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Running on Empty: Ford v. Montana and the Folly of Minimum Contacts

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Abstract. Jurisdictional contests are in disarray. Criticisms date back to the issuance of International Shoe Co. v. Washington *but the breakdown may be best illustrated in two recent Supreme Court opinions, the first rejecting California's "sliding scale" that mixes general and specific contacts, the second using the discredited sliding scale to hold Ford amenable in states where accidents occurred.*

California's sliding scale is one variety of the contacts-relatedness tests, used in lower courts to have general contacts bolster weaker specific contacts. Some states—Montana and Minnesota for example—use the opposite extreme requiring a causal connection in defendant's forum contacts, often using foreseeability or proximate cause. In Bristol-Myers Squibb v. Superior Court, *California used the sliding scale to support jurisdiction over a class action by mostly nonresident members for a drug not made in California. The Supreme Court reversed, pointedly rejecting the sliding scale as a spurious form of general jurisdiction.*

Four years later, the Court found the unconstitutional scale handy in Ford v. Montana, *affirming Montana and Minnesota decisions asserting jurisdiction for local accidents involving local residents. Ford objected to suits in those states because the cars were originally sold in other states. The Supreme Court unanimously rejected Ford's contact-causation argument, holding that Ford's overall forum contacts—"a veritable truckload"—relate to the claims because plaintiffs would be less likely to buy a used car if it weren't for Ford's name and presence. Using these general contacts to find specific jurisdiction, the Court gave up the last semblance of logic in the worn-out minimum contacts test.*

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Ford *is not an outlier but the product of an unworkable maze of a test whose precedents are a patchwork of contradictions. This Article reviews the origins, confusion, and doctrinal deviation in the minimum contacts test, then focuses on the particular conceptual breakdown that occurred with the* Ford *decision. It includes critiques of contacts problems like imputed consent and relatedness, and balancing problems like interest analysis and interstate federalism. While this Article covers a number of problems, its focus is* Ford *as the breaking point. The Article concludes with solutions, some proposing a revised test, others arguing the benefits of a statutory scheme, and my proposal to refocus on the historical emphasis on access to an adequate forum and a de-emphasis on vague political theories.*

Introduction

International Shoe drones on:

> This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises.[1]

Forum selection contests are in disarray, not just with disagreements on how the amenability scale should balance, but what goes on the scale, and even the scale itself. Criticisms date back to the 1945 issuance of *International Shoe Co. v. Washington*,[2] which discarded (more or less) the old territorial model that tied amenability to contemporaneous service of process in the forum. Instead, nonresident amenability would be based on vaguely outlined forum contacts, a test that grew over the years with clarifications that often increased—rather than resolved—the ambiguities. Although critics have announced the test's failure for years,[3] the breakdown may be best illustrated in two recent Supreme Court opinions, the first rejecting California's "sliding scale" that mixes general and specific contacts, the second implicitly using that sliding scale to hold Ford amenable in forums where accidents occurred.

The Court's sliding scale ban occurred in *Bristol-Myers Squibb Co. v. Superior Court*,[4] a class action case in California state court seeking damages for alleged injuries and death from a blood-clotting drug. Class members included eighty-six Californians and 592 residents of thirty-three other states, with defendant pharmaceutical companies objecting to jurisdiction only as to the forum nonresidents. The California Supreme Court upheld jurisdiction under a theory that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[5] This was true even though there was "no claim that Plavix itself was designed and developed in [BMS's California research facilities],"[6] because defendant did other unrelated research in California, their overall contacts were substantial, and the nonresidents' claims were similar to those arising in California.[7]

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[1] CHARLES DICKENS, BLEAK HOUSE 5 (Charles Scribner's Sons, 1899).

[2] 326 U.S. 310 (1945). The critics included Justice Black. *See id.* at 323 (Black, J., concurring); *see also infra* note 92.

[3] *See infra* notes 309–322 and accompanying text.

[4] 137 S. Ct. 1773 (2017).

[5] Bristol-Myers Squibb Co. v. Superior Ct., 377 P.3d 874, 889 (Cal. 2016) (quoting Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1098 (Cal. 1996)).

[6] *Bristol-Myers Squibb*, 137 S. Ct. at 1779.

[7] *Bristol-Myers Squibb*, 377 P.3d at 888.

The United States Supreme Court reversed in 2017, finding no jurisdiction as to the nonresidents' claims and pointedly rejecting the sliding scale as a "loose and spurious form of general jurisdiction."[8]

California's sliding scale is one variety of the contacts-relatedness tests that have percolated in state and federal courts for years, drawn from the misapplication of dictum in *World-Wide Volkswagen Corp. v. Woodson*.[9] There was no Supreme Court review until *Bristol-Myers*, then again four years later when another contacts-relatedness version—causality—came up in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[10] The sliding scale test features weak causality for specific jurisdiction, requiring only a light relationship between defendant's forum contacts and the claim if defendant's general forum contacts are strong. The opposite extreme is to require a strong relationship and that the claim be causally linked to defendant's forum contacts, often using foreseeability or even proximate cause as a measure.

Plaintiffs sued Ford for separate accidents in Montana and Minnesota, alleging defective designs. In both cases, the Ford cars were purchased in the forum state as used cars which were originally sold in other states, then brought to the forum by the original owners and resold there. Ford objected to personal jurisdiction, pointing out that none of Ford's forum contacts—advertising, new car dealerships, and so on—gave rise to the accident. Specifically, the cars were not designed, manufactured or originally sold in the forum, and Ford was neither incorporated nor principally located in the forum states.

Ford's too-clever argument was valid on the law (at least lower court precedents), but laughable on the facts—that an international manufacturer with otherwise heavy forum presence shouldn't have to defend a local accident involving local residents for a car purchased, licensed, and driven locally. The Supreme Court rejected it unanimously, holding that Ford's overall forum contacts—"a veritable truckload"[11]—could be said to "relate to" the claim because plaintiffs would be less likely to buy a used car if it weren't for Ford's name. The contacts considered for that can't have any label other than general contacts, and, in so ruling, the Court gave up the last semblance of logic in the worn-out minimum contacts test.

Ford is not an outlier, but the inevitable product of an unworkable maze of a test whose precedents are a repetitive patchwork of contradictions. Those contradictions are by no means the only weakness

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

9 444 U.S. 286 (1980).

10 141 S. Ct. 1017 (2021).

11 *Id.* at 1031–32.

in the minimum contacts model—even the vocabulary has become less focused.

> Every Justice now on the Court might speak the same language of specific and general jurisdiction, but there's no consensus on the animating principles behind these categories—leading to wild swings in doctrine over the past few years.[12]

A growing number of critics are calling for a new look at forum selection.

This Article reviews the origins, confusion, and doctrinal deviation in the minimum contacts test over its span, and then focuses on the particular conceptual breakdown that occurred with the *Ford* decision. Part I explains the English and colonial origins of American amenability theory and their contribution to the current test's successes and failures. In particular, it distinguishes the English concept of single-polity territorialism from its application in the American colonies, and the perhaps unintended changes that followed in the multi-jurisdictional United States. It then details the imposition of due process that cemented the awkward pairing of territorially distinct laws with mandated judgment enforcement.

Part II examines the *International Shoe* paradigm, its progression, and resulting distortions. Part II highlights the minimum contacts test's features, along with several problematic issues, such as the elusive idea of presence, the resulting Supreme Court splits on stream of commerce and tag jurisdiction, interstate federalism, contact relatedness, and, overall, the test's unfortunate embrace of government interest analysis as a dominant—but ill-defined—focus of many jurisdictional contests.

Part III summarizes our present conceptual and practical predicament with detailed critiques of contacts problems like imputed consent and relatedness, and balancing problems like interest analysis and interstate federalism. While the Article attempts to cover all the problems, its focus is *Ford* as the breaking point, though noting that prior critics have heralded a breakdown before. Part III concludes with solutions, some proposing a revised test, others arguing the benefits of a proactive statutory scheme, and mine advocating for a refocus on the historical emphasis on access to an adequate forum and a de-emphasis on what Professor Lea Brilmayer appropriately calls political issues.[13]

In spite of its historical span, this Article has a limited message: the ongoing failure of the minimum contacts test, especially the question of contacts relatedness and the distortion of interest analysis. *Ford* is the

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[12] Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1316 (2017).

[13] *See* Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617, 619–21 (2012).

punchline of this amenability story, but because of the sequential discussions of other problems, the story will start at the beginning.

I. England's Proto-Territorialism and Its Aberrant Application in the Colonies and States

Although scholars have debated the sources of American jurisdictional rules,[14] the most common source is English law that developed with the Norman invasion and ripened under Henry II. While Europe was developing rules for jurisdictional conflicts in a multi-state setting, England crafted its rules in a unitary setting—an island lacking contiguous jurisdictions—that would be transported to a multi-jurisdictional colonial setting that would become distinct states for most, but not all, conflict of laws purposes. "Aberrant" in the heading above does not mean that transplanting English practice in America was badly done, only that it took on a different reality with transitory service becoming a jurisdictional concept with a multi-state effect rather than mere venue. Coupled with full faith and credit, plaintiff could forum shop and still enforce the judgment at defendant's home.

A. *English Antecedents*

England's jurisdictional rules, with varied influences from Rome, other invaders, and feudal tradition, allow no easy summary.[15] Often capsulized as one of territorial power,[16] civil jurisdiction in England was also concerned with the trappings of its history.[17] Apart from those influences, commentators have disagreed with the accuracy of the

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[14] *See infra* notes 15–21 and accompanying text.

[15] For a general look at English law reception into the colonies and then the United States, see Sachs, *supra* note 12, at 1260–65.

[16] *See, e.g.*, Burnham v. Superior Ct., 495 U.S. 604, 611 (1990) (discussing Justice Story's view that English jurisdictional theory was territorially based).

[17] [U]ntil after 1800 it would have been impossible, even it if had been thought appropriate, to disentangle the question of territorial limitations on jurisdiction from those arising out of charter, prerogative, personal privilege, corporate liberty, ancient custom, and the fortuities of rules of pleading, venue, and process. The intricacies of English jurisdictional law of that time resist generalization on any theory except a franchisal one; they seem certainly not reducible to territorial dimension.

Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–53. For a detailed discussion of the varied factors comprising English jurisdiction, see Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 872–88 (1999) (describing English jurisdiction as a fragmented "legal cornucopia" until the seventeenth century and Lord Coke's writings).

territorial assessment. Notably, Professors Albert Ehrenzweig and Geoffrey Hazard both argued that there was little evidence of English courts defining their jurisdiction in a territorially focused manner. Ehrenzweig's criticism focused on transient jurisdiction and Justice Story's conclusions about its English origins.[18] Hazard took a broader view and criticized the overall territorial model, again challenging Story's conclusions.[19] In the 1990 case *Burnham v. Superior Court*,[20] the Supreme Court noted the critics, but held that American practice, even if erring on English history, had clearly adopted the territorial basis up to the time of *International Shoe v. Washington*.[21] As a result, for purposes of its eventual influence in America, the two important concepts of English history (however accurate they may be) are territorially based power and the distinction between local and transitory actions.

It may seem intuitive—Hazard called it a truism[22]—that jurisdiction is territorial or that it has elements of coercion.[23] Certainly the act of judicial intervention in a civil dispute involves some level of coercion, whether used or not, and the state's use of that power has territorial limits, even if not absolute. The function of this truism of territory and power can take different forms, and the transfer of England's jurisdictional

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[18] Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 *passim* (1956).

[19] *See* Hazard, *supra* note 17, *passim*.

[20] 495 U.S. 604 (1990).

[21] *See id.* at 609–10. *Burnham* was a plurality, with four Justices holding that precedent alone was sufficient to validate transient jurisdiction. *Id.* at 619. While the other five Justices acknowledged the history but held that Burnham's forum contacts were sufficient for due process. *Id.* at 629 (Brennan, J., concurring). As for the Story criticism, in a later study James Weinstein argued persuasively that Ehrenzweig's and Hazard's critiques had misconstrued several points and given Justice Story too little credit, and that, overall, English history was too unclear to reach an accurate conclusion on territoriality. *See* James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 *passim* (1990) [hereinafter Weinstein I]; James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 4–5 (1992) [hereinafter Weinstein II]. Despite the disputed conclusions as to influences, Ehrenzweig's and Hazard's historical data are valid and are used here.

[22] *See* Hazard, *supra* note 17, at 264–65.

[23] However intuitively we may see it, defined territories did not always define power. English legal historian Sir Henry Maine explained that the concept of jurisdiction having territorial boundaries occurred only after the tenth or eleventh centuries. Before that, European sovereignty was divided into two concepts, tribal (governing a people) and empire (governing undefined areas subject to the emperor's army). The concept of a defined state with mapped boundaries began ascending, at least in Europe, after the tenth and eleventh centuries with rise of the Capetian Dynasty. It culminated during the reign of Phillip II who took the throne as King of the Franks (a people) and ended as King of France (a territory). *See* HENRY SUMNER MAINE, ANCIENT LAW 101–06 (11th ed. 1887). For a thorough and fascinating discussion of the evolution of jurisdictional theory, see Ford, *supra* note 17, *passim* (further noting the importance of mapmakers in enabling territorial jurisdiction).

practice to its American colonies is a good example. England lacked Europe's territorial theories of jurisdiction because it was a distinct island and thus lacked Europe's experience with cross-border civil disputes. The resulting English jurisdictional concepts were unitary, best understood as functions of venue and notice, along with other aspects of English local law.[24]

The point here rests on the distinction between jurisdiction (the state's authority to litigate the dispute) and venue (the state's choice of location). Although both jurisdiction and venue are controlled by forum law, jurisdiction has an international facet in hoping to achieve acceptance by other states under comity, preclusion, or other judgment-recognition rules.[25] Venue, for the most part, is not concerned with cross-border acceptance.

Postfeudal England developed venue laws that were initially local, placing legal actions at the property's situs, or where the jury venire was acquainted with the facts.[26] For most in rem actions the venue remained local, thus the term "local actions."[27] But for personal actions involving claims in contract or tort, plaintiffs' choices increased because of the English method for notice: a writ for the defendant's arrest. The writ was labeled *capias ad respondendum*, and as an arrest warrant, it was served wherever defendant was found.[28] Because defendants were subject to jurisdiction throughout England, all courts had jurisdiction over the

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[24] *See* Hazard, *supra* note 17, at 248–58.

[25] A country's statement of its courts' jurisdiction often distinguished between municipal (or "local" or "domestic") law and "international" law. While municipal law might allow excessive authority for a non-local dispute, the country's view of international law would state principles likely to be recognized by other countries. In *Pennoyer v. Neff*, the Supreme Court used this distinction, noting that it was stating rules from international law as observed historically by the common law. *See* 95 U.S. 714, 730–31 (1878) (discussing several American cases using the international law of jurisdiction in relation to judgment recognition). The First Restatement of Conflict of Laws defined jurisdiction, for conflict of laws purposes, as "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 42 (AM. L. INST. 1934). The Restatement (Second) of Conflict of Laws omitted any definition of jurisdiction. *See also* Weinstein II, *supra* note 21, at 18 nn.73–75 (noting Story's use of the municipal/international distinction, and Ehrenzweig's failure to recognize that).

[26] *See* JACK H. FRIEDENTHAL, MARY KAY KANE, ARTHUR R. MILLER, & ADAM N. STEINMAN, CIVIL PROCEDURE 85 n.595 (6th ed. 2021).

[27] *See id.* at 85 (noting the difficulty in defining the concepts).

[28] "For centuries, the basic way the English courts obtained personal jurisdiction over the defendant was by arresting him." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 reporter's note (AM. L. INST. 1971). Defendants could avoid confinement by posting bail. *See* Ehrenzweig, *supra* note 18, at 297 n.60. Jurisdiction often vested without arrest. *Id.* at 299 n.68. In 1725, England authorized service by summons. *See* Hazard, *supra* note 17, at 248 n.19. Although arrest continued to be available for decades. *See* Weinstein I, *supra* note 21, at 81 & n.39; *see also* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. SURV. AM. L. 23, 32 (2018).

arrested defendant (though not necessarily subject matter jurisdiction), and these became transitory actions.[29]

In the 14th century, the use of arrest to initiate the action led to a practice of allowing plaintiffs to try the suit where defendant was arrested.[30] Because most disputes involved English parties who were subject to English jurisdiction, transitory service operated mostly as a venue rule, though there were instances of transitory service establishing English jurisdiction.[31] Although English history is murky on the jurisdictional (as opposed to venue) effect of transitory service,[32] its use in America's multi-jurisdictional setting had a very different effect.

B. *Transplanting English Practice to the American Colonies*

Despite Magna Carta's guarantees of court access,[33] jurisdiction in England was not so much theoretically based on access or fairness, but on the practicality of power over the defendant and the ability to compel both process and judgment enforcement. The system, still developing in England, was imported to the American colonies, a non-unitary system with distinct governing boundaries. Thus, a territorial concept based on physical power and implemented by civil arrest was the paradigm in England, the colonies, and then the states.

Justice Joseph Story greatly influenced the American model, both with his opinions[34] and his 1834 treatise on conflict of laws.[35] Story's model drew not only from English common law but also from Dutch and other

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[29] In his conflict of laws treatise, Justice Story concluded that "[b]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found," for "every nation may . . . rightfully exercise jurisdiction over all persons within its domains." Burnham v. Superior Ct., 495 U.S. 604, 611 (1990) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 554, 543 (1846).

[30] *See* FRIEDENTHAL ET AL., *supra* note 26, at 85 n.595 and sources cited therein.

[31] *See* Hazard, *supra* note 17, at 253–55.

[32] *See* Weinstein II, *supra* note 21, at 19–26.

[33] In a forthcoming article, tentatively titled Forum Fights and Fundamental Rights: Amenability's Distorted Fairness Frame, I examine plaintiffs' longstanding rights under English and American law to a remedy, to open courts, and to court adequacy, and the erosion of those rights under our use of government interest analysis. *See generally* A. E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY (rev. ed. 1998); CLAIRE BREAY, MAGNA CARTA: MANUSCRIPTS AND MYTHS (2002); J. C. HOLT, MAGNA CARTA (3d ed. 2015); Justin Champion & Alexander Lock, *English Liberties*, *in* MAGNA CARTA: LAW, LIBERTY, LEGACY (Claire Breay & Julian Harrison eds., 2015); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1 (2006).

[34] *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. 165, 169–70 (1850) (applying the rule requiring in-forum service later relied on in Pennoyer v. Neff, 95 U.S. 714, 720, 729 (1878)).

[35] *See* STORY, *supra* note 29.

European influences that Story believed properly aligned American law with the appropriate "law of nations" (meaning private and not public international law) that is necessary for cross-border issues like jurisdiction and judgments.[36] Despite the Constitution's creation of the United States as a distinct polity (more or less), Story treated the states as distinct—which of course they are for conflict of laws purposes—but that had not been true in England. Specifically, Story distinguished between states' internal jurisdiction and judgment-enforcement rules (municipal law) and the states' reciprocal obligations under the law of nations.[37] On the other hand, the European and international theories did nothing to soften the application of transitory jurisdiction.

The colonial transplant included of course the *capias* writ—using arrest to implement the lawsuit, accomplishing both notice and the declaration of amenability—and further compelling the defendant's submission with bail. Arrest remained common until the mid-1700s, but by the time of the revolution had been replaced by civil summons[38] which was also effective in transitory jurisdiction. As in England, the *capias* writ (and later the summons) created amenability wherever defendant was found, leading to Justice Oliver Wendell Holmes's aphorism that "[t]he foundation of jurisdiction is physical power."[39] A single act achieved both notice and amenability.

Even so, defendants—or potential defendants who were debtors, tortfeasors, or other obligors—had advantages in America. They could disappear or dissipate assets in a much larger area than England. While it's true that defendants can still do that, the opportunity to disappear or hide assets was sufficiently great in the 18th and 19th centuries to compel expansion of judicial options, albeit within the territorial paradigm. Creditors and obligees already had transitory jurisdiction and the *capias* writ, but the enabler was full faith and credit, which mandated interstate

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36 "[W]ithout some general rules of right and obligation, recognized by civilized nations to govern their intercourse with each other, the most serious mischiefs and most injurious conflicts would arise." STORY, *supra* note 29, § 4, at 5; *see also id.* § 539, at 450. Story relied on European sources. *See* Weinstein I, *supra* note 21, at 92, 94–95.

37 *See* Weinstein II, *supra* note 21, at 18 n.73.

38 *See* Effron, *supra* note 28, at 32. There were exceptions where arrest and bail were still used. *See, e.g.*, Mills v. Duryee, 11 U.S. 481, 484 (1813) (defendant "was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive"); Barrell v. Benjamin, 15 Mass. 354, 355 (1819) ("[D]efendant had been arrested and held to special bail, on a contract made in France . . . ." (emphasis omitted)).

39 McDonald v. Mabee, 243 U.S. 90, 91 (1917). *But see* Ehrenzweig, *supra* note 18, at 296.

judgment enforcement, at least those issued by courts having jurisdiction.[40]

After the revolution, the Articles of Confederation had a weak full-faith-and-credit clause that attempted some cohesion between the newly independent states, but it lacked a judgment-recognition provision.[41] The purpose of the Constitution's stronger full-faith-and-credit clause was interstate federalism, the balance of interests among states promoting both state sovereignty and federal unity.[42] But there was more to it than balancing collective state interests. It is difficult to ignore full faith and credit's advantages to claimants in pursuing debtors or other obligors, and hard to imagine that mercantile influence had little to do with the advantages gained from interstate judgment enforcement. In *Federalist No. 42*, Madison noted that the newly revised clause was an "evident and valuable improvement,"[43] that the former clause was "extremely indeterminate, and can be of little importance under any interpretation,"[44] and most important, that the "power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States."[45] Thus, the judgment-recognition component of the Constitution's revised full-faith-and-credit clause was about justice and the judicial pursuit of those evading it. Full faith and credit made the United States more of a unitary system like England and, combined with transitory jurisdiction, gave plaintiffs a broad reach.

Quasi in rem jurisdiction was another plaintiff's advantage, and its practice grew in the United States. Whatever good or bad flowed from transitory jurisdiction applied only to in personam actions; there was no "transitory" for in rem disputes because the forum was limited to the property's situs. Full faith and credit was mostly irrelevant to in rem judgments because execution was necessarily going to occur in the rendering forum.[46] The rules for in rem claims were ancient, but along the way English law developed another concept, a hybrid of using in rem jurisdiction for personal claims. It allowed the attachment of local property that created jurisdiction to satisfy an unrelated claim, with enforcement again limited to the forum and no full faith and credit to

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[40] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

[41] *See* Weinstein II, *supra* note 21, at 8 n.30.

[42] In Federalist No. 42, James Madison urged that the stronger clause would support "harmony and proper intercourse among the States." THE FEDERALIST NO. 42, at 93 (James Madison) (Michael A. Genovese, ed. 2009); *see also* Weinstein II, *supra* note 21, at 3.

[43] THE FEDERALIST NO. 42, *supra* note 42, at 95.

[44] *Id.*

[45] *Id.*

[46] *See* FRIEDENTHAL, KANE & MILLER, *supra* note 26, at 98-99.

pursue collection elsewhere. The concept provided a means of pursuing evasive debtors but also subjected absent defendants to property loss without notice.[47]

Plaintiffs, then, had the best of the common-law system in the United States—distinct jurisdictions with distinct laws that allowed for forum shopping, all using transitory jurisdiction for in personam claims, also allowing unrelated claim against local property, with the in personam judgments enforceable in every state provided the rendering court had jurisdiction. As if this pro-plaintiff setting weren't enough, the transplanted English system allowed worse. That's not to say it authorized worse, but that it resulted in worse; the territorial concept mixed with mandatory interstate judgment enforcement allowed courts excessive assertions of power, usually exercised for local residents against people who had no presence in the forum.[48] The best example may be the assertion of in personam jurisdiction against absentees who had no local property to attach. Because the full faith and credit precedents would (or at least should) block enforcement in other states, the court would acknowledge the judgment's limit to local enforcement but nonetheless allow the claim in case the defendant ever reappeared or had property pass through.[49] This illicit service was often available to forum residents but denied to strangers, and the courts justified the practice under the concept of municipal or local law—we can do whatever we want locally—with an acknowledgement that they were violating the common law view of "international law," or conflict of laws.[50]

C. Pennoyer *and the Due Process Overlay on Common Law Standards*

The frequency of these excesses is uncertain, but they were enough to get the Supreme Court's attention in 1878 with *Pennoyer v. Neff*.[51] Describing the pervasive problem that called for a more sweeping ruling that the case itself required,[52] Justice Field noted that cases were found in

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47 *See* STORY, *supra* note 29, § 549, at 461; *see also* Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 39–44 (1978).

48 *See* Silberman, *supra* note 47 at 50–52.

49 *See, e.g.*, McMullen v. Guest, 6 Tex. 275, 279 (1851) ("[N]onresidence of the defendant constitutes no objection to the jurisdiction, however the judgment might be regarded if sought to be enforced in a foreign State.").

50 *See, e.g.*, Campbell v. Wilson, 6 Tex. 379, 390–92 (1851).

51 95 U.S. 714 (1878).

52 The Court had already ruled at least twice that in personam judgments, as *Pennoyer* was, required personal service in the forum or defendant's later appearance in the case, neither of which happened. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. 165 (1850); Knowles v. Gaslight & Coke Co., 86 U.S. 58

all states where a court rendered an in personam judgment against an unserved nonresident who lacked forum property.[53] Field noted that courts often added in the opinion that the judgment had no effect outside the state, which implied, Field said, that the judgment was valid in the rendering forum.[54] His reaction was a complete rejection of this argument, Story's municipal law or not.

> But if the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State.[55]

The Court's ruling did not change the law of jurisdiction, at least not in the detail. It merely imposed the recently adopted Fourteenth Amendment's Due Process Clause, requiring states then to adhere to what the Court said was the clearly established common law, drawn from various sources but primarily Justice Story's view.[56] And that use of due process did change the law, ending courts' exercise of exorbitant jurisdiction against nonresidents who weren't served in the forum and lacked property there.[57]

For a proper contrast (or partial alignment) with *International Shoe* sixty-seven years later, *Pennoyer*'s standards and rule recitations require listing here. First, the Court announced the two-part jurisdictional prime directive:

> [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.... [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.[58]

The Court explained further (disabling extraterritorial service of process that wouldn't be validated until 1945[59]) that "the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and

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(1873). A citation to *D'Arcy* would have resolved the case, but the Court chose to describe the problem more thoroughly to justify its application of the Fourteenth Amendment to jurisdictional analysis.

53 *Pennoyer*, 95 U.S. at 722–24.

54 *Id.* at 732.

55 *Id.*

56 For a persuasive argument that *Pennoyer*'s due process discussion was dictum and the ruling was based on full faith and credit (with due process merely guaranteeing the right to object), see Patrick J. Borchers, Pennoyer's *Limited Legacy: A Reply to Professor Oakley*, 29 U.C. DAVIS L. REV. 115 (1995); *see also* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 318–19 (6th ed. 2018).

57 *See* Silberman, *supra* note 47 at 47–49.

58 *Pennoyer*, 95 U.S. at 722 (citing STORY,*supra* note 29, § 22, at 23–24).

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

that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."[60] The Court also clarified that service of process must be done in the forum state's territory.[61]

Beyond that, *Pennoyer* provided a primer on the common law rules. Most important was the now-due-process mandated distinction between in personam jurisdiction (requiring service in the forum or an appearance during the case) and in rem (requiring real or personal property in the forum).[62] Within those two broad categories were a number of exceptions and explanations: (1) prior consent established in personam jurisdiction;[63] (2) in rem jurisdiction has two categories: claims directed to specific property, and claims seeking to satisfy an unrelated dispute based on an unrelated property's value, or quasi in rem jurisdiction;[64] (3) publication service is allowed in certain circumstances;[65] (4) status jurisdiction is used for marital status, custody, and competence, with jurisdiction hinging only on the presence of the person whose status is at issue;[66] (5) service can be made on certain agents;[67] and (6) states may require business entities to appoint agents, and failing that, the State may appoint one.[68]

All that detail was long-standing law, but the Court apparently found it necessary to explain what American courts could and could not do with the new due process limit on in personam jurisdiction. Some disagree that it was an accurate statement of the common law,[69] but if the *Pennoyer* recitation was not the law before, it was now. With that, *Pennoyer* enshrined the territorial theory and its transitory corollary, based on the relationship of de facto power and the legal conclusion of jurisdiction. There were, no doubt, some inconsistencies in *Pennoyer*'s faithful application,[70] but it was now the law for all American courts, rejecting the concept of municipal or internal law.

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60 *Pennoyer*, 95 U.S. at 722–23.

61 *Id.* at 724 (quoting Justice Story from Picquet v. Swan, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134)).

62 *Id.*

63 *Id.* at 733.

64 *Id.* at 733–34.

65 *Id.* at 733.

66 *Pennoyer*, 95 U.S. at 734–35.

67 *Id.* at 735.

68 *Id.*

69 *See, e.g.*, Ehrenzweig, *supra* note 18, *passim*; Hazard, *supra* note 17, *passim*.

70 In *Ford Motor Co. v. Montana*, Justice Gorsuch provided a summary of American jurisdictional practice, using adverbial qualifiers—usually, normally, generally—that reflect the occasional inconsistencies in the vague rules' applications.

The conflict of laws hornbook observes that, "The *Pennoyer* jurisdictional bases were adequate to handle most problems of that era."[71] One illustration is Harvard law professor Austin Scott's 1915 casebook on civil procedure, which paints a picture of personal jurisdiction after *Pennoyer* and before *International Shoe*.[72] As with many modern texts, the 1915 casebook starts with forum selection (not using that term) organized in three chapters.[73] Chapter 1 is venue, indicative of the local nature of most actions and the relative lack of interstate litigation.[74] Chapter 2 is "process" broken down into three sections, covering form of process (with examples of summonses from various states), service of process, and return of process.[75] Chapter 3 is appearance, with cases illustrating the varied objections in defendant's response to the summons.[76]

Neither "jurisdiction" nor "amenability" are used as headings. The pertinent concepts for forum selection are illustrated in Chapter 2, Section II, titled "Service of Process," followed by eleven cases making various points: lack of personal service in the forum negates jurisdiction;[77] transient presence suffices for in personam service;[78] a nonresident in the forum to attend a bankruptcy hearing was immune from service;[79] service made on a transient agent was insufficient for in personam jurisdiction;[80] parties may agree on an alternate method of service;[81] a signed waiver of service subjected defendant to jurisdiction;[82] substituted service was

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> Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. But once a plaintiff was able to "tag" the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State.

Ford Motor Co. v. Mont., 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring) (citations omitted).

71 HAY ET AL., *supra* note 56, at 319.

72 AUSTIN WAKEMAN SCOTT, A SELECTION OF CASES AND OTHER AUTHORITIES ON CIVIL PROCEDURE IN ACTIONS AT LAW (1915). For a recent historical survey, see Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 12–29 (2014).

73 *See* SCOTT, *supra* note 72.

74 *Id.* at 1–14.

75 *Id.* at 14–56.

76 *Id.* at 57–75.

77 *See id.* at 17–19 (discussing Needham v. Thayer, 18 N.E. 429 (Mass. 1888)).

78 *See id.* at 20 (discussing Smith v. Gibson, 3 So. 321 (Ala. 1887)).

79 *See* SCOTT, *supra* note 72, at 21–23 (discussing Matthews v. Tufts, 87 N.Y. 568 (1882)).

80 *See id.* at 24–27 (discussing Cabanne v. Graf, 92 N.W. 461 (Minn. 1902)).

81 *See id.* at 27–29 (discussing Montgomery, Jones & Co. v. Liebenthal & Co. [1898] 1 QB 487.

82 *See id.* at 30–31 (discussing Allured v. Voller, 65 N.W. 285 (Mich. 1895)).

constitutional;[83] publication service on domestic corporations that failed to designate an agent was constitutional;[84] service on the forum state's statutorily designated official (here an auditor) was valid on a domestic corporation;[85] New York lacked jurisdiction over a West Virginia corporation that had never done business in New York even though its charter listed New York City as the site of its principal office;[86] New York had jurisdiction over a Maine corporation based on service on defendant's treasurer while he was passing through New York, noting a United States Supreme Court case holding the opposite but stating that the New York court was bound to follow its own rule.[87]

In 1915, then, amenability was not a primary doctrine but an implicit conclusion flowing from proper service, although some corporate defendants are immune from service because of their location or lack of forum presence. At this point, the United States was still waiting to feel the legal impact of the automobile—still twelve years away from *Hess v. Pawloski*[88]—and the point made in *Hess* (imputed consent) was not reflected in Scott's casebook.

Professor Scott's case collection is a stark contrast to Ehrenzweig's argument that physical power and transitory presence were manufactured concepts that did not reflect what courts were doing prior to *Pennoyer*.[89] Of course, these cases are all post-*Pennoyer* and their collective view may be another example of Ehrenzweig's point that the courts and scholars were wrong, but Professor Scott did not see it that way. Neither did Justice Holmes, Justice Story, or Professor Beale, and nor does the current Supreme Court. In their views, up to 1945 and *International Shoe*, American forum selection was based on territorial power over people and property, with exceptions for waiver and express or implied consent.

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83 *See id.* at 31–34 (discussing Cont'l Nat'l Bank v. Thurber, 26 N.Y.S. 956 (Gen. Term 1893)).

84 *See id.* at 34–36 (discussing Clearwater Mercantile Co. v. Roberts, 40 So. 436 (Fla. 1906)).

85 *See* SCOTT, *supra* note 72, at 37–38 (discussing Bruning v. Bhd. Accident Co., 77 N.E. 710 (Mass. 1906)).

86 *See id.* at 39 (discussing Kendall v. Am. Automatic Loom Co., 198 U.S. 477 (1905)).

87 *See* id. at 40–42 (discussing Sadler v. Boston & Bolivia Rubber Co., 125 N.Y.S. 405 (App. Div. 1910)).

88 274 U.S. 352 (1927).

89 *See* Ehrenzweig, *supra* note 18, *passim*.

II. Beyond Territorialism

A. International Shoe *and the Elusive New Paradigm*

Twentieth century changes in technology, commerce, and human behavior underscored the reality that while states were territorial, disputes often were not. Of course, disputes had always ignored borders that got in the way, but the incidence and intensity of cross-border fact patterns increased, and the intra-territorial model was inadequate. The world shrunk and a different jurisdictional model was needed.[90] The result came in 1945 with *International Shoe Co. v. Washington*.[91] Like *Pennoyer*, the dispute probably could have been resolved more simply but the Supreme Court saw a fact pattern that lent itself to broad changes.[92]

Where *Pennoyer* simply packaged the existing law and labeled it with due process to compel compliance, *International Shoe* discarded the pure territorial model in favor of an approximated new test. The result was a vague set of phrases and standards that allowed extraterritorial jurisdiction with promises of undefined limits based on fairness. But territorialism remained, in that the contacts were with a legally defined territory and the vague new rules were simply a basis for asserting that territory's power.

The Court first observed the standing rule with the modifier "historically," as though it was already gone: "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him."[93] Having summed up more than two centuries of American practice (including colonial), the next sentence swept it away as though territorial theory had ended with the arrest

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[90] *See* Sachs, *supra* note 12, *passim*. *But 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, 51–53 (1990).

[91] 326 U.S. 310, 316 (1945).

[92] In a concurrence, Justice Black noted that existing law clearly established Washington state's taxing authority over a company doing this amount of business in the state, and the in-hand and mail notice clearly satisfied due process. *Id.* at 323 (Black, J., concurring). Black further expressed concern that the Court had chosen to conduct an "unnecessary discussion" involving "vague Constitutional criteria" that "introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution." *Id.* Other critics include Professor Hazard who noted in 1965, twenty years later, that *Pennoyer*'s jurisdictional theory had been replaced by *International Shoe*'s minimum contacts approach, but that "no such theory has yet been constructed out of those components." *See* Hazard, *supra* note 17, at 242.

[93] *Int'l Shoe*, 326 U.S. at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1878)).

warrant, replacing it with an undefined minimum contacts test and a goal of fairness:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[94]

The Court linked its undefined new test to precedents on nonresident amenability that had arguably laid a conceptual groundwork but were likely not intended to foreshadow the new test. The Court relied on two cases for the phrase "traditional notions of fair play and substantial justice," and its reliance is a good example of common law judges' power to shape the law in the absence of precedent and legislation. The literal phrasing was used in *Milliken v. Meyer*,[95] a case concerning whether substituted service on a domiciliary was adequate, not for amenability purposes but merely as a matter of notice.[96]

Milliken coined the traditional-notions phrase from separate points, in separate paragraphs, in *McDonald v. Mabee*,[97] another notice adequacy case that did not consider amenability. Rather, *McDonald* ruled on the adequacy of publication notice after defendant had permanently left the forum.[98] Notably, *McDonald* is a Holmes opinion and the source of his often-quoted phrase "the foundation of jurisdiction is physical power."[99] After setting that premise, Holmes noted that "there may be some extension" of the rule requiring personal service, "but the foundation [of in-forum service] should be borne in mind."[100] Then adding the due process emphasis: "And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the *fair play* that can be secured only by a pretty close adhesion to fact."[101] For this point, Holmes cited an interstate probate case denying full faith and credit to a Tennessee judgment lacking jurisdiction.[102] Holmes's "adhesion to fact" was cautioning against getting too far from *Pennoyer*'s requirement of personal service in the forum. The other component—substantial justice—came six sentences later in the subsequent paragraph on the following page: "To dispense with personal

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94 *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

95 311 U.S. 457 (1940).

96 *Id.* at 463.

97 *See* 243 U.S. 90 (1917).

98 *Id.* at 92.

99 *Id.* at 90–91.

100 *Id.* at 91.

101 *Id.* (emphasis added).

102 *Id.* (citing Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917)).

service the substitute that is most likely to reach the defendant is the least that ought to be required if *substantial justice* is to be done."[103] This point cited no case law.[104] *McDonald* used both "fair play" and "substantial justice" generically, and while those descriptive terms were fair summaries of the law, *McDonald* simply upheld the requirement of in-forum service. From these descriptive terms that simply applied common law standards consistent with *Pennoyer*, *International Shoe* crafted our still-prevailing term of art.[105]

If "traditional notions" had arguable lineage, where did "minimum contacts" come from? *International Shoe* used the iconic phrase once in articulating the standard,[106] and unlike for "traditional notions," cited no precedents or comparisons in that initial phrasing.[107] The idea of minimum contacts, however, is a fair conclusion from the discussion that followed, examining corporate contacts that justify amenability. After the minimum contacts phrasing, *International Shoe* uses "contacts" four more times. Two of the four explain how contacts work,[108] the third uses "contacts" in its conclusion that *International Shoe* is amenable,[109] and the

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103 *McDonald*, 243 U.S. at 92 (emphasis added).

104 *See id.* at 91–92.

105 Following *Milliken* and *McDonald*, the *International Shoe* opinion adds Compare and See citations to four more cases, ostensibly supporting "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). All four cases were concerned with the forum state's interest in regulating various behaviors of nonresidents, with all claims arising in the forum. The nonresident defendants included: insurers, Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 315 (1943); nonresident forum citizens, Blackmer v. United States, 284 U.S. 421, 436–37 (1932); motorists, Hess v. Pawloski, 274 U.S. 352, 353 (1927); and car owners who loaned to negligent drivers, Young v. Masci, 289 U.S. 253, 256 (1933). All four cases upheld nonresident amenability using in-forum service on an agent, or in Blackmer's case, through letters rogatory. *Hoopeston Canning*, 318 U.S. at 319; *Blackmer*, 284 U.S. at 438–39; *Hess*, 274 U.S. at 356–57; *Young*, 289 U.S. at 258. *International Shoe*'s reasoning, then, simply relied on long-existing provisions of *Pennoyer* practice.

106 *See Int'l Shoe*, 326 U.S. at 316. The case did use the term "contacts" four more times in reference to the new test, but the cited authority was either to the "traditional notions" phrase, or such related concepts as notice. *Id.* at 316, 320.

107 *Id.* at 316.

108 *Id.* at 317–19. The first use of contacts states: "Those demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.* at 317 (citing no cases). The second use states: "That [due process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319 (with no supporting cites but a *cf.* to *Pennoyer* and to *Minn. Com. Men's Ass'n v. Benn*, 261 U.S. 140 (1923) (insurer's solicitation of business in a forum does not necessarily make it amenable to suit there)).

109 *Int'l Shoe*, 326 U.S. at 320. "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception

fourth discusses the adequacy of service of process on International Shoe.[110]

Without using the term "contacts" further, the Court was thorough in describing corporate contacts, and in doing so, articulated additional phrases that were generic or merely descriptive at the time, but became terms of art later. These include "continuous and systematic,"[111] "quality and nature of the activity,"[112] and the point that when a defendant exercises the "privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state,"[113] foreshadowing *Hanson v. Denckla*'s[114] purposeful availment test.[115] The Court also distinguished between what would become specific and general jurisdiction—though using terms it later had to rethink[116]—and offered a hint at what would become the fair play and substantial justice balancing test.[117]

In spite of the birthing of this radical new test for amenability, the analysis was limited to the concept of corporate presence, leading some to believe that *International Shoe*'s new standard was nothing more than a new test for corporate jurisdiction.[118] Indeed, a Supreme Court case

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of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." *Id.*

110 *Id.* Of the two applied to defendant, one concerns defendant's amenability and cites no authority (because it's applying the new test), and the other for the adequacy of service on an agent and by mail, for which it cites numerous precedents. *Id.* at 320–21.

111 *Id.* at 317 (citing cases regarding corporate amenability).

112 *Id.* at 318, 319 (citing cases).

113 *Int'l Shoe*, 326 U.S. at 319 (citing cases).

114 357 U.S. 235 (1958).

115 *Id.* at 253, discussed in context *infra* note 170.

116 *Int'l Shoe*, 326 U.S. at 317–18. The court explained what would later be called specific jurisdiction as based on "continuous and systematic" contacts that give rise to the claim distinguished from single or isolated activities unconnected to the claim. *Id.* The qualifier "continuous and systematic" would later be attached to general jurisdiction. *See infra* notes 256–264. It is mentioned in *International Shoe* briefly, in theory but not name, as "continuous corporate operations ... so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 318. Specific jurisdiction would later be narrowed to as little as a single act related to the claim. *See infra* note 127. All this was without the use of labels, which were coined by Professors von Mehren and Trautman in their definitive 1966 article. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 *passim* (1966).

117 An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *See* Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

118 *See* Ehrenzweig, *supra* note 18, at 311 & n.151 (referring to *International Shoe* as "the law of jurisdiction over corporations"); GEORGE WILFRED STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 99–100 (2d ed. 1951) (discussing *International Shoe* as applying only to corporate presence but speculating that the theory ought to govern natural persons).

involving a human defendant's amenability would not occur until 1977 in *Shaffer v. Heitner*.[119] Even so, *International Shoe*'s analysis included cases involving individual defendants,[120] and commentators suggested its obvious broader application.[121]

The Court's vagueness in crafting a new amenability rule was necessary because of the focus on nonresidents' "presence" other than when served with process, and the further idea that amenability was determined on a case-by-case basis.[122] There were nonetheless critics, starting with concurring Justice Black, who believed the Court's new formulation was too vague and also unnecessary, at least in this case.[123] In the years following, as the Supreme Court struggled with clarifying the test, lower courts struggled applying it.

B. *Refinements, and Attempts*

A temporal history is tempting because it shows the common law exercise of building the model, precedent by precedent. The problem is that it doesn't necessarily explain where we are today. A more efficient and accurate depiction comes from a focus on the specific jurisdiction test in *Burger King Corp. v. Rudzewicz*,[124] with side notes on the after-tweaks and the attempt to go elsewhere. Because this survey covers so many cases, it assumes a familiarity with the better-known cases and focuses instead on doctrinal components, including the bifurcated contacts/fairness test, the increasing use of interest analysis, and the deviation into contact relatedness.

1. Initial Steps

As discussed below, *Burger King* is the fundamental nonresident amenability test. Everything before *Burger King* was build-up, and

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119 433 U.S. 186, 189 (1977).

120 *E.g.*, McDonald v. Mabee, 243 U.S. 90, 90–91 (1917).

121 *See, e.g.*, STUMBERG, *supra* note 118, at 99–100; *see also* von Mehren & Trautman, *supra* note 116, at 1143–44.

122 The Court noted that the jurisdictional test "cannot be simply mechanical or quantitative" but instead "must depend rather upon the quality and nature of the activity." Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

123 *See infra* note 333. The more prominent early critics included Professor Ehrenzweig, who proposed a "forum conveniens" standard that would seek consensus among interested jurisdictions as to the litigation's best location. *See* Ehrenzweig, *supra* note 18, *passim*. Twenty years after *International Shoe*, Professor Hazard complained that the minimum contacts test still had not developed. *See* Hazard, *supra* note 17, at 242.

124 471 U.S. 462 (1985).

everything after was refinement or attempted application.[125] The lead-up, though, required several steps. The first two cases, *Perkins v. Benguet Consolidated Mining Co.*[126] and *McGee v. International Life Insurance Co.*,[127] established the distinction between general and specific jurisdiction, though without those instructive labels. The terminology came from Professors Arthur von Mehren and Donald Trautman's 1966 article[128] that the Supreme Court would not pick up until 1984.[129] Just after *McGee* defined the minimalist end in 1957, *Hanson* gave us a nice bookend, showing that one contact may not be enough, and with that gave us the purposeful availment test.[130] But even with the radical minimum-contacts change, the basic territorial rules remained in place, as did the ongoing recognition of aspects like tag jurisdiction.[131]

Nineteen years passed before the next puzzle piece fit in, when *Shaffer v. Heitner* in 1977 changed the in rem focus from jurisdiction over forum property to jurisdiction over the defendant's interest in property, governed naturally by minimum contacts.[132] In doing so, *Shaffer* cut back plaintiffs' forum options, but only to the extent of eliminating quasi in

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125 *Burger King* is the high point of the minimum contacts evolution, considerably outperforming other cases in citations. As of September 11, 2022, according to Westlaw, *Hanson* (the origin of the purposeful availment test), has 9,816 case cites and 31,197 total cites. *Hanson v. Denckla: Citing References*, WESTLAW EDGE, https://perma.cc/A5RA-2FXH. *World-Wide Volkswagen* has 10,813 case cites and 35,641 total cites. *World-Wide Volkswagen Corp. v. Woodson: Citing References*, WESTLAW EDGE, https://perma.cc/3GNY-ECDL. *Burger King* has 21,899 case cites and 84,708 total cites. *Burger King Corp. v. Rudzewicz: Citing References*, WESTLAW EDGE, https://perma.cc/8JV9-3QEK. Although *International Shoe* is more often cited, those citations are not for the operative test.

126 342 U.S. 437 (1952). In *Perkins v. Benguet Consol. Mining Co.*, the Court used "continuous and systematic" to find a Philippine mining company relocated to Ohio subject to jurisdiction there for a claim arising in the Philippines. *Id.* at 438–39.

127 355 U.S. 220 (1957). In McGee v. International Life Insurance Co., the Court defined the quintessential minimum contact as one, based on its quality and nature in relation to the claim. *Id.* at 222–23.

128 *See* von Mehren & Trautman, *supra* note 116, at 1136.

129 *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

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

131 Even though tag jurisdiction would not be reaffirmed until 1990 in *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990), to the surprise of some, the American Law Institute's 1971 issuance of the Restatement (Second) of Conflict of Laws stated that: "A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 28, § 28. Comment a goes on to explain that: "Physical presence in the state was the traditional basis of judicial jurisdiction at common law. It is immaterial that the individual is only temporarily in the state. His presence in the state, even for an instant, gives the state judicial jurisdiction over him." *Id.* § 28 cmt. a.

132 Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

rem jurisdiction, an often-unfair and abused forum choice.[133] Equally important, *Shaffer* added to the developing test with its tripartite formula of the relationship between the defendant, the forum, and the litigation,[134] along with Justice Stevens's point that due process requires that defendants have "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign."[135] Although it should not have been necessary, *Shaffer* also emphasized that *International Shoe* applies to people as well as corporations.[136]

Several formula adjustments followed, starting with *Kulko v. Superior Court*[137] the next year, a family law case seeking custody and child support modification. In one sense the case was simple: the distinction between status jurisdiction over the custody claim, and the lack of in personam jurisdiction over child support.[138] But the Court's analysis looms larger, engaging in a thorough interest analysis—plaintiff's, the forum state's, interstate collective interest, and the judicial system's interest—four of the five elements of what would later become the fairness test. Unlike the later bifurcated test,[139] the Court mixed the interest factors with its contacts analysis, finding both that the New York defendant had insufficient forum contacts, and using the various interests to support that.

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133 *See, e.g.*, Rush v. Savchuk, 444 U.S. 320, 328–30 (1980) (disallowing quasi in rem jurisdiction over auto insurance policies, a practice that enabled lawsuits in states unconnected to the accident or defendant's residence).

134 "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer*, 433 U.S. at 204 (footnote omitted). The concept remains popular. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 126, 132–33 (2014). This discounting of state sovereignty may have triggered Justice White's later dictum about the importance of interstate federalism. *See infra* notes 239–253 and accompanying text.

135 *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

136 *Shaffer* was apparently the first Supreme Court consideration of human defendants, although language including natural persons goes back to *International Shoe*. *See Shaffer*, 433 U.S. at 204 & n.19 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)) ("That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

137 436 U.S. 84 (1978).

138 The California-based mother sued the New York-based ex-husband for a custody change and increased child support. The Court reversed the California court's assertion of child support jurisdiction, ruling that the husband's lack of California contacts made him non-amenable to the child support claim for money damages, even though California had status jurisdiction to adjudicate custody. Note lower court and dissents. *See Kulko*, 436 U.S. at 100.

139 *See infra* notes 170–172 and accompanying text.

World-Wide Volkswagen Corp. v. Woodson[140] in 1980 offered more significant changes to the doctrine. It was a products liability case arising from rear-end car collision and explosion, occurring on an interstate passing through a rural part of Oklahoma. Plaintiffs sued not only the manufacturer, but also other corporate entities in the distribution chain. Two of them—the local Audi dealer in New York and the New York-based distributor—objected to distant Oklahoma jurisdiction. As Professor Russell Weintraub explained, the Court may have had an unstated reason for rejecting plaintiff's theories. By joining the local New York defendants, plaintiffs (who were at that point New York domiciliaries) could defeat diversity removal from a rural state court to an urban federal court.[141] Whatever the underlying motive, the Court's lengthy rejection of plaintiffs' foreseeability argument was the dress rehearsal for the full-blown specific jurisdiction test in *Burger King* and added several other facets to the minimum contacts test. Thus, *World-Wide Volkswagen*:

- was the first to collect the five factors that became the fairness test,[142] although it remained for *Burger King* to clarify the two-step process.[143]
- was the first to use foreseeability and reasonable anticipation as synonyms for purposeful availment, although reasonable anticipation had been used as a distinct consideration in *Shaffer* and *Kulko*.[144] Foreseeability, on the other hand, appears to be original in *World-Wide Volkswagen*,[145] reacting to the Oklahoma Supreme Court's reasoning.[146] Rather than rejecting the term, the Court provided a nuanced discussion that provided more confusion than clarity. That led in turn to various causation tests—a can of conceptual worms—in many

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140 444 U.S. 286 (1980).

141 *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 153 (4th ed. 2001).

142 *See World-Wide Volkswagen*, 444 U.S. at 292; *see also infra* note 170 for the text as quoted by and first applied in *Burger King*.

143 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–82 (1985).

144 "Reasonable anticipation of being haled into court" originated in *Shaffer* as an alternative grounds to purposeful availment, looking directly to Delaware's lack of statutory notice on stock ownership. *See* Shaffer v. Heitner, 433 U.S. 186, 216 (1977) ("Moreover, appellants had no reason to expect to be haled before a Delaware court. Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." (footnote omitted)). *Kulko* then modified the phrase to "reasonably have anticipated being 'haled before a [California] court.'" Kulko v. Superior Ct., 436 U.S. 84, 97–98 (1978). In *World-Wide Volkswagen* it became an attempt to define purposeful availment.

145 The Court's foreseeability discussion in *World-Wide Volkswagen* came from the Oklahoma Supreme Court's justification that the defendants could foresee their product's use in Oklahoma. *See* 444 U.S. at 290–91 (citing World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978)).

146 *World-Wide Volkswagen*, 585 P.2d at 354.

lower state and federal courts[147] until seemingly rejected in the Court's recent *Ford* opinion.[148]

- proposed—or at least hinted at—a new amenability consideration: interstate federalism, the respect for individual state sovereignty that calls for limits on a state's exercise of exorbitant jurisdiction. The resulting questions and confusion were abated two years later when the Court assured us that personal jurisdiction was a matter of due process and not state sovereignty,[149] but the Court then reinvigorated sovereignty in later cases.[150]
- used stronger language, moreso than in *Shaffer*, discounting plaintiff's forum-selection rights:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[151]

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, *while always a primary concern*, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the *plaintiff's interest* in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; 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.[152]

The Court's tangents on issues like foreseeability and interstate federalism are good examples of the conceptual experimentation the Court did in crafting and attempting to refine the minimum contacts test, but they're also the source of considerable confusion. Some of these cases did little more than resolve the dispute in front of the Court,[153] but the amenability test grew with phrases and analogies that attempted to clarify

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147 *See, e.g.*, Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 584–85 (Tex. 2007) and cases discussed there, discussed further *infra* notes 273–289 and accompanying text.

148 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021), discussed *infra* at notes 301–310 and accompanying text.

149 *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). Justice Brennan offered the same reassurance in 1980 in his concurring opinion in *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 782 (1984) (Brennan, J., concurring).

150 *See infra* notes 241–243 and accompanying text. For the latest reinvocation of sovereignty as a jurisdictional factor, see *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780–81 (2017).

151 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

152 *Id.* at 292 (emphasis added) (citations omitted).

153 *Helicopteros Nacionales de Colombia, S.A. v. Hall* told us that general jurisdiction didn't apply in that case, but little else. 466 U.S. 408, 415–18 (1984). It took another twenty-seven years before we got the "essentially at home" test in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

but often added more ambiguity. All this was done during a time period of ever-expanding communication, commerce, and technological innovation that increased the demands on the ill-defined test. In the Court's expanded attention to state interests and defendant's rights, what increasingly faded was plaintiff's fundamental right to access, which was subsumed in state interest analysis.[154]

Although *World-Wide Volkswagen* set the stage for the definitive amenability test, three interim cases came along before *Burger King* implemented the test. The first two were libel cases, *Keeton v. Hustler Magazine, Inc.*[155] and *Calder v. Jones*,[156] which both expanded state interest analysis. Issued on the same day in 1984, it is interesting (though perhaps coincidental) that the first-issued *Keeton* made the more radical holding—jurisdiction in a forum where none of the parties were significantly connected—making *Calder*'s finding of jurisdiction at plaintiff's residence a foregone conclusion. After explaining the function of libel law's single publication rule, and its permitting a forum having jurisdiction to assess damages occurring outside that forum, the Court held that a New York plaintiff with virtually no New Hampshire contacts could sue Florida defendants for a defamatory magazine article.[157] *Keeton* relied heavily on state interest analysis, primarily the forum's but also the collective interest in the single publication rule.[158]

The *Calder* analysis was simpler, focused on plaintiff's California contacts and the effect of defendants' Florida action on her in California.[159] In spite of the Court's finding defendants in both cases amenable, neither *Keeton* nor *Calder* used the *World-Wide Volkswagen* formula that *Burger King* would apply as the fully developed specific jurisdiction test, likely because any court's decision is at least partly based on the case presented and the lawyers' arguments. Even so, *Keeton* and *Calder* both expanded the use of state interest as a dominant factor,[160] often subordinating plaintiff's forum-selection rights to a subjective assessment of state interest. You may argue that both cases advanced plaintiffs' forum choices, at least for intentional torts. *Keeton* addressed it specifically:

> The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts ... such that the

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154 *See infra* notes 183–194 and accompanying text.

155 465 U.S 770 (1984).

156 465 U.S. 783 (1984).

157 *Keeton*, 465 U.S. at 777–78.

158 *Id.*

159 *Calder*, 465 U.S. at 784–85, 788–89. Although the emphasis on plaintiff's California contacts implies state interest, the there was no outright discussion of that issue.

160 *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (citing *Keeton* on state interest analysis).

> maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[161]

In fact, this is nothing but a truism: plaintiff may file anywhere defendant is amenable to suit. The cases did, however, expand the concept of amenability, at least for intentional torts.

The third sidebar between *World-Wide Volkswagen* and *Burger King* was general jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*[162] in 1984 did little more than rule on the question at hand, reversing Texas's assertion of general jurisdiction over a Colombian air-taxi company for an accident in Peru. The case did little to clarify the limits of general jurisdiction but did invoke von Mehren's and Trautman's important distinction of general and specific jurisdiction.[163] *Helicopteros* was also true to the newly bifurcated minimum contacts test established in *World-Wide Volkswagen*: because there were insufficient contacts, there was no need for an interest analysis.[164]

2. *Burger King* and the Definitive Test for Specific Jurisdiction

Although *World-Wide Volkswagen* provided important (if misguided) insight, much of it was dicta unapplied there. *Burger King* was the first true application of the full test, though limited to specific jurisdiction. The Court recited the test to that point,[165] and though its recitation was not as thorough as *Pennoyer* had been in reciting the compete common law of amenability,[166] *Burger King* did distinguish that it was a specific jurisdiction case,[167] noted not only purposeful availment and its corollaries: reasonable anticipation and foreseeability,[168] but also identified stream of commerce as a valid-but-inapplicable theory.[169] *Burger King* was the first to note that contacts are considered as a predicate to the fairness test, first fully articulated in *World-Wide Volkswagen*:

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161 *Keeton*, 465 U.S. at 780–81 (citations omitted) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

162 466 U.S. 408, 418 (1984).

163 *Id.* at 414 n.8.

164 *See id.* at 414–18 (concluding the amenability analysis with a finding of no forum contacts).

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

166 *Burger King* was sparse on the traditional bases, omitting residence, and mentioning waiver and consent, but not in a structured test. The Court mentioned the Florida long arm but only to note that this is an appeal from its exercise.

167 *See id.* at 472. The Court distinguished from general jurisdiction. *Id.* at 473 n.15.

168 *Id.* at 471–78.

169 *Id.* at 473.

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and 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."[170]

Burger King is the basic model for specific jurisdiction, even though it required further refinement for issues such as internet contacts. *Burger King* is also where the balance gets further distorted in defendant's favor, ironically in a case where plaintiff's choice of forum prevailed.

Burger King clarified the formula and established a needed checklist:

- traditional bases (residence, consent, and waiver),[171]
- if none, then the forum's long arm statute,
- if the long arm reaches defendant, then the due-process litmus test of
    - contacts, specific or general,
    - if the contact is sufficient, then the fair play and substantial justice balancing test.[172]

Although questions and disagreements would follow, Supreme Court opinions after *Burger King* haven't altered the basic specific jurisdiction test, even when several amenability postscripts came along. Some questions have been answered: forum clauses were approved and general jurisdiction was cabined to a point of near elimination. However, the Court has failed to answer other significant questions: stream of commerce, tag jurisdiction, internet contacts, the emergent causation test, and the unanswerable question of what amounts to presence.

3. Governmental Interest Analysis Given Higher Status

The term "governmental interests" or sometimes just "interests" was common in mid-twentieth century tests for amenability, forum non

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[170] *Id.* at 476–77 (citations omitted) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). The Ninth Circuit uses a seven-factor test: (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *See* Dole Food Co. v. Watts, 303 F.3d 1104, 1114 (9th Cir. 2002).

[171] In *Burnham v. Superior Court*, 495 U.S. 604, 611 (1990), a plurality suggested the possibility of tag jurisdiction as a fourth traditional basis.

[172] *See Burger King*, 471 U.S. at 476–78.

conveniens, and choice of law. Although its use increased with twentieth century legal analysis, the concept originated in the 15th century—but only in reference to private interests.[173] Its first use for governmental interests did not occur until 1872,[174] and even then it did not appear in 1877's *Pennoyer* decision, where "interest" was limited to private concerns. That had not changed by 1945, and *International Shoe* does not use the term "interest," but does use "power" throughout, referring to the Constitution and the forum state.[175] The first use of "interest" referring to state judicial jurisdiction may be in *McGee*,[176] but its usage increased, and with the formalization of the fair play and substantial justice test in *World-Wide Volkswagen* and *Burger King*, lower courts were instructed to include both the forum state's interest and those of other affected states[177] in assessing amenability.

That test is now a mantra in amenability analysis,[178] although its application is inconsistent to both terminology and thoroughness.[179] Lurking somewhere in the balance is the Court's flirtation with interstate federalism.[180] As jurisdictional quandaries increase with globalization and technology, it's unclear what role governmental interests will or should play, especially in private disputes.

4. The Diminution of Plaintiffs' Forum-Selection Rights

Plaintiffs' fundamental rights of court access and forum adequacy go back at least to 13th century common law and have been heralded at crucial points along the way, including several clauses in the

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173 *Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

174 *Governmental Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

175 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315–16 (1945).

176 McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.").

177 *See Burger King*, 471 U.S. at 476–77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (in the five-factor test, the second is "the forum State's interest in adjudicating the dispute," and the fifth is the "shared interest of the several States in furthering fundamental substantive social policies."); *see also supra* note 170 and accompanying text for the full test.

178 *See, e.g.*, Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy, 508 S.W.3d 569, 585 (Tex. App. 2016) (reciting the five factors verbatim, without quotation marks, citing only to Texas precedent).

179 *See, e.g.*, Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 765 (1987).

180 *See infra* notes 203–219 and accompanying text.

Constitution.[181] These rights are further reflected in case law that should have—but somehow hasn't—survived the current amenability equation. A significant step in the evolution (or devolution) of the minimum contacts test was the diminution of plaintiff's rights into "interests" that are mostly subsumed in the forum state's perceived interests. In the United States, we've taken plaintiffs' rights as well-exercised in plaintiffs' power to pick the forum initially, furthered by tag jurisdiction, implied consent (recognized from before *Pennoyer*), and the reach of long arm statutes after *International Shoe*. In fact, those doctrines have enhanced plaintiff's reach, but a counteraction began—perhaps starting in *McGee*[182]—appearing expressly (though in dictum) in *World-Wide Volkswagen*'s noting of five "fairness" factors that had been considered beyond mere forum contacts.[183] Five years later *Burger King* applied those factors as a distinct, post-contact balancing test, and that test has been a rote feature of amenability assessments once contacts are found.[184]

Before *World-Wide Volkswagen*, no particular labels applied to plaintiff's right to forum selection, contrasted with defendant's right to object to plaintiff's choice, which had been identified as a due process matter since *Pennoyer*. With the emergence of the fairness test, plaintiff's right became an "interest in obtaining convenient and effective relief."[185] In many cases, plaintiff's interest has no greater value than the forum state's interest, however that may be defined.[186] The framing of amenability as defendant's due process rights versus plaintiff's ephemeral "interests" is a semantic mismatch that subliminally throws the advantage to defendant in close cases, especially in lower court opinions that aren't

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181 *See* Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. MIAMI INT'L & COMP. L. REV. 343, 350, 361 (2006).

182 In *McGee*, the Court based its approval of plaintiff choice of a California forum on California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). Although the Court followed that conclusion with examples of plaintiff's inconvenience without a California forum, the "right" being applied was based on California's interest, and more important, plaintiff's amenability victory was dependent on forum interest.

183 *See supra* notes 142 & 170 and accompanying text. This was a dictum review of considerations given in prior cases after a contact had been found. Because no contact was found in *World-Wide Volkswagen*, the factors were not applied. 444 U.S. 286, 292 (1980).

184 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77, 482–85 (1985).

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

186 *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011). In *Asahi Metal Industry Co. v. Superior Court*, the lack of forum interest defeated forum access for a third-party contribution claim arising from an accident on a California road, where defendant manufacturer Cheng Shin now occupied plaintiff's position after settlement. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 114 (1987). A number of other cases confirm this and will be discussed in an article directed to this point.

appealed and often not reported. Whether you agree with that idea—that framing has effects in law just as in marketing—it is a fact that these labels evolved and that they dominate the amenability analysis.[187]

5. Forum Clauses Approved

Forum clauses don't fall under *International Shoe*'s contacts analysis, as they arise contractually and are enforced as jurisdictional consent.[188] They are nonetheless worth mentioning in this amenability summary as they are, ironically, a further reduction of plaintiff's forum access, at least where the plaintiff is the substantive claimant. At first glance, forum clauses may seem to enhance plaintiff's options by reinforcing a pre-dispute choice. That works well for plaintiffs who are satisfied with the contractually designated forum, through a "prorogating forum clause" that supports plaintiff's filing choice and creates jurisdiction by defendant's contractual consent.[189] But what if the clause is ambiguous or arguably inapplicable, or comes from a lengthy form-printed consumer contract? Plaintiffs who disregard a forum clause and file in another forum face a derogating clause whose enforceability (requiring dismissal by or transfer from the non-designated forum) is not a matter of jurisdictional consent, because defendant did not consent to this non-chosen forum. How do we resolve that?

As many scholars have pointed out, the tests for interpreting and validating forum clauses are inadequate, even for contracts between equal-bargaining parties, and are all the more unfair in consumer contracts and other non-negotiable agreements.[190] The question is not simply a matter of contract law, and there are parallels to the issues discussed throughout this Article. One is the courts' use of interest analysis that until recently resembled *Burger King*'s balancing test, examining both the parties' and the pertinent states' interests. In 2013, however, the Supreme Court modified the derogating forum clause test to remove the private interest factors (that is, plaintiff's basis for picking

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187 The framing effect on amenability outcomes is too rich and detailed to include here, but I explore it in a forthcoming article tentatively titled *Forum Fights and Fundamental Rights: Amenability's Distorted Fairness Frame*.

188 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

189 *See* Joseph M. Perillo, Jr., *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 162, 162–65 (1964); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 924 (1999).

190 In *Carnival Cruise*, the non-negotiable, fine-print forum clause on the cruise ticket required a Washington state couple to litigate the wife's ship-board injury occurring off the Baja peninsula at defendant's headquarters in Florida, rather than their residence where the ticket was sold and the evidence was readily available. *See* Linda S. Mullenix, Carnival Cruise Lines, Inc. v. Shute: *The Titanic of Worst Decisions*, 12 NEV. L.J. 549, 550 (2012).

the nondesignated forum), leaving only the public or governmental interest factors to protect plaintiff's forum access.[191] Unsurprisingly, this subsuming of plaintiff's forum access rights with forum clauses tracks the amenability balancing test's gradual diminution of plaintiffs' forum access rights, discussed immediately above.[192]

6. Stream of Commerce

If the Court's answers regarding forum clauses and general jurisdiction generate criticism, the Court's non-answers perpetuate uncertainty and justify calls for a new test that can resolve the uncertainties. Stream of commerce, which has defied agreement, is the prime example. The theory is that a nonresident (typically corporate) defendant may be amenable without direct presence or contact, based on its knowledge of its product entering the forum through another party.[193] It was mentioned in favorable dictum in both *World-Wide Volkswagen*[194] and *Burger King*[195] (though it is unclear what those opinions intended in using the term), argued as grounds for jurisdiction by the dissents in *World-Wide Volkswagen*,[196] and produced pluralities in *Asahi Metal Industry Co. v. Superior Court*,[197] and *J. McIntyre Machinery, Ltd. v. Nicastro*.[198]

Asahi's facts echo the seminal case, *Gray v. American Radiator & Standard Sanitary Corp.*[199] Both involved a failed valve made by a manufacturer that had no forum presence but reason to know of its valve's use in the forum as a component of a widely sold product.[200] In *Gray*, the Illinois Supreme Court devised stream of commerce (or "course of commerce") to establish jurisdiction over a small Ohio company for its failed valve that caused a water heater to explode and injure Mrs. Gray in Illinois.[201]

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191 *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49 (2013).

192 This Article's focus is limited to the contacts problem evident in *Bristol-Myers* and *Ford*, but it's necessary to point out that plaintiffs" reduced forum access is not limited to minimum contacts. For forum clause critics and arguments, see James P. George, *Forum Clauses at the Margin*, 71 BAYLOR L. REV. 267 (2019) and sources cited therein.

193 Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (1961).

194 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980).

195 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985).

196 *See World-Wide Volkswagen*, 444 U.S. at 306 (Brennan, J., dissenting); *id.* at 318–19 (Blackmun, J., dissenting).

197 480 U.S. 102 (1987).

198 564 U.S. 873 (2011).

199 176 N.E.2d 761 (Ill. 1961).

200 *See id.* at 762; *Asahi*, 480 U.S. at 107; *see also id.* at 121 (Brennan, J., concurring).

201 *See Gray*, 176 N.E.2d at 765–66.

Similarly, Asahi's ruptured tire valve injured plaintiff Zurcher and killed his wife when a tire blew out on the motorcycle they were riding on a California highway.[202] Zurcher sued tire manufacturer Cheng Shin which filed a third-party indemnity claim against Asahi.[203] Cheng Shin was Taiwanese, and one of the world's largest tire manufacturers.[204] Asahi was a small Japanese company that did little business outside Japan and none in the United States.[205] Zurcher and Cheng Shin settled, leaving Cheng Shin's claim against Asahi, who objected to California jurisdiction.[206] The lower California courts divided, but the California Supreme Court found jurisdiction over Asahi based on stream of commerce and the effects test.[207]

The United States Supreme Court reversed in a divided opinion that failed to establish a stream-of-commerce rule. Four Justices—O'Connor, Rehnquist, Powell, and Scalia—rejected the stream-of-commerce theory and would have held that the only valid specific jurisdiction theory is purposeful availment.[208] Four Justices—Brennan, Marshall, White, and Blackmun—accepted the stream-of-commerce test as valid but believed that the fairness test favored Asahi and therefore dismissal.[209] Justice Stevens, joined by White and Blackmun from the pro-stream group, would refrain from the stream-of-commerce inquiry because it was mooted by the decision that the fairness balance favored Asahi.[210] All nine, however, agreed that the fairness test favored Asahi and dismissal, not only because of the burden on the small Japanese company, but because of California's lack of interest in an accident where its residents had settled.[211]

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202 *Asahi*, 480 U.S. at 105–06.

203 *See id.*

204 *Id.* at 106.

205 *Id.*

206 *Id.*

207 *Id.* at 107–08.

208 Justices O'Connor, Rehnquist, Powell, and Scalia wrote that stream of commerce activities, without additional purposeful activities directed at the forum, are insufficient, and further, that assuming arguendo the existence of contacts, the fair play and substantial justice test was not met because of the forum state's lack of interest after plaintiff's settlement. *Asahi*, 480 U.S. at 108–09, 112, 114.

209 Justices Brennan, Marshall, White, and Blackmun wrote that stream of commerce is a valid theory, and Asahi had such contacts, but jurisdiction fails because the fair play and substantial justice test favors Asahi. *See id.* at 116–21.

210 Justices Stevens, White and Blackmun wrote that because of the failing of the fair play and substantial justice test, it was unnecessary to conduct the inquiry as to the validity of stream of commerce jurisdiction. Second, if the stream of commerce inquiry is appropriate, Asahi had such contacts from its volume of use in California. *See id.* at 121–22.

211 *See generally id.*

This ruling ignored the crucial point that Cheng Shin now stood in Zurcher's shoes as the claimant and assignee of Zurcher's claim.[212] The resulting holding is that California lacked jurisdiction to determine liability for a fatal accident on its roads. The Supreme Court pointed out that Cheng Shin failed to show inconvenience,[213] but that failure is understandable given the fledgling status of the balancing test in the mid-1980s when the lower court records were made. Cheng Shin's counsel may have believed, when arguing in the lower courts where the appellate record was made, that California would have jurisdiction over an in-state accident. If Zurcher's remaining in the case made a difference in Asahi's amenability,[214] then Cheng Shin's substitution as plaintiff should not have changed that; surely California's forum-furnishing duty is not limited to residents.

The Supreme Court's second stream of commerce case—*McIntyre*[215]—didn't come along for twenty-two years. This time the facts differed but the plurality remained in place, even with somewhat different personnel. The case arose from Nicastro's injury in New Jersey when his hand was partly severed by a metal shearing machine made in England.[216] English-based defendant McIntyre objected to New Jersey jurisdiction because it had no contacts there, and few with the United States, even though its lack of American presence was by careful design and the use of a wholly owned distributorship.[217] Four Justices—Kennedy, Roberts, Scalia, and Thomas—rejected stream of commerce using O'Connor's *Asahi* argument that purposeful availment is the only specific jurisdiction contact test.[218] Two Justices—Breyer and Alito—were reluctant to reject stream of commerce outright but thought it should not be applied here.[219] Three Justices—Ginsburg, Sotomayor, and Kagan—dissented, arguing that

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212 *Id.* at 114–15. The Court re-characterized the question as Cheng Shin's right to indemnity, rather than liability for the accident, but Asahi's contract defense under Japanese or Taiwanese law seems more litigable in California than Japanese litigation of product failure and causation on a California highway. Not only was the crucial factual evidence in California, but Cheng Shin had calculated settlement based on California remedies and American dollars, that might be viewed differently in Japan. *Id.*

213 *See Asahi* 480 U.S. at 114.

214 *Id. Asahi*'s Part II.B concedes this, although at least four Justices—the O'Connor group—would still have dismissed for lack of minimum contacts. *Id.*

215 *See generally* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

216 *Id.* at 894 (Ginsburg, J., dissenting).

217 *See id.* at 894–98.

218 *See id.* at 877–87 (plurality opinion).

219 *See id.* at 887–93 (Breyer, J., concurring).

stream of commerce did apply, and that jurisdiction passed the fairness balancing test.[220]

If party resources are a factor in calculating access to a specific court, *McIntyre* stands out as much worse than *Asahi*. Machine operator Nicastro, now disabled, would have to sue in England. Unlike Titan and Asahi, McIntyre wasn't a distant, small manufacturer of a component part with no need for a multinational sales team, but was the maker of the defective machine who deliberately structured its presence in the United States to dodge our courts. It worked.

As for the doctrinal vote tallies, *Asahi*'s votes were four rejecting stream of commerce, four approving it, and one on the fence.[221] In *McIntyre*, four said no, two said maybe, and three said yes.[222] Although stream of commerce may be the most extreme example of presence, it echoes the "effects jurisdiction" concept often used in transnational litigation.[223] Many have criticized the Court's stream of commerce results,[224] but whatever your view, the Court needs to resolve this critical point on meaningful but indirect presence.

7. Tag Jurisdiction

Tag jurisdiction, another plurality, is a throwback to *Pennoyer*'s territorial model. It was unquestionably legal, of course, until *International Shoe*'s paradigm shift in 1945, and didn't come up in the Supreme Court again until *Burnham v. Superior Court* in 1990, where a New York father was served with a support claim while visiting California[225] Four Justices believed that in-state service was enough,[226] and four believed that it

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220 *See id.* at 893–910 (Ginsburg, J., dissenting).

221 *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987).

222 *See McIntyre*, 564 U.S. 873.

223 Effects jurisdiction applies to nonresidents who commit an act (typically a tort) outside the jurisdiction that has an effect in the jurisdiction. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (AM. L. INST. 1971); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 422 reporter's note 6 (AM. L. INST. 2018).

224 Professor Effron, for example, urges courts to examine not only the defendant's relationship to the forum, but the claim's relationship, which puts *McIntyre* and possibly *Asahi* in a different perspective. *See* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867 *passim* (2012); *see also* Borchers, *supra* note 72 *passim* and articles cited therein.

225 495 U.S. 604, 607–08 (1990).

226 *Burnham* provides a complete history of in-state service being sufficient and remaining so after *International Shoe*. *See id.* at 610–13.

wasn't, but that the visiting father had sufficient forum contacts.[227] Commentators have both approved[228] and disapproved,[229] although Professor Stephen Sachs (who approves of it) points out the greater volume of disapproval.[230] In any event, *Burnham*'s split holding—its failure to rule directly on tag jurisdiction—leaves lower courts free to use it.[231]

8. Internet Contacts

Internet contacts may be the best example of technology once again pushing, or even outdating, the jurisdictional paradigm. This is true for everything from "presence" for contracting purposes to targeted audiences in defamation cases, and even situs for patent infringement. The Supreme Court has thus far declined opportunities to rule (or been unable to find appropriate fact patterns) on the question of how internet "presence" or "contacts" count.[232] In this absence, courts have issued opinions considering internet contacts for both specific[233] and general[234] jurisdiction. Supreme Court dicta implies that the Court is looking for the right internet contacts case.[235]

9. Interstate Federalism

Another thorny issue is the role of interstate federalism in amenability. Interstate federalism is the notion that states in the United States have residual sovereignty that can be compromised when a sister

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227 *Id.* at 628–40 (concurring opinions). Even with Brennan's insistence in *Burnham* that jurisdiction based merely on presence was negated in *International Shoe*, and with several Justices in *Burnham* declining to go as far as Justice Scalia's view that precedent alone compelled the upholding of tag jurisdiction, all the Justices agreed that tag jurisdiction remained valid in general and as applied in that case.

228 *See, e.g.*, Borchers, *supra* note 72.

229 *See, e.g.*, Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 602–603.

230 *See* Sachs, *supra* note 12, at 1320.

231 *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 247 (2d Cir. 1995) (upholding service of summons and resulting amenability for civil suit against Radovan Karadzic for war crimes in Bosnia).

232 *See* FRIEDENTHAL ET AL., *supra* note 26, at 153 & n.425, 156 & nn.443–44 (discussing passed-up opportunities in J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) and Walden v. Fiore, 571 U.S. 277 (2014)).

233 *E.g.*, UMG Recordings, Inc. v. Kurbanov, 963 F.3d 344, 355 (4th Cir. 2020).

234 *E.g.*, Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1074 (9th Cir. 2003). As to internet jurisdiction in general, see FRIEDENTHAL ET AL., *supra* note 26, at 153–57.

235 *See, e.g.*, *McIntyre*, 564 U.S. at 890 (Breyer, J., concurring) (not prepared to reject stream of commerce jurisdiction but preferring a case that "implicate[s] modern concerns").

state assumes judicial jurisdiction over a dispute more connected to another state. Justice White invoked it in *World-Wide Volkswagen* as grounds to deny Oklahoma jurisdiction (over an Oklahoma accident), but concerns raised about this new element of the amenability paradigm pushed him to later disavow it expressly in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[236] which would be echoed by Justice Brennan's concurrence in *Keeton*.[237]

The discounted doctrine came to life again in *McIntyre*, with the plurality explaining that defendant's submission to sovereign authority was the justification for the purposeful availment concept,[238] and on that basis declining jurisdiction. This prompted the three-Justice dissent to object that this was nothing more than interstate federalism (though the plurality did not use that term) that was rejected in *Insurance Corp. of Ireland*.[239] The *McIntyre* dissent's concern is muted somewhat by the fact that only four Justices signed on to the sovereignty theory with Breyer's and Alito's concurrence agreeing only in the result.[240]

Equivocation on interstate federalism seemed to disappear in 2017 in a California class action against Bristol-Myers Squibb, a Delaware corporation headquartered in New York but with numerous California contacts related to these claims for damages from a blood-thinning drug. Although Bristol-Myers had significant California contacts for the 88 class members from California, they had none for the remaining 592 class members from thirty-three other states.[241] The California Supreme Court upheld jurisdiction[242] under a theory that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[243] This was true even though

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236 456 U.S. 694, 702 n.10 (1982).

237 Keeton v. Hustler Mag., Inc., 465 U.S. 770, 782 (1984) (Brennan, J., concurring) (restrictions on state's sovereignty is a function of individual liberty interests).

238 *McIntyre*, 564 U.S. at 881.

239 *Id.* at 889–900 (Ginsburg, J., dissenting) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (pointing out that *Shaffer* had also rejected the concept)).

240 *McIntyre*, 564 U.S. at 893.

241 Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1777–78 (2017).

242 *Id.* at 1778. The California courts first found general jurisdiction but were forced to reconsider when the Supreme Court again restricted general jurisdiction in *Daimler*. *See infra* notes 259–260 and accompanying text. Based on *Daimler*, the California Supreme Court reversed the general jurisdiction finding and remanded to the court of appeals for consideration of specific jurisdiction, which it found under a sliding scale approach which uses overall contacts to enhance specific contacts. *See Bristol-Myers*, 137 S. Ct. at 1778. In rejecting this, the United States Supreme Court noted that the sliding scale "resembles a loose and spurious form of general jurisdiction." *Id.* at 1781.

243 Bristol-Myers Squibb Co. v. Superior Ct., 377 P.3d 874, 885, 888, 889 (Cal. 2016). The California Supreme Court apparently likes that phrase.

there was "no claim that Plavix itself was designed and developed"[244] in California, and because defendant did other unrelated research in California, their overall contacts were substantial, and the nonresidents' claims were similar to those arising in California.[245] An eight-Justice Supreme Court majority reversed based expressly on interstate federalism[246] and noted that the sliding scale "resembles a loose and spurious form of general jurisdiction."[247]

Whatever the current status for interstate federalism, and whatever its merit as an amenability factor, Justice Sotomayor and her predecessors (White and Brennan) are incorrect that interstate federalism is not an amenability factor under the current test. A good argument can be made that state interest has been an amenability factor at least since *World-Wide Volkswagen* grouped the five-factor fair play and substantial justice balancing test. The second factor is the forum state's interest, balanced against the fifth, "the shared interest of the several States in furthering fundamental substantive social policies."[248] Although not stated as a definitive test until *World-Wide Volkswagen*, this balance of interstate interests was first imposed in *Kulko*'s determination of child custody and support jurisdiction between New York and California.[249] The only difference in the *Bristol-Myers* analysis is to move state interest consideration from the second prong, fairness, to the first, the contacts test. That still leaves open the question of what role competing state interests should play in amenability, but it's clear the issue has at least lurked in the background for some time. What is unclear is how this will play out in the future—despite the eight-Justice opinion in *Bristol-Myers*, that is likely not the final word.

10. General Jurisdiction Mostly Disapproved, at Least up to *Ford v. Montana*

The Court's other clarification, general jurisdiction, significantly restricts plaintiffs' choices, although it seems justified in most cases given the premise of no relevant forum contacts. The lower court history of

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244 *Id.* at 888. Noted also in the United States Supreme Court opinion. *Bristol-Myers*, 137 S. Ct. at 1779.

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

246 *Bristol-Myers*, 137 S. Ct. at 1780–81.

247 *Id.* at 1781. Justice Sotomayor objected that this produced a result in which a defendant with nationwide contacts, including significant forum contacts and with no inconvenience in litigating in California, escaped a convenient single-forum litigation for a case having nationwide impact. *Id.* at 1788–89 (Sotomayor, J., dissenting).

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

249 Kulko v. Superior Ct., 436 U.S. 84, 92 (1978).

general jurisdiction is mixed, but the concept hasn't fared well in the Supreme Court, having been approved only once, in a 1952 case where defendant Benguet Mining could only have been sued in the objected-to Ohio forum, and nowhere else.[250]

The Supreme Court has rejected general jurisdiction in four later cases. The first, *Helicopteros* in 1984, merely recited the continuous and systematic standard and held that it wasn't met in that case.[251] Twenty-seven years later, after much favorable use in lower courts, *Goodyear Dunlop Tires Operations v. Brown*[252] modified the continuous-and-systematic test to add the "essentially at home" factor.[253] Lawyers don't give up easily, and it took two more cases to emphasize that general jurisdiction over nonresidents is—at best—disfavored. The jurisdictional facts in both were extreme. *Daimler AG v. Bauman*[254] attempted general jurisdiction in California for Daimler's subsidiary's alleged collusion in Argentine human rights offenses, with the California connection being another Daimler subsidiary.[255] The Court rejected jurisdiction, both on the at-home standard and the idea that general jurisdiction could be based on a subsidiary's unrelated contacts. Despite Justice Ginsburg's thorough rejection language,[256] the Court left open the idea that general jurisdiction might apply in some cases.[257]

The Court's final emphasis on general jurisdiction's restriction came in *BNSF Railway Co. v. Tyrrell*,[258] two cases asserting general jurisdiction in Montana for workers' claims arising in other states. The jurisdictional

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250 *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952). Justice Scalia's view of tag jurisdiction fits perfectly here but apparently was not argued. *See supra* notes 195–197 discussing tag jurisdiction.

251 *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984); *supra* notes 162–163 and accompanying text.

252 564 U.S. 915 (2011).

253 *Id.* at 919 (holding that a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945))).

254 571 U.S. 117 (2014).

255 *Id.* at 120–21.

256 *Id.* at 132–33. Justice Sotomayor's concurrence, raising concerns of over-limiting United States jurisdiction, tempered the Court's ongoing constraints on general jurisdiction. *See id.* at 142–59 (Sotomayor, J., concurring).

257 *Id.* at 137–39, 139 n.19. In dictum, the Court questioned whether the amenability test's second prong—fairness—even applies to general jurisdiction, noting that the court has never ruled on that question. *Id.* at 139 n.20. On one hand, it makes sense that an at-home defendant cannot complain of inconvenience. Then again, the location of witnesses and evidence may make litigation in a remote forum unfair, though that can also be challenged separately in a forum non conveniens motion.

258 137 S. Ct. 1549, 1553–54 (2017).

claim here was perhaps more realistic than in *Daimler*—defendant's employee-count and track miles in Montana[259]—but the Court again rejected general jurisdiction, this time with a Sotomayor partial dissent.[260] The results in *Daimler* and *BNSF* did not negate general jurisdiction altogether but reduced it to little more than the traditional basis of forum residence, with the idea that continuous and systematic contact is the jurisdictional equivalent of residence. Other than the need for case-by-case judgment calls on what amounts to "at home," these clarifications seem to resolve the general-jurisdiction disparities—until the Supreme Court rescrambled the analysis in *Ford v. Montana*, discussed immediately below.[261]

11. Contact Relatedness

In changing the amenability test from *Pennoyer*'s pure territorial power to *International Shoe*'s contacts/fairness analysis, the Court emphasized the language of arising under, relatedness, and connections.[262] Lurking in those otherwise generic descriptions is a perplexing legal standard and ensuing riddle: what must be related, and how much? Twenty years after *International Shoe*, Professors von Mehren and Trautman explored this idea, and in doing so gave us the term specific jurisdiction, derived from cases litigated between 1945 and 1965: "In the case of specific jurisdiction, the assertion of power to adjudicate is limited to matters arising out of—or intimately related to—the affiliating circumstances on which the jurisdictional claim is based."[263] They go on to explain several variations of relatedness, and they note that, "[i]t is in this area that the most significant—and most controversial—developments have occurred in contemporary American thinking and practice."[264] And that was only the first twenty years.

Apart from assessing contacts in every case it chose to review, the Court has pointedly mentioned the relatedness issue in several cases,

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259 Defendant had 2,061 track miles in Montana (6% of its total) and around 2,100 employees, but the Court found this too little when matched against defendant's operation in 28 states. *Id.* at 1554.

260 Justice Sotomayor argued that the Court's ruling eliminates *Daimler*'s possibility that a defendant not incorporated or headquartered in a state might nonetheless be subject to general jurisdiction. *Id.* at 1560–62 (Sotomayor, J., concurring in part and dissenting in part).

261 See *infra* notes 301–311 and accompanying text.

262 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (discussing obligations that "arise out of or are connected with the activities within the state" and "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure").

263 von Mehren & Trautman, *supra* note 116, at 1144–45.

264 *Id.*

starting with *Shaffer* and its abolition of quasi in rem jurisdiction: "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."[265]

"Relatedness" was first argued as a point of contention in *World-Wide Volkswagen*, where plaintiffs argued that because the New York defendants (the car dealer and regional distributor) would be amenable for a lawsuit for an accident in New York, they were also amenable for one in Oklahoma, because it was foreseeable that a car might be driven there. The Court rejected this expansive view of foreseeability but did not reject foreseeability as a factor. The Court explained:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[266]

World-Wide Volkswagen thus expanded the contact relatedness issue to causation, and from that, proximate cause, giving defendants a more finely tuned argument of non-relatedness.

At this point, the Court had not used the term "arise from or relate to" as a term of art. It did so for the first time in *Helicopteros*. Like *Shaffer*, *Helicopteros* was not a specific jurisdiction case, but the Court found a thorough discussion of specific jurisdiction helpful in categorizing the *Helicopteros* facts as general jurisdiction.[267] In doing so, the case was the first to credit Professors von Mehren and Trautman's coining of the terms specific and general jurisdiction, and at that point, "arise from or relate to" acquired common usage.[268]

With the "arise from" term of art established, and with *World-Wide Volkswagen*'s explanation of foreseeability, the idea came (at least in lower courts) that defendant's forum contacts creating specific jurisdiction must be *causally related* to plaintiff's claim. The problem with this approach is that it takes on aspects of proximate cause—foreseeability, in other

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265 Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (footnote omitted).

266 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980). In *Shaffer*'s conclusion that the minimum contacts test should be pre-eminent, the Court did not use "arise" in a jurisdictional context, but did use "relate" throughout. *See Shaffer*, 433 U.S. at 204, 205, 208, 209, 213, 214 (discussing the lack of relationship between the quasi in rem property, plaintiff's claim, and defendant's relationship with the Delaware forum). At the time in *Shaffer*, which was 1977, the Court had not come around to the later-essential term "arise from or relate to."

267 *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 & n.8 (1984) (quoting *Shaffer*, 433 U.S. at 204) (though *Shaffer* did not use those terms as such).

268 *See id.*

words—which is an issue that may not be ripe for determination until the merits of the case are litigated. This approach benefits defendants, who could now disclaim any forum contacts that are not causally connected to plaintiff's substantive claim. Although the Supreme Court would not address this for years (and still hasn't fully), the idea flourished in some lower courts. The Texas Supreme Court provided a prime example in *Moki Mac River Expeditions v. Drugg*.[269]

Moki Mac is a river-rafting outfitter based in Utah. Moki Mac markets its excursions from Utah, by sending out promotional materials, and, more pointedly, by rewarding customers for recruiting other customers. Solicitation by another customer is how Betsy Drugg came to book a trip for her son Andy, who then died on a negligently supervised mountain hike in the Grand Canyon.[270] When Andy's parents sued in Dallas, Moki Mac objected that their Texas contacts were not connected to the claim for death in Arizona. The jurisdictional objection failed in the trial court and the intermediate appellate court,[271] but the Texas Supreme Court reversed, agreeing with Moki Mac's contact-relatedness argument.[272] In reaching this conclusion, the Texas Supreme Court had to consider a question of first impression for Texas: what is the relatedness test?

In searching for the best approach to contact relatedness, the Texas Supreme Court surveyed existing case law and found four operative tests.[273] The first is the "but-for" test, taken from Justice Brennan's dissent in *Helicopteros*. It holds that "a cause of action arises from or relates to a defendant's forum contacts when, but for those contacts, the cause of action would never have arisen."[274] The test strongly favors plaintiffs and is criticized for having too broad a reach.[275] As of *Moki Mac*'s issuance in 2007, the Ninth Circuit was the sole subscriber.[276]

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269 221 S.W.3d 569 (Tex. 2007).

270 *Id.* at 573 (describing Andy's fall from a boulder-impeded mountain path with no guide and no special safety equipment).

271 *Id.* at 573–74.

272 *Id.* at 588.

273 Although *Moki Mac* was current only as of 2007, it may be the most thorough assessment of the relatedness tests. *See* Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, Ford Motor Company v. Montana Eighth Judicial District Court*: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 22 nn.191–95 (2021). Moreover, its updating is unnecessary because the United States Supreme Court rejected this approach in *Ford*.

274 *Moki Mac*, 221 S.W.3d at 580 (citing Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 427–28 (1984)).

275 *See also* Lea Brilmayer, Colloquy, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1462 (1988) (criticizing the but-for test for its limitless reach).

276 *See Moki Mac*, 221 S.W.3d at 580.

The second test is the "substantive relevance/proximate cause" test, used in the First, Second and Eighth Circuits. It holds that proximate cause requires the defendant's conduct to be both the cause in fact and the foreseeable cause of injury: "Under this more stringent relatedness standard, the purposeful contact that is a proximate cause of injury is an essential liability element and is thus substantively relevant to a plaintiff's claim of harm."[277]

Third is the "sliding scale" approach used by California state courts, holding that the greater the contacts overall, the less the relatedness requirement for the contacts creating the claim.[278] Despite the California courts' arguments otherwise,[279] the sliding scale approach appears to use general contacts to enhance specific jurisdiction, and thus mixes the two approaches. Based on that, the United States Supreme Court rejected the sliding scale in *Bristol-Myers*.[280]

The fourth relatedness test is "substantial connection" to operative facts, as explained by the Sixth Circuit[281] and in turn drawn from language in *Burger King* (though not necessarily intended there as a legal test).[282] The test distinguishes other aspects of "arise from," explaining that the "relatedness element 'does not require that the cause of action formally "arise from" defendant's contacts with the forum [but instead requires] that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.'"[283]

With this thorough analysis, the Texas Supreme Court purported to adopt the substantial connection approach,[284] and then contradictorily applied the proximate cause test, finding no link between Moki Mac's ongoing solicitation of business in Texas and the negligence in New Mexico leading to Andy's death.[285]

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277 *Id.* at 582.

278 *Id.* at 583–84.

279 *See* Bristol-Myers Squibb Co. v. Superior Ct., 377 P.3d 874, 885–89 (Cal. 2016).

280 *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1776 (2017); *supra* notes 244–250 and accompanying text.

281 Third Nat'l Bank in Nashville v. WEDGE Grp., Inc., 882 F.2d 1087, 1091 (6th Cir. 1989).

282 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 n.18 (1985) (stating "[s]o long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction" (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

283 *Moki Mac*, 221 S.W.3d at 584–85 (quoting *WEDGE Grp.*, 882 F.2d at 1091).

284 *Id.* In crafting its analysis on contact relatedness, the *Moki Mac* court relied three times on the contacts relatedness discussion in *Rush v. Savchuk*, 444 U.S. 320 (1980), which was a rejection of Minnesota's quasi in rem jurisdiction and not a specific jurisdiction analysis. *See id.*

285 *Id.* at 585–88. "Whatever connection there may be between Moki Mac's promotional materials sent to Texas and the operative facts that led to Andy's death, we do not believe it is sufficiently direct to meet due-process concerns." *Id.* at 585. "Similarly, the injuries for which the Druggs seek recovery

The lower courts' use of these relatedness/causation approaches is a miscue resulting from *World-Wide Volkswagen*. In that case, plaintiffs argued, and the Oklahoma Supreme Court agreed, that the New York defendants' forum contacts came from the foreseeability of the car traveling to outside New York, and in this case to Oklahoma.[286] In the United States Supreme Court review, the foreseeability argument got a thorough discussion from the majority and support from the dissents,[287] but none of the Justices described it as a proximate cause link for forum contacts, and there is little basis for its adoption in the lower courts.

In spite of the Supreme Court majority's rejection of foreseeability as causation (and the dissenters' failure to adopt a causation view), the argument took root in lower courts—as explained above in the *Moki Mac* discussion—but did not get the Supreme Court's attention. Interestingly, the Court used all the relatedness buzzwords in *Walden v. Fiore*[288] in 2014, but applied the terms only generically, and not as defined tests.[289] *Walden* was a claim against a Georgia-based federal officer who seized plaintiffs' money (almost $97,000) as they passed through the Atlanta airport on their way to Las Vegas. The money was later returned, but plaintiffs sued in Nevada federal court, alleging that defendant Walden falsified the probable cause affidavit to support the seizure, which temporarily deprived plaintiffs of money they planned to use for gambling in Las Vegas.[290] The only forum contacts belonged to plaintiffs; defendant had none.

Plaintiffs argued analogies from *Calder* and *Keeton* about out-of-state conduct producing effects in the forum, but the Court pointed out that in *Calder* and *Keeton*, the defendants aimed their defamatory articles at the forum, while in *Walden* defendant simply acted within Georgia, with no design elsewhere. Plaintiffs argued that the seizure made it foreseeable that plaintiffs would suffer damage at their destination, but the Court

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are based on Andy's death on the hiking trail in Arizona, and the relationship between the operative facts of the litigation and Moki Mac's promotional activities in Texas are simply too attenuated to satisfy specific jurisdiction's due-process concerns." *Id.* at 588.

286 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290–91 (1980) (citing World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978)).

287 *See id.* at 295–97; *see also id.* at 306, 311 n.18 (Brennan, J., dissenting); *id.* at 318–19 (Blackmun, J., dissenting).

288 571 U.S. 277 (2014).

289 *Id. Walden*'s term usage includes "defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 284. "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)). The injury "would not have occurred but for the fact that the defendants wrote an article for publication in California." *Id.* at 287–88 (referring to Calder v. Jones, 465 U.S. 783 (1984)). "[C]ause" referring to defendant's conduct causing the injury, *id.* at 282, 287, 288, 289; and "connection," *passim.*

290 *Id.* at 279–81.

rejected that, emphasizing that the forum contacts were exclusively plaintiffs'. The Court apparently granted certiorari in *Walden* to underscore that defendant's contacts are what count, not plaintiff's.[291] In doing so, the Court again ignored or rejected tort-like foreseeability arguments. Thus, the issue was simply defendant's lack of forum contacts, not what type of contacts count, or how they count, or how related they are to the claim.

Relatedness came nearer to high court consideration in *Bristol-Myers*, (discussed above in the interstate federalism section) the California-filed class action seeking to include class members from thirty-three states.[292] Among other arguments, Bristol-Myers urged a causation theory; that defendant's "in-state conduct must actually cause a plaintiff's claim."[293] The majority ignored the causation argument[294] but Justice Sotomayor addressed it—in a footnote, negatively—fearing unseen consequences. She concluded: "That question, and others like it, appears to await another case."[295]

Justice Sotomayor's "other case" arrived four years later in *Ford Motor Company v. Montana Eighth Judicial District Court*, presenting the relatedness issue head on and leading the Court to contradict its rejection of California's sliding scale in Bristol-Myers.[296] There were two cases, one in Montana and one in Minnesota, each a car accident involving a Ford originally purchased in another state, then re-sold as a used car in the forum state. Each plaintiff was a forum resident who sued in their home forum for an accident occurring there.[297] Ford challenged jurisdiction with the argument that the cars were not manufactured or originally sold in the forums, that Ford was neither incorporated nor principally located in the forums, and therefore lacked any forum contact causally linked to plaintiffs' claims.[298]

A unanimous Court rejected the strict causation argument, with five Justices opting for a distinction created by parsing the disjunctive "arise

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291 "This approach to the 'minimum contacts' analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." *Id.* at 289.

292 Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017); *see supra* notes 244–250 and accompanying text.

293 *Id.* at 1788 & n.3 (Sotomayor, J., dissenting) (citing to Brief for Petitioner 14-37).

294 The majority opinion used "foreseeability" once, had no direct discussion of causation, and focused on the nonresident's lack of harm in the forum. *Id.* at 1781–82 (majority opinion).

295 *Id.* at 1788 n.3 (Sotomayor, J., dissenting).

296 *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

297 *Id.* at 1022.

298 *Id.*

out of or relate to."[299] The majority reasoned that "relate to" created an alternative to any causation implication in "arise out of," specifically, "relate to" as a separate category "contemplates that some relationships will support jurisdiction without a causal showing."[300] The majority cautioned that this vaguely (and perhaps newly) defined category has limits, which it attempted to define with precedents:

- there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."[301]
- there must be "a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction."[302]
- jurisdiction must be predictable, that is, it cannot be a surprise.[303]
- there must be "a connection between the forum and the specific claims at issue," which the majority characterized as interstate federalism.[304]

Even with the invocation of precedent, three concurring Justices expressed concern over what they believe is a new and undefined contact category.[305] The doubting concurrences nonetheless supported the jurisdictional conclusion, all finding ample reason for Ford to defend local car crashes.[306] Although the Court's reasoning is persuasive on the facts (that the manufacturer should be amenable at the accident situs), the jurisdictional reasoning is flawed on the law, relying on Ford's overall forum contact. As such, the jurisdictional analysis mimics the California

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299 *Id.* at 1026–28. It is unclear if this rejection includes all causation approaches or just the but-for concept.

300 *Id.* at 1026.

301 *Id.* at 1025 (quoting Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780–81 (2017)).

302 *Ford Motor Co.*, 141 S. Ct. at 1028 (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984)).

303 *Id.* at 1029–30 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

304 *Id.* at 1030–31 (quoting Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1781 (2017)) (where California lacked that connection with the nonresidents' claims).

305 Justice Alito agreed with the majority that but-for causation does not fit specific jurisdiction but saw "arise out of or relate to" as synonymous. *Id.* at 1033–34 (Alito, J., concurring). He also believed the new "relate to" category is too ambiguous and agreed with Gorsuch and Thomas that the *International Shoe* model is dated. *Id.* at 1032–34. Justices Gorsuch and Thomas questioned the current validity of the *International Shoe* model, questioned the majority's "relate to" distinction, and seemed to support but-for causation for specific jurisdiction contacts. *Id.* at 1034–35 (Gorusch, J., concurring).

306 *See id.* at 1032–33 (Alito, J., concurring); *id.* at 1039 (Gorsuch, J., concurring).

sliding scale approach (requiring fewer specific contacts in the face of greater general contacts) that the Court rejected in *Bristol-Myers*.[307]

To be sure, *Bristol-Myers* and *Ford* are distinguishable on the facts: California's inclusion of nonresident class-members for claims arising elsewhere, versus Montana and Minnesota providing forums for local residents involved in local accidents. They are not distinguishable on the law; both involved the use of general contacts to find specific jurisdiction, which the Supreme Court rejected in one and approved in the other. Apart from the vagaries of single-case outcomes, *Ford* has significant ongoing implications, not only blurring distinctions between specific and general contacts, but leaving us lost as to how they count.

12. The Extra *Shoe*—Forum Non Conveniens

For the plaintiff who wins the amenability battle, the forum fight isn't over. Defendant can now file a motion to transfer (or dismiss and refile) based on much the same factors considered in the *Burger King* fairness test.[308] It's defendant's second chance, a redundant test that often changes forum selection.[309] This Article's focus is on initial amenability, but forum non conveniens has become something of a lockstep issue in forum analysis.

Forum non conveniens seems an appropriate safeguard where defendant is subjected to jurisdiction by a traditional basis—residence, consent, waiver, or tag—and has not had the chance to argue inconvenience. But after a minimum contacts analysis, it's not clear why defendant should have that chance twice.

Besides its redundancy, the law of forum non conveniens is in disarray. In addition to inconsistent application of the agreed-on points,[310] there is disagreement over the deference due plaintiff's choice of forum,[311]

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307 *See supra* notes 244–250 & 295–300 and accompanying text.

308 *See supra* note 170 and accompanying text.

309 *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 *passim* (1985).

310 *See id.* at 785 ("The result has been a crazy quilt of ad hoc, capricious, and inconsistent decisions."); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1157 & n.76 (2006) (discussing inconsistent standards for testing the availability of an alternative forum); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 352–53 (2002) (discussing inconsistency in public and private factor balancing); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 353–66 (1994) (criticizing excesses of forum non conveniens).

311 *See* Otto Candies, LLC v. Citigroup, Inc., 963 F.3d 1331, 1339 (11th Cir. 2020) (explaining the "manifest injustice" standard used in the Fourth, Fifth, Eighth, and Eleventh Circuits); Iragorri v.

no clearly articulated or applied standard for defendant's burden in establishing inconvenience,[312] disagreement in the weighing of public and private factors, and on the imposition of dismissal conditions,[313] and disagreement on choice of law analysis (in international cases) with some circuits holding that a choice of domestic law forecloses forum non conveniens.[314] Because of its now-common role in forum determinations, any rethinking of the larger amenability picture should also address the problems with forum non conveniens.

III. The Present Quandary

A. *Some Problems*

Whatever the strengths of the contacts/fairness analysis, its datedness surfaces too often in the Supreme Court, and who knows how commonly in lower courts and unreported decisions.

Critics call for modifications, or a new test, or congressional control. The problems are thorough. The contacts component of the test has several issues. One is imputed consent, the idea that nonresident defendants consent to forum law by engaging in forum contact and theoretically consenting to its laws. This is a primary foundation for purposeful availment but is not universally accepted. In *McIntyre*, for example, Justice Ginsburg complained of the plurality's finding no jurisdiction by using an explanation of consent,[315] phrased in the plurality as "intent to benefit" and "intent to submit."[316] This view enabled English defendant McIntyre to dodge jurisdiction in states where its product

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United Techs. Corp., 274 F.3d 65, 71–72 (2d Cir. 2001) (explaining the sliding scale approach used in the Second, Third, Sixth, and Ninth Circuits); Interface Partners Int'l Ltd. v. Hananel, 575 F.3d 97, 101–02 (1st Cir. 2009) (doubting plaintiffs' entitlement to forum choice deference at all).

312 In spite of the Supreme Court's clear imposition on defendant of the burden of justifying a forum non conveniens dismissal or transfer, Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430 (2007), lower courts often ignore this requirement and decide based on factors such as the location of witnesses and evidence. *See* Brief of *Amici Curiae* Legal Scholars in Support of Petitioners at 8, Acuna-Atalaya v. Newmont Mining Corp., 142 S. Ct. 461 (2021) (No. 21–33) [hereinafter Acuna-Atalaya Amicus].

313 *See* Acuna-Atalaya Amicus, *supra* note 312, at 9–10.

314 *See, e.g.*, Archangel Diamond Corp. Liquidating Tr. v. OAO Lukoil, 812 F.3d 799, 804 (10th Cir. 2016) (holding that domestic law's application does not justify retaining the case); *see also* Trotter v. 7R Holdings, LLC., 873 F.3d 435, 441–42 (3d Cir. 2017); Acuna-Atalaya Amicus, *supra* note 312, at 10–12.

315 *See* J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 900–01 (2011) (Ginsburg, J., dissenting).

316 *Id.* at 880–87 (plurality opinion). For other criticism of consent as a specific jurisdiction basis, see Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304–06 (1989); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536–44 (1991).

malfunctioned by using third parties and avoiding contact, but not impact. Another contacts problem is relatedness or foreseeability, an analytical approach that flourished in the lower courts but evaded Supreme Court review until *Ford*.[317]

A third problem is stream of commerce. Plurality opinions continue to split the court, most recently in *McIntyre*, with dissenters Ginsburg, Kagan, and Sotomayor falling short of endorsing stream of commerce, but arguing that McIntyre was subject to New Jersey jurisdiction based on its overall solicitation of the U.S. market.[318] In contrast, Justices Breyer and Alito agreed there was no jurisdiction, but reserved their opinions on stream of commerce for a case involving "a better understanding of the relevant contemporary commercial circumstances."[319] A fourth contacts puzzle is the maximum contacts theory, general jurisdiction. Most of the Justices agree that the concept of corporate home-base amenability should be pretty much limited to the corporate home, but with undefined exceptions.[320]

The test's second component—fairness balancing—has sore spots including governmental interests and its subset, interstate federalism (at least it seems a subset to me). Their application to amenability is often vague and inherently invites questions[321]: What is a governmental interest? Is it contacts with the dispute? If so, how do we assess them? Is it the state's economic connection? Does public or collective interest even belong in a private dispute? Does it require express regulatory declarations? If so, what's a state's interest in the absence of express regulation? Can a state manipulate its interest by extending its regulatory scope or territory? If so, aren't we just talking about legislative jurisdiction, and if that's true, what role does that have in amenability? Do states even have interests in private disputes? They didn't under *Pennoyer*'s power model, and Professor Sachs thinks we should reconsider that.[322] If state interests are collectively defined by contacts and regulatory intent, what of interstate federalism?

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317 *See supra* notes 281–296 and accompanying text.

318 *McIntyre*, 564 U.S. at 893–909 (Ginsburg, J., dissenting).

319 *Id.* at 892–93 (Breyer, J., concurring).

320 *See* Daimler AG v. Bauman, 571 U.S. 117, 137–39, 139 n.19 (2014). Justice Sotomayor is concerned that the language in *BNSF* effectively eliminated it. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560–61 (2017) (Sotomayor, J., dissenting); *see supra* notes 253–261 and accompanying text.

321 *See, e.g.*, Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 103–07 (criticizing the concept of interest analysis and the inconsistent terminology). Interest analysis has ebbed and flowed. In 1987, Professor Stein noted an analytical shift favoring contacts and convenience and away from interest analysis. *See* Stein, *supra* note 179 *passim*. This declining use was reversed in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780–81 (2017) (discussing interest analysis in general and interstate federalism in particular).

322 *See* Sachs, *supra* note 12, at 1260–65.

Is it a due process function of individual liberty or a full faith and credit function of shared sovereignty?

Overall criticisms of minimum contacts range from the narrow, such as tag jurisdiction's arguable violation of due process,[323] to the broad, that the minimum contacts test is not aligned with current technology and commerce.[324] Critics include scholars throughout *International Shoe*'s timespan, including Hazard in 1965,[325] followed by Professors Allan Stein,[326] Brilmayer,[327] Patrick Borchers[328] and many others, with Sachs providing a well-documented recent list.[329]

The most notable calls for reform may be from the Justices, starting with Black's vagueness concern in *International Shoe*.[330] In his *World-Wide Volkswagen* dissent, Justice Brennan stated that minimum contacts precedents "may already be obsolete as constitutional boundaries."[331] More recent criticisms range from Justice Sotomayor's advocacy for general jurisdiction and other dissenters for long-arm reach,[332] to the more pointed overall concerns from Justices Gorsuch, Alito, and Thomas in *Ford v. Montana*. Gorsuch in particular, who noted that "the old guardrails have begun to look a little battered,"[333] is clearly calling for a new test, as opposed to an overhaul. Much of his *Ford* concurrence was on the same

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323 The criticism dates back at least to Ehrenzweig. *See supra* note 18, at 308, and accompanying text.

324 "I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents." *McIntyre*, 564 U.S. at 887 (Breyer, J., concurring).

325 *See* Hazard, *supra* note 17, at 274–75.

326 *See, e.g.*, Stein, *supra* note 179 *passim* (proposing greater jurisdictional emphasis on a state's expressed regulatory interests).

327 *See* Brilmayer, *supra* note 321, at 89.

328 Borchers, *supra* note 90, at 105 ("[P]ersonal jurisdiction doctrine has drifted aimlessly, producing an unacceptably confused and irrational set of jurisdictional 'rules.'"); *see also* Borchers, *supra* note 72, at 12–29 (including a summary of his past minimum contacts criticisms).

329 *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304–07 (2014) (summarizing criticism, including "hollow," "incoherent," and "doctrinal confusion," with numerous sources and adding his own).

330 Justice Black criticized the initial minimum contacts discussion as depending on "vague Constitutional criteria" leading to "uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution." Int'l Shoe Co. v. Washington, 326 U.S. 310, 323 (1945) (Black, J., concurring).

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

332 *See, e.g.*, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560–62 (2017) (Sotomayor, J., concurring in part and dissenting as to general jurisdiction limits); J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 893–910 (2011) (Ginsburg, J., dissenting) (dissenting as to the New Jersey long arm reach for a local injury).

333 Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring).

point, beyond the mere resolution of that case: "With the old *International Shoe* dichotomy looking increasingly uncertain, it's hard not to ask how we got here and where we might be headed."[334]

Gorsuch re-emphasized the point two pages later:

> Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why. Maybe, too, *International Shoe* just doesn't work quite as well as it once did.[335]

And again, another page later:

> The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.[336]

Justice Alito added his own call for something new:

> To be sure . . . there are grounds for questioning the standard that the Court adopted in *International Shoe* . . . . And there are also reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted.[337]

We're now to the point of the Court denying California's use of the "sliding scale" (greater general contacts allow fewer or weaker specific contacts), and then using a sliding scale of Ford's overall contacts with Montana and Minnesota to bind it to litigating claims not arising from Ford's specific activity in those states.

That's not to say the results are improper—the outcomes of both cases make sense—but the theoretical bases are contradictory. The *Ford* reasoning managed a tortuous path to find that Ford's general contacts were "related to" the accidents because the owners probably would not have purchased the cars if Ford had no presence in the forum states. Even so, it's inescapable that the court was looking to Ford's general contacts and counting them for specific jurisdiction.[338] *Bristol-Myers* and *Ford* can be distinguished on the facts, but not on the law: Ford's amenability rested on the accidents' occurrence in the forum states while many of the *Bristol-Myers* claimants had no claim-related connection to California. But it is inescapable that the Court used Ford's general contacts, such as advertising and new car sales, to justify jurisdiction over claims regarding

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334 *Id.* at 1036.

335 *Id.* at 1038.

336 *Id.* at 1039.

337 *Id.* at 1032 (Alito, J., concurring).

338 *See id.* at 1032 (majority opinion).

mechanical failures in used cars.[339] If the *Ford* measure of specific contacts is valid, then any number of vaguely related forum connections are countable. *Ford* is the One-Hoss Shay that has finally broken down the minimum contacts paradigm.[340] That's where we are with the basic specific jurisdiction test: the minimum contacts analysis bent to the breaking point in order to justify a state's obvious (and unanimously upheld) jurisdiction over a local accident.

B. *Some Solutions*

Where do we go from here? More to the point, where does the Court go from here? Or should it be Congress? The critics noted above, at least the non-judicial ones, have suggestions dating from less than twenty years after the test's premier, after only a few Supreme Court turns at the doctrine. The suggestions come in all forms, but one convenient breakdown is to divide them into two groups: those focused on the test without regard to its source, and those who believe the problem is the source and the solution should come from Congress instead of the judiciary. In addition to dividing them by focus (the test, or the source), I'll list them chronologically to note the suggestions' alignment with then-current cases.

1. Change the Test

The first group, focused on the test's contents, starts with Professors von Mehren and Trautman and their endorsing of contacts-based jurisdiction. They argued that existing terminology—in personam, in rem, quasi in rem—distorted the analysis necessary for a contacts-based approach to amenability, and proposed a new terminology of general and specific jurisdiction that the Court adopted in *Shaffer*, which also did away with the jurisdictional bases for in rem and quasi in rem.[341]

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339 The Court's specious analysis was that Ford's overall forum contacts made it more likely that used cars would be purchased in the state, even though the claims related to mechanical failure or design defects as opposed to sales in the state. Although Ford certainly should be amenable at the accident situs, the Court's calculus clearly employs a California sliding scale and merely re-labels the general contacts as giving rise to the car sales, when the issue was not the sale but the mechanical failure.

340 *See* OLIVER WENDELL HOLMES, THE ONE HOSS SHAY: WITH ITS COMPANION POEMS, HOW THE OLD HORSE WON THE BET & THE BROOMSTICK TRAIN 12–29 (1891).

341 *See* von Mehren & Trautman, *supra* note 116, *passim*. The authors include a discussion of interest analysis related to choice of law and its function in amenability, *id.* at 1130-32, which was essential at that time in light of Brainerd Currie's influence in 1965. Governmental interest analysis

Professor Hazard, writing before *Shaffer* and in reaction to lingering Pennoyerism for in rem jurisdiction, proposed a more comprehensive minimum contacts test that would cover all aspects of nonresident jurisdiction.[342] With that problem seemingly cured by *Shaffer*, Hazard later shifted to a version of Ehrenzweig's national venue proposal, discussed below.[343]

In 1967, Professors Paul Carrington and James Martin proposed a contact-oriented sliding scale based on the type of claim:

> [W]e must expect that somewhat less contact with the forum state will generally be necessary to trigger a response favorable to the exercise of power in a restitution case than in a reliance case, while less will generally be required in a reliance case than in an expectation case.[344]

Similarly, bodily injury claims should require less contact than purely economic claims, with the alleged harm's tangibility also affecting the jurisdictional analysis.[345]

World-Wide Volkswagen provoked reaction and calls for change from a number of critics, notably Professor Charles Adams telling of the tragedy of the accident and the fifteen years of litigation missteps,[346] and Professor Brilmayer's thorough argument against interest analysis and endorsing contact analysis, adding that we need a better causation test to identify which contacts count.[347]

It is my impression—anecdotal only—that most scholarly criticism has favored contacts reliance over theories like sovereignty and governmental interest, in spite of those latter theories' relative strength in the current test.[348] Even so, the sovereign power theories have their advocates. A good example is Allan Stein's 1987 article praising the use-of-interest analysis and interstate federalism and urging the Supreme Court to clarify their roles.[349]

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does not, however, appear to be a component of their amenability approach, which is heavily contacts and relationship based.

342 Hazard, *supra* note 17, at 281–88.

343 *See infra* notes 367–373 and accompanying text.

344 Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 232 (1967).

345 *Id.*

346 Charles W. Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122 *passim* (1993).

347 *See* Brilmayer, *supra* note 321, *passim.*

348 *See supra* notes 173–180 & 239–253 and accompanying text.

349 "If the Court begins the task, however, and acknowledges that a defendant's right to resist jurisdiction is a function of whether the state has a right to assert it, the Court could, over time, bring clarity and reason to the law." Stein, *supra* note 179, at 761.

The 2011 decisions in *McIntyre* and *Goodyear* elicited several comments, many calling for congressional action,[350] and some for revising the contacts analysis. Professor Robin Effron, for example, argued for requiring judges to consider not only defendant's forum relationship, but the claim's relationship to the forum as well, an approach that might have changed *Asahi* and *McIntyre* and resolved the deadlock in stream-of-commerce jurisdiction.[351]

The most thorough court-focused analysis may be from Professor Brilmayer who, with coauthor Mathew Smith, reacted to *Goodyear* and *McIntyre* with an explanation of four then-current problems in forum selection:

- political justification—the need to clarify the vague theories of federalism and sovereign authority related to adjudicating a private dispute;[352]
- causality—the need to clarify the level of relationship necessary between the defendant's acts and the claim; too narrow a concept shields defendants like *McIntyre* who can structure their contacts and use agents to minimize jurisdictional exposure, but too broad subjects nonresidents to suits in states based on tangential connections;[353]
- symmetry in evaluating plaintiffs' and defendants' access rights—the issue of which party should pick the forum should be "roughly symmetric," but the current unstructured test thwarts that by failing to focus judges (who may have plaintiff or defendant biases) on the need to balance interests;[354] and
- international due process—the unclear standards for assessing due process rights of foreign defendants for their actions outside the United States; confusion about whether foreign defendants' extraterritorial acts are entitled to due process protection; federal courts' reluctance to have these issues decided in state courts.[355]

These points, of course, are more criticism than suggestion, but inherent in them is the argument for a clear, contacts-based analysis for amenability.

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350 *See, e.g.*, *infra* notes 382–384 and accompanying text.

351 Effron, *supra* note 224, *passim*.

352 Brilmayer & Smith, *supra* note 13, at 620–27.

353 *Id.* at 627–29.

354 *See id.* at 630–32. Brilmayer and Smith also point out the test's bias in labeling defendant's rights as due process protected while plaintiff's access has no such explicit label. I explore that problem further, *supra* notes 182–186 and accompanying text, and will at length in a follow-up article.

355 *Id.* at 632–34.

2. Change the Test's Source from Judicial to Legislative

In an aside that may prove prescient, Justice Kennedy noted in *McIntyre* that, "[i]t may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts."[356] A number of scholars have argued for statutory oversight, most seeing venue as a solution, some focusing on state courts and others on federal courts. Several suggestions are summarized here, not chronologically, but according to their state or federal court model.

The statutory discussion began, at least in the *International Shoe* era, with Albert Ehrenzweig, a strong proponent of a national venue system.[357] Specifically, Ehrenzweig argued that "[j]urisdiction must become venue,"[358] and proposed uniform legislative reform that would homogenize state and federal assertions of jurisdiction. He argued against due process as the prime measure of jurisdiction,[359] the use of sovereignty in the calculation,[360] and the concept of the "imaginary 'powers' and 'interests' of sister states."[361] Instead of assuming the fairness of plaintiff's choice, Ehrenzweig favored a cooperative effort to pick a "forum conveniens" based on contacts and the parties' ability to prosecute and defend.[362] That is, the personal injury victim would file the suit and, upon defendant's objection, await a collective decision on where the claim would be litigated.[363]

Ehrenzweig's venue proposal in 1965 gained Professor Hazard as an adherent in 1979. After his earlier endorsement of a more comprehensive judicial balancing test,[364] Hazard came around to Ehrenzweig's view that a national venue system was better.[365] In his formulation, Hazard criticized the praise of minimum contacts as an elastic test; the point, he argued, is

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356 *See* J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 885 (2011).

357 Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 112–13 (1971).

358 *Id.* at 113.

359 *See id.* at 107–08.

360 *See id.* at 108–09.

361 *Id.* at 112.

362 *See id.* at 107; *see also* Ehrenzweig, *supra* note 18, *passim*.

363 To the extent my recitation of these proposals implies agreement, I do not agree that interstate disputes should be collectively directed to "the best forum." As I will explain in the follow-up article, I prefer the presumption favoring plaintiff's choice, followed by the various shifting presumptions if defendant objects.

364 *See* Hazard, *supra* notes 17 & 19 and accompanying text.

365 Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 NW. U. L. REV. 711, 712–13 (1979).

not its elasticity, but which form it should be stretched over.[366] That form, according to Hazard, is not in personam but in rem, viewing the lawsuit or dispute as a *res* and asserting jurisdiction over parties having a claim or defense related to that *res*.[367] To accomplish this, Hazard preferred a state-court arrangement (federal courts not being suited to take on such a huge task[368]) managed by a nationwide venue system.[369]

Venue manipulation is a popular solution with various approaches. One is a federally mandated national long arm statute.[370] Professor Ralph Whitten offered this as a closing thought in his critique of due process's misuse in amenability.[371] In a more pointed proposal, Professor Adams argued that Congress should use the Full Faith and Credit Clause, along with the Interstate and Foreign Commerce Clauses, as authority for a federal long arm statute that would authorize, though not command, the states to exercise jurisdiction over nonresidents in the circumstances outlined in the federal statute.[372] To the extent state-court conformity is the answer, another possibility is uniform long-arm legislation setting up a national venue structure. But only Ehrenzweig endorsed that,[373] while Whitten suggested (or I infer) its futility,[374] and others ignored it.

Some scholars believed that political and legal impediments made state courts a bad solution for multi-state disputes, and federal courts the only realistic approach for a cooperative nationwide system. Two scholars proposed the expansion of Federal Rule 4(k) as a means of providing a sound basis for jurisdiction in cases like *McIntyre* where plaintiff amazingly lacked any American forum for an injury in New Jersey. Professor A. Benjamin Spencer would amend Rule 4(k) to extend

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366 *Id.* at 717–19.

367 *Id.*

368 *Id.* at 711.

369 *Id. passim*. Hazard argued that state courts, instead of being viewed as distinct sovereigns in a federal system, should be seen as constituents of a national legal system whose common objective is to supply an appropriate forum. *Id.* at 720. He further argued that "the court system of the United States, considered as a whole, should be so constructed that it can provide reasonably convenient administration of justice in all litigation arising from the country's domestic affairs." *Id.* at 712.

370 *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 Two)*, 14 CREIGHTON L. REV. 735, 850–52 (1981).

371 *Id.*

372 *See* Charles W. Adams, *A Call for a Federal Long Arm Statute to Confer Lawful Authority over Nonresidents on the State Courts* (Univ. of Tulsa Legal Stud. Rsch. Paper Series, Paper No. 2012-07, 2012).

373 *See* Ehrenzweig, *supra* note 357, at 112–13.

374 *See Whitten*, *supra* note 370, at 839 n. 428. von Mehren and Trautman made analogies to uniform state legislation but did not propose it. *See* von Mehren & Trautman, *supra* note 116, at 1152, 1173–76.

nationwide federal jurisdiction to any defendant with constitutionally permissible contacts with the United States.[375] Based only on an expansion of Rule 4(k), this proposal does not extend diversity jurisdiction (for which the Constitution requires congressional authorization[376]), although it would certainly open the door to that. Professor Borchers has a similar but more reserved solution targeting claims against foreign manufacturers like McIntyre who have insulated themselves from state contacts.[377] He would expand Rule 4(k)(2) to diversity and alienage jurisdiction to create federal forums over foreign defendants not subject to state forums.[378]

These solutions using federal long arms and venue circumvent the more direct approach of outright expansion of federal jurisdiction, and Professor Sachs covers that ground. He suggests a new federal statute—"28 U.S.C. § 1370" (no cite because it doesn't exist!)—authorizing nationwide jurisdiction in federal courts based on minimal diversity.[379] This would offer a federal forum to all claims except citizens of the same state[380] which presumably would involve only local claims.

Sachs's far-reaching proposal is limited to the use of federal courts, but at least one proposal goes broader still. Professor Israel Packel would use the Commerce Clause to create nationwide personal jurisdiction for all state and federal courts subject only to forum non conveniens.[381] There are of course other critiques and proposals, but these are some of the better known and show the range of theories on how amenability should be assessed.[382]

3. If I May . . .

The current amenability formula is a two-part test that first requires adequate contacts, and if they're found, then a balancing test of defendant's *due process rights* against plaintiff's *interests*, which are often

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375 A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 329–30 (2010).

376 "That means turning to the federal courts for sovereign authority, employing venue statutes to achieve convenience, and relying on due process only when fundamental fairness is really at stake." Sachs, *supra* note 329, at 1350.

377 Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1274–75 (2011).

378 *Id.*

379 *See* Sachs, *supra* note 329, at 1331.

380 *See id.* at 1347.

381 Israel Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919, 920 (1986).

382 For a summary of additional critics supporting some form of nationwide jurisdiction or venue, see Sachs, *supra* note 329, *passim*.

subordinated to forum interests.[383] This defendants' rights versus plaintiff's forum-dependent interests framework is probably fairly assessed in most appellate-reviewed cases (but see *McIntyre*, *Asahi*, *Moki Mac*, etc.), but how does that slanted formula play out in cases that are dismissed and go no further? This approach of balancing defendant's rights against forum interests is contrary to hundreds of years of common-law fundamental rights of forum access. I'm not the first to make this suggestion[384] but I may be offering a more thorough basis, and recent Supreme Court cases call for a reconsideration.

Capsulized here, these rights were meant to assure victims not only a remedy for a proven wrong, but access to a convenient and adequate forum to prove that wrong.[385] Plaintiff's access was further increased by tag and quasi in rem jurisdiction, deemed necessary to offset pre-industrial defendants' ease in avoiding creditors and other claimants.[386] Eventually, with improved communication and transportation, plaintiff's upper hand became too abusive, and we resolved that by eliminating quasi in rem power and trimming tag jurisdiction with forum non conveniens.[387] But in that same time frame, protecting defendant's rights to a fair forum led to ill-defined and poorly reasoned theories like interstate federalism and others discussed above. Lost in the analysis is an emphasis on plaintiff's rights to forum access and adequacy.

The scenarios to which the minimum contacts test(s) are applied are mostly private disputes between private parties. The incursion of governmental interest appears to come from the idea that defendant is being subjected to a claim that could involve the defendant's loss of money or property, requiring that the state have at least a legitimate interest. Even though it's true that litigation involves a government asserting power (judicial, legislative and executive), the exposure to a taking is no more true for defendant than for plaintiff who may also suffer a loss when denied an adequate forum. This loss is not only that of a procedural right, but the loss of compensation or recovery, which is every bit as real as defendant's loss.

A test based on rights versus rights will not only refocus on fairness and give victims like Nicastro a forum other than England, but also avoid absurdities and strained reasoning like that in *Ford* necessary to assert

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383 *See supra* notes 160 & 183–194 and accompanying text.

384 *See* Brilmayer & Smith, *supra* note 13, at 630–32.

385 *See generally* HOWARD, *supra* note 33; BREAY, *supra* note 33; HOLT, *supra* note 33; Champion & Lock, *supra* note 33; Phillips, *supra* note 33; George, *supra* note 33.

386 Regarding tag jurisdiction, see *supra* notes 228–234 and accompanying text. Regarding quasi in rem jurisdiction, see STORY, *supra* note 29 § 549, at 461. *See also* Silberman, *supra* note 47, at 39–42.

387 *See* Shaffer v. Heitner, 433 U.S. 186 (1977) (ending quasi in rem jurisdiction); *supra* notes 311–317 and accompanying text (forum non conveniens).

obviously fair jurisdiction. My suggestion may be another of Professor Sachs's examples of mere disagreements over components when the real problem is the reactive nature of a judicially conceived test.[388] Even so, I believe my proposal to balance parties' rights and de-emphasize governmental interests will lead to an analysis that is both better-focused and fairer. I believe the absence of an equal party focus shapes a number of cursory jurisdictional decisions in lower courts and shields a number of unfair denials of plaintiffs' forum access, with those of moderate-income plaintiffs never seeing appellate review and never being litigated elsewhere. As the follow-up article will explain, the data on those jurisdictional dismissals is simply not available, but its unavailability cannot conceal the distortion in the current test.

That simpler focus on parties and events should eliminate ill-defined and unworkable tests involving sovereignty, federalism, and governmental interests balancing, focusing instead on resolution of private disputes in a fair and convenient forum. At any rate, a test looking squarely at the parties' rights and the event's location should not permit a *McIntyre* decision where no forum in America could claim jurisdiction to litigate an American tort. This approach will work whether we use a judicial test or craft a statute. Whatever form the amenability test has, and whatever its source—Supreme Court or Congress—amenability should be based on the parties' access to a fair forum.

Conclusion

Aberrational court opinions are not necessarily signs of doctrinal failure. But building on years of criticism and judicial questioning,[389] the additional disconnect between *Bristol-Myers* and *Ford* makes it difficult to see the contacts/fairness test as viable. After *Ford*, we need either a new model or an overhaul of the old one.

It's unfortunate that von Mehren and Trautman aren't around to provide the insight that came with their 1966 users' guide,[390] which worked for a time until hamstrung by the increasing influence of governmental interests into private disputes. I think they'd be chagrined, though, by the current analysis of their ideas of general and specific jurisdiction, especially the absurdity of *Ford*'s struggle with general and specific contacts in order to find jurisdiction that should have been valid on its face.

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388 *See* Sachs, *supra* note 329, at 1349–50.

389 *See supra* notes 278–303 for judicial and other criticism.

390 *See* von Mehren & Trautman, *supra* note 87.

My preoccupation with *Ford* aside, concerns with the test aren't new, and judges and scholars have offered a variety of solutions. One is modifying the current test, though what needs modifying is up for debate. Is the fix to clarify the meaning and role of contacts? Define governmental interests and interstate federalism, and explain their relation to private disputes? Adjust the fairness test to include equal measures of plaintiff's access and defendant's forum adequacy? Or perhaps remove due process oversight and replace it with the pre-*Pennoyer* function of full faith and credit?

A second approach is to cast aside these sinking-ship deck chairs (others' argument, not necessarily mine), to reexamine the problem as one of judicial oversight that bases amenability theory on reactive reasoning limited to the fact patterns that happen along. Opting for legislative control—state or federal or both—would create a proactive model that, if nothing else, promotes consistency and uniformity while still allowing for case-by-case assessment.

My own proposal, briefly stated here and explored in an upcoming article, is to focus on parties' access to fair and adequate forums, minimizing or discarding ill-defined theories of sovereignty, federalism, and interest balancing. Amenability for litigating private disputes should be a question of the respective parties' rights rather than a kaleidoscope of governmental interests.

Whether the larger solution is fixing the judicial test or creating a statutory approach—whether it's up to the Court or Congress—we must realize that the problem is not finite issues with stream of commerce or tag jurisdiction. It is the larger confusion of contacts relatedness, forum presence, the undefined concept of governmental interest analysis, and the other vagaries used to explain them. Together, they lead to *Ford*'s absurdity of distorting the concept of general and specific contacts in order to confirm to obviously reasonable amenability. It's time for a new model.