.³⁸⁸

³⁸⁷ See, e.g., Borchers, *Death of the Constitutional Law*, *supra* note 71, at 20 ("For over a century American procedural law has labored under the suggestion that the due process clause of the Fourteenth Amendment limits the jurisdictional reach of state courts. Although the Court, and most commentators, have not questioned the correctness of this major premise, I believe it is time to re-examine seriously the supposed fountainhead of our jurisdictional jurisprudence." (footnote omitted)).

³⁸⁸ See *id.* at 100 ("Due Process has been an unwelcome stranger to personal jurisdiction. The Court did not explain in *Pennoyer* why it was invoking due

Apart from that above-noted incorrect use, however, the Due Process Clause does have two less central roles in personal jurisdiction doctrine. First, irrespective of the source of geographic limitations on a court's personal jurisdiction, a defendant can utilize the Due Process Clause to challenge an adjudication made without jurisdiction—what I will call the “facilitation role.” Second, although not a primary definer of the geographic scope of personal jurisdiction, in a particular case a defendant might be able to demonstrate that adjudication in a particular forum is so burdensome that to allow the case to go forward there would violate the defendant's due process rights—what I will call the “backstopping role.”³⁸⁹ These themes will be developed in the proposal section of this article.³⁹⁰

Two problems undermine due process as a primary limitation on personal jurisdiction. First, examining due process doctrine as developed and applied in circumstances other than personal jurisdiction involving the deprivation of property demonstrates that those standards do not justify general limitation on the geographic scope of a State's geographic reach. Second, the Due Process Clause, like other constitutional provisions that protect individual rights should operate as a basis for arguing that a particular practice in a given case violates one's rights under that provision, which is how due process issues are generally evaluated. It is inappropriate to use a rights-protecting provision *as a starting point* for affirmatively crafting a set of procedures, which is exactly how the Supreme Court has (mis)used the clause in developing and implementing the

process.”); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 101 (2010) (“[The Court has been unable] to enunciate a coherent theory of precisely why the Due Process Clause imposes limitations on the states' exercises of personal jurisdiction.”).

³⁸⁹ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 100 (“I am not arguing that state long-arm statutes should be insulated from constitutional review[.] [But] [a]bsent such a bizarre statute, however, . . . long-arm jurisdiction is not unconstitutional.”); *cf.* Parry, *supra* note 82, at 853–54 (“Under [traditional procedural due process standards], a court should be able to exercise jurisdiction over a defendant if (1) there is a legitimate or rational basis—such as a forum state interest—for suing the defendant in the chosen forum, and (2) the course of proceedings—including the burden of litigating in that forum—will be fundamentally fair.” (footnote omitted)).

³⁹⁰ See discussion *infra* Part IV.

minimum contacts test. These two defects are discussed in the next two subsections.

(a) *Traditional Due Process Standards and the Lack of Connection to General Geographic Limits on State Adjudicatory Power*

Due process falls into two categories, procedural and substantive. Given that personal jurisdiction is essentially a procedural issue— involving what rights a defendant has prior to adjudication of property rights—substantive due process has no role in personal jurisdiction, and the Court has not relied on it its minimum contacts analysis. Therefore only a brief discussion of substantive due process is in order here.

Substantive due process is not only oxymoronic,³⁹¹ it is a misnomer. The Court's decisions in this area involve only substance and not process. Specifically, the Court has prohibited both state and federal government from implementing certain laws whose substance it deems constitutionally problematic. Most of the limits involve prohibiting the Court from infringing on certain fundamental rights in a narrow set of circumstances.³⁹² Other limits come into play when a State seeks to enact a legislative provision that lacks any rational basis.³⁹³ Private civil adjudication over property rights does not implicate the narrow set of fundamental interests that the Court has indicated are usually necessary before a substantive due process argument will succeed. Moreover, none of the Court's personal

³⁹¹ See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997) ("In fact, the whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because 'process' means procedure, substantive due process is not just an error but a contradiction in terms.").

³⁹² See *id.* at 501 ("[Substantive Due Process prohibits] governmental actions that impinge on interests the Court regards as fundamental.").

³⁹³ See *id.* at 500–01 ("Substantive Due Process . . . requires that most governmental actions bear a rational relationship to a permissible governmental objective.").

jurisdiction cases have ever indicated that a State has no rational basis for asserting jurisdiction over defendants sued in its courts.³⁹⁴

Procedural due process has a greater relationship to the private civil adjudication of property rights than does substantive due process. It requires that a person, including entities like corporations and partnerships, be afforded sufficient protections before the government deprives that person of property, as well as life or liberty.³⁹⁵ Although personal jurisdiction generally arises in disputes between private parties, meaning the government itself is not directly depriving anyone of property, it is generally agreed that before a civil judgment may be rendered against a party, that the party be afforded the procedural protections of the Due Process Clause—namely procedural due process.

Procedural due process is thus a protection that gives defendants the fair opportunity to defend themselves in a suit that might dispose of their property rights.³⁹⁶ Personal jurisdiction, in contrast, involves the court's *authority* over a particular defendant. To be sure, a defendant's due process rights would be violated by adjudication in a Court which does not have authority to adjudicate that defendant's rights, as would adjudication by a court lacking subject matter jurisdiction, even though subject matter jurisdiction itself is not a function of fairness.³⁹⁷ But, whether it is fair to allow adjudication is

³⁹⁴ Cf. *id.* at 501 (“[The] rationality requirement is extremely lenient.”); Parry, *supra* note 82, at 853 (“For substantive due process, the test is reasonableness—that is, a rational relationship to a legitimate state interest—unless a fundamental right is involved (and the Court has never indicated that personal jurisdiction implicates a fundamental right.”). Perhaps in unusual circumstances an exercise of jurisdiction could be so irrational that it would violate a defendant's substantive due process rights. Actually, tag jurisdiction seems the most likely candidate for this.

³⁹⁵ See Craig W. Hillwig, *Giving Property all the Process that's Due: A 'Fundamental' Misunderstanding about Due Process*, 41 CATH. U. L. REV. 703, 707 (1992) (“The procedural component of the Due Process Clause guarantees that the state shall not deprive a person of property without ‘constitutionally adequate’ process.” (footnote omitted)); Parry, *supra* note 82, at 853 (“For procedural due process the basic test is fundamental fairness.”).

³⁹⁶ As civil adjudication disposes of property rights between two parties (or among three or more parties in some cases), due process protections should also protect plaintiffs.

³⁹⁷ See Hillwig, *supra* note 395, at 708 (“Once a court determines that an interest constitutes property, the state may not deprive a person of the interest without

generally a separate issue from whether a particular court has authority in a particular case.

More specifically, due process guarantees that a defendant receives a fair adjudication of his or her property rights. This generally means that the defendant must be given notice and a hearing,³⁹⁸ an adequate opportunity to present evidence, and an opportunity to call and cross-examine witnesses.³⁹⁹ For example, a person facing the loss of welfare benefits must be afforded “timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence

providing constitutionally adequate procedural safeguards to prevent erroneous deprivations.”). Note, as discussed here, the disconnect between due process, a protection of the defendant’s rights to fair adjudication, and personal jurisdiction; the power of a court over the defendant is separate from the issue of whether an adjudication lacking personal jurisdiction violates the defendant’s rights. It certainly does under the facilitation role of due process. *See* discussion *infra* Part IV. But to say that adjudication where the court lacks personal jurisdiction violates due process is not incompatible with the argument that the Due Process Clause should not be the primary source in determining whether personal jurisdiction exists as an initial matter. By way of analogy, consider the following. Adjudication by a court where the judge is not qualified to serve, either because not properly appointed or elected to office, or because lacking the statutory requirements to be a judge, would almost certainly violate the due process rights of parties whose rights were adjudicated. But that would not mean that the Due Process Clause should be the primary source to determine whether a particular person was in fact qualified to be a judge in a particular court. In a sense, to say that the Due Process Clause provides the source of a court’s jurisdictional power would also be circular. A court’s adjudication without personal jurisdiction deprives a defendant of due process. Thus, if due process were the source of personal jurisdiction authority and a limit thereon, then in essence the personal jurisdiction test would amount to saying that if the Due Process Clause does not allow the exercise of personal jurisdiction in a particular case, then the exercise of jurisdiction in that case would deprive the defendant of due process.

³⁹⁸ *See* *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The fundamental requisite of due process of law is the opportunity to be heard.” (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))); *see also* *Hillwig*, *supra* note 395, at 708 (“The Supreme Court has usually held that due process requires the state to afford pre-deprivation process in the form of some notice and opportunity to be heard.”).

³⁹⁹ *See* *Goldberg*, 397 U.S. at 267 (“The hearing must be ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

orally.”⁴⁰⁰ The purpose for these protections is to minimize the risk that a party will be deprived of property incorrectly in the sense that the facts or law do not support deprivation.

In terms of the location of the forum, unless the location of a particular court is so distant that it would interfere with this right—which concern is addressed by the backstopping role for due process in the proposed model⁴⁰¹—where an adjudication takes place does not generally implicate due process concerns, whereas personal jurisdiction is entirely about the location of an adjudication. Thus, the two concepts—personal jurisdiction and due process—involve two separate concerns, rather than being separate flavors of the same concept, which is how the Supreme Court has treated them.⁴⁰² That very treatment is central to the ills of personal jurisdiction doctrine.

Two other aspects of due process demonstrate that attempts to make it the center of personal jurisdiction law are quixotic. First, personal jurisdiction in the United States predated the Due Process Clause of the Fourteenth Amendment by almost a century. Even the underlying personal jurisdiction dispute in *Pennoyer* itself predated the effective date of that provision.⁴⁰³ Neither *Pennoyer* itself nor subsequent cases have argued that personal jurisdiction limits only came into play with the enactment of the Fourteenth Amendment. Indeed, since that enactment, personal jurisdiction authority has generally expanded. Therefore, although the Court has argued otherwise, strictures on the scope of geographic adjudicatory authority must spring primarily from a source other than the Due Process Clause of the Fourteenth Amendment.

Second, civil adjudication involves determining property rights *between plaintiff and defendant*.⁴⁰⁴ If due process prohibits a defendant from having to have his or her rights adjudicated in a

⁴⁰⁰*Id.* at 267–68.

⁴⁰¹ See discussion *infra* Part IV.B.

⁴⁰² See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 78 (“The suggestion in *Pennoyer* that due process has anything to do with the territorial reach of the state courts was ill-considered.”).

⁴⁰³ See Kogan, *supra* note 19, at 302 (“In [*Pennoyer*] Justice Field invoked the fourteenth amendment due process clause, not in effect at the time of the events in issue in the lawsuit.”).

⁴⁰⁴ This is not to say that allowing a court to unfairly decide a case between two parties would not implicate due process merely because the state itself is not going to obtain the property.

particular forum because of the defendant's lack of relationship with the forum, then logic would dictate that plaintiffs would be denied due process if they had to have the case adjudicated in a forum with which they had no connection. Of course, the Court has not held, nor has anyone seriously argued, that a plaintiff's due process rights are violated when a plaintiff must go elsewhere to adjudicate against the defendant. Due process requires fairness of adjudication, not adjudication in a particular location.

(b) *The Due Process Clause Protects Rights and Therefore is Appropriately Raised as a Defense and Should not Serve as a Starting Point for Formulating a Particular Procedure*

Another flaw in the Court's personal jurisdiction with due process approach arises from the fact that the Due Process Clause is not a *source of authority* that a proponent of a practice need satisfy. Rather, it is a protection that a party claiming a property deprivation would cite to argue that a particular procedure employed in a particular matter violated his rights. Put differently, the odd, but often unnoticed, aspect of the Court's modern-day due process jurisprudence is that in each case the court starts with the Due Process Clause to construct a rigid and specific test to determine whether personal jurisdiction is present rather than simply consulting typical due process standards to evaluate a given exercise of personal jurisdiction.⁴⁰⁵

The Court's approach to due process in this way is backwards. A provision that protects one's rights against the government cannot be the source for the government to exercise authority. No one would claim that the First Amendment gives the government the authority to enact a particular provision that may or may not hamper protected speech. The authority must come from elsewhere, with the constitutional amendment limiting that authority. So too the authority of a state court to adjudicate the rights of a defendant must derive from some fount other than the Due Process Clause.

⁴⁰⁵ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 101 ("The due process clause does not give the Court the final word on personal jurisdiction.").

Certainly, as discussed in Section IV below, the exercise of personal jurisdiction in a given case may violate the rights of a defendant because the defendant may not be able to adequately defend in a particular forum—i.e., the backstopping function of the Due Process Clause as applied to personal jurisdiction. This is analogous to how due process protects defendants against unfair procedures in other circumstance, yet does not itself serve as the source of authority, or the starting point, for crafting a particular procedure. That approach is correct and should be used in evaluating whether a given exercise of personal jurisdiction violates the Due Process Clause.

An example will help sharpen the above point. In a civil matter, a defendant might argue that his due process rights were violated because he was not informed about a key witness for the plaintiff until that witness was called to testify: so too with personal jurisdiction. In a given case a defendant might argue that the location of the court in which the plaintiff sued was so distant and hard for the defendant to litigate in that to allow the suit to proceed there would violate the defendant's due process rights.⁴⁰⁶ But as things now stand in personal jurisdiction disputes, the Court has made due process the starting point and a very specific standard for evaluating personal jurisdiction emerges.

In the witness example above, using the Court's current approach to due process in the personal jurisdiction doctrine would be akin to saying that the Due Process Clause requires anyone calling a witness to satisfy a very specific standard in terms of notice. By extension, this would be the same for every other procedural matter if the personal jurisdiction approach were followed. Of course, this is not how courts proceed in civil adjudication. Nor could they. If every procedural issue were subject to the lengthy crimped screening standard as personal jurisdiction issues are, cases would take decades to conclude. Just by itself, personal jurisdiction stretches out litigations.⁴⁰⁷ Due process thus has a role in personal jurisdiction, but that role is more limited and qualitatively different than the one that the Court has been assigning it for the last seventy years.

⁴⁰⁶ See discussion *infra* Part IV (addressing this role of due process in the personal jurisdiction jurisprudence).

⁴⁰⁷ See discussion *infra* Part IV (discussing this shortcoming).

2. *Minimum Contacts Do Not Follow from Due Process*

Just as the generally unquestioned connection between due process and personal jurisdiction fails to withstand close examination, so too does the connection between due process and minimum contacts, which courts and commentators often uncritically accept as correct.⁴⁰⁸ Thus, even if this article were incorrect in the argument just made that due process should not play a central role in personal jurisdiction jurisprudence; minimum contacts would nonetheless not the proper test for effecting due process goals.⁴⁰⁹

The prior subsection already discussed that due process is generally about ensuring that a party receive fair procedures before being deprived of property. But a lack of minimum contacts does not necessarily deny this protection to a defendant this, just as the presence of those contacts would not ensure fairness of adjudication.⁴¹⁰ In some cases, to be sure, minimum contacts will correlate with convenience or fairness, because the location of the forum vis-à-vis the defendant may make it burdensome for the defendant to litigate there.⁴¹¹ Perhaps that is what *International*

⁴⁰⁸ This section discussion necessarily accepts *arguendo* that due process provides content to the personal jurisdiction standard even though the article has just rejected that connection. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 89 (1980) (“By prohibiting unreasonable deprivations [of property] and requiring a justification for state imposition of legal burdens, the Due Process Clause *seems to require* that the person who would suffer the deprivation have some contact with the State by which he has subjected himself to its power.” (emphasis added)).

⁴⁰⁹ See Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2183–84 (1997) (“[T]he Supreme Court must with all deliberate speed disavow the doctrine that the Due Process Clause of the Fourteenth Amendment, or anything else in the United States Constitution, requires a territorial nexus between forum and defendant as a sine qua non for the exercise of in personam jurisdiction.”).

⁴¹⁰ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 90 (“[T]he Court has reviewed most assertions of state authority deferentially The minimum contacts test, however, developed independently, and has turned out to be a far more searching inquiry.”).

⁴¹¹ See *id.* at 99 (“Perhaps there are some cases in which a defendant is put to the test of defending or defaulting, and it is economically rational for the defendant to

Shoe was aiming at in linking minimum contacts with substantial justice and fair play. And some court members have attempted to interpret *International Shoe* in a way that focused on fairness and burden on the defendant rather than on minimum contacts as an end in itself.⁴¹² This approach, however, has been a losing argument in the Court since the *Hanson* decision in 1958. Instead, from the late 1950s through the present term, the Court has been treating jurisdiction as if it involved subjecting the defendant to State regulation of the defendant's behavior—i.e., almost as though the issue were the choice to allow the application of the forum state's law—something that would seem to require a meaningful relationship between defendant and the state.⁴¹³

Moreover, even though the minimum contacts test would be less problematic if used as a proxy for burden and fairness, it would at best be an approximation.⁴¹⁴ The contacts that the courts look to are those between the defendant and the forum state prior to and during the dispute, rather than the physical relationship between the defendant and the state at the time of the suit.⁴¹⁵ In addition, the

make a motion to dismiss for lack of personal jurisdiction. . . . [But] if there are such cases, they are few and far between.”).

⁴¹² See, e.g., *Hanson*, 357 U.S. at 258–59 (Black, J., dissenting); *World-Wide*, 444 U.S. at 299–300 (Brennan, J., dissenting); discussion *supra* Parts II.B.2 and II.B.3.a.

⁴¹³ See Weintraub, *supra* note 98, at 536 (“*Hanson* also proclaimed a proposition that defied common sense—that a contact with a state sufficient to make it reasonable for that state to apply its laws to the defendant was not necessarily sufficient to permit exercise of personal jurisdiction over the defendant. In future decisions, repetition of this concept invariably signaled the least cogent passage in the opinion.” (footnote omitted)).

⁴¹⁴ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 94–95 (“The Court has suggested, [and several academics] have advanced with some force, the right to have access to process as a rationale for using the due process clause to analyze jurisdiction. . . . All of those proposals are much more palatable alternatives than the Court's approach of the last several years. Certainly the formula resulting from such an approach would have no resemblance to ‘minimum contacts.’ Even this clipped back and more sensible role for due process, however, does not justify a constitutional law of personal jurisdiction.” (footnote omitted)).

⁴¹⁵ Of course if the defendant has actually moved to or is present in the state when suit is commenced, that would be sufficient for jurisdiction under *Milliken v. Meyer*, 311 U.S. 457 (1940), and *Burnham*. But a defendant who had little contact with the suit at the time of the events leading to litigation, who thereafter increased

minimum contacts analysis focuses purely on state lines, rather than geographic proximity or other factors that correlate with the fairness of requiring the defendant to litigate in a particular state.⁴¹⁶ A defendant may live just over the line outside of the state where he or she is sued, and yet have no contacts with the state that would satisfy due process. Another defendant may live in one corner of a large state, and yet the Court's minimum contacts test would afford no protection against a suit brought over 1,000 miles away, at the other edge of the state.⁴¹⁷ For this reason, to the extent that a particular adjudication would be unfair or burdensome, the due process issue should be evaluated with an eye towards those factors themselves, rather than through an intermediary concept like minimum contacts, which is not only vague, but also necessarily over-inclusive in some cases and under-inclusive in others.⁴¹⁸

its contacts, would not thereby be subject to jurisdiction in the forum absent contacts sufficient to create the rarely invoked doctrine of general jurisdiction. See discussion *supra* Part II.A.

⁴¹⁶ See Juenger, *supra* note 80, at 1029 (“[*Pennoyer*] lump[ed] together the two disparate ideas of sovereignty and fairness, but ever since the two have coexisted uneasily in the realm of jurisdiction.”).

⁴¹⁷ Consider states like California, Texas, Florida, Montana, Alaska, and even New York, where parts of those States are quite distant from other parts. A defendant living near one border of the State might find it quite easy if sued just over the border in the next State—say a defendant living on the California side of the California/Oregon border sued in southern Oregon. Yet, if sued at the far end of the defendant's own state, the defendant might be quite burdened—and it might be unfair—to require that defendant to defend in that distant courthouse. Although State venue rules might limit this, to the extent that they did not, the Supreme Court's strange interpretation of due process with a focus on state boundaries would provide no relief. See Parry, *supra* note 82, at 855 (“[P]ersonal jurisdiction is not a constitutional issue when the defendant is a resident of the forum, no matter how inconvenient the specific in-state venue may be. Personal jurisdiction is a due process issue only when a person is required to litigate in the courts of a state with which he or she claims to have no meaningful connection.”).

⁴¹⁸ In cases like *Hanson*, *World-Wide*, and *Nicastro*, where minimum contacts were in fact lacking, adjudication was almost certainly less burdensome (and no more unfair) for the defendants than in cases like *Burger King* and *Calder*, where contacts were established. This probably explains why these cases have led to such a great divide on the Court. See discussion *supra* Part II. Minimum contacts is clearly the test, but it also is supposedly driven by due process concerns. In these cases, like many others, the two concepts do not line up.

The poor match between contacts and fairness/burden may explain why many of the Court's opinions have relied on minimum contacts for some purposes other than fairness. Moreover, the lack of fit is the best explanation for the Court's making the odd assertions that due process is the sole limit on the exercise of personal jurisdiction, while simultaneously maintaining that personal jurisdiction requires contacts even if fairness considerations counseled in favor of finding jurisdiction.⁴¹⁹

The inadequacy of the minimum contacts test as an agent of due process comes into sharper focus by looking at the manner in which it arrived in the personal jurisdiction lexicon in the first place. *International Shoe* promulgated minimum contacts as the personal jurisdiction touchstone without giving a reason that that particular language or test made more sense than another standard, like strong contacts, presence, slightest contacts, reasonable contacts, etc. In asserting that the permissibility of jurisdiction over a particular defendant depended upon sufficient minimum contacts that did not offend "traditional notions of fair play and substantial justice," *International Shoe* cited *Miliken*.⁴²⁰ But *Milliken* itself, a case involving jurisdiction over a resident of a state, did not refer to minimum contacts. Instead, it discussed the due process concepts of fair play and substantial justice in connection with the issue of whether the form of service of process gave the defendant notice of suit and an adequate opportunity to be heard,⁴²¹ criteria that are central to traditional due process analysis.⁴²² That *International Shoe* substituted minimum contacts for notice of suit and an opportunity to be heard indicates that it stretched due process beyond

⁴¹⁹ See discussion *supra* Part II.B.3.g (discussing *J. McIntyre*).

⁴²⁰ See *International Shoe*, 326 U.S. at 316 ("[I]n 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 suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting *Milliken*, 311 U.S. at 463)).

⁴²¹ See *Milliken*, 311 U.S. at 463 ("Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied." (citation omitted)).

⁴²² See discussion *supra* Part III.B.1.

its logical and theoretical boundaries, or that it was primarily concerned with true due process concerns, and used minimum contacts only casually to indicate that idea. Whatever *International Shoe* intended, ever since *Hanson* the Court has relied upon minimum contacts as an end in themselves, and has not decided personal jurisdiction disputes primarily with an eye toward fairness.

In addition, the Court turned to minimum contacts in *International Shoe* based on a series of cases decided in the decades prior to *International Shoe* that essentially reached outcomes that could be explained by minimum contacts even though they used legal fictions like consent and presence to justify their results rather than that actual language.⁴²³ Believing the outcomes of those cases correct and that personal jurisdiction over *International Shoe* should be found, but unsatisfied with the legal fictions as a rationale, the *International Shoe* Court groped for an alternative legal theory and settled on the minimum contacts language used in a different context in *Milliken*.

International Shoe's logic was thus: *Pennoyer* required presence or consent; these other cases conclude that defendants were present or had consented but in reality that was incorrect because the defendants were not actually present and did not consent; we believe that the outcomes are correct but that the reasoning is wrong; the only other way to justify those outcomes then is that those defendants had minimum contacts; ergo, minimum contacts will replace the legal fictions of presence and consent for out-of-state defendants.

This logic brings to mind the statement: "This isn't right! This isn't even wrong."⁴²⁴ The reasoning that inheres in the Court's position is that prior case outcomes cannot be squared with the reasoning in those cases or the underlying doctrine—elucidated in *Pennoyer*—that those cases purport to rely on; therefore the Court will adopt a standard that explains those outcomes. The Court apparently reasoned in *International Shoe* that even if the tests relied upon in those cases are wrong, the case outcomes must be right under some standard, even though they were not decided under a

⁴²³ See discussion *supra* Part II.A.

⁴²⁴ STEVEN GEORGE KRANTZ, MATHEMATICAL APOCRYPHA REDUX: MORE STORIES AND ANECDOTES OF MATHEMATICIANS AND THE MATHEMATICAL 194 (2005) (attributing the statement to physicist Wolfgang Pauli).

standard that the Court was now endorsing. The problem is that if some or all of those outcomes are wrong, then a standard that justifies all of them as though they were all correct is bound to be flawed. Moreover, even if all of those cases were correctly decided, the fact that the standard explains them does not necessarily mean it will be a sound approach to future cases. For this reason, not surprisingly, the Court has continued make various revisions to the minimum contacts test in an attempt to make it work upon the facts of each particular case. This continued attempt to force minimum contacts to work has made personal jurisdiction doctrine difficult to apply.

3. *Beyond Due Process, No Other Theory or Rational Supports Minimum Contacts as a Component of Personal Jurisdiction Jurisprudence*

As noted, since *International Shoe*, the Court has united three concepts: 1) personal jurisdiction; 2) due process; and 3) minimum contacts. It has already been argued—hopefully persuasively—that the links between personal jurisdiction and due process, and between due process and minimum contacts are weak and illogical.⁴²⁵ Even so, perhaps the appropriate test of personal jurisdiction remains minimum contacts. Perhaps the primary error involved the introduction of due process into the mix, and if that idea were dismissed then minimum contacts would make sense as an appropriate test under a different theory for defining the scope of personal jurisdiction.

The Court itself assumed this posture in *World-Wide* where it said that minimum contacts do not only protect the defendant's liberty interest, but also further goals of state sovereignty and interstate federalism.⁴²⁶ Of course, it had to retreat from that position two years later in *Insurance Corp.* by indicating that due process was the only limit on personal jurisdiction.⁴²⁷ Justice Powell's separate opinion in that case argued that the Court was mistaken in its decision to put all its personal jurisdiction eggs in the

⁴²⁵ See discussion *supra* Parts III.B.1 and III.B.2.

⁴²⁶ See *World-Wide*, 444 U.S. at 292; discussion *supra* Part II.B.3.a.

⁴²⁷ *Insurance Corp.*, 456 U.S. at 703 n.10; discussion *supra* Part II.B.3.b.

due process basket, maintaining that important sovereignty interests beyond due process were furthered by the minimum contacts test.⁴²⁸ He was saying that minimum contacts were important, and that they did flow from something other than due process. Minimum contacts do not make any sense as a central component of personal jurisdiction based on any theory.

Justice Powell was correct that at times the Court has suggested that interstate federalism and/or sovereignty puts limits on a court's exercise of personal jurisdiction and requires minimum contacts.⁴²⁹ Even the Court's current approach—at least the current plurality approach as articulated in *J. McIntyre*—which emphasizes due process as the sole source of limitation, has spoken in terms of state power and the defendant's submission to sovereign authority.⁴³⁰ Some commentators are sympathetic to this view.⁴³¹ The Court now

⁴²⁸ See *Insurance Corp.*, 456 U.S. at 709–716 (Powell, J., concurring in judgment). Powell predicted that this change in direction would signal the end of contacts, which the Court had previously indicated in both *Hanson* and *World-Wide* was inappropriate. Powell was incorrect. The Court has continued to hold on to the centrality of contacts while simultaneously maintaining that this is purely a matter of due process. The incompatibility of due process and minimum contacts is most pronounced in Justice Kennedy's plurality opinion in *J. McIntyre*. See discussion *supra* Part II.B.3.g.

⁴²⁹ See Weintraub, *supra* note 98, at 536 (“The United States Supreme Court has alternately embraced and rejected [the] notion that states’ rights play a significant role in interstate jurisdiction to adjudicate.”).

⁴³⁰ *J. McIntyre*, 131 S.Ct. at 2789.

⁴³¹ See Freer, *supra* note 32, at 580 (“The liberty interest is more than a right to be free from litigation in an onerous venue. . . . [I]t is the right to be free from the imposition of authority by a sovereign with which the defendant lacks sufficient ties. Limitations on personal jurisdiction reflect not a matter of transgressing other states’ authority, but of political legitimacy.” (footnote omitted)); Parry, *supra* note 82, at 854–55 (“[The] divergence of result[s] between standard due process analysis and the actual outcomes of Supreme Court personal jurisdiction cases leads to three possible conclusions: (1) personal jurisdiction doctrine requires radical change that would remove most obstacles to state court jurisdiction over out-of-state defendants; (2) due process has additional content in personal jurisdiction cases that generates further restrictions on personal jurisdiction; or (3) some other constitutional principle is also at work. Although I sympathize with the first option, I suspect that the third is most likely to be correct. Something else in the Constitution, other than due process, provides a basis for further restrictions on personal jurisdiction. The most obvious principle is federalism.”); *id.* at 855–56 (“The question is whether the consequences of crossing state borders are sufficiently important to require additional federalism safeguards. The Supreme

may be simply hanging onto the language of due process, while actually implementing a sovereignty-based standard that would otherwise make sense if due process were abandoned as a central component of personal jurisdiction. In addition to sovereignty and federalism, some have treated the exercise of jurisdiction as akin to the State's regulating a defendant's behavior, something that would understandably require some connection between the defendant and the forum.

Minimum contacts, however, does not withstand scrutiny as a agent of sovereignty, interstate federalism, or any other apparent theory, even if due process is put to one side, something that a few commentators have recognized.⁴³² Prior to *International Shoe*, the

Court's continued search for restrictions that go beyond those of minimal due process indicates a collective judgment that more is necessary.”)

⁴³² See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 58 (“I am . . . more concerned with the fundamental question of why the Court employs the minimum contacts test, or any test for that matter, to limit state court jurisdiction, and less concerned with the nuances of that test.”); Koppel, *supra* note 17, at 949 (“Several writers have counseled [for] . . . the elimination of sovereignty and state lines from the due process analysis or the removal of due process from ‘the equation’ altogether.”) (footnote omitted); cf. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 90 (1996) (“Borders are no longer as significant as they once were. From the economic standpoint at least, they are hardly impenetrable frontiers, but rather flimsy and insubstantial curtains of gauze, through which goods, ideas, and people flow rather easily.”); Judith Resnick, *Afterword, Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 492–93 (1996) (“Given cyberspace and globalization, the coherence of physicality as the basis of jurisdiction diminishes, with variation depending on the context.”). Some have tried to see minimum contacts as protecting the individual’s due process rights through its allocation of adjudicatory authority into separate States. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 711 (1987) (“The federalism-individual rights debate thus poses a false dichotomy. Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from illegitimate assertions of state authority. Legitimacy, though, is defined by reference to the state’s allocated authority within the federal system.”). Many commentators, moreover, believe that the minimum contacts test is workable, and simply needs to be reworked. See, e.g., John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 752 (arguing for “a reformulation of the ‘minimum contacts’ theory in which the concept of purposefulness is more carefully defined as the criterion for what ‘contacts’ count, and in which the intertwined concepts of the magnitude of the

Court's standard for personal jurisdiction was presence within the state, even if courts resorted to fictions to find that a defendant was present where realistically speaking the defendant was not.⁴³³ That standard stood up to logic if a court literally could not exercise power over those outside of its territories. If adjudication required the ability of the rendering court itself to enforce its judgment with no help from the Full Faith and Credit Clause or statute, then understandably there would be a problem if the defendant were located elsewhere.

Once one accepts that state courts have jurisdiction over some defendants found outside of their state lines—which one must in a country structured as the United States is and which the minimum contacts tests clearly does—then sovereignty falls away as a possible basis for limits on personal jurisdiction. To the extent that there are sovereign limits on state power, those end at the state border. The state logically cannot have sovereign authority over those outside the border, whether those persons have contacts with the state or not. So if personal jurisdiction were a matter of sovereignty, then minimum contacts could not represent the appropriate test.⁴³⁴ That is why between truly sovereign nations, jurisdiction over those outside a country can only be exercised by way of comity or agreement. The current approach at least since *International Shoe*, and in some cases before then, has conceded that states have some authority to adjudicate rights of those beyond their borders, ergo sovereignty cannot be the source of a limit on personal jurisdiction reach or the basis of the minimum contacts test.

contacts and their relationship to the claim in issue are more carefully defined as criteria for whether the cognizable contacts meet the required 'minimum'").

⁴³³ See generally *Pennoyer*, 95 U.S. 714; discussion *supra* Part II.A.

⁴³⁴ See Parry, *supra* note 82, at 852 ("Unless one is simply convinced that the Constitution requires a particularly strict approach to jurisdiction—something along the lines of *Pennoyer v. Neff's* focus on territory, property, and domicile—it is difficult to see why courts should do very much to limit personal jurisdiction."); cf. Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 581 ("All of the preoccupation with minimum contacts might just as well be preoccupation with implied consent, because there is little practical difference between the two.").

Interstate federalism has been used to express a slightly different, but related, basis for the exercise of personal jurisdiction.⁴³⁵ This term is actually a misnomer since federalism concerns relations between federal and state government. Essentially, what is meant here is the relationship between states within a federalist system. Posed this way, the issue is not so much that states are exercising sovereign authority without their borders to the detriment of those upon whom it is exercised. Rather, some have argued that the overbroad extension of one state's personal jurisdiction reach, would upset the balance of authority among states in the American constitutional federation.⁴³⁶

This formulation, too, falls apart upon closer scrutiny. The forum state is adjudicating the rights of two private parties.⁴³⁷ By so doing, it is not acting upon another state, but only upon someone who is present within that state. Enforcement would either take place within the adjudicating state, assuming that the defendant had assets therein, or only with the cooperation of a state where the defendant had assets, probably through the Full Faith and Credit Clause. Thus, the adjudicating state would in no way be taking any action against, within, or affecting the sovereignty of any other state.⁴³⁸

Sovereignty and interstate federalism also cannot support the minimum contacts test for another reason: a defendant may waive or

⁴³⁵ See Koppel, *supra* note 17, at 910–11 (“More generally, the debate continues over the relevance of state lines—the concrete manifestation of interstate federalism—in state-court jurisprudence.”).

⁴³⁶ See Kogan, *supra* note 21, at 262–63 (“The existence of boundary lines between states is a fact of our constitutional life. A central issue of federalism is the significance of these boundaries. Personal jurisdiction doctrine addresses this issue with respect to one feature of our federalist nation, the existence of separate court systems in each of the fifty boundaried areas. It attempts to justify the constitutional limits placed on the adjudicatory authority of each of these court systems over nonresidents. In performing this seemingly narrow task, however, the doctrine necessarily implicates a vision of the nature of American federalism.” (footnote omitted)).

⁴³⁷ See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 582 (explaining that personal jurisdiction is almost completely procedural, and it allocates business between courts rather than involving primary rights and liabilities).

⁴³⁸ Indeed, it would be surprising if a state were deemed to have standing to object to another state's exercise of personal jurisdiction over one of its residents.

even forfeit its personal jurisdiction argument.⁴³⁹ Therefore, if minimum contacts devolved from sovereignty or interstate federalism, then the power of individuals and private companies to forfeit, waive, or otherwise affect the sovereign rights of the states where they were located, would clearly be incompatible with the notion of sovereignty. Not surprisingly, it was when the Court had to confront this contradiction that it abandoned the posture that the minimum contacts test protected sovereign interests themselves rather than merely the rights of the defendants.⁴⁴⁰

Another aspect of the federalist system that counsels against minimum contacts as a function of sovereignty or minimum contacts is that federal courts retain parallel diversity jurisdiction in many cases arising under state law. Those cases could be brought in, or removed to, federal court in the state where jurisdiction is objected to.⁴⁴¹ Most of these cases are decided using the same minimum contacts test applied in state court, but only as a matter of federal rule.⁴⁴² Courts and commentators generally agree that Congress could extend the personal jurisdiction of a federal court throughout the entire country, and does not, in fact, have to organize federal courts by state.⁴⁴³ If Congress did that, then state lines and minimum contacts would only matter for cases brought in state court. Since the same dispute between the same parties would be decided under the same substantive law⁴⁴⁴ whether in state court, or in a federal court located nearby—often across the street—then the

⁴³⁹ See *Insurance Corp.*, 456 U.S. at 703 n.10.

⁴⁴⁰ See discussion *supra* Part II.B.3.b (discussing *Insurance Corp.*).

⁴⁴¹ Several of the Supreme Court's personal jurisdiction cases were brought in federal court under diversity jurisdiction, and one, *Walden*, 134 S. Ct. 1115, was there based upon federal jurisdiction.

⁴⁴² See, e.g., *Burger King*, 471 U.S. 462; *Walden*, 134 S. Ct. 1115.

⁴⁴³ See *U.S. v. Union P. R. Co.*, 98 U.S. 569 (1978) (suggesting that Congress has the power to create a single federal trial court with nationwide personal jurisdiction); *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Powell, J., dissenting) (“[Because] due process requires only certain minimum contacts between the defendant and the sovereign that has created the court. . . . suits against residents of the United States in the courts of the United States [presents] [n]o due process problem.”); *Andrews*, *supra* note 16, at 1375 (same).

⁴⁴⁴ *Erie*, 340 U.S. 64; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (requiring federal courts sitting in diversity to follow the choice of law rules of the state in which they are located). A case like *Walden* would be decided under the same federal law whether in state court or federal court.

relevance of state lines and minimum contacts therewith seems illogical as a sovereignty-based criteria for the exercise of personal jurisdiction.⁴⁴⁵

Yet another way that minimum contacts is defended is by means of argument presenting a state's adjudicatory authority as similar to its power to regulate with regard to particular parties. There is some surface appeal to this approach. After all, it would not only be odd, but probably unconstitutional, for a state to create substantive standards that would apply outside its boundaries.⁴⁴⁶ But as already noted, the exercise of personal jurisdiction involves arbitrating property rights between private individuals, rather than the state regulating or sanctioning the defendant, or the plaintiff for that matter.⁴⁴⁷ The application of state substantive law to the dispute would involve some measure of after-the-fact regulation, and should require some connection to a party who would be subject to it.⁴⁴⁸

⁴⁴⁵ Surely the United States remains sovereign throughout the country while states do not. But ultimately the court, whether federal or state, is not acting outside the boundaries of a state by engaging in an adjudication. Moreover, that the current approach limits federal personal jurisdiction, in almost all cases, to the same extent as state jurisdiction, sovereignty cannot be the driving force because the sovereignty of the federal government obviously extends even to those outside the forum state who lack minimum contacts therewith.

⁴⁴⁶ For example, the state of New York could not pass legislation requiring people in New Jersey to drive a particular speed limit; Florida could not regulate pharmacies located in Minnesota; and California could not promulgate fishing license regulations for Maine.

⁴⁴⁷ See discussion *supra* Part III.B.1.a.

⁴⁴⁸ Notably, the Court has generally taken a *laissez-faire* approach to choice of law matters. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981) (Stevens, J. concurring) (“The forum State’s interest . . . is . . . sufficient, in my judgment, to attach a presumption of validity to a forum State’s decision to apply its own law to a dispute over which it has jurisdiction.”); David P. Currie, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986* 581 (University of Chicago Press 1990) (“*Allstate v. Hague* [449 U.S. 302 (1981)] . . . seemed to carry the deferential attitude of earlier modern cases to extremes in 1981 by permitting a State to apply its own law . . . for injuries inflicted by one or more nonresident on another outside its borders.”). This is backwards, for a party would seem to care much more about the governing law than where in the United States the dispute is litigated, especially with federal court being an option in most interstate cases.

But state courts do not automatically apply their own substantive laws to matters that they adjudicate.⁴⁴⁹

Other aspects of personal jurisdiction doctrine also undermine the regulatory basis for personal jurisdiction and minimum contacts. Whatever the basis for jurisdiction (consent, tag, minimum contacts), the exercise of it has the same implications. So if the exercise of jurisdiction equated with regulation as a basis for minimum contacts, the jurisdiction would also amount to regulation when a defendant was tagged in the state, or forfeited or waived its jurisdictional argument. But clearly handing a defendant a piece of paper while he happened to be in a given state (*Burnham*),⁴⁵⁰ or merely flying over it (*Grace*),⁴⁵¹ is not sufficient to subject him to state regulation. The same could be said about a state applying its laws to a person who simply failed to timely object thereto. Put differently, if jurisdiction were equated with regulation, then many of the ways in which jurisdiction is conferred would afford a state the ability to regulate even his activities outside its borders, which would generally be deemed improper. The exercise of jurisdiction necessarily involves something other than regulation. State regulatory authority therefore does not provide a justification for the minimum contacts test.

Leaving aside the particular theory on which one would base minimum contacts, examining the nature of a civil suit—a battle between two or more private parties—undermines minimum contacts as a basis for personal jurisdiction. The parties to a civil suit have a congruent relationship to the suit and the forum. Reduced to the essentials, both plaintiffs and defendants seek to have

⁴⁴⁹ Even with the fairly lax constitutional strictures on choice-of-law, the Supreme Court imposed some limits. See *Allstate*, 449 U.S. at 326 (Stevens, J. concurring) (“The forum State’s interest . . . is clearly not sufficient, however, to justify the application of a rule of law that is fundamentally unfair to one of the litigants.”); Currie, *supra* note 448, at 581 (“*Phillips Petroleum Co. v. Shutts* made clear for years after *Hague* that the Constitution still imposed limits on the authority of one state to meddle with the affairs of another.”). If applicable law is the problem, then the answer is not to use personal jurisdiction doctrine to direct matters to another court where a different law may be applied, but provide stronger limits on application of substantive law to those without a connection to the state whose law is being applied.

⁴⁵⁰ 495 U.S. 604; see *supra* Part II.B.3.f.

⁴⁵¹ 170 F. Supp. 442; see *supra* Part II.B.3.f.

the court of a particular forum allocate disputed property rights.⁴⁵² Since the parties are similarly situated, if minimum contacts were constitutionally essential for a defendant to be subject to adjudication, so too would contacts be required between plaintiff and forum before the plaintiff's rights could be adjudicated by a given court.⁴⁵³ Of course that is not a requirement, nor should it be for either plaintiff or defendant.

In sum, minimum contacts has no logical place in the personal jurisdiction lexicon either as a function of due process or otherwise. It has previously been shown that due process itself has only a limited role. It is now necessary to formulate a new approach to personal jurisdiction that does not include minimum contacts, and involves due process only in the limited roles already suggested.

IV. A PROPOSAL FOR A NEW APPROACH TO PERSONAL JURISDICTION

A major problem with the current personal jurisdiction approach is its complexity.⁴⁵⁴ It would make little sense to replace it with something else complex. As it has been argued that personal jurisdiction need not be primarily a constitutional matter, the groundwork has been established to create a straightforward doctrine.

The approach being advocated calls for the Supreme Court to get out of the way and allow states to be the primary arbiters of personal jurisdiction. Around that state-law core, both the Constitution as applied by the courts, including the Supreme Court, and Congress have secondary roles to fill in gaps where necessary. The model proposed here is primarily for use with defendants located in the

⁴⁵² The term "property rights" is used here in a liberal fashion. The dispute may not be about a particular piece of property. It may involve a suit for damages or even an injunction. But even then, both sides are essentially beseeching the court to give it something—and thereby take something from the other side—that has the quality of property, be it money or the right to enjoin or not be enjoined.

⁴⁵³ A similar argument has been made already regarding the incongruity that arises between a plaintiff's rights and a defendant's rights when due process is made a central component of the personal jurisdiction analysis.

⁴⁵⁴ See Weintraub, *supra* note 98, at 558 ("It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated.").

United States being sued in other states. Because policy concerns, rather than high theory and constitutionalism, ought to drive personal jurisdiction, the appropriate exercise of jurisdiction over defendants located in foreign countries should be a matter of negotiation through bi-lateral agreements and/or more comprehensive treaties, a matter beyond the scope of this article. Even so, the model proposed here, could still provide guidance for those types of negotiations.

A. *States as the Primary Arbiters of Personal Jurisdiction*

Personal jurisdiction over defendants located in the United States should be primarily a matter of state law.⁴⁵⁵ States would decide, as a matter of policy, to which parties and disputes to open their courts.⁴⁵⁶ This state-focused approach would be supplemented by limited constitutional protection and, as needed, congressional legislation, as discussed in the next two subsections

As jurisdiction is being put forth as a policy decision, no specific approach will be advocated here as to what personal jurisdiction standards states ought to craft. Some states already have long-arm statutes that provide specific limitations.⁴⁵⁷ But under the Supreme

⁴⁵⁵ Cf. Geoffery C. Hazard Jr., *A General Theory of State Court Jurisdiction*, 1965 S. CT. REV. 241, 281–82 (1965) (“The long-arm statutes are settling into familiar application in multistate tort and contract cases. If drafted to embrace multiparty litigation . . . they would close the gap that has long existed.”).

⁴⁵⁶ Cf. Borchers, *supra* note 71, at 101 (“There are plenty of sound reasons for, and sensible methods of, regulating jurisdiction. These choices, however, are legislative, not constitutional, choices.”).

⁴⁵⁷ See, e.g., N. Y. C.P.L.R. § 302 (Consol. 2014) (“Personal jurisdiction by acts of nondomiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international

Court's current approach most states have long-arm statutes that explicitly—or as interpreted by their own courts—permit jurisdiction to the full extent allowed under the Due Process Clause.⁴⁵⁸ The current state statutes that provide specific limitations, or model jurisdictional provisions, could provide models for drafting new long-arm statutes in those states who statutes now extend to the full extent of the Due Process Clause.

This description might seem open-ended, and some might assume that it will lead to mischief and inappropriate and over-extensive jurisdictional grabs. Section V below addresses this concern. That section concludes that these fears will likely not come about. And while it might seem strange to argue that states should be the primary drivers of personal jurisdiction law, that peculiarity results from the long-standing history of the current doctrine. In fact, allowing states to take the lead in defining personal jurisdictional reach is consistent with the traditional role of these entities, especially as most of the disputes involving personal jurisdiction arise under state substantive law.⁴⁵⁹ Moreover, defining the boundaries of personal jurisdiction was primarily a state function during portions of this country's first one hundred plus years.⁴⁶⁰

B. *The Role of the Constitution in Personal Jurisdiction*

Although states will be called on to lead in creating personal jurisdiction standards, there is still some role for some mild constitutional and federal legislative limits to supplement what will

commerce; or 4. owns, uses or possesses any real property situated within the state.”).

⁴⁵⁸ See, e.g., CAL. CIV. PROC. CODE § 410.10 (Deering 2015) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”); Vedder, Price, Kaufman & Kammholz, *Long-Arm Statutes: A Fifty-State Survey* (2003) <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>.

⁴⁵⁹ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 101 (“I am not arguing that jurisdiction should be a free-for-all, unregulated phenomenon. There are plenty of sound reasons for, and sensible methods of, regulating jurisdiction. These choices, however, are *legislative*, not constitutional, choices.”).

⁴⁶⁰ See Kogan, *supra* note 19, at 279-97 (discussing pre-*Pennoyer* personal jurisdiction cases in federal and state court).

now be primarily a state-law policy matter.⁴⁶¹ Due process should not provide the starting point or play a prominent role in determining the test for the exercise of personal jurisdiction, with the various arbitrary criteria that the Court has created under the auspices of that provision—minimum contacts, purposeful availment, state sovereignty and the like.⁴⁶² Instead, the Due Process Clause will play two minor roles in personal jurisdiction, channeling and backstopping, as alluded to above,⁴⁶³ and discussed more fully here.

First, under the *channeling role*, although the contours of personal jurisdiction will generally spring from non-constitutional sources, where personal jurisdiction is lacking, the defendant will have an argument that adjudication will violate its due process rights. This will allow defendants to directly challenge the improper exercise of jurisdiction, as they do now, rather than raising a lack of jurisdiction under the Full Faith and Credit Clause, in response to an enforcement action.

Whenever a court lacks proper authority to adjudicate, a deprivation of property rights by that tribunal denies the deprived party due process. The lack of authority could be a lack of personal jurisdiction, a lack of subject matter jurisdiction, a lack of proper appointment or qualification for the judge, or other irregularity that divests a tribunal of appropriate adjudicatory power. The Due Process Clause need not be the source of the standard for determining whether the court may properly proceed. Certainly, due process does not determine whether a court has subject matter jurisdiction. So too, personal jurisdiction need not be—and ought not be—primarily evaluated based upon due process considerations. Rather, if personal jurisdiction in fact is missing in a given case, then

⁴⁶¹ See Borchers, *supra* note 71, at 94 (“The Court has suggested, and [several commentators] all have advanced with some force, the right to have access to process as a rationale for using the due process clause to analyze jurisdiction. . . . All of these proposals are much more palatable alternatives than the Court’s approach of the last several years.”) (collecting cases and commentary). All of these proposals are much more palatable alternatives than the Court’s approach of the last several years.

⁴⁶² Cf. Koppel, *supra* note 17, at 949 (“Several writers have counseled . . . [in favor of] the elimination of the reasonableness inquiry and, on the functionalist end, the elimination of sovereignty and state lines from the due process analysis or the removal of due process from ‘the equation’ altogether.”).

⁴⁶³ See discussion *supra* Part III.B.1.

a defendant has the right to argue that the adjudication has deprived him or her of property without due process of law. The language of *Pennoyer* certainly suggests—even if it does not make absolutely clear—that this is an appropriate role for due process. Several commentators have read *Pennoyer* this way. Whether or not that is what was actually intended in that case, it is nonetheless a role that this procedural provision should play to prevent adjudication of property rights by a tribunal lacking authority over the deprived party.

Second, the Due Process Clause will have a *backstopping role*. Unlike the current approach in which due process has a primary role in shaping personal jurisdiction limits, the role would be more limited. Irrespective of contacts or other criteria that has found its way into post-*International Shoe* personal jurisdiction jurisprudence, defendants' due process challenges to personal jurisdiction would be treated under the same standard as other procedural due process challenges.

Due process generally requires that a party have notice and a fair opportunity to defend.⁴⁶⁴ The procedures afforded should be ones that minimize the risk that a party will lose property without a fair assessment of the facts and law—that the likelihood of mistake be minimized.⁴⁶⁵ As applied to the exercise of jurisdiction by a particular court, the inquiry would focus on how difficult or burdensome it would be for a defendant to litigate in that court. This would involve an assessment of the distance to be traveled, the ease of litigating from afar, and consideration of any other element that could undermine the defendant's ability to have his or her day in court.⁴⁶⁶

⁴⁶⁴ See *Goldberg*, 397 U.S. at 267; Parry, *supra* note 82, at 853 (“For procedural due process the basic test is fundamental fairness.”).

⁴⁶⁵ See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 577–79 (arguing for applying the *Matthews v. Eldridge* due process standard to the personal jurisdiction context); Borchers, *Death of the Constitutional Law*, *supra* note 71, at 99 (“[To show that the exercise of personal jurisdiction is constitutionally invalid] should require a defendant to show a practical inability to defend.”); *cf.* Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS § 4.8 A(1)(E), at 191 (6th ed. 2010) (“[Courts should] permit a plaintiff to bring suit against a United States defendant in any forum that has a reasonable interest in adjudicating the case.”).

⁴⁶⁶ See Borchers, *supra* note 71, at 99 (“Perhaps there are some cases in which a defendant is put to the test of defending or defaulting, and it is economically

This approach will be consistent with due process doctrine as applied to other matters. It will thereby correct the over-inclusiveness and under-inclusiveness of the current minimum contacts standard as a proxy for due process. Due process will serve to protect those defendants who are truly unduly burdened by the exercise of jurisdiction, while affording no relief to those who are not.⁴⁶⁷ No longer will due process protections help create legal fictions like purposeful availment or in-state service that have little relevance to whether it will be unfair to hale a particular party before a tribunal.⁴⁶⁸ This will mean that those defendants like J. McIntyre and World-Wide, parties who clearly would not have been burdened by defending in the plaintiff's chosen forum, will not escape on due process grounds, while parties like those that both Kennedy and Breyer were concerned about in each of their *J. McIntyre* opinions—Appalachian potters, and Egyptian shirt-makers—will be protected if

rational for the defendant to make a motion to dismiss for lack of personal jurisdiction. This much, however, should be clear: if there are such cases, they are few and far between. Such a motion should require a defendant to show a practical inability to defend.”). Additionally, courts can employ other devices, like a *forum non conveniens* dismissal to minimize inconvenience when burdens do not rise to a constitutional level.

⁴⁶⁷ See Parry, *supra* note 82, at 854 (“[Due process evaluation in personal jurisdiction is an] open-ended but also deferential inquiry into the likelihood that the proceedings will be fundamentally fair to the defendant. At the core of this inquiry is the inconvenience, if any, caused by crossing a border.”). Moreover, because both plaintiff and defendant may suffer burdens in litigating in a distant forum, there is no reason that the due process evaluation should focus purely on the defendant. See *id.* (“[T]he fairness analysis can also include an assessment of plaintiff’s interests.”); *cf. id.* at 857 (“[P]ersonal jurisdiction doctrine should reflect basic due process doctrine supplemented by federalism values. An appropriate standard is something like the following: a state court may presumptively exercise jurisdiction over non-consenting defendants who know or ought to know that their voluntary acts or omissions, and/or the effects of those acts or omissions, implicate the legitimate regulatory interests of the forum state, unless the defendant demonstrates that (1) the forum state’s interests in the litigation are minimal and significantly outweighed by those of another state or (2) the burdens on the defendant would make litigation in that forum significantly unfair in relation to another available forum and the potential burdens on the plaintiff.”).

⁴⁶⁸ But see McFarland, *supra* note 7, at 794 (“[S]tate boundaries are meaningful. This rules out a test based on convenience—similar to *forum non conveniens*—in which state boundaries are irrelevant.” (footnotes omitted)).

they can show that they cannot reasonably defend in the plaintiff's chosen forum.⁴⁶⁹

C. *The Role of Congress*

Congress will also have a role as needed. If states, freed from the minimum contacts diktat, enact problematic jurisdictional statutes, Congress could intervene using its authority under the Full Faith and Credit Clause.⁴⁷⁰ That provision gives Congress the authority to determine under what circumstances a judgment will be entitled to recognition. It is generally agreed that Congress could use this to create substantive jurisdictional rules.⁴⁷¹ True, technically this would not allow a direct attack on a court's jurisdiction, but only allow the defendant to raise a defense to collateral enforcement.⁴⁷² Even so, where the defendant is not located within the forum state, a

⁴⁶⁹ See Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475–76 (2012) (“Despite the expressed concern of Justice Kennedy for the small Florida farmer whose produce may be marketed nationally, and of Justice Breyer for the Appalachian potter being sued in Alaska or Hawaii, the obvious beneficiaries of *McIntyre*'s constriction on personal jurisdiction will be manufacturers, pharmaceutical companies, and other significant economic entities. In my view, the four plurality Justices should not have focused on formal contacts and notions of sovereignty and the defendant's intent to submit to the forum, with no acknowledgement that the farmer and potter can be protected by the principles of fair play and substantial justice recognized in *International Shoe* and reprised in *Asahi Metal*.” (footnote omitted)).

⁴⁷⁰ U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.*” (emphasis added)); see Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 504 (1981) (“[T]he Full Faith and Credit Clause . . . authorize[s] Congress to legislate on the topic [of personal jurisdiction].”).

⁴⁷¹ See Borchers, *Death of the Constitutional Law*, *supra* note 71, at 105; *cf.* Whitten, *supra* note 470, at 604 (“Congress may enact a set of nationwide long-arm jurisdictional rules to govern the validity of the judgments of state courts in sister state proceeding.”).

⁴⁷² *But see* Whitten, *supra* note 470, at 604–05 ([T]his congressional power is not limited to provision of jurisdictional rules available only on collateral attack of state-court judgments in other states.”).

judgment that cannot be enforced elsewhere will likely be of little value, so that plaintiffs would have no incentive to bring suits that they could not enforce in sister states. At any rate, for reasons discussed above and in the next section, states will probably be sufficiently careful in crafting jurisdictional statutes that little, if any, congressional intervention of the type discussed in this paragraph will be necessary.⁴⁷³

Congress could also play a helpful role by amending the current diversity statute to prevent clever ways for plaintiffs to thwart federal jurisdiction.⁴⁷⁴ The purpose of diversity jurisdiction is to protect plaintiffs and defendants from being disadvantaged by the other party's court system. And with regard to personal jurisdiction, the federal court system, being one national system, has the flexibility to take a holistic approach to where the trial and various proceedings may be had.⁴⁷⁵ Whether the current transfer of venue provisions are sufficient or require tweaking will require evaluation, but certainly either under current or amended provisions, Congress could create a fair, uniform, and common sense personal jurisdiction regime. Transfer of venue—and its state-court cousin, *forum non conveniens*—are better tools for determining on a case-by-case basis the best location for a particular case, taking into account all relevant interest than is the rigid doctrinal approach of constitutional personal jurisdiction.⁴⁷⁶

⁴⁷³ Also, many current long-arm statutes say, or have been interpreted by state courts, to extend jurisdiction to the full extent authorized by the due process, a concept that would become meaningless under the proposed standard. For this reason, Congress might have to create an interim statute until all states adopt specific long-arm provision.

⁴⁷⁴ This does not mean that Congress need overly expand diversity jurisdiction, but it could ensure a federal court in situations where adverse parties are truly in different locales, irrespective of tactical joinders. See generally E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569 (2006).

⁴⁷⁵ 28 U.S.C. §§ 1404, 1406 already address this. To the extent that the federal courts provide a refuge out of the personal jurisdiction trap, Congress could revise these statutes to lessen the incentives for the use of tactics to take advantage of personal jurisdiction doctrine, allowing judges to make a common sense determination of where to allow litigation to take place.

⁴⁷⁶ See Parry, *supra* note 82, at 852 (“Venue doctrines, including removal, transfer, and *forum non conveniens*, provide some help, and other ‘procedural devices’ are also available to defendants.”); cf. Freer, *supra* note 32, at 572–73 (“[A case like]

In sum, the proposed model calls for personal jurisdiction to be primarily a state law, policy matter. The Constitution and Congress will both have secondary roles. The system will be simpler, fairer, and more likely to further the goals of both personal jurisdiction and due process.

V. APPLYING THE PROPOSED APPROACH TO COMMON PERSONAL JURISDICTION SCENARIOS

How will what was proposed in Section IV work in practice? Will it result in absurd outcomes, or will personal jurisdiction make more sense and be more efficient? Let us see by examining several scenarios that make up the typical personal jurisdiction cases. First, there are cases in which the plaintiff picks some state that has no apparent connection to either party or to the dispute. *Keeton*⁴⁷⁷ is the best example of this. Second, are cases in which the plaintiff sues the defendant in the plaintiff's home state, where that state has no connection to the dispute, for example a Connecticut plaintiff suing a New York defendant in Connecticut for a car accident that happened in New York or New Jersey. *Goodyear*⁴⁷⁸ represents this type of case, although the international aspect adds a wrinkle that raises issues beyond the scope of this article. Third, there are unintentional and intentional tort cases where at least the injury is suffered in the plaintiff's home state, where the plaintiff sues, like *J. McIntyre*,⁴⁷⁹ *World-Wide*,⁴⁸⁰ and *Calder*.⁴⁸¹ Fourth, there are cases arising from

Burger King . . . filed in federal court [makes] transfer to federal court in Michigan . . . at least possible; state court litigation cannot be transferred across state lines. At best, a state-court defendant would have to rely on dismissal under *forum non conveniens*, which as Dean Hay reminds us, 'is an uncertain and unreliable corrective mechanism.'" (footnote omitted) (quoting Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 603 n.76 (1990)).

⁴⁷⁷ 465 U.S. 770; see Part II.B.3.c.

⁴⁷⁸ 1315 U.S. 2846; see discussion *supra* Part II.B.3.g.

⁴⁷⁹ 131 S. Ct. 2780; see discussion *supra* Part II.B.3.g.

⁴⁸⁰ 444 U.S. 286; see discussion *supra* Part II.B.3.a.

⁴⁸¹ 465 U.S. 783; see discussion *supra* Part II.B.3.c. Cases like *World-Wide*, *Calder*, *Walden*, and *Nicastro* fit this pattern. In some of these tort cases, the tort is actually committed within the plaintiff's state (e.g. a car accident occurring in

transactional disputes brought as either tort or contract suits by the plaintiff in the plaintiff's home state, like *McGee* and *Burger King*.⁴⁸² Fifth, there are various domestic relations, wills, trusts, and other personal transaction cases, like *Burnham*, *Kulko*, *Hanson*, and *McGee*.⁴⁸³ Sixth, there are cases involving tag jurisdiction like *Burnham* and *Grace*.⁴⁸⁴

Consider the categories in turn, starting with plaintiffs picking states have no connection to the parties or events. Left to make their own policy, most states would probably craft long-arm statutes that exclude these types of suits. After all, states have little incentive to clog their own courts with disputes where the events and the parties have no connection to the state.

Moreover, plaintiffs will rarely bring a suit in a forum having no connection to itself, the defendant, or the events of the case. The only reason a plaintiff might do this, is to gain tactical advantage. In *Keeton*, the plaintiff sought to take advantage of New Hampshire's extra-long statute of limitations. Conceivably, a plaintiff with extensive resources might choose an arbitrary, distant forum to gain an advantage over less well-healed plaintiff, such as a New Yorker suing a fellow New Yorker in Alaska over a New York car accident. Assuming that states even allowed these types of suits, which the previous paragraph argued is not likely, the Due Process Clause, in its backstopping role, would provide a vehicle for a defendant to argue that he or she really would be denied a fair opportunity to litigate.⁴⁸⁵

Actually, the proposed model with its focus on state driven policy and fairness will be less subject to tactical abuse and sharp practice than the current formalistic approach. For example, the somewhat unsettling result in *Keeton*—a suit in New Hampshire as a

the plaintiff's state). In others, some activity, like manufacturing or selling a product occurs outside the plaintiff's state but causes injury there.

⁴⁸² 471 U.S. 462; see discussion *supra* Part II.B.3.d. In some transaction cases, the parties have included choice-of-forum clauses. The Court has taken a sound approach to evaluating and applying these clauses, and no change is recommended to that doctrine. See *Carnival*, 499 U.S. 595; *The Bremen*, 407 U.S. 1.

⁴⁸³ See *Burnham*, 495 U.S. 604; *Kulko*, 436 U.S. 84; *Hanson*, 357 U.S. 235; *McGee*, 355 U.S. 220.

⁴⁸⁴ See *Burnham*, 495 U.S. 604; *Grace*, 170 F. Supp. 442.

⁴⁸⁵ See discussion *supra* Part IV.B.

result of forum shopping⁴⁸⁶—would probably be avoided under the approach proposed here, even though on its surface my proposal seems more permissive. Left to make policy, New Hampshire likely would have crafted a narrower long-arm statute than the one it had allowing the exercise of jurisdiction to the full extent of the due process clause. Moreover, to the extent that due process arguments in personal jurisdiction would focus on fairness, and not legal fictions of contacts and purposeful availment, the Ohio-based defendant’s argument that it should not be subject to suit in New Hampshire in a suit by a New Yorker, for conduct that took place primarily outside New Hampshire, would have more traction than it did in *Keeton* itself.

The second category, plaintiffs suing at home for conduct occurring elsewhere—e.g., the suit in New York by a New Yorker against a New Jersey defendant for a New Jersey car accident—is not that common. Most state long-arm statutes that actually place limits on jurisdiction beyond the constitutional strictures, do not allow this type of suit.⁴⁸⁷ And long-standing Supreme Court doctrine clearly does not allow it. So plaintiffs generally know better than to bring these types of suits, although they probably would so if they were allowed to. Even so, even if left to make their own policies, states probably may not allow jurisdiction over these types of suits.

In crafting long-arm statutes, the interest of their own citizens gives states incentives not to overreach to protect their own citizens from overreaching by sister-states. Moreover, to the extent coordination problems between states do lead to overreaching, this would be an ideal place for congressional intervention, *if desired*. The latter modifier is added, because allowing one who is in an accident with an out-of-state plaintiff to be sued in the plaintiff’s home state is not necessarily a problematic result. Perhaps it is. And for this reason, having a cogent, coordinated policy, rather than piece-meal results based on legal fictions promulgated by various courts will generally produced better, and more predictable results. *Goodyear*⁴⁸⁸ itself, which is an example of a suit in this category,

⁴⁸⁶ 465 U.S. 770; *see discussion supra* Part II.B.3.c.

⁴⁸⁷ *See e.g.*, N.Y. C.P.L.R. § 302 (Consol. 2014).

⁴⁸⁸ 131 S. Ct. 2846; *see discussion supra* Part II.B.3.h.

being a suit against a foreign defendant, raises issues that require treatment beyond the bounds of this article. But suppose *Goodyear* had involved the same facts happening in a U.S. state other than North Carolina—the plaintiff’s home state—thereby making it an example of this category of case. Under the circumstances whether plaintiffs should be able to sue at home, in those circumstances, as opposed to the defendant’s state should be a policy choice, not a matter of Supreme Court doctrine.

The third category makes up an area of great dispute. The most contentious and unsatisfying Supreme Court cases come from this area—cases like *World-Wide*, *Asahi*, and *J. McIntyre*. Yet, these should be easy cases. In most of Europe, defendants are answerable in the jurisdiction in which they caused harm.⁴⁸⁹ And most states would probably allow jurisdiction in this type of situation if given the choice. In none of those three cases would the defendant have faced any hardship or unfairness in litigating in the plaintiff’s chosen forum, whereas the plaintiff, as well as the witnesses, and even the defendants may have faced difficulties elsewhere, given the location of evidence and witnesses.

Asahi and *J. McIntyre* both involved international defendants. But in each, a plurality would not have allowed jurisdiction even if they were domestic defendants, and those cases are discussed for that reason.⁴⁹⁰ As for the small-time defendants that Justices Kennedy and Breyer each cite in their respective *J. McIntyre* opinions as potentially unfairly subject to suit in a distant forum over a single, indirect sale, the current approach will benefit them. Their burdens themselves could be examined as part of the due process protection proposed here if the defendants argued that the exercise of jurisdiction was unfair, as opposed to jurisdiction turning upon the arbitrary nature of contacts.⁴⁹¹ In this way, the proposed approach

⁴⁸⁹ See Regulation (EU) No. 1215/2012 (Art. 7(2)) (providing for tort jurisdiction where a harmful event occurred).

⁴⁹⁰ The issue of jurisdiction over international defendants raises issues of foreign relations that require separate treatment beyond the scope of this article. The Court has taken account of this fact in passing, but for the most part it has inappropriately used the same analysis for out-of-country defendants as it does for out-of-state defendants.

⁴⁹¹ Cf. Miller, *supra* note 469, at 475–76 (“Despite the expressed concern of Justice Kennedy for the small Florida . . . and of Justice Breyer for the Appalachian potter . . . the obvious beneficiaries of McIntyre’s constriction on personal

would more likely protect those defendants who would suffer unfairness if required to defend in a distant forum, while allowing adjudication to proceed against those defendants who would not be so disadvantaged.

The fourth category, transactional disputes, can often be addressed by forum selection clauses. The Court has generally enforced these clauses, so long as the party on whom it is imposed is aware of and can understand the clause, and the chosen jurisdiction makes sense.⁴⁹² While a full analysis of the Court's forum selection clause jurisdiction is not undertaken here, this article's basic conclusion is that this represents one area where the Court has taken the appropriate approach to personal jurisdiction. For cases lacking a forum selection clause, the most common scenario likely to lead to a dispute is the *Burger King* situation—one contracting party suing the counterparty in the former's home state. This situation can be addressed much like the tort situation, and generally leave matters to state law and federal housekeeping provisions like transfer of venue. Constitutional court intervention would be limited to those cases in which the defendant would truly suffer unfair burden by litigating in the plaintiff's home state.

The fifth category, domestic disputes, trusts and estates, and the like, presents a particularly apt area for state-crafted jurisdiction law. Law regarding marriage, divorce, child support, wills, and trusts often vary greatly by state.⁴⁹³ Therefore, sensitivity to local concerns is important, and this arena would benefit from the ability

jurisdiction will be manufacturers, pharmaceutical companies, and other significant economic entities. In my view, the four plurality Justices should not have focused on formal contacts and notions of sovereignty . . . no acknowledgement that the farmer and potter can be protected by the principles of fair play.”). Consider the Appalachian potter, who sells an urn via eBay.com to someone in Hawaii. Under the current Supreme Court doctrine with its focus on the defendant's purposeful availment, the potter probably is subject to suit, even if it would be hard for him to litigate thousands of miles away. Under the proposed approach, the due process issue would come down to whether the defendant really could fairly and without undue burden (truly elements of due process) litigate in the Aloha State.

⁴⁹² See, e.g., *Carnival*, 499 U.S. 585.

⁴⁹³ See generally Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257 (1996); Adrienne H. Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMP. L. 151 (2014).

to states to coordinate jurisdictional policies that protect the important interests involved. In many of these cases the designation of parties as plaintiff and defendant is arbitrary, since they generally involve resolving a matter in which both parties are seeking to obtain something—and therefore where both are effectively petitioning the court for relief—rather than one party seeking relief, while the other party is merely seeking to avoid having to pay damages. For that reason, the Court's current approach, which treats plaintiffs and defendants unevenly,⁴⁹⁴ is particularly inappropriate. Again, the due process backstop can provide relief from unduly burdensome litigation. But given that collectively states have an incentive to protect each other's laws in the domestic relations area, there is reason to expect that they will coordinate both their jurisdictional and their choice-of-law standards.⁴⁹⁵

Finally, there is tag jurisdiction. This will probably no longer constitute a separate category. At the time *Burnham* was decided, most states that addressed the matter still allowed tag jurisdiction.⁴⁹⁶ Yet, this was probably merely a relic from the centuries-old practice that had not been addressed, rather than a conscious choice. Most states now demure to the Due Process Clause in writing long-arm statutes.⁴⁹⁷ If the Court no longer played the lead role in personal jurisdiction, states would be forced to give serious consideration to when they would open their courts. Just as states would have no incentive to generally allow suits for matters not involving their state or their citizens, those states would probably take a similar approach

⁴⁹⁴ Under the minimum contacts test, plaintiffs generally get to choose where to litigate out of all possible fora with which defendants have sufficient contacts, while defendants can avoid fora with which only the plaintiffs have contact. Thus, the plaintiff generally will have the upper hand whenever the defendant has minimum contacts with the plaintiff's forum, while being disadvantaged (and having to litigate away from home) whenever the defendant lacks contacts with the plaintiff's forum.

⁴⁹⁵ One reason that jurisdiction may take on so much importance in this area is that domestic relations law is highly state specific, and where a case is litigated may have important implications for the substantive law to be applied. Ideally, states will seek to reach an approach that deters parties from bringing suit to gain tactical advantage either in locale or governing law.

⁴⁹⁶ See *Burnham*, 495 U.S. at 608 (Scalia, J., plurality opinion).

⁴⁹⁷ Since *Burnham* held that tag jurisdiction comported with due process requirements, these long-arm statutes that allow jurisdiction to the outer-reaches of the Constitution tacitly condone tag jurisdiction.

when a party was fortuitously served with process inside its borders. So tag jurisdiction would probably be a non-issue. Moreover, even if states allowed it, the proposed approach for constitutional purposes, which eliminates contacts as well as sovereignty as factors in personal jurisdiction, would not turn upon whether or not a defendant was served within the boundaries of the state. All that would matter is whether or not it was unfair or burdensome for the defendant to litigate in the particular forum, which in no manner would be affected by the location of service. Thus, this odd, illogical, anachronistic form of jurisdiction would be effectively eliminated, thereby making the personal jurisdiction doctrine more cogent and reasonable.

Beyond the various categories, in most personal jurisdiction scenarios there is an overriding dilemma which can be better addressed by the proposed approach than the current doctrine. A suit between parties from two different states requires either the plaintiff or the defendant to travel to litigate.⁴⁹⁸ There is no solution that treats each party equally, short of litigation on neutral turf, which is no solution at all.⁴⁹⁹ The current approach does not resolve this issue, and treats the parties unequally. So long as the defendant has sufficient contacts with the plaintiff's state, the plaintiff gets to choose between home and away. On the other hand, if the defendant lacks those contacts, the plaintiff will have to litigate on the defendant's turf, even if the plaintiff lacks contacts with that state. The proposed approach will allow states to experiment through their jurisdictional statutes and *forum non conveniens* rules so as to further fairness concerns. Moreover, in cases that are removable,⁵⁰⁰ the federal transfer statute (28 U.S.C. § 1404) can be used. Freed from the focus on state lines, courts would then be able to decide between two possible states which location is best in terms of fairness to the parties, as well as efficient use of litigation and judicial resources.

⁴⁹⁸ Obviously the situation could be more complex with several parties from different places on each side, but the two-party two-state solution will be used to address this issue.

⁴⁹⁹ But the availability of diversity jurisdiction in federal court serves to lessen this unfairness.

⁵⁰⁰ Since long-arm disputes generally arise between citizens of different states, in many of these cases diversity jurisdiction will be available.

The above discussion shows that the proposed approach is superior with regard to outcomes. It will also be better than the minimum contacts standard with regard to process. The proposed model will likely be more predictable and more efficient to apply. Legislation is prospective and therefore allows the creation of more comprehensive law than reactive court decision.⁵⁰¹ The advantage here is jurisdiction law can be part of a complete package rather than a series of discrete, but hard to mesh rules. Further, parties and lower courts will benefit by better predictability to where suit may be brought.⁵⁰² In short, there will be a lesser drain on litigation and judicial resources, which should benefit all involved other than those who seek unfair tactical delay and lawyers who bill by the hour.⁵⁰³

VI. CONCLUSION

This article has suggested a seemingly radical change to personal jurisdiction doctrine. In reality, however, the proposal is consistent with the theoretical bases of personal jurisdiction, as well as the views of commentators and quite a number—albeit a minority—of justices that have served on the Court in the years since *International Shoe*. Theoretically, the proposal is truer to notions of due process as well as the concept of personal jurisdiction itself. Moreover, in practice it will lead to results that are fairer, more logical, and easier to apply.

⁵⁰¹ See Borchers, *supra* note 43, at 583–84 (“Adjudication is inherently concerned with past events. . . . This process simply does not lend itself well to announcing broad, easy-to-apply rules.”); cf. Cass R. Sunstein, *LEGAL REASONING AND POLITICAL CONFLICT* 106 (Oxford 1996) (“A great virtue of rules is that they limit permissible grounds for both action and argument. I have said that in a heterogeneous society, containing people of limited time and capacities, this is an enormous advantage. It saves effort, times, and expense.”).

⁵⁰² See Borchers, *Jurisdictional Pragmatism*, *supra* note 43, at 583–84 (“Adjudication is inherently concerned with past events, and the Court necessarily focuses on reaching a result based upon the specific facts of that case. This process simply does not lend itself well to announcing broad, easy-to-apply rules. Legislation, of course, is much better suited to prospective announcement of broad rules[.] The Supreme Court’s exceedingly close attention to personal jurisdiction has stunted legislative innovation.”).

⁵⁰³ This may not even be a detriment to lawyers. Law firms do not have unlimited resources and time and money spent litigating jurisdictional disputes may limit attorneys’ ability to address more important substantive matters.