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Pennoyer Strikes Back: Personal Jurisdiction in a Global Age

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ARTICLES

PENNOYER STRIKES BACK: PERSONAL JURISDICTION IN A GLOBAL AGE

*By: William V. Dorsaneo, III**

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I. INTRODUCTION

The primary purpose of this Article is to evaluate the four most recent Supreme Court decisions on personal jurisdiction and situate those decisions within the history of Supreme Court personal jurisdic-

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tion jurisprudence. Starting with the seminal case of *Pennoyer v. Neff*,¹ personal jurisdiction jurisprudence has been remarkably kaleidoscopic, with the Supreme Court intervening at various intervals to redefine the law in broad strokes, while zigzagging from one doctrinal position to another and thereby leaving lower courts to hash out the application of an evolving personal jurisdiction doctrine to varying fact patterns. I will divide this jurisprudential history into two main groups of cases after *Pennoyer* was superseded by the modern minimum contacts approach. The first group of decisions begins with *International Shoe Co. v. Washington*² and continues through *Hanson v. Denckla*.³ The second group begins almost two decades later with *Shaffer v. Heitner*⁴ and continues through *Asahi Metal Industry Co. v. Superior Court*⁵ and *Burnham v. Superior Court*.⁶

The first group of post-*Pennoyer* decisions initially substituted the “minimum contacts” doctrine for the rules developed under *Pennoyer*’s reign and then attempted to clarify and explain the doctrine, but this group of decisions ended in confusion, particularly with respect to the impact of the concept of “purposeful availment.” Likewise, during the second period, real progress was made by the unification of the in personam and in rem wings of *Pennoyer v. Neff* and by the reformulation of the minimum contacts doctrine into a more user-friendly framework, but the second period also ended in uncertainty resulting from disagreement among the members of the Supreme Court on the scope of purposeful availment.

After each of these two groups of decisions, the Supreme Court retired from the field, and the lower federal courts and the state courts were required to finish the due process analysis themselves. Thus far, the third group of cases begins with the Court’s fractured opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*⁷ and continues with its unanimous opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁸ the Court’s nearly unanimous opinion in *Daimler AG v. Bauman*,⁹ and ends with its unanimous opinion in *Walden v. Fiore*.¹⁰

This third group of decisions has severely limited the scope of general personal jurisdiction, but has not only not resolved interpretive problems with the scope of specific jurisdiction, but instead has exac-

1. *Pennoyer v. Neff*, 95 U.S. 714 (1877). For an informative discussion of this case and its notable protagonists, see Wendy Collins Purdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

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

3. *Hanson v. Denckla*, 357 U.S. 235 (1958).

4. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

5. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

6. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

7. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

8. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

9. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

10. *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

erated these problems while making very little progress in resolving how issues of extraterritoriality should be resolved in the era of globalization and electronic commerce.

II. PERSONAL JURISDICTION AND DUE PROCESS BEFORE *INTERNATIONAL SHOE*

The landmark personal jurisdiction case decided in the nineteenth century is *Pennoyer v. Neff*.¹¹ *Pennoyer* established rigid rules for the exercise of extraterritorial jurisdiction over the person or property of nonresidents. Under *Pennoyer*'s regime, absent consent by "voluntary appearance," the appointment of "an agent or representative in the State to receive service of process," or the implied designation of a "public officer" on whom "service may be made,"¹² as required by a long-arm statute:

- "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."¹³
- "[N]o tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."¹⁴

The rationale behind this approach rests on the following "principles of public law" that were incorporated into the newly enacted Due Process Clause of the Fourteenth Amendment:

- "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."¹⁵
- "The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. . . . [T]he laws of one State have no operation outside its territory, except so far as allowed by comity."¹⁶

Under *Pennoyer*'s in rem wing, the attachment of the defendant's property within the forum sufficiently supported the exercise of in rem or quasi in rem jurisdiction over the nonresident property owner.¹⁷ This jurisdiction was limited to the extent of the nonresi-

11. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

12. *Id.* at 726, 735.

13. *Id.* at 722.

14. *Id.*; see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 754 (Melville M. Bigelow ed., 8th ed. 1883).

15. *Pennoyer*, 95 U.S. at 722.

16. *Id.*

17. As Professor Charles W. Rhodes explains:

[T]he court in *Pennoyer v. Neff*, while adopting a rule generally equating a court's jurisdictional reach with the physical presence of a person or properly attached property within the forum, also cautioned that its holding would not preclude a state from exercising jurisdiction over a divorce action brought by a state citizen against a nonresident. . . .

dent's interest in the property when the property was properly subjected to the jurisdiction of the forum court.¹⁸ According to the First Restatement of Judgments, a judgment in rem affected the interests of all persons in the property while a judgment quasi in rem affected the interests of particular persons in designated property.¹⁹ More significantly, from the standpoint of jurisdiction over nonresident property owners' interests in such property, however, was the fact that the second type of quasi in rem jurisdiction did not require the resident plaintiff to have any preexisting claim to an interest in the subject property.²⁰ In this case the only relationship between the property subjected to jurisdiction and the claim asserted against the nonresident was the defendant's ownership of property in the forum state. The dispute did not need any relationship to the property.²¹ The heart of this jurisdictional principle was that, with respect to litigation that otherwise had nothing to do with the property, the nonresident's property could be captured and held hostage through the exercise of legal process directed at the property.²² As explained below, the second type of quasi in rem jurisdiction was eliminated in 1977.²³

Courts subsequently developed other exceptions similarly allowing jurisdictional assertions based on the type of dispute rather than a general adjudicative power over the individual defendant. The most notable of these doctrines was the concept of implied consent.

Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 144 (2005) (footnote omitted).

18. See *Pennoyer*, 95 U.S. at 722–23.

19. See RESTATEMENT (FIRST) OF JUDGMENTS §§ 5–9 (AM. LAW INST. 1942).

20. See *Pennoyer*, 95 U.S. at 725–26.

21. See *id.* at 716–20.

22. As Professor Allan R. Stein and others have explained, "*Pennoyer* made no distinction between cases related and unrelated to the forum. If the defendant was present and served, he was subject to the state's judicial authority for all purposes. If the defendant was absent, his prior wrongdoing in the forum was irrelevant." Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 534 (2012) (footnotes omitted); see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (explaining additional challenges with the distinctions).

23. The rise of the corporate form, whose non-corporeality failed to square with the *Pennoyer* model, destabilized "the relatively simple *Pennoyer* model based on physical presence Accordingly, to ask whether the person of the corporation was physically present in the state at the time of service of process is something of a category mistake [that] was recognized by *International Shoe*." See Stein, *supra* note 22, at 534–35; see also Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577–86 (1958) (explaining the many challenges presented by the rise of the corporate form).

III. INTERNATIONAL SHOE'S STANDARD OF FAIRNESS

The modern era of due process analysis begins with Justice Stone's opinion in *International Shoe Co. v. Washington*.²⁴ From the outset, the opinion's importance rests on its insistence that a court's power over the defendant's person or property is not the central concern in making the jurisdictional determination. Rather, the approach is to determine under what circumstances a nonresident may be justly subjected to a local suit when the matter is considered in light of our federal system of government and "traditional notions of fair play and substantial justice."²⁵ The main difficulty with this more flexible approach is in translating the idea into a course of conduct in the particular contexts in which the problem is likely to arise.²⁶

In *International Shoe*, the issue was whether a foreign corporation was subject to the jurisdiction of the State of Washington as a result of the conduct of its representatives who sold shoes in the state. In the Court's opinion, a new standard of fairness was born to deal with personal jurisdiction issues in the twentieth century:

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*."²⁷

The opinion reflects dissatisfaction with a purely quantitative evaluation of the nonresident's activities. The determination of whether it is fair to subject a nonresident to a local suit also depends upon the quality and nature of the activity. In given cases, when a nexus exists between the activity in the forum state and the litigation problem, the forum state's exercise of jurisdiction might be fair and reasonable even though the activity is of a limited character because the nonresident enjoys the benefits and protections of the laws of the forum state while conducting the activity there.²⁸ On the other hand, substantial, continuous, and systematic activity of a nonresident within the forum

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

25. *See id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

26. This flexibility arises from the fact that "*International Shoe* put a variety of [new] topics on the table for assessing the constitutionality of personal jurisdiction," such as the defendant's "minimum contacts" with the forum and the suit's prosecution in conformity with "traditional notions of fair play and substantial justice." Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 554 (2012).

27. *See Int'l Shoe*, 326 U.S. at 316 (emphasis added).

28. *See id.* at 318 ("[T]he commission of some single or occasional acts of the corporate agent in a state . . . because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." (citations omitted)).

could also be sufficient to support the exercise of jurisdiction, even when the activity did not give rise to the litigation.²⁹ In these cases, “the continuous corporate operations within a state were thought 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.”³⁰ The Due Process Clause, however, has never supported the exercise of jurisdiction over a nonresident “with which the state has no contacts, ties, or relations.”³¹

Although the Court altered the jurisdictional analysis in *International Shoe*, the original formulation of the minimum contacts test was not particularly helpful when concrete problems required its application.³² The significance of the decision has been its departure from the tradition of a physical power conception of personal jurisdiction, but as the commentators noted, “the ‘minimum contacts’ doctrine has the merit of flexibility and the defect of vagueness.”³³

After *International Shoe*, the Supreme Court decided several other cases on the subject of the exercise of personal jurisdiction over non-residents. In *Travelers Health Ass’n v. Virginia*,³⁴ the Commonwealth of Virginia sought enforcement of an order of the Virginia Corporation Commission requiring a mail order insurance company incorporated in Nebraska and having its only office in Omaha, Nebraska, to cease solicitation of business in Virginia without obtaining authority to do so under Virginia’s Blue Sky Law, which required proof of solvency and an agreement that suits can be filed against the insurance

29. *See id.* In an influential article, which is cited extensively in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, Professors von Mehren and Trautman note that:

[A]ffiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice . . . is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.

von Mehren & Trautman, *supra* note 22, at 1136.

30. *See Int’l Shoe*, 326 U.S. at 318.

31. *See id.* at 319.

32. In assessing the *International Shoe*’s new standard of fairness, Justice Hugo Black “criticized the injection of ‘uncertain elements’ and imprecise terms such as ‘fair play’ and ‘substantial justice’ His caution was born of fear that the Court would use these open-ended concepts to restrict state-court jurisdiction.” *See Freer, supra* note 26, at 554–56 (citing *Int’l Shoe*, 326 U.S. at 323–25 (Black, J., concurring)). Justice Black’s concern may have been rooted in his rather broad view of jurisdictionally sufficient contacts, which he confirmed in *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 647 (1950) and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223–24 (1957). *See id.* at 555–56.

33. John A. Gorfinkel & Richard A. Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1164 (1970).

34. *Travelers Health Ass’n v. Virginia*, 339 U.S. 643 (1950).

company in Virginia.³⁵ The insurance company contested Virginia jurisdiction on the basis that its activities occurred in Nebraska, not Virginia. The Supreme Court of Virginia affirmed the Commission's cease and desist order.³⁶ On appeal to the Supreme Court, in an opinion by Justice Hugo Black, a bare majority of the Court upheld the exercise of jurisdiction by reasoning that "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."³⁷ The Supreme Court reasoned that the insurer's systematic and widespread solicitation of insurance business in Virginia, its issuance of insurance certificates to Virginians, and the burden on Virginia certificate holders of bringing suit in Nebraska supported Virginia's exercise of jurisdiction.³⁸ Shortly thereafter, in *Perkins v. Benguet Consolidated Mining Co.*, the Court reiterated that jurisdiction could be asserted against a nonresident when the cause of action did not arise out of the nonresident's activities within the forum State if the nonresident's activities in that state were "continuous and systematic" and "substantial."³⁹

Five years later, in *McGee v. International Life Insurance Co.*, another opinion written by Justice Black involving a nonresident insurance company that solicited business in the forum State, a personal judgment in favor of a California resident was upheld by a California court against a Texas-based insurance company because the company sent a reinsurance certificate and premium statements to a policyholder who resided in California.⁴⁰ At the time *McGee* was decided in 1957, the opinion was thought to support a very broad interpretation of the minimum contacts doctrine such that virtually any contact would support the exercise of jurisdiction over a nonresident.⁴¹ This view was quickly eroded in 1958 by the Supreme Court's elusive opinion in *Hanson v. Denckla*.⁴² In *Hanson*, the Court held that the minimum contacts test of *International Shoe* is not satisfied unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."⁴³ Thereafter, until its 1977 opinion in *Shaffer v.*

35. *Id.* at 644–46.

36. *Travelers Health Ass'n v. Commonwealth*, 51 S.E.2d 263, 271 (Va. 1949), *aff'd* 339 U.S. 643 (1950).

37. *Travelers Health Ass'n*, 339 U.S. at 647. Based on *International Shoe* and other cases, "the contacts and ties of [the insurance company] with Virginia residents, together with that state's interest in the faithful observance of the certificate obligations, justify subjecting [the company] to cease and desist proceedings." *Id.* at 648.

38. *Id.* at 648–49.

39. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

40. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221–23 (1957).

41. *See* Kurland, *supra* note 23, at 607.

42. *Hanson v. Denckla*, 357 U.S. 235 (1958); *see* Kurland, *supra* note 23, at 620–22.

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

Heitner,⁴⁴ the Supreme Court left the resolution of the “minimum contacts” and “purposeful availment” conundrums to state and lower federal courts.

IV. THE MINIMUM CONTACTS DOCTRINE AFTER *SHAFFER V. HEITNER*

In a series of cases beginning in the late 1970s with *Shaffer v. Heitner*, the Supreme Court recast the minimum contacts doctrine and at the same time extended its applicability to *Pennoyer*'s in rem wing.⁴⁵ In *Shaffer*, a stockholder's derivative action was instituted in Delaware against Greyhound Corporation and several of its officers who were also stockholders of the corporation.⁴⁶ For many of the individual defendants, no showing of any contact with Delaware was made that would support a personal judgment against them. A Delaware procedure called sequestration was used to constructively seize the individual defendants' ownership interests in the Greyhound Corporation.⁴⁷ This seizure was accomplished by placing stop transfer orders on the corporation's books. The Delaware trial court's order clearly indicated that the sequestration would be vacated as to any defendant who personally appeared in the action.⁴⁸ In other words, the stock was held hostage to compel the personal appearance of the individual defendants who otherwise would forfeit their interests in Greyhound Corporation.

After tracing the development of the minimum contacts doctrine and quoting *International Shoe*, the Supreme Court recast the doctrine in the following terms: “[T]he 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.”⁴⁹

This new formulation of the minimum contacts doctrine modified the original standard. The minimum contacts standard articulated in *International Shoe* focuses on the defendant's “minimum contacts” with the forum State, that is, the relationship between the defendant and the forum. By contrast, as recast in *Shaffer*, the modified standard appears to place the relationship of the forum to the litigation—the State's interest in adjudicating the case in its courts—on an equal footing with the relationship between the defendant and the forum.⁵⁰ On the other hand, the balance of the *Shaffer* opinion and subsequent

44. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

45. *Id.* at 207–08.

46. *Id.* at 189–90.

47. *Id.* at 190–92.

48. *Id.* at 190, 192–93.

49. *Id.* at 204.

50. William V. Dorsaneo, III, *Due Process, Full Faith and Credit, and Family Law Litigation*, 36 Sw. L.J. 1085, 1096–99 (1983).

Supreme Court decisions suggest that the state's interest must be particularly strong when the relationship of the defendant to the forum is insubstantial.⁵¹

In *Shaffer*, it was argued that because the nonresident defendants held positions as officers and directors of a corporation chartered in Delaware, Delaware's interest in supervising the management of the corporation should give its courts jurisdiction over a stockholder's derivative action even though the nonresidents had never set foot in Delaware. In answering this contention, the Supreme Court made two responses. First, the Court stated:

Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. . . . If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest.⁵²

Second, by accepting positions as officers and directors of a Delaware corporation, the nonresidents "had no reason to expect to be haled before a Delaware court."⁵³

The Supreme Court applied the minimum contacts doctrine next in *Kulko v. Superior Court*.⁵⁴ In *Kulko*, a mother brought suit in California against her ex-husband to obtain custody of two children and to increase his child support obligations. Under a prior separation agreement, the children were to remain with the father most of the year and spend vacations with the mother. The mother was to receive \$3,000 for the children's support during the time they resided with her. Although the parents had been married in California while Mr. Kulko was in the armed forces, they lived as husband and wife in New York for thirteen years. After they separated, she moved to California, and he stayed in New York. The father voluntarily sent one of the children with her belongings to California. The California courts considered this act sufficient to support the exercise of in personam jurisdiction over him with respect to both children.⁵⁵

The father did not contest the California court's jurisdiction for the purpose of the custody determination. The Supreme Court held that the father's purchase of a one-way plane ticket for his daughter so that she could go to live with her mother was not sufficient to subject him

51. *See id.* One commentator has noted that "[t]he only basis our law has traditionally recognized for state authority over conduct unrelated to the state is the unique relationship between a state and its citizens or residents," which provides the state with "a legitimate claim of authority over all of the defendant's conduct, including conduct entirely unrelated to the state." Meir Feder, Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. REV. 671, 691 (2012).

52. *Shaffer*, 433 U.S. at 214–15.

53. *Id.* at 216.

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

55. *Id.* at 86–88.

to personal jurisdiction in California with respect to either child. The Court relied heavily upon the limiting language quoted above from *Hanson v. Denckla* regarding purposeful availment.⁵⁶

From the standpoint of the defendant's relationship to the forum, the *Kulko* Court concluded that the father's acquiescence in his daughter's desire to live with her mother did not constitute a purposeful act. The Court reasoned that "[a] father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."⁵⁷ Furthermore, the Supreme Court considered the act of acquiescing in the daughter's return an insufficient jurisdictional basis for two other reasons.⁵⁸ First, the Court explained:

This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "haled before a [California] court."⁵⁹

Second, "the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."⁶⁰

Regarding the relationship between the forum and the litigation, the Court in *Kulko* recognized California's legitimate interests, but held that "California's legitimate interest in ensuring the support of children resident in California without unduly disrupting the children's lives, moreover, is already being served by the State's participa-

56. *Id.* at 93-94 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [itself] of the privilege of conducting activities within the forum State [thus invoking the benefits and protections of its laws]." (first alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

57. *Id.* at 94. Justice Brennan dissented from the majority, disagreeing with how it weighed the case's facts and believing that the father's "connection with the State of California was not too attenuated" to sustain personal jurisdiction there. *Id.* at 102 (Brennan, J., dissenting).

58. Professor Freer notes that in *Kulko*: "[T]he Court stated the basic contact test more narrowly than it had in *Shaffer*. Instead of looking for contact among the defendant, the forum, and the litigation, the focus was . . . '[a] sufficient connection between the defendant and the forum State' The majority found no such connection." See Freer, *supra* note 26, at 564 (footnote omitted) (quoting *Kulko*, 436 U.S. at 91).

59. *Kulko*, 436 U.S. at 97-98 (alteration in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).

60. *Id.* at 101.

tion in the Revised Uniform Reciprocal Enforcement of Support Act of 1968.”⁶¹

After *Kulko*, *World-Wide Volkswagen Corp. v. Woodson*⁶² and *Rush v. Savchuk*⁶³ extended the interpretation of the new minimum contacts formulation to commercial litigation. Of principal importance are the sections of the *World-Wide Volkswagen* opinion that explain the “haled before a court” foreseeability standard mentioned first in *Shaffer* and restated in *Kulko*.⁶⁴

In *World-Wide Volkswagen Corp. v. Woodson*, the plaintiffs purchased an Audi in New York. The following year the plaintiffs were injured during their move to Arizona when, “[a]s they passed through the State of Oklahoma, another car struck their Audi in the rear.”⁶⁵ They filed a products liability action in Oklahoma against the manufacturer, the importer, the regional distributor, and the retailer. The retailer and the regional distributor made special appearances, which were overruled.⁶⁶

The Supreme Court determined that although it was foreseeable that an automobile purchased in New York could arrive in Oklahoma and cause injury there, this foreseeability was not the kind Due Process envisaged.⁶⁷ To be relevant, a different type of foreseeability was required:

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. The Due Process Clause, by ensuring the “orderly administration of the laws” gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.*⁶⁸

With respect to the overall relationship between the defendant, the forum, and the litigation, including the special interest of the forum in adjudicating the controversy, the Court in *World-Wide Volkswagen* further explains:

61. *Id.* at 98.

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

63. *Rush v. Savchuk*, 444 U.S. 320 (1980).

64. In *World-Wide Volkswagen*, the majority, led by Justice White, “embraced the strongest defendant-centric focus yet.” Freer, *supra* note 26, at 565. Justice Brennan dissented, asserting that the Court’s “new focus on foreseeability of suit in the forum . . . gives the defendant a ‘veto power’ over jurisdiction, which is inappropriate in an era in which jurisdiction is no longer based upon notions of implied consent.” *Id.* at 567 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 312 (Brennan, J., dissenting)).

65. *World-Wide Volkswagen Corp.*, 444 U.S. at 288.

66. *Id.* at 288 n.3.

67. *Id.* at 295.

68. *Id.* at 297 (emphasis added) (citations omitted).

The relationship between the defendant and the forum must be such that it is “reasonable . . . to require the [defendant] to defend the particular suit which is brought there.” 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.⁶⁹

V. BURGER KING’S TWO-PRONGED APPROACH TO SPECIFIC JURISDICTION

Instead of embracing the recapitulated minimum contacts standard devised in 1977 by the Supreme Court’s landmark decision in *Shaffer v. Heitner*, by 1985 the Court rejuvenated the seminal “minimum contacts” language of the *International Shoe* opinion by creating a two-pronged analytical framework in *Burger King Corp. v. Rudzewicz*.⁷⁰ The Court obviously crafted both prongs under the influence of its 1980 opinion in *World-Wide Volkswagen*.⁷¹

The first prong of this framework examines whether the nonresident purposely directed activities at residents of the forum state or, more generally, purposefully established minimum contacts with the forum state.⁷² Under the second prong, after establishing that the defendant purposely established minimum contacts with the forum state, the contacts are evaluated in light of other factors to determine whether the assertion of personal jurisdiction comports with fair play and substantial justice. These factors include:

[1] “the burden on the defendant,” [2] “the forum State’s interest in adjudicating the dispute,” [3] “the plaintiff’s interest in obtaining convenient and effective relief,” [4] “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and [5] the “shared interest of the several States in furthering fundamental substantive social policies.”⁷³

Under the second prong, to avoid being subject to personal jurisdiction in the forum state, the nonresident defendant must present “a compelling case that the presence of some other considerations would

69. *Id.* at 292 (first alteration in original) (citations omitted).

70. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985).

71. *World-Wide Volkswagen Corp.*, 444 U.S. at 291–92; see Freer, *supra* note 26, at 569 (citing *Burger King Corp.*, 471 U.S. at 476–77).

72. *Burger King Corp.*, 471 U.S. at 474–75.

73. *Id.* at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

render jurisdiction unreasonable.”⁷⁴ Thus, in most cases the exercise of jurisdiction will comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state. In other words, under this approach, the determination of purposeful minimum contacts normally will control the outcome, except for cases in which the defendant is a resident of another nation.⁷⁵

Only two years later, the first prong of *Burger King*’s new analytical framework proved itself inadequate to resolve the jurisdictional dilemma in an international “stream of commerce” case.⁷⁶ In *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court split down the middle on the issue of the defendant’s purposeful minimum contacts with the forum state.⁷⁷ Justice O’Connor’s plurality opinion, writing for four Justices, stated that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”⁷⁸ Instead, purposeful availment requires evidence of “plus factors” showing that the defendant was “seeking to serve” the market in the forum state, such as “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”⁷⁹ Justice Brennan, also writing for four justices, opined separately:

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a sur-

74. *Id.*

75. *Id.* at 477–78; *see also* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (“The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”).

76. *Asahi*, 480 U.S. at 106, 109, 112; *see* Rhodes, *supra* note 17, at 188 (“A question not definitively resolved in *World-Wide Volkswagen*, . . . was the type of activities that would constitute serving the market of a particular state. . . . The Court . . . only provided some examples of sufficient forum marketing activities in dicta: making sales, advertising, soliciting business, and delivering ‘products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.’ The scope of this last activity, delivering goods into the stream of commerce, generated debate in the lower courts” that the Court attempted but failed to resolve in *Asahi*. (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 295–98)).

77. *See Asahi*, 480 U.S. at 105.

78. *Id.* at 112.

79. *Id.*

prise. Nor will the litigation present a burden for which there is no corresponding benefit.⁸⁰

All nine justices agreed, however, that the exercise of jurisdiction over Asahi in California was unreasonable under the second (“reasonableness”) prong of the jurisdictional test.⁸¹

The Supreme Court’s divided opinions in *Burnham v. Superior Court*⁸² brought the Court’s second group of personal jurisdiction opinions to a close, approving transient or “tag” jurisdiction on the basis of its historical “pedigree,” as identified by Justice Scalia, as well as considerations of foreseeability and fairness identified by Justice Brennan, and principles of common sense.⁸³ Thus, the second period of post-*Pennoyer* decisions also ended in 1990 with considerable disagreement among the members of the Court on the most important issue—the determination of whether the nonresident defendant’s conduct and connection with the forum state constitutes purposeful availment in satisfaction of the first prong of the jurisdictional test. As explained in the next section of this Article, the Supreme Court did not return to this issue or other aspects of personal jurisdiction jurisprudence for more than two decades.

VI. THE IMPACT OF THE SUPREME COURT’S MOST RECENT PERSONAL JURISDICTION DECISIONS

A. *Types of Personal Jurisdiction*

Although Chief Justice Harlan Stone’s canonical opinion in the *International Shoe* case discusses them, the terms “specific jurisdiction” and “general jurisdiction” have their genesis in an influential law review article.⁸⁴ It was not until the Supreme Court’s decision in *Helicopteros Nacionales de Colom., S.A. v. Hall*⁸⁵ that the Court adopted these terms to describe the types of personal jurisdiction, defining specific jurisdiction as “arising out of or related to the defendant’s contacts with the forum” and general jurisdiction as “personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum.”⁸⁶

The dividing line between specific jurisdiction and general jurisdiction is whether the cause of action brought against the nonresident defendant arises from or relates to “the defendant’s contacts with the forum state.”⁸⁷ Despite its importance, however, this line is a hazy one because the Supreme Court has declined to clarify how closely related

80. *Id.* at 117 (Brennan, J., concurring).

81. *Id.* at 113–14, 116, 121–22.

82. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

83. *Id.* at 610–11, 621–22, 629–30, 637–39.

84. von Mehren & Trautman, *supra* note 22, at 1136–83.

85. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

86. *Id.* at 414 nn. 8–9.

87. *Id.* at 415.

a cause of action must be to the defendant's forum contacts to support the exercise of specific jurisdiction. As explained below, in *Helicopteros* the Supreme Court determined that the defendant's limited contacts with Texas did not support the exercise of general jurisdiction by Texas courts.⁸⁸ Because a majority of the Court concluded that the parties did not argue the point, the majority opinion does not address whether the plaintiffs' wrongful death causes of action were sufficiently related to the defendant's limited contacts to support the exercise of specific jurisdiction.⁸⁹ By contrast, Justice Brennan's dissenting opinion reasoned that the Court should have recognized the "substantial difference" between "arise from" and "related to" and that the plaintiffs' wrongful death claims were "significantly related" to the defendant's Texas contacts, but without defining the breadth of the "relate to" approach.⁹⁰

In the absence of specific guidance from the Supreme Court, lower courts have developed several possible ways to interpret and apply the relatedness standard. In trying to define the "relate to" standard, some courts have used a "but-for" test that is jurisdictionally expansive because it embraces every event in every jurisdiction that hindsight can logically identify as within the chain of causation between the defendant's contacts with the forum and the plaintiff's cause of action. Others adopted a considerably more restrictive and more complicated relatedness test, requiring the nonresident's contacts to be substantively relevant to an element of the plaintiff's cause of action. Some courts have applied a sliding scale of relatedness in which there is an inverse relationship between the quantity of contacts and the degree of relatedness (more related/fewer contacts required; less related/more contacts required). Another less popular approach uses a "similarity" standard that allows specific jurisdiction principles to be applied in every state where the nonresident defendant engaged in similar activities.⁹¹

[It is] specific rather than general jurisdiction [that] accounts for the majority of personal jurisdiction litigation.

Specific personal jurisdiction exists when defendant's contacts are limited, yet connected with the plaintiff's claim such that the cause of action "arises from or relates to" the defendant's contacts with the forum. The connection between the forum state, the defendant's activities, and the cause of action establish a court's jurisdiction to adjudicate; therefore, a court's jurisdiction is limited, thus "specific," to the related cause of action.

. . . [F]or a contact to qualify under this analysis, it must be a "purposeful availment" by the defendant of the benefits of conducting activities within the forum state or with the forum state residents.

Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1269-70 (1993) (footnotes omitted).

88. *Helicopteros*, 466 U.S. at 416.

89. *See id.* at 412-13.

90. *Id.* at 425-27 (Brennan, J., dissenting).

91. *See generally* Maloney, *supra* note 87, at 1276-81.

For a prominent state court application/synthesis of these competing standards, in 2007, the Texas Supreme Court considered these standards and concluded that “for a nonresident defendant’s forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation.”⁹²

B. *General Jurisdiction*

Among the traditional bases for general jurisdiction are (1) an individual’s domicile in the forum state; (2) an individual’s physical presence in the forum state at the time of service there (“tag” jurisdiction); (3) a corporation’s incorporation in the forum state; or (4) its registration to transact business in the forum combined with the appointment of an agent for service of process.⁹³ Until 1977, when the Supreme Court demolished part of the in rem wing of *Pennoyer v. Neff* and assimilated the remainder into the minimum contacts doctrine,⁹⁴ the presence of property in the forum state would also support general jurisdiction over the property. Much of this law has been preserved. But otherwise, the scope of general jurisdiction has been unclear for many years because of the paucity of Supreme Court decisions on the subject.

Until recently, two Supreme Court decisions controlled the analysis, *Perkins*,⁹⁵ the only case in which the Court upheld a finding of general jurisdiction, and *Helicopteros*.⁹⁶ In *Perkins*, the Supreme Court held that Ohio properly exercised general jurisdiction over a Philippine corporation that was sued in the state, where the corporation’s affairs were overseen from Ohio during World War II such that the corporation maintained “continuous and systematic” and “substantial” general business contacts in Ohio.⁹⁷ In *Helicopteros*, the Court held that the exercise of general jurisdiction was improper in Texas courts in wrongful death actions brought against a Colombian corporation by

92. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007); see also *Moncrief Oil Int’l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 157 (Tex. 2013) (“[B]ut-for causation alone is insufficient.”).

93. There is a “sharp contrast” between the number of times that the Supreme Court addressed specific and general jurisdictions. Whereas “[s]pecific jurisdiction . . . has been the subject of numerous Supreme Court decisions since *International Shoe*,” before the Court’s most recent decisions on the subject in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and in *Daimler AG v. Bauman*, general jurisdiction was considered only twice, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). See Stein, *supra* note 22, at 533.

94. See *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (“[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”).

95. *Perkins*, 342 U.S. at 442–44.

96. *Helicopteros*, 466 U.S. at 414.

97. See *Perkins*, 342 U.S. at 447–48.

survivors of U.S. citizens who died in a helicopter crash in Peru.⁹⁸ General jurisdiction was not proper in Texas because the corporation's contacts "consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services . . . for substantial sums; and sending personnel to [Texas] for training."⁹⁹ In this connection, the Supreme Court explained that "mere purchases" of goods or services in the forum state is no basis for the exercise of general, all-purpose, dispute-blind jurisdiction.¹⁰⁰

These two cases were generally interpreted as requiring the defendant's contacts with the forum to be "continuous," "systematic," and "substantial." Because these simple words are subject to multiple interpretations, judicial interpretations of them were inconsistent, and the scope of general jurisdiction was problematic.

In 2011, this relatively opaque guidance was clarified in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, followed in 2014 by *Daimler AG v. Bauman*.¹⁰¹ These two decisions restrict general jurisdiction to a very limited number of situations, including a foreign corporation's state of incorporation and its principal place of business. In these decisions, the Supreme Court explained that "general jurisdiction requires affiliations 'so "continuous and systematic" as to render [the foreign corporation] essentially at home in the forum State.' . . . i.e., comparable to a domestic enterprise in that State."¹⁰²

Significantly, in *Daimler* the Court abandoned or recapitulated the traditional test for general jurisdiction in the following terms:

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. *Plaintiffs would have us look beyond the exemplar bases Goodyear identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.*

. . . Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some

98. *Helicopteros*, 466 U.S. at 418–19.

99. *Id.* at 416.

100. *Id.* at 418.

101. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 758 n.11 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). The Supreme Court relied in part on Professors Brilmayer and Twitchell in both *Goodyear* and *Daimler*. See Lea Brilmayer, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 728 (1988) (identifying domicile, place of incorporation, and principal place of business as "paradigm bases" for the exercise of general jurisdiction); see also Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628, 635 (1988).

102. *Daimler*, 134 S. Ct. at 758 n.11 (alteration in original).

sense “continuous and systematic,” it is whether that corporation’s “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”¹⁰³

In addition, the general jurisdiction inquiry does not focus “solely on the magnitude of the defendant’s in-state contacts.”¹⁰⁴ Instead, general jurisdiction requires “an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”¹⁰⁵ Although Justice Sotomayor concurred in the judgment, she disagreed with the Court’s new “nationwide and worldwide” perspective, by reasoning that “[t]he problem, the Court says, is not that Daimler’s contacts with California are too few, but that its contacts with other forums are too many.”¹⁰⁶ According to Justice Sotomayor, “[a] State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State’s laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.”¹⁰⁷

So (one might ask) where, other than Germany, is Daimler AG “at home” and subject to general jurisdiction? Although this is not explained in the Court’s opinion,¹⁰⁸ general (all-purpose) jurisdiction over corporations and other similar business entities that have not consented to suit in the forum State has clearly been severely limited, especially in the international context, and of course these new limits on general jurisdiction make specific jurisdiction’s reach more and more important.

One byproduct of the Supreme Court’s recent decisions limiting the breadth of general jurisdiction is the increased importance of state statutes requiring foreign corporations and certain other business entities to register with the state, obtain a certificate of authority to transact intrastate business activities, and to appoint a registered agent to accept service of process for the foreign business entity.¹⁰⁹ For a number of years, in view of *Shaffer v. Heitner*’s probably overbroad assertion that “all assertions of state-court jurisdiction must be evaluated

103. *Id.* at 760–61 (alteration in original) (second emphasis added) (citation omitted).

104. *Id.* at 767 (Sotomayor, J., concurring).

105. *Id.* at 762 n.20 (majority opinion).

106. *Id.* at 764 (Sotomayor, J., concurring).

107. *Id.*

108. *See id.* at 761 n.19 (majority opinion) (noting that the Court did not “foreclose the possibility that . . . an exceptional case, see, e.g., *Perkins*,” might satisfy the new “at home” test).

109. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 5.251 (West 2013) (designating Texas Secretary of State as agent for service “of foreign filing entity” that transacts business in Texas without being registered as required by statute); *see also* § 9.251 (listing activities that do not constitute “transaction of business” in Texas).

according to the standards set forth in *International Shoe* and its progeny,¹¹⁰ an increasing number of courts have held that a complete personal jurisdictional analysis must be conducted, even if the corporation has registered to transact business in the forum state and appointed a registered agent to accept service of process.¹¹¹ Under this analysis, even though the Texas Business Organizations Code and the Texas general long-arm statute provide generally for the appointment of the secretary of state as the service agent for a foreign corporation that “is required by statute to designate or maintain a resident [registered] agent or engages in business in this state,”¹¹² these provisions are not sufficient for jurisdiction under a consent theory or evolving principles of jurisdiction. On the other hand, if this analysis is not correct, the Supreme Court’s recent decisions in the *Goodyear* and *Daimler* cases would ironically make no difference to the outcome of jurisdictional disputes in a great many cases, only to the legal basis (consent) for them.

C. *Specific Jurisdiction*

By far the greatest number of Supreme Court cases decided since the *International Shoe* decision have grappled with the requirements for specific jurisdiction. As explained by the Court in *Burger King Corp. v. Rudzewicz*, under the minimum contacts analysis for specific jurisdiction, courts must determine whether the nonresident defendant purposefully availed itself of the privilege of conducting activities within the forum state or purposely directed out-of-state actions toward the forum state or residents of the forum state.¹¹³ Yet the concept of purposeful availment remains elusive, particularly in the context of interstate and international commerce.¹¹⁴

Although the bench and bar anticipated that the Supreme Court would ultimately resolve the split between the O’Connor and the Brennan opinions in *Asahi*, twenty-four years after *Asahi* the Court’s 2011 opinions in *J. McIntyre Machinery Ltd. v. Nicastro* continued and arguably exacerbated the division.¹¹⁵ In *Nicastro*, although there is no

110. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

111. *See, e.g.*, *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 416 (Tex. App.—Houston [14th Dist.] 1997, no writ) (“A foreign corporation . . . cannot voluntarily consent to jurisdiction by compliance with the Texas registration statute unless it is actually ‘doing business’ in Texas. By registering to do business, a foreign corporation only *potentially* subjects itself to jurisdiction.”); *see also* *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181–82 (5th Cir. 1992). *But see, e.g.*, *Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 597–98 (Tex. App.—Houston [14th Dist.] 1975, no writ).

112. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(a)(1) (West 2013).

113. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–76 (1985).

114. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (four to four split between opinions authored by Justices O’Connor and Brennan).

115. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality opinion). As Professor Arthur R. Miller laments:

majority opinion, a plurality of the Court decided that a British manufacturer was not subject to jurisdiction in New Jersey because it did not purposely avail itself of the privilege of conducting purposeful activities in or directed toward New Jersey, even though the British manufacturer's scrap metal machines were marketed in the United States by an exclusive United States distributor that ultimately sold one of the machines to a New Jersey company (Curcio Scrap Metal).¹¹⁶ The machine was shipped from Ohio to New Jersey, where its allegedly defective condition caused injury to Nicasro, a New Jersey resident.¹¹⁷

The plurality opinion authored by Justice Kennedy reasoned that it is only the British manufacturer's "purposeful contacts with New Jersey, not with the United States, that alone are relevant."¹¹⁸ Hence, even though the British manufacturer's distributor agreed to sell its machines in the United States and the manufacturer attended trade shows in several states (but not in New Jersey), because it had no office in New Jersey, owned no property there, and neither advertised in nor sent any employees to New Jersey, the manufacturer did not purposely avail itself of the New Jersey market.¹¹⁹

The plurality opinion refers to the stream of commerce as a metaphor and substitutes a largely new analysis (reminiscent of *Pennoyer*), which abandons the "minimum contacts" doctrine's traditional focus on fairness and substitutes a new "general rule" under which "the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State; thus invoking the benefits and protections of its laws.'"¹²⁰ Under this standard of "lawfulness," the "principal inquiry in cases of this sort is [to be] whether the defendant's activities manifest an intention to submit to the power of a sovereign"¹²¹ rather than

Departing analytically and linguistically from its personal jurisdiction jurisprudence going back sixty-five years to the seminal decision in *International Shoe Corp. v. Washington*, four Justices clearly signaled a contraction of that reach. . . .

. . . That is why I view *McIntyre* as yet another procedural stop sign, this one posted at the very genesis of the case. The *McIntyre* plurality opinion is an open invitation to defense interests to exploit this stop sign for all it is worth.

Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475-476 (2012) (footnotes omitted).

116. *Nicasro*, 131 S. Ct. at 2784.

117. *Id.* at 2786.

118. *Id.* at 2790.

119. *Id.* at 2790-91.

120. *Id.* at 2785 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

121. *Id.* at 2788. Submission to the State's authority under general jurisdiction can be based on "explicit consent," presence "at the time suit commences through service of process," "[c]itizenship or domicile," or "incorporation or principal place of business for corporations." *Id.* at 2787 ("Each of those examples reveals circumstances, or

“the defendant’s ability to anticipate suit [that] renders the assertion of jurisdiction fair”¹²²:

Where a defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,” it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised, in connection with the defendant’s activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction “in a suit arising out of or related to the defendant’s contacts with the forum.”¹²³

According to the plurality opinion:

[A] rule based on general notions of fairness and foreseeability is inconsistent with the premises of lawful judicial power. . . .

. . . [J]urisdiction is in the first instance a question of authority rather than fairness Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive.¹²⁴

Justice Breyer and Justice Alito concurred separately and explained the plurality went too far in eschewing *International Shoe*’s fairness standard:

The plurality seems to state strict rules that limit jurisdiction where a defendant does not “inten[d] to submit to the power of a sovereign” and cannot “be said to have targeted the forum.” But what do those standards mean when a company targets the world by

a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State.”).

122. *Id.* at 2788 (“It was the premise of [Justice Brennan’s] concurring opinion [in *Asahi*] that the defendant’s ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.”).

123. *Id.* at 2787–88 (citation omitted).

124. *Id.* at 2789 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)). Professor Miller also remarks:

It now appears that a corporate defendant may be able to structure its distribution system and send products to all fifty states, while avoiding the reach of any, or almost any, individual state’s courts. No longer would injured consumers and employees be free to bring cases where they receive defective products or services, or live, or were injured; rather, plaintiffs might have to litigate in distant fora, and possibly in other countries, or abandon their claims altogether.

. . . .
 . . . *McIntyre* offers a heightened prospect of a dismissal for lack of jurisdiction. . . .

We are moving toward a system in which an increasing number of civil actions may be stillborn.

Miller, *supra* note 115, at 475–76.

selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in the forum? . . .

. . . [We] do not agree with the plurality's seemingly strict no-jurisdiction rule¹²⁵

But the concurring justices concluded nonetheless that “[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court’s previous holdings suggest the contrary.”¹²⁶

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented. The dissenters saw nothing unfair about requiring an “international seller to defend at the place its products cause injury . . . as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States.”¹²⁷ So what do the opinions handed down in *Nicastro* tell us about specific jurisdiction other than that the number of Supreme Court Justices favoring Justice Brennan’s approach has been reduced from four in *Asahi* to three in *Nicastro*? The combination of the plurality opinion and the concurrence tells us that a majority of the Supreme Court has rejected Justice Brennan’s relatively broad view of jurisdictionally sufficient contacts in favor of an increasingly narrower interpretation of purposeful availment.¹²⁸

In 2014, in *Walden v. Fiore*,¹²⁹ the Supreme Court’s most recent specific jurisdiction case, a unanimous Supreme Court restrictively interpreted the “effects test” and its earlier opinion in *Calder v. Jones*.¹³⁰ In *Walden*, the Supreme Court explained that in *Calder* the assertion of

125. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (first alteration in original) (citation omitted).

126. *Id.* at 2792 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)); see Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in J. McIntyre Machinery Ltd. v. Nicastro to Clarify the Stream of Commerce Doctrine*, 12 DEPAUL BUS. & COM. L.J. 171, 189–92 (2014).

127. *Nicastro*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting). The dissent also opined that the plurality opinion “would take a giant step away from the ‘notions of fair play and substantial justice’ underlying *International Shoe*.” *Id.* at 2804 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

128. See *Ainsworth v. Moffett Eng’g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013) (When no single rationale enjoys the assent of five justices, “the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on narrowest grounds.”) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). In *Nicastro*, it is Justice Breyer’s opinion, which explains that under the Court’s precedents “‘a single isolated sale’ is not an adequate basis for personal jurisdiction.” *Id.* (quoting *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring)); see also *AFTG-TG, LLC v. Nuroton Tech. Corp.*, 689 F.3d 1358, 1365 (Fed. Cir. 2012).

129. *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

130. *Id.* at 1123–24 (discussing *Calder v. Jones*, 465 U.S. 783, 787 n.6 (1984)).

jurisdiction over the individual defendants in a libel case was proper because the libel claims were based on an article written and edited by the individual defendants for publication in the *National Enquirer*, a national weekly newspaper with a California circulation of roughly 600,000, in reliance on phone calls from Florida to “California sources” for the information in the article, which was about the plaintiff’s activities in California.¹³¹ Accordingly, the Supreme Court determined that:

The crux of *Calder* was that the reputation-based “effects” of the alleged libel connected the defendants to California, not just to the plaintiff. . . . In this way, the “effects” caused by the defendants’ article—*i.e.*, the injury to the plaintiff’s reputation in the estimation of the California public—connected the defendants’ conduct to *California*, not just to a plaintiff who happened to live there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court’s exercise of jurisdiction.¹³²

It remains to be seen whether the Court’s opinion in *Walden* will have a significant impact on personal jurisdiction jurisprudence. But the Court’s general statement in *Walden* that “our ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there,” coupled with other statements in the opinion, may be intended to establish a more rigorous or more demanding version of purposeful availment for effects test cases.¹³³ This new standard would require a nonresident to direct out-of-state activities that cause harmful effects in the forum State, not merely at one or a few persons who happen to reside there, but only when the nonresident defendant’s contacts connect the defendant with the forum State in some more “meaningful way,” even if the out-of-state activities constitute intentional torts.¹³⁴ Under this analysis, for jurisdictional purposes, *Calder* is not about the harm suffered by Shirley Jones but about the extent of the defendant’s contacts and connection with California.¹³⁵

One potential consequence of the Court’s opinion may be the reduction or elimination of specific jurisdiction in interstate and international commercial litigation cases involving fraud or misrepresentation

131. *Id.* at 1123.

132. *Id.* at 1123–24.

133. *Id.* at 1122.

134. *Id.* at 1123, 1125 (“These same principles apply when intentional torts are involved. . . . A forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.”).

135. *Id.* at 1125 (“*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum.”).

claims or the commission of other deceptive trade practices by long-distance, unless the nonresident defendant is otherwise connected to the forum State based on the defendant's preexisting or resulting affiliation with the forum State and not based on the nonresident defendant's "'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity'" of the plaintiff or plaintiffs or someone else.¹³⁶

Another more significant potential consequence is the elevation of the requirements for satisfaction of the purposeful availment prong of *Burger King's* analytical framework more generally, whenever the defendant does not regularly engage or plan to engage in substantial activities purposefully directed toward the forum State. In other words, additional contacts with the forum state may be needed to bolster the exercise of specific jurisdiction.¹³⁷ Under this analysis, cases like *McGee v. International Life Insurance Co.* would probably fail to meet the standard.¹³⁸

On the other hand, *Walden* possibly came out the way it did simply because the Court unanimously concluded that Agent Walden's contacts with Nevada were simply too "'random,' 'fortuitous,' or 'attenuated'" to justify jurisdiction.¹³⁹ Even if Walden intended to injure the plaintiffs, he did not "aim" any conduct at Nevada.¹⁴⁰ Viewed this way, *Walden* is arguably more like *World-Wide Volkswagen*¹⁴¹ than *Calder*. As a result, *Walden* may not have much of an effect on personal jurisdiction jurisprudence in many other cases, including cases of interstate and international fraud, misrepresentation, or deceptive trade practices.¹⁴² Unfortunately, this conservative interpretation of the Court's opinion in *Walden* may rest more on wishful thinking rather than on the language of the opinion itself.

136. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted).

137. *Cf. Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2855 (2011) ("Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction.").

138. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

139. *Walden*, 134 S. Ct. at 1123–24.

140. *Id.* at 1124 ("Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada.").

141. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("[W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.").

142. It is also worth noting that the Supreme Court's opinion in *Walden* quotes a statement in the Court's prior opinion in *Keeton v. Hustler Magazine, Inc.*, another libel case decided at the same time as *Calder*, that "[t]he tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984). This statement was made in *Keeton* to justify the exercise of jurisdiction over *Hustler* because a lot of its magazines were sold in New Hampshire and, therefore, the tort was committed in New Hampshire. *See Walden*, 134 S. Ct. at 1123–24. The same elemental reasoning process could be used to justify jurisdiction in business tort and contract cases involving wrongful conduct directed at the forum State rather than based on the defendant's "'random,' 'fortuitous,' or 'attenuated' contacts" with the forum or resulting from the "unilateral activity" of the plaintiff or someone else.

VII. IMPUTED CONTACTS; JURISDICTIONAL VEIL-PIERCING

Another important aspect of personal jurisdiction jurisprudence is the circumstances under which one person's or one entity's contacts can be imputed to another person or entity for the purpose of jurisdictional veil-piercing. This issue was raised belatedly in *Goodyear*, but the Court refused to address it because the contention was not addressed in the North Carolina Court of Appeals or in the respondents' brief in opposition to the petition for certiorari.¹⁴³ Similarly, in *Daimler AG v. Bauman*, the Supreme Court not only rejected the Ninth Circuit's attribution of the California contacts of MBUSA, a Delaware limited liability company and indirect subsidiary of Daimler, to Daimler based on an agency theory, but the Court also refused to conclude that there would be a basis for general jurisdiction over Daimler in California, even assuming "that MBUSA [was] at home in California" and that its "contacts [were] imputable to Daimler."¹⁴⁴ Under these circumstances, the Court simply stated that "[t]his Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary."¹⁴⁵

Based on prior Supreme Court decisions, however, it is not anticipated that the Supreme Court will look favorably on the concept of judicial veil-piercing.¹⁴⁶ For example, in *Keeton*, the Supreme Court explained that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually."¹⁴⁷ Similarly, in 1925 the Supreme Court explained that as long as the subsidiary is maintained as "a distinct corporate entity" and "[a]ll transactions between the two corporations are [conducted] as if the two were wholly independent corporations," then "the corporate separation . . . was real. It was not pure fiction."¹⁴⁸

Following *Cannon Manufacturing Co. v. Cudahy Packing Co.*, the Fifth Circuit Court of Appeals in *Hargrave v. Fibreboard Corp.* ex-

143. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857–58 (2011).

144. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

145. *Id.* at 759.

146. As Professor Lonny S. Hoffman observes:

[V]eil piercing has been the subject of searching criticism. It has been derisively called many things: "unprincipled," "defy[ing] any attempt at rational explanation," "not entirely comprehensible," "dysfunctional," and "freakish[.]" Whittled down to their essential core, the critiques of jurists and corporate law scholars may be described as two-fold: veil piercing is *indeterminate* and, worse still, *irrelevant* to the harm caused to the victims the doctrine was ostensibly designed to protect.

Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1075–76 (2004) (first alteration added) (footnotes omitted).

147. *Keeton*, 465 U.S. at 781 n.13 (citations omitted).

148. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335, 337 (1925).

plained that “our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes.”¹⁴⁹ The Texas Supreme Court, among others, has taken the same approach.¹⁵⁰

VIII. VIRTUAL CONTACTS AND INTERNET ISSUES

A. *Guidance from the Supreme Court*

The Supreme Court does not want to talk about virtual contacts yet. In *Walden*, in response to the respondents’ argument that the Court’s failure to find that the petitioner lacked minimum contacts with Nevada will result in “unfairness in cases where intentional torts are committed via the Internet or other electronic means (e.g., fraudulent access of financial accounts or ‘phishing’ schemes),” the Court stated that “this case does not present the very different questions whether and how a defendant’s virtual ‘presence’ and conduct translate into ‘contact’ with a particular State. . . . We leave questions about virtual contacts for another day.”¹⁵¹

Similarly, in *Nicastro* the plurality chose not to address new issues posed by the changing global economy.¹⁵² In their concurring opinion, Justices Breyer and Alito noted that these developments might require changes in the Court’s personal jurisdiction jurisprudence, explaining, however, that this was not the case in which to do so. As Justice Breyer’s concurrence states, “I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues.”¹⁵³

So for the foreseeable future state and federal judges and the lawyers who appear before them will be required to conduct their own analysis of these questions.

B. *General Jurisdiction and Virtual Contacts*

Although some early cases held that an Internet presence on computer websites was a type of “continuous and systematic” activity in the forum State sufficient for general jurisdiction, these cases are almost certainly incorrect.

Even before *Daimler*, most courts ruled that the fact that a corporation uses a website to conduct business via the Internet is not sufficient to establish general jurisdiction. For example, Texas courts have held that the fiction that a nonresident defendant’s maintenance or

149. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983).

150. *See* *PHC-Minden, LP v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173–76 (Tex. 2007) (Jefferson, C.J.).

151. *Walden v. Fiore*, 134 S. Ct. 1115, 1125 n.9 (2014).

152. *See* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

153. *Id.* at 2791 (Breyer, J., concurring).

use of a website can be accessed by a computer in Texas is not sufficient to create the kind of contacts needed for general jurisdiction.¹⁵⁴ Similarly, the Fifth Circuit Court of Appeals has yet to find that Internet-based contacts establish general jurisdiction.¹⁵⁵

Likewise, courts around the country have routinely rejected attempts to assert general jurisdiction based on website activities even before *Daimler*.¹⁵⁶

If anything, because the Supreme Court's opinion in *Daimler* appears to virtually eliminate general jurisdiction for business entities except for places in which a corporation is incorporated or where it has its principal place of business, it is even more unlikely that courts will find Internet-based contacts establish general jurisdiction.

C. Specific Jurisdiction and Zippo

Specific jurisdiction cases present larger difficulties. One popular test for jurisdiction based on Internet-based contacts is the sliding scale test first articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁵⁷ *Zippo* established a sliding scale of Internet activity test in a case involving the potential exercise of specific jurisdiction.¹⁵⁸ Although this sliding scale test has been applied in connection with the

154. See, e.g., *Choice Auto Broker, Inc. v. Dawson*, 274 S.W.3d 172, 177–78 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

155. See, e.g., *Bowles v. Ranger Land Sys., Inc.*, 527 F. App'x 319, 321–22 (5th Cir. 2013) (unpublished) (holding that a defendant's website that can be accessed in Texas and contain e-mail addresses for several of defendant's employees was insufficient to establish general jurisdiction).

156. See, e.g., *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010) (holding that Illinois could not exercise general personal jurisdiction over website owners in business operator's tort action against website owners); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (“[T]he fact that Dotster maintains a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction.”).

157. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

158. Professor Michael A. Geist remarks:

One of the primary reasons for the early widespread support for the *Zippo* test was the desire for increased legal certainty for Internet jurisdiction issues. While the test may not have been perfect, supporters felt it offered a clear standard that would allow businesses to conduct effective legal risk analysis and make rational choices with regard to their approach to the Internet.

In the final analysis, however, the *Zippo* test simply does not deliver the desired effect. First, the majority of websites are neither entirely passive nor completely active. . . .

Second, distinguishing between passive and active sites is complicated by the fact that some sites may not be quite what they seem. . . .

Third, it is important to note that the standards for what constitutes an active or passive website are constantly shifting. . . .

Fourth, the *Zippo* test is ineffective even if the standards for passive and active sites remain constant.

Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKLEY TECH. L.J. 1345, 1378–80 (2001).

general jurisdiction inquiries, *Zippo's* "scale does more work with specific jurisdiction" and "is not well adapted to the general jurisdiction inquiry."¹⁵⁹ On one end of the scale is a "'passive' website, one that merely allows the owner to post information on the internet [sic]."¹⁶⁰ A passive website is not enough to establish personal jurisdiction. On the other side of the scale are interactive sites, "sites whose owners engage in repeated online contacts with forum residents over the internet [sic], and in these cases personal jurisdiction may be proper."¹⁶¹ If a website falls somewhere in between, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website [sic]."¹⁶² Under the sliding scale, maintaining an interactive website can amount to purposeful availment while the passive website does not. By contrast, other courts and commentators have concluded that *Zippo's* approach should not be used as a shortcut that replaces traditional doctrine.¹⁶³

IX. CONCLUSION

Like its predecessors, the Supreme Court's third group of decisions addresses the standards for both general and specific jurisdiction. But this time the Court's opinions not only fail to clarify personal jurisdiction jurisprudence, the opinions deemphasize the basic standard of fairness on which the minimum contacts doctrine has rested from its inception.

With respect to general jurisdiction, the Court identifies only two "paradigm all-purpose forums" that have general jurisdiction over a nonresident business entity, the nonresident's place of incorporation and its principal place of business, but without providing additional guidance. At the same time, the Supreme Court expressly rejects the prior conventional view that general jurisdiction should exist in any forum where "a corporation engages in a substantial, continuous and systematic course of business." Further, by fixing the location of a corporation's principal place of business based on its "nationwide" or "worldwide" corporate activities, the Court appears to have narrowed the scope of general jurisdiction even more, conceivably restricting it to one or two forums. Under this approach, there is also no need to

159. *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002).

160. *Id.* at 470.

161. *Id.*

162. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (quoting *Zippo*, 952 F. Supp. at 1124).

163. *See, e.g., Caiazza v. Am. Royal Arts Corp.*, 73 So. 3d 245, 255 (Fla. Dist. Ct. App. 2011) ("[R]igid adherence to the *Zippo* test is likely to lead to erroneous results." (quoting *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004))). *See generally* A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71.

conduct any separate analysis of whether the exercise of general jurisdiction is consistent with traditional notions of fair play or substantial justice, considering the interests of claimants in obtaining convenient and effective relief or the interest of forum states in adjudicating disputes involving interstate and international business entities.

With respect to specific jurisdiction, the Court's recent decisions present a confusing picture resulting from the Court's current doctrinal struggles concerning retention of *International Shoe's* traditional standard of fairness rather than the adoption of newer principles of sovereignty reminiscent of *Pennoyer's* simple rules. In addition, the Court appears to have adopted a regressive recapitulation of specific jurisdiction doctrine in ways that maximize the threshold concept of purposeful availment and minimize the relevance of the interests of claimants and the interests of American states in providing forums for resident claimants against nonresidents.

As a result, restrictions on the exercise of specific jurisdiction as well as the Court's reluctance to expand its use to jurisdictions and markets where multinational corporations conduct commercial activities make the availability of specific jurisdiction more problematic and render our "traditional notions of fair play and substantial justice" less and less recognizable.