

LIMITING ACCESS TO U.S. COURTS: THE SUPREME COURT'S NEW  
PERSONAL JURISDICTION CASE LAW

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## I. INTRODUCTION

The 1980s marked a decade of retrenchment in the Supreme Court’s case law governing personal jurisdiction.<sup>1</sup> However, the Court subsequently avoided the issue for twenty years, from 1990 until 2010.<sup>2</sup> The Court’s avoidance of the issue was noteworthy due to both a rapid expansion in Internet technology and liberalization of trade.<sup>3</sup> No doubt, the Court’s hesitation was a result of deep divisions within the Court and Justice Stevens’ idiosyncratic views,<sup>4</sup> preventing the Court from achieving a clear majority on difficult issues.<sup>5</sup>

Since Justice Stevens’ retirement, the Court has returned to the topic and decided four personal jurisdiction cases, two in 2011<sup>6</sup> and two in 2014.<sup>7</sup> While the 2011 decisions have already produced considerable commentary,<sup>8</sup> the recent decisions — read in conjunction with the earlier decisions — call

<sup>1</sup> See discussion *infra* Part III.

<sup>2</sup> See discussion *infra* Part IV.a.

<sup>3</sup> See *Nicastro v. McIntyre Mach. Am. Ltd.*, 897 A.2d. 575, 589 (N.J. 2010) (“In the twenty-two years since *Asahi*, transnational commerce has accelerated, and we realize more than ever that we live in a global marketplace.”), *rev’d*, 131 S. Ct. 2780 (2011).

<sup>4</sup> Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction of Justice John Paul Stevens*, 88 U. DET. MERCY L. REV. 433, 469 (2011) [hereinafter *The Last Common Law Justice*] (“Despite — or more likely because of — his refusal to provide a fifth vote to any opinion in *Asahi* or *Burnham*, the Supreme Court did not revisit the doctrinal disputes at issue in those cases until after Stevens retired.”); Roger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in J. McIntyre Machinery, Ltd. v. Nicastro?*, 63 S.C. L. REV. 643, 644 (2012) [hereinafter *The Case of the Retired Justice*].

<sup>5</sup> See *infra* pp. 231-235.

<sup>6</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

<sup>7</sup> *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>8</sup> See generally John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court’s Decision in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707 (2013) (analyzing the *Nicastro* and *Goodyear* decisions and how they limit the ability of U.S. citizens to bring suit against foreign defendants for injuries); John T. Parry, *Introduction: Due Process, Boarders, and the Qualities of Sovereignty – Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827 (2012) (providing a critical analysis of *Nicastro* and how it has confused the doctrine of general jurisdiction); Collyn A. Peddie, *Mi Casa es Su Casa: Enterprise Theory and General Jurisdiction Over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 36 S.C. L. REV. 697 (2012) (exploring the reasons for the *Goodyear* decision limiting jurisdiction and discussing the possible implications of this decision).

for more commentary.<sup>9</sup>

The four most recent decisions are unusual in a number of ways. Three of the cases produced near unanimity, with only one concurring opinion in those cases.<sup>10</sup> As developed below, the Court's unanimity is surprising because the Court's case law suggests a continued retrenchment at a time when one might have expected the liberal wing of the Court to push for a longer jurisdictional reach for state and federal courts.<sup>11</sup> In addition, in the Court's two general jurisdiction cases, Justice Ginsburg's opinions signal a significant narrowing of general jurisdiction.<sup>12</sup> Had the Court simultaneously expanded courts' jurisdictional reach in specific jurisdiction cases, the narrowing of general jurisdiction might make sense.<sup>13</sup> But the two recent specific jurisdiction cases have not done so.<sup>14</sup>

The most troubling case is *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>15</sup> It proved to be the most controversial, producing a deeply divided Court without a majority opinion.<sup>16</sup> But Justice Kennedy's four-justice plurality opinion suggests a major retrenchment, well beyond the retrenchment of the 1980s.<sup>17</sup> Still in search for an independent rationale for the contacts part of the due process analysis, Justice Kennedy invokes notions of implied consent, a theory that has long been discredited.<sup>18</sup> While his opinion also suggests a congressional solution to the issue before the Court,<sup>19</sup> given the discord in Congress,<sup>20</sup> his solution seems unrealistic. Finally, the plurality's extreme position is especially troubling in light of the division within the Court: while Justice Alito joined Justice Breyer's concurring opinion,<sup>21</sup> Justice Alito's usual alignment with the conservative wing of the Court does

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<sup>9</sup> See, for example, Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 75 OHIO ST. L.J. (forthcoming Fall 2014); Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, SMU L. Rev. (forthcoming 2015), for some commentary that has been produced by these decisions.

<sup>10</sup> See *infra* Parts IV.b.i.A, IV.b.i.B, IV.b.ii.B, IV.b.ii.A.

<sup>11</sup> See discussion *infra* Part IV.b.ii.

<sup>12</sup> See discussion *infra* Parts IV.b.i.A, IV.b.i.B.

<sup>13</sup> See discussion *infra* Part IV.b.ii.

<sup>14</sup> See discussion *infra* Part IV.b.ii.

<sup>15</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

<sup>16</sup> See discussion *infra* Part IV.b.ii.A.

<sup>17</sup> See *infra* pp. 260-262.

<sup>18</sup> *Nicastro*, 131 S. Ct. at 2787-88 (2011); see *infra* p. 261-262.

<sup>19</sup> *Nicastro*, 131 S. Ct. at 2790.

<sup>20</sup> Rep. Debbie Wasserman Schultz, *The Roots of Congressional Discord*, HUFFINGTON POST (Oct. 18, 2013) [http://www.huffingtonpost.com/rep-debbie-wasserman-schultz/congress-discord\\_b\\_4123823.html](http://www.huffingtonpost.com/rep-debbie-wasserman-schultz/congress-discord_b_4123823.html).

<sup>21</sup> *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

not bode well for future cases.<sup>22</sup> If he was convinced to adopt Justice Kennedy's position, the personal jurisdictional reach of state courts will shrink to its shortest reach since the days prior to *International Shoe Co. v. Washington* at the same time as information and goods flow into states more freely than at any other time in history.<sup>23</sup>

The jurisdictional reach of American courts is of special interest to foreign corporations that are intent on gaining access to markets in the United States. Foreign business representatives often express surprise when they encounter unique aspects of the American justice system; liberal discovery provides only one example.<sup>24</sup> As a result, foreign corporate representatives may seek to avoid the jurisdiction of American courts. Seemingly, the Court's new case law provides a blueprint to do so.<sup>25</sup>

This article explores how the Court's recent case law provides foreign corporations access to markets in the United States while allowing them to limit their vulnerability to jurisdiction in American courts. Part II provides a snapshot of the Court's case law in the modern era, beginning with a passing reference to *Pennoyer v. Neff*<sup>26</sup> and moving to the period after *International Shoe*,<sup>27</sup> when the jurisdictional reach of courts in the United States was dramatically extended.<sup>28</sup> It discusses briefly a notable exception, *Hanson v. Denckla*,<sup>29</sup> a case so obviously result-oriented that lower courts felt free to ignore its implications.<sup>30</sup> Further, it discusses alternatives available to a plaintiff in need of a forum, including commencing suit by property attachment, invocation of general jurisdiction and consent.<sup>31</sup> Part III discusses a series of cases, mostly in the 1980s, which signaled a

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<sup>22</sup> General William K. Suter, *Supreme Court Report*, 44 TEX. TECH. L. REV. 333, 337 (2012) ("The so-called conservatives are the Chief Justice and Justices Scalia, Thomas, and Alito. Chief Justice and Justice Alito voted together about 95% of the time."); *see also* *Citizens United v. Federal Election Commission*, 558 U.S. 310, 316 (2010) (Justice Kennedy delivered the majority opinion joined by Chief Justice Roberts, Justice Scalia, and Justice Alito).

<sup>23</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See also infra* pp. 270-272.

<sup>24</sup> For example, some commentators suggest that UBS officials repeatedly ignored obligations under federal discovery rules because in their own system, they did not have to hand over documents that supported their opponents' cases and found compliance with such a rule inappropriate. *See, e.g.,* *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (imposing significant sanctions for obstructionist behavior).

<sup>25</sup> *See* discussion *infra* Part V.

<sup>26</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>27</sup> *Int'l Shoe*, 326 U.S. 310.

<sup>28</sup> *See* discussion *infra* Part II.

<sup>29</sup> *Hanson v. Denckla*, 357 U.S. 235 (1958).

<sup>30</sup> *See infra* Part II.d.

<sup>31</sup> *Hanson v. Denckla*, 357 U.S. at 245; *see also* discussion *infra* Part II.

retrenchment by the Court.<sup>32</sup> Part IV discusses the four Supreme Court cases decided since Justice Stevens' retirement.<sup>33</sup> It concludes that the Court has shortened the jurisdictional reach of domestic courts at a moment in history when dramatic changes in communications and commerce bring Americans into contact with foreigners and foreign corporations at rates never seen before in our history.<sup>34</sup> Part V explores the implications of those four decisions for foreign corporations seeking to do business in the United States but hoping to avoid litigation in our courts.<sup>35</sup>

## II. PERSONAL JURISDICTION: EXPANDING THE ARMS OF THE STATES

### A. *A Short History*

In conversation with lawyers who are not procedural junkies, I hesitate to mention *Pennoyer v. Neff*, lest they storm out or zone out. I mention *Pennoyer* in passing because it brought Fourteenth Amendment due process analysis into the law governing personal jurisdiction.<sup>36</sup> Scholars disagree about the original meaning of *Pennoyer*.<sup>37</sup> But as generally understood, the Court held<sup>38</sup> that a state violated due process if it attempted to assert jurisdiction over a non-consenting non-resident unless the defendant was served in hand, in state. Relying primarily on an analogy from international law, the Court viewed states as separate sovereigns. As such, they exercised exclusive jurisdiction over individuals and property within their borders.<sup>39</sup> The corollary was that each state's jurisdictional arm ended at its borders.<sup>40</sup>

In *Pennoyer*, the lower federal court had to determine whether the owner of property procured from a federal land grant could proceed against a defendant who purchased the land at a sheriff's sale pursuant to a default judgment entered against the owner.<sup>41</sup> The Court found that the defendant could not rely on full faith and credit, requiring the second court to enforce

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<sup>32</sup> See discussion *infra* Part III.

<sup>33</sup> See discussion *infra* Part IV.b.

<sup>34</sup> See discussion *infra* Part IV.

<sup>35</sup> See discussion *infra* Part V.

<sup>36</sup> *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

<sup>37</sup> See, e.g., Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561 (1995).

<sup>38</sup> One could argue that the discussion of due process was dicta. After all, the plaintiff in the original action filed suit before the effective date of the Fourteenth Amendment. But the Court's subsequent case law makes clear that a state's assertion of personal jurisdiction must comport with due process.

<sup>39</sup> *Pennoyer*, 95 U.S. at 722.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 720.

the original judgment.<sup>42</sup> It so held because the original judgment was procured without proper assertion of jurisdiction over the owner of the property.<sup>43</sup> Thus, the Court integrated the recently enacted Fourteenth Amendment Due Process Clause with prior restrictive practice, limiting states' jurisdictional reach.

The underlying theory — that the Fourteenth Amendment protected one “sovereign” state’s power from overreaching by another state — is analytically jarring. By its express terms, the Fourteenth Amendment is a limitation on state power, not a device to protect, for example, California from having Oregon reaching its jurisdictional arm into California.<sup>44</sup> Treating the Fourteenth Amendment as protecting states’ rights is to ignore a central message of the Civil War. As observed by one historian, until the Civil War, the United States was referred to in the plural. It was only during reconstruction that reference to the United States shifted to the singular. Lincoln himself made this shift, consciously using the term “nation” in place of “union” in the Gettysburg Address, evoking an ideal of the states as having one national identity rather than being a loose collective of sovereigns.<sup>45</sup>

Despite *Pennoyer*’s theoretical weakness, its rigid rule limiting jurisdiction seldom worked particular hardship on a plaintiff seeking to sue a defendant during at a time when travel was limited. In an agrarian society, individual defendants would most often be found near their homes.<sup>46</sup> *Pennoyer* recognized in dicta that special rules would prevail in other situations, including in cases involving corporations and other business entities. The Court suggested that a business entity might be forced to appoint an agent for the purposes of receiving process or to appoint a public official for the same purpose.<sup>47</sup>

The industrial revolution, with expanded travel and commerce, created

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<sup>42</sup> *Id.* at 729-30.

<sup>43</sup> *Id.*

<sup>44</sup> See *Insurance Corp. of Ireland v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702-30 (1982), for the Court’s eventual recognition that the Fourteenth Amendment is not a device to protect one state from another’s jurisdictional overreaching.

<sup>45</sup> JAY WINIK, *APRIL 1865: THE MONTH THAT SAVED AMERICA* 250 (2001). Not only was *Pennoyer*’s states’ rights theory theoretically vulnerable, the Court itself seemed to recognize as much. Towards the end of the opinion, the Court discussed instances in which a court could assert jurisdiction even without satisfying the in-hand, in-state rule. *Pennoyer*, 95 U.S. at 735-36.

<sup>46</sup> See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 749 (1988). (“Before the advent of modern transportation, when traveling was difficult and ties between jurisdictions were attenuated, courts justifiably were concerned that defendants could evade suit by avoiding forums in which potential plaintiffs resided”).

<sup>47</sup> *Pennoyer*, 95 U.S. at 735.

situations where *Pennoyer*'s restrictive holding created unfair situations.<sup>48</sup> For example, a plaintiff injured by a motorist from out-of-state would have to travel to the defendant's home state to sue if the defendant left the state before the plaintiff served the defendant with process. A plaintiff injured by a defective product shipped from out-of-state was also forced to sue in the defendant's home state as well.

During the early years of the last century, states used different devices to expand the jurisdictional reach of their courts, including the now-widely rejected implied consent theory that allowed a state court to exercise jurisdiction over a person who conducted business in the state or used state highways.<sup>49</sup> The need for such fictions changed with the Court's decision in *International Shoe*.<sup>50</sup> Instead of relying on the fiction of implied consent,<sup>51</sup> the Court expanded its *quid pro quo* theory from a case involving the assertion of jurisdiction based on state residency: a defendant who sought the benefits and protections of the laws of the forum state gives rise to the obligation to respond to suit in the forum state at least when the claim arose out of the activities in the forum state.<sup>52</sup> As a result, courts must examine the nature and quality of the defendant's contacts with the forum state to determine whether the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice."<sup>53</sup>

*International Shoe* did a number of important things. It stated a theory of jurisdiction more in sync with the Fourteenth Amendment than did *Pennoyer*. The focus shifted from states' power to fairness to the defendant.<sup>54</sup> It also provided a framework more consonant with modern life

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<sup>48</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223-24 (1957).

<sup>49</sup> *See Hess v. Pawloski*, 274 U.S. 352 (1927); *see also Olberding et al. v. Illinois Cent. R. Co., Inc.*, 346 U.S. 338, 341 (1953) ("[T]o conclude from [the] holding [in *Hess*] that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland.").

<sup>50</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>51</sup> *Id.* at 318.

<sup>52</sup> *Id.* at 319. *See also Miliken v. Meyer*, 311 U.S. 457, 463 (1940) ("The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties").

<sup>53</sup> *Int'l Shoe*, 326 U.S. at 316.

<sup>54</sup> *See* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L. Q. 819, 835 (1991) ("From the realist or social-functional perspective, however, *International Shoe* constructed a new paradigm that would better serve the social needs and values of contemporary life and business. Under this view, the meaning of *International Shoe* is to be determined by looking beyond words and their dictionary meanings to social, legal, and value contexts. Therefore, the formulations of *International Shoe*'s minimum contacts/fair-play standard, and 'contacts, ties, or relations' should not be burdened by territorially loaded concepts or terms. Instead, the Court should develop this social-functional standard to serve the needs of our modern federal system and allow the states to effectuate their needs through extraterritorial jurisdictional

than did earlier cases and no longer required reliance on the fiction of implied consent. Indeed, the jurisdictional reach of state courts was about to expand dramatically. Imagine a case in which Neff, a California citizen, calls a lawyer, say, named Mitchell, in Oregon and asks Mitchell to perform legal services for Neff. When Neff subsequently fails to pay for the legal services, as long as Oregon has a statute authorizing service of process on a non-resident, Mitchell could properly bring suit in Oregon without violating due process. Jurisdiction would be proper even if Neff had never taken a step in Oregon.<sup>55</sup> The Court had come a long way since *Pennoyer*.<sup>56</sup>

*B. The High Water Mark: McGee v. International Life*

The process of expansion culminated with the Court's decision in *McGee v. International Life Insurance Co.*<sup>57</sup> There, Lowell Franklin purchased a life insurance policy from Empire Insurance. Later, International Life assumed Empire's insurance obligations.<sup>58</sup> When Franklin died, probably by suicide,<sup>59</sup> the insurance company refused to pay Lulu McGee, his mother and beneficiary under the policy.<sup>60</sup> McGee sued in

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actions. The phrase 'contacts, ties, or relations' should be given a functional interpretation not limited to activities within the forum or actions outside the forum intentionally causing effects in the forum."); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 813 (2004) ("In the mid-twentieth century, *International Shoe Co. v. Washington* reformulated the jurisdictional touchstone from a state's power over those present within its territory to an analysis of the fairness or reasonableness of an exercise of jurisdiction premised on the defendant's forum contacts.").

<sup>55</sup> The facts are, of course, those from *Pennoyer*. But as the Court observed in *Burger King*, a defendant may be subject to the court's jurisdiction even if the defendant never entered the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

<sup>56</sup> Picking up on *International Shoe*'s implications, in 1962 the Uniform Law Commissioners drafted a model long-arm statute that attempted to describe categories of cases where the assertion of jurisdiction would comport with due process. Unif. Interstate & Int'l Procedure Act, 9B U.L.A. 81 (Supp. 1965) (withdrawn 1977). See also NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, 71ST CONFERENCE HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS AND PROCEEDINGS OF THE ANNUAL MEETING 219 (1962). While some states adopted the model law, others simply allowed for service of process on non-resident defendants as long as the assertion of jurisdiction comports with due process; see, e.g., 735 Ill. Comp. Stat. 5/2-209 (2014) (adopting the model law); N.Y. C.L.P.R. 302 (2014) (also adopting the model law); Cal. Civ. Code § 410.10 (2014) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); Nev. Rev. Stat. § 14.065 (2014) ("A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the Constitution of this state or the Constitution of the United States.").

<sup>57</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>58</sup> *Id.* at 221.

<sup>59</sup> Death Certificate of Lowell Franklin, Dec. 1, 1950 (on file with author).

<sup>60</sup> *McGee*, 355 U.S. at 222.

California, where International Life did not appear.<sup>61</sup> After she obtained a default judgment, she filed a collection action in Texas, where International Life had its principal place of business.<sup>62</sup> The Texas courts refused to give the California judgment full faith and credit because the California court lacked personal jurisdiction over the defendant.<sup>63</sup>

A unanimous Supreme Court reversed in a terse opinion.<sup>64</sup> The operative facts were few:

[After International Life assumed Empire's obligations] [r]espondent . . . mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he had with Empire Mutual. He accepted this offer and from that time until his death . . . paid premiums by mail from his California home to respondent's Texas office . . . . It appears that neither Empire nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.<sup>65</sup>

Thus, the Court had to determine whether jurisdiction violated due process when the only contact with the forum state was a single insurance contract, which arguably the defendant had breached by its refusal to pay.

The Court reviewed the history of personal jurisdiction and recognized the "trend [that] is clearly discernible [is] toward expanding the permissible scope of state jurisdiction over foreign corporations."<sup>66</sup> The reasons were obvious. Commerce had become nationalized, commercial transactions could occur through the use of the mails across the continent, and modern transportation and communication reduced the burden on a defendant.<sup>67</sup>

Justice Black's opinion changed the way in which the Court viewed jurisdictional analysis and brought it more in line with due process than did *Pennoyer*. The Court made passing references to the fact that International Life solicited Lowell Franklin's business when it sent him the certificate of reinsurance.<sup>68</sup> Nothing in the opinion suggested that was a necessary

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<sup>61</sup> *Id.* at 221.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Chief Justice Warren took no part in the consideration or decision of this case.

<sup>65</sup> *McGee*, 355 U.S. at 221-22.

<sup>66</sup> *Id.* at 223.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 221. There is some irony in the fact that Justice Black authored the opinion. In his concurring opinion in *International Shoe*, Justice Black criticized the due process approach taken there that focused on fair play and substantial justice, consistent with his critique of

condition. In fact, the Court's analysis would apply with equal force even if Franklin had written International Life to seek renewal of his insurance policy. That is so because of the Court's primary emphasis on the minimal burden on the defendant in the modern era.<sup>69</sup> Even if the Court found the hypothetical case more difficult, it probably would have come to the same result. *McGee* — decided unanimously by the eight Justices hearing the case — was an easy case.<sup>70</sup> *McGee* also focused on an overall assessment of the suitability of the forum. It looked to the needs of the plaintiff, convenience for witnesses, and the forum state's interest in the litigation.<sup>71</sup>

The particular emphasis on the burden to the defendant was more consistent with the concept of due process than was *Pennoyer*'s view that due process was somehow linked to states' interest in preventing sister states from interfering with their sovereignty.<sup>72</sup> *McGee* focused on procedural due process: given the level of the burden on the defendant, did the defendant have adequate notice and an opportunity to be heard?<sup>73</sup> That interpretation of due process is consistent with the terms "due process;" that is, did the court provide a litigant with procedural fairness?<sup>74</sup> It was also consistent with the

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substantive due process. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 322 (1945) (Black, J., concurring).

<sup>69</sup> *McGee*, 355 U.S. at 223.

<sup>70</sup> *Id.* at 221.

<sup>71</sup> *Id.* at 223-2.

<sup>72</sup> Reynolds, *supra* note 54, at 876-77 (1991) ("While jurists and scholars under the influence of the *Pennoyer* paradigm like to regard *McGee* as an exceptional case and the high water mark under the *International Shoe* standards, from a social-functional perspective, *McGee* is neither a high nor a low water mark. It is simply a case where the Court properly applied the social-functional method in which the forum state's legitimate needs and policy concerns are of primary importance, and in which the territorialized concept of defendants' purposeful availment of forum benefits was not the touchstone of extra-territorial jurisdiction. A social-functional critique reveals that *Pennoyer*'s progeny — in rem, quasi in rem, transient jurisdiction, implied consent, and presence — are all expressions of the forum state's perpetual need and interest in exercising extraterritorial jurisdiction to deal with matters of legitimate concern. Though these devices have been traditionally viewed as merely exceptions to, or minor deviations from the basic territorial principle of *Pennoyer*, and applied in ways that seem to make them consistent with *Pennoyer*, all these doctrines are evidence of the social infirmity of *Pennoyer*'s territorial jurisdiction notion. *Pennoyer*'s jurisdictional progeny were social-functional actions. The attempts to rationalize these exceptions with *Pennoyer* involved transparent fictions. The emphasis in these exceptions on things, people, or actions in the forum placated only formalist minds.").

<sup>73</sup> *McGee*, 355 U.S. at 224.

<sup>74</sup> Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 (1978) ("In its procedural aspect, due process has typically been viewed as setting the conditions, if any, which must attach to deprivatory governmental action. When operative, these conditions have normally been defined in terms of a requirement of some sort of notice and opportunity to be heard prior to adverse governmental action.").

emerging view of due process during the Warren Court years.<sup>75</sup> And again, although the Court quoted language from *International Shoe* to the effect that the defendant had sufficient minimum contacts with the forum state, *McGee* did not give special emphasis to the importance of states' boundaries.<sup>76</sup>

Some contemporary scholars interpreted *McGee* as adopting a rule akin to choice of law rules.<sup>77</sup> Under such an analysis, the balance of several factors might weigh in favor of the assertion of jurisdiction even if a defendant had not directed business activity towards the forum state. Imagine, for example, a case in which a defendant had not directed activity to the forum state but where the plaintiff had a strong need for the particular forum and the forum state had a compelling interest to hear the case. If the burden on the defendant was slight, given the ease of modern communication and transportation, jurisdiction over the defendant might not offend due process.<sup>78</sup> Or one might have thought so.

### *C. Hard Cases Make Bad Law with a Vengeance: Hanson v. Denckla*

A Delaware trust company created a trust for Mrs. Donner, a Pennsylvania domiciliary.<sup>79</sup> Thereafter, she moved to Florida.<sup>80</sup> Over the next eight years, the trust company maintained the business relationship with its client, managing the trust and sending income checks to her in Florida.<sup>81</sup>

Once in Florida, Mrs. Donner made a number of decisions involving the

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<sup>75</sup> See, e.g., *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969) (finding that wage garnishment without hearing violates procedural due process, the court did not base its decision on whether a wage earner's interest in said wages was fundamental or non-fundamental (substantive due process)); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (discontinuing a welfare recipient's benefits without a prior hearing violated procedural due process).

<sup>76</sup> *McGee*, 355 U.S. at 222.

<sup>77</sup> Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1148-50 (1966) ("These developments have conduced to a rethinking of the field's methodology; they have considerably undermined the traditional jurisdictional premise that the plaintiff should seek out the defendant; and they have . . . increased the temptations toward parochial choice-of-law thinking . . .").

<sup>78</sup> *Id.* ("The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. 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. . . . When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof. Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality.").

<sup>79</sup> *Hanson v. Denckla*, 357 U.S. 235, 238 (1958).

<sup>80</sup> *Id.* at 239.

<sup>81</sup> *Id.* at 252.

distribution of her estate.<sup>82</sup> She left the bulk of her estate to two of her daughters, Katherine Denckla and Dorothy Stewart.<sup>83</sup> Named as residual legatees, they were to share an inheritance of about \$1,000,000.<sup>84</sup> Around the same time, Mrs. Donner also exercised the power of appointment under the Delaware trust and created two trusts, each in the amount of \$200,000 for the two sons of her third daughter, Elizabeth Hanson.<sup>85</sup> Mrs. Donner's donative intent seemed obvious: she was dividing her estate roughly into three parts, with each daughter or in Elizabeth's case, her children, receiving about a third of Mrs. Donner's assets.

In a story reminiscent of King Lear, two of Mrs. Donner's daughters sought to frustrate Mrs. Donner's attempts to divide her assets equally.<sup>86</sup> In Florida court proceedings to divide Mrs. Donner's assets, Denckla and Stewart, the residual legatees, argued that the trust was invalid, resulting in the trust assets becoming part of Mrs. Donner's estate and passing to them.<sup>87</sup> They sought to make the Delaware trust company a party to the suit in Florida.<sup>88</sup> While the proceedings were still pending in Florida, Hanson brought an action in Delaware to have the trust declared valid.<sup>89</sup> The Florida court ruled for Denckla and Stewart; the Delaware court ruled for Hanson.<sup>90</sup>

The Court faced several difficult issues, including whether the trust company was a "necessary and indispensable" party in the Florida proceeding,<sup>91</sup> whether the case was governed by *in rem* principles,<sup>92</sup> and whether the Full Faith and Credit Clause was relevant to the dispute.<sup>93</sup> However, the Court focused on the question of whether personal jurisdiction was proper over the trust company in the Florida case.<sup>94</sup>

Decided six months after *McGee*, the case seemed to come within its holding.<sup>95</sup> The burden on the Delaware trust company seemed minimal, no greater than the burden on International Life. The trust company had maintained a long business relationship with Mrs. Donner after she moved to Florida. Surely Florida and the Florida litigants had an interest in a

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<sup>82</sup> *Id.* at 239.

<sup>83</sup> *Id.* at 239-40.

<sup>84</sup> *Id.* at 240.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 241.

<sup>89</sup> *Id.* at 242.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 244-45.

<sup>92</sup> *Id.* at 245-50.

<sup>93</sup> *Id.* at 255.

<sup>94</sup> *Id.* at 250-52.

<sup>95</sup> *Id.* at 260 n.4.

convenient forum.<sup>96</sup> But the effect of applying *McGee* would have been to reward the two sisters who seemed determined to overturn their mother's donative intent for their own gain.

Chief Justice Warren wrote for a narrow majority.<sup>97</sup> His opinion made clear his view of the two sisters' venality: "[r]esiduary legatees Denckla and Stewart, *already the recipients of over \$500,000 each*, urge that the power of appointment over the \$400,000 appointed to sister Elizabeth's children was not 'effectively exercised' and the property should accordingly pass to them."<sup>98</sup>

*Hanson v. Denckla* included a number of important points that the Court has largely overlooked when it resurfaced in the 1980s. For example, the Chief Justice suggested that the claim did not arise out of the contacts with the forum state.<sup>99</sup> In current terminology, were that the case, jurisdiction was not proper under a specific jurisdiction theory.<sup>100</sup>

The Court did not rest there. Instead, it focused on the nature of the trust company's contacts with the forum state. Those contacts came about through Mrs. Donner's "unilateral activity."<sup>101</sup> As a result, the trust company did not purposefully avail itself of the benefits of doing business with its customer in Florida.<sup>102</sup> In what would appear to be a revision of its holding in *McGee*, according to the Chief Justice, *McGee* turned on the fact that International Life "solicited a reinsurance agreement in" the forum state.<sup>103</sup> As discussed above, *McGee* mentioned the fact as one of a number of reasons why jurisdiction was proper, but hardly made it a necessary condition for the assertion of jurisdiction.<sup>104</sup>

As developed below, the Court and lower courts often ignored *Hanson* for over twenty years.<sup>105</sup> No doubt, courts did so for a number of reasons, including the obvious result-orientation of the decision. But that would all change when the Court began its retrenchment in 1980.<sup>106</sup>

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<sup>96</sup> *Id.* at 259.

<sup>97</sup> *Id.* (5-4 decision).

<sup>98</sup> *Id.* at 240 (emphasis added).

<sup>99</sup> *Id.* at 251.

<sup>100</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>101</sup> *Hanson*, 357 U.S. at 253.

<sup>102</sup> *Id.* at 253-54.

<sup>103</sup> *Id.* at 251-52.

<sup>104</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957). *See also supra* p. 218.

<sup>105</sup> *See infra* Part II.d. *See Shaffer v. Heitner*, 433 U.S. 186, 206 (1977), for the Court's first citation of *Hanson*.

<sup>106</sup> *See infra* Part III.b.

*D. A Look at State Courts*

State judges often favored expanding the jurisdictional reach of their courts in the post-*McGee* era. Finding an explanation for the expansion of jurisdiction by the lower courts is not difficult. Relieved from the narrow constraints of *Pennoyer*, state courts were eager to protect their citizens from out-of-state actors.<sup>107</sup> That populist attitude was summarized by former West Virginia Supreme Court Justice Richard Neely in a different context when he stated:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me.<sup>108</sup>

Almost certainly, the same sentiment underlies the dramatic expansion of states' jurisdictional reach. State courts did so in two notable ways. First, even if the state had in place a limited long-arm statute, many state courts read those statutes as if they stated, simply, that the state could exercise jurisdiction to the full extent of due process.<sup>109</sup> The second way in which they expanded jurisdiction was by ignoring *Hanson*.<sup>110</sup>

The facts of *Gray v. American Radiator & Standard Sanitary Corp.* demonstrate the latter point.<sup>111</sup> There, Titan Valve, an Ohio corporation, manufactured a valve that it shipped to American Radiator in Pennsylvania.<sup>112</sup> American Radiator incorporated the valve into a hot water heater that it presumably shipped to Illinois.<sup>113</sup> There, the hot water heater exploded, injuring the plaintiff, Mrs. Gray.<sup>114</sup> The plaintiff joined as co-

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<sup>107</sup> *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 763 (Ill. 1961). In more recent years, business interests have poured millions of dollars into judicial campaigns, often resulting in the election of business friendly judges. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), for the most egregious example.

<sup>108</sup> RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988).

<sup>109</sup> See *supra* text accompanying notes 66-67.

<sup>110</sup> See *infra* text accompanying notes 112-122. Not all courts ignored *Hanson*, but courts interested in expanding jurisdiction often did so, especially in cases involving contacts that came about via the stream of commerce. *Gray* is a textbook example where that was the case. There, the court cited *Hanson*, but not for its implications for the purposeful availment aspect of the analysis. Instead, it distinguished *Hanson* as a case where the contact was unrelated to the claim for relief. *Gray*, 176 N.E.2d at 764.

<sup>111</sup> *Gray*, 176 N.E.2d 761.

<sup>112</sup> *Id.* at 762.

<sup>113</sup> *Id.* at 762, 764.

<sup>114</sup> *Id.* at 762.

defendants American Radiator and Titan.<sup>115</sup>

Titan moved to dismiss for lack of personal jurisdiction.<sup>116</sup> Had the state courts followed *Hanson*, Titan's argument that the assertion of jurisdiction violated due process would have been strong because Titan did not direct any purposeful activity towards the forum state.<sup>117</sup> Instead, it shipped its product to Pennsylvania. The valve ended up in the forum through the activity of a third party, akin to Mrs. Donner's decision to move to Florida. The record was silent on whether any other Titan products ended up in Illinois but the court was willing to assume that many Titan valves did so.<sup>118</sup> The court found that products arriving in the forum through the stream of commerce made the assertion of jurisdiction over Titan fair and reasonable.<sup>119</sup>

The result in *Gray* makes sense if *McGee's* view of due process is at work: Titan's corporate counsel could hardly claim that the corporation was unduly burdened if it had to respond to suit in Illinois. A phone call could have secured local counsel; documents required in discovery could have been mailed; and if witnesses needed to attend the trial, they could have flown or driven on the then-emerging interstate highway system, less than 400 miles away.<sup>120</sup> And as indicated, the courts that were ignoring *Hanson* would have had good reasons to do so, if they had been forced to articulate their reasoning. It looked like a sport in the law, an aberrational decision, not entitled to precedential value.<sup>121</sup>

#### *E. In Rem Actions, General Jurisdiction, and Consent*

During the pre-*International Shoe* era, in rem jurisdiction provided a plaintiff some relief from having to travel far from home as long as the defendant owned in-state property.<sup>122</sup> As long as the value of the property exceeded the plaintiff's claim, in rem jurisdiction filled a need.<sup>123</sup>

*Harris v. Balk* provides a classic example whereby a plaintiff seeking to

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Cf. Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987).

<sup>118</sup> *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

<sup>119</sup> *Id.*

<sup>120</sup> DISTANCE BETWEEN CITIES, [http://www.distancebetweencities.net/il\\_and\\_oh/](http://www.distancebetweencities.net/il_and_oh/) (last visited June 17, 2014).

<sup>121</sup> *See* discussion *supra* Part II.d.

<sup>122</sup> *Cornett & Hoffheimer*, *supra* note 9 (manuscript at 8) ("The availability of in rem proceedings obviated the need for plaintiffs to bring actions in personam that tested the outer limits of general jurisdiction.")

<sup>123</sup> *Id.* at 7 ("Corporations with assets in a state were subject to general jurisdiction to the extent of those assets.")

sue an out-of-state defendant could use a property attachment to stay at home.<sup>124</sup> There, Balk from North Carolina owed money to Epstein, a Maryland resident.<sup>125</sup> Harris, also from North Carolina, owed money to Balk.<sup>126</sup> Unable to find Balk in Maryland, Epstein began his suit by serving Harris when he was traveling in Maryland.<sup>127</sup> In effect, he attached the debt owed to Balk.

The theoretical justification for in rem jurisdiction would erode as the Court moved away from formalism to legal realism.<sup>128</sup> But it was premised on the same theory of sovereignty relied on in *Pennoyer*: the state where the property was located had exclusive jurisdiction over the property within its borders.<sup>129</sup> Similarly formalistic, according to the courts, in rem jurisdiction was an action against the property, not the owner.<sup>130</sup> Again, apart from the questionable foundation for in rem jurisdiction, it provided a gap-filler for a plaintiff who was unable find an in-state defendant.<sup>131</sup>

General jurisdiction, the assertion of jurisdiction over a defendant on a claim that does not arise out of or relate to the defendant's contacts with the forum state almost certainly has historical roots. As observed by the Court in *Pennoyer*, establishing jurisdiction over a corporation presented the courts a distinct query. There, the Court observed that "a State, on creating corporations . . . , may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked."<sup>132</sup> In the *Pennoyer* era, corporations were subject to jurisdiction in their state of incorporation.<sup>133</sup> By 1945, when the Court decided *International Shoe*, courts had also held that under some circumstances a corporation was subject to personal jurisdiction on a claim unrelated to forum contacts if the contacts were sufficiently substantial.<sup>134</sup>

Despite the recognition that sufficient contacts with the forum may

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<sup>124</sup> Harris v. Balk, 198 U.S. 215, 223-24 (1905).

<sup>125</sup> *Id.* at 221.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Shaffer v. Heitner, 433 U.S. 186, 206 (1977).

<sup>129</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

<sup>130</sup> *Id.* at 721-22.

<sup>131</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 6-7) ("Before 1977, U.S. courts routinely exercised general jurisdiction under the guise of quasi in rem jurisdiction.").

<sup>132</sup> *Pennoyer*, 95 U.S. at 735-36.

<sup>133</sup> Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1004 (2012) ("Jurisdiction over corporations was not as easy or obvious. The conceptual difficulty, which preceded *Pennoyer*, coincided with the law's evolving treatment of the corporate structure. In the early nineteenth century, courts considered corporations incapable of acting beyond the borders of the state in which they were incorporated. Because a corporation could act only in its state of incorporation, jurisdiction was limited to that state.").

<sup>134</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

support jurisdiction in that forum, Supreme Court precedent has been sparse.<sup>135</sup> *Perkins v. Benguet Consolidated Mining Company* arose under unusual circumstances: the claim arose during World War II based on conduct in the Philippine Islands, during Japanese occupation.<sup>136</sup> The president of the corporation, who was also the general manager and principal shareholder, set up business in Ohio where “he maintained an office in which he conducted his personal affairs and did many things on behalf of the company.”<sup>137</sup> Specifically, he maintained the office files; he carried on correspondence for the company; he drew checks there for employees and carried substantial balances in local banks.<sup>138</sup> An Ohio bank acted as the transfer agent for the company.<sup>139</sup> Directors’ meetings were held there. The president also supervised policies dealing with property in the Philippines.<sup>140</sup>

The facts presented the majority with an easy case and found that jurisdiction was proper.<sup>141</sup> Two Justices dissented on other grounds, dealing with the doctrine of independent and adequate state law grounds for a decision.<sup>142</sup>

Justice Burton’s opinion spoke both broadly and narrowly. For example, in framing the issue at the outset, the Court described the relevant facts: the corporation was “carrying on a continuous and systematic, but limited, part of its general business.”<sup>143</sup> In framing its analysis, the Court stated, “The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation.”<sup>144</sup> It concluded that the president of the company “carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.”<sup>145</sup>

While the Court has decided few general jurisdiction cases,<sup>146</sup> plaintiffs often rely on general jurisdiction.<sup>147</sup> As indicated, courts have upheld jurisdiction based solely on the substantial contact that corporate defendants have established with the forum state.<sup>148</sup>

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<sup>135</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011).

<sup>136</sup> *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447-48 (1952).

<sup>137</sup> *Id.* at 448.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 449-50. (Minton, J., dissenting).

<sup>143</sup> *Id.* at 438.

<sup>144</sup> *Id.* at 445.

<sup>145</sup> *Id.* at 448.

<sup>146</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011).

<sup>147</sup> B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1111-14 (1990) (describing ways in which plaintiffs have asserted general jurisdiction).

<sup>148</sup> *Id.*

A plaintiff seeking to sue a corporation could also rely on consent.<sup>149</sup> Many states have in place legislation that requires corporations to appoint an agent to receive process as a condition of doing business in state.<sup>150</sup> Such legislation varies from state to state. Some states limit consent to claims arising out of forum activity,<sup>151</sup> while others make consent binding for any claims against the corporation.<sup>152</sup>

Thus, in the period between 1945 (possibly earlier) and the late 1970s, a plaintiff commencing suit could rely on any number of bases for asserting jurisdiction. Modern long-arm statutes reached well beyond the borders of the state where the plaintiff sought to sue and due process analysis had kept abreast.<sup>153</sup> A plaintiff could also rely on more traditional bases of jurisdiction, including in rem, general jurisdiction, and consent.<sup>154</sup> But litigants were about to enter a period of retrenchment.<sup>155</sup>

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<sup>149</sup> 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, 578 (1957) (“[S]ince a foreign corporation could not carry on business within a state without the permission of that state, the state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within that state.”).

<sup>150</sup> Brilmayer et al., *supra* note 46, at 757 (“The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment”).

<sup>151</sup> *Id.* at 757 n.187 (“In some states, statutory consent only applies to suits arising from the defendant’s forum activity. See *Dragor Shipping Corp. v. Union Tank Car Co.*, 361 F.2d 43, 49 (9th Cir.), *cert. denied*, 385 U.S. 831 (1966); *Williams v. Williams*, 621 S.W.2d 567, 569-70 (Tenn. Ct. App. 1981).”).

<sup>152</sup> *Id.* at 757-58. (“Other courts, however, have almost eliminated minimum contacts analysis for defendants that have appointed agents. The court in *Cowan v. Ford Motor Co.* summarily concluded that ‘by appointing a resident agent and conducting substantial business in Mississippi, the defendant has consented to Mississippi’s exercise of personal jurisdiction.’ The opinion fails to reveal what those substantial contacts were, preferring simply to state in a footnote that ‘sufficient contacts indisputably are present.’ Even conclusory assertions of connections to the forum are lacking from some opinions that have based general jurisdiction wholly on the defendant’s statutory appointment of an agent. In a brief opinion, the court in *Goldman v. Pre-Fab Transit Co.* held that Texas courts could entertain a suit against a foreign corporation for property damages suffered in a truck crash in Louisiana. Noting service on the defendant’s resident agent, the court explained that ‘the rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for purposes of all lawsuits within the state.’ The court in *Junction Bit & Tool Co. v. Institution Mortgage Co.* went so far as to say that ‘minimum contacts would seem patently established’ when a ‘foreign corporation has actually qualified under Florida law to transact business in the state and has appointed a resident agent for service of process’ as the Florida statute required.”) (footnotes omitted).

<sup>153</sup> See *supra* Part II.d.

<sup>154</sup> See *supra* Part II.e.

<sup>155</sup> See discussion *infra* Part III.

## III. THE FIRST RETRENCHMENT

A. *The Late 1970s*

The Court's decision in *World-Wide Volkswagen Corp. v. Woodson* in 1980 marks the beginning of its retrenchment. One might argue that two cases in the late 1970s signaled the Court's intent to narrow jurisdiction.<sup>156</sup> But neither decision appeared to challenge most liberal efforts to extend the jurisdictional reach of state courts.<sup>157</sup>

The expansion of personal jurisdiction was the result of changed conditions.<sup>158</sup> These changed conditions also led to the rejection of the nineteenth century formalism reflected in *Pennoyer*.<sup>159</sup> Even before the Court addressed the continued vitality of in rem jurisdiction, the Court had undercut the rationale for the doctrine. *Pennoyer* explained the theory allowing suit by property attachment as being consistent with the theory borrowed from international law that a sovereign has exclusive jurisdiction over property within its borders.<sup>160</sup> As discussed above, modern case law eroded that theory.<sup>161</sup> In the days of legal formalism, one might argue that the action was against the property, not against the individual.<sup>162</sup> But that did not withstand scrutiny. In *Mullane v. Central Hanover Bank & Trust Co.*, the Court effectively held that the distinction between in rem and in personam no longer had significance when the question was whether the

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<sup>156</sup> *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>157</sup> See Cornett & Hoffheimer, *supra* note 9 (manuscript at 8) ("The Court held in *Shaffer v. Heitner* that quasi in rem jurisdiction violated due process in the absence of minimum contacts. Justice Marshall required broadly that 'all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.' But no one at that time thought general jurisdiction was limited to a corporation's base of operations, and Justice Marshall would have been astonished to learn that his words would one day have the effect of eliminating state power over large corporations active in states where they were routinely required to answer lawsuits in 1977."). See also *Kulko v. Superior of Court of California*, 436 U.S. 84 (1978) (focused on the effect of jurisdiction on family disputes).

<sup>158</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

<sup>159</sup> See Reynolds, *supra* note 54, at 824-36 (detailing the changing conditions leading to a change in legal theories).

<sup>160</sup> *Pennoyer v. Neff*, 95 U.S. 714, 729 (1878).

<sup>161</sup> See *supra* Part II.a; see also David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 WASH. & LEE L. REV. 1757, 1761-65 (2014) ("It remains unclear why the [*Pennoyer*] Court thought it could apply international law to invalidate a state court judgment . . .").

<sup>162</sup> Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anitybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 255 (2002) ("[A]n in rem action traditionally was considered to be formally directed at property, not the defendant personally.").

notice provided comported with due process.<sup>163</sup> As summarized by the Restatement (Second) of Conflicts of Laws, “The phrase, ‘judicial jurisdiction over a thing’, is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.”<sup>164</sup>

In *Shaffer v. Heitner*, the Court brought in rem jurisdiction in line with in personam jurisdiction.<sup>165</sup> There, the plaintiff brought an action in Delaware by attaching shares of stocks owned by some of the directors of the Greyhound Corporation.<sup>166</sup> The claim arose out of conduct occurring in Oregon and the record was silent on other contacts between the defendants and Delaware.<sup>167</sup> The Court held that the assertion of jurisdiction on the basis of the property attachment, standing alone, violated due process.<sup>168</sup> In broadly worded dicta, the Court stated that all assertions of jurisdiction must satisfy due process as developed in *International Shoe* and its progeny.<sup>169</sup>

*Shaffer* did not seem to presage a retrenchment. As indicated, its holding was signaled years earlier in *Mullane*.<sup>170</sup> Further, in *Fuentes v. Shevin*, the Court had already made pre-judgment attachment of property more difficult by requiring some kind of hearing.<sup>171</sup> In addition, the need for property attachments became less important in light of the movement towards liberalized in personam jurisdiction.<sup>172</sup>

The other decision in the late 1970s that might have signaled a retrenchment in the Court’s personal jurisdiction case law was *Kulko v. Superior Court of California*.<sup>173</sup> There, the defendant’s ex-wife moved to California from New York and the defendant acquiesced in his children’s request to live with their mother in California.<sup>174</sup> The defendant’s ex-wife sued him for child support in a California state court.<sup>175</sup> The majority held that the assertion of jurisdiction violated due process, partially relying on *Hanson*.<sup>176</sup> But *Kulko* did not seem to signal a major movement towards

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<sup>163</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950).

<sup>164</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, INTRODUCTORY NOTE (1971).

<sup>165</sup> *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977).

<sup>166</sup> *Id.* at 189-90.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 209.

<sup>169</sup> *Id.* at 207-08.

<sup>170</sup> *See supra* text accompanying note 164.

<sup>171</sup> *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

<sup>172</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 8) (“After in rem actions became subordinated to due process limits governing actions in personam, courts began to address substantive limits on general jurisdiction irrespective of the form of litigation”).

<sup>173</sup> *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84 (1978).

<sup>174</sup> *Id.* at 87-88.

<sup>175</sup> *Id.* at 88.

<sup>176</sup> *Id.* at 94.

limiting jurisdiction for at least two reasons. First, while the Court did find that the defendant's contacts did not come about through his purposeful conduct, the Court treated that as only one factor.<sup>177</sup> It also considered whether the assertion of jurisdiction might be constitutional based on an assessment of the effects of his conduct and the reasonableness of the assertion of jurisdiction.<sup>178</sup> Second, the Court distinguished the facts in *Kulko* from those in cases involving business transactions.<sup>179</sup> Thus, the clear suggestion was that *Kulko* was cabined to domestic relations cases.<sup>180</sup>

## B. *The 1980s*

### 1. Specific Jurisdiction

Harry and Kay Robinson bought an Audi in New York.<sup>181</sup> A year later, while they were on their way to Arizona, Harry was driving a moving truck.<sup>182</sup> While Kay and their children were driving through Oklahoma in the Audi, a drunk driver rear-ended them.<sup>183</sup> The occupants were trapped inside the vehicle and severely burned.<sup>184</sup> The plaintiffs brought suit in Oklahoma state court where they joined as co-defendants Audi, Volkswagen of America, Seaway (the dealer), and World-Wide Volkswagen (the distributor

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 96. As observed by one scholar, *Kulko* seemed to be an outlier. See Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 B.Y.U. L. REV. 1043, 1064 (1986).

<sup>179</sup> *Kulko*, 436 U.S. at 97 (“The cause of action herein asserted arises, not from the defendant’s commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court; appellant’s activities cannot fairly be analogized to an insurer’s sending an insurance contract and premium notices into the State to an insured resident of the State.”).

<sup>180</sup> Duncan E. Barber, *Minimum Contacts in Single Contract Cases: Burger King Has Its Way*, 1986 B.Y.U. L. REV. 505, 509-10 (1986) (“For example, in *McGee v. International Life Insurance Co.*, defendant’s solicitation of an insurance contract with a forum resident established a substantial connection between defendant and the forum because of the defendant’s deliberate solicitation within the forum. Jurisdiction was therefore appropriate. However, when ‘deliberate affiliation’ is lacking the Court has been reluctant to find jurisdiction. Thus, the Court denied jurisdiction in *Kulko v. Superior Court*, reasoning that defendant’s acquiescence to his daughter’s decision to live in the forum could not be analogized to seeking ‘a commercial benefit from solicitation of business from a resident of California.’”).

<sup>181</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

<sup>182</sup> Charles W. Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 NEB. L. REV. 1122, 1123 (1993).

<sup>183</sup> *World-Wide*, 444 U.S. at 288.

<sup>184</sup> *Id.*

for New York, New Jersey, and Connecticut).<sup>185</sup> Audi and Volkswagen eventually conceded personal jurisdiction,<sup>186</sup> but Seaway and World-Wide pursued their jurisdictional challenge in the Supreme Court.<sup>187</sup>

Oklahoma seemed like a convenient forum. Even Justice White seemed to acknowledge that fact in his majority opinion.<sup>188</sup> He recognized that the burden on the defendant, which was the primary focus of the Court's test, "will in an appropriate case be considered in light of other relevant factors."<sup>189</sup> But the Court did not consider whether the burden on the defendants was outweighed by other factors. Instead, relying on *Hanson*, the Court held that a threshold question was whether the defendants had purposefully availed themselves of the benefits of Oklahoma.<sup>190</sup>

The Court rejected the idea that jurisdiction would be proper even if a defendant would suffer no or little inconvenience by litigating in the forum because due process would be violated.<sup>191</sup> To so conclude, the Court had to find a rationale for why purposeful contacts with the forum, not the burden on the defendant, mattered.<sup>192</sup> Recognizing that the Court had abandoned "the shibboleth" of *Pennoyer* that each state is limited by its territorial borders, the Court needed to find a continued justification for the purposeful availment aspect of *Hanson*.<sup>193</sup> While the overall analysis focused on due process, the Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes," nor could the Court do so while remaining "faithful to principles of interstate federalism embodied in the Constitution."<sup>194</sup> Thus, even if all of the factors relied on by the Court in *McGee* favored jurisdiction in the forum state, absent the necessary contacts with the forum state, jurisdiction would be improper.<sup>195</sup> That was so because "the Due Process Clause, act[s] as an instrument of interstate federalism."<sup>196</sup>

Within two years, even Justice White, the author of *World-Wide*, recognized the inadequacy of that theory.<sup>197</sup> Due process does not advance

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<sup>185</sup> *Id.* at 288-29.

<sup>186</sup> *Id.* at 288 n.3.

<sup>187</sup> *Id.* at 288.

<sup>188</sup> *Id.* at 294.

<sup>189</sup> *Id.* at 292.

<sup>190</sup> *Id.* at 297.

<sup>191</sup> *Id.* at 294.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 293.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 294.

<sup>196</sup> *Id.*

<sup>197</sup> *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 695 (1982).

states' interests.<sup>198</sup> Further, were the Due Process Clause a way to protect a state's interest, the Court would have to explain why a defendant can waive an objection to personal jurisdiction.<sup>199</sup> Instead, because the interest would seemingly be the state's interest, one would expect that the Court should treat the matter as it does subject matter jurisdiction, not subject to waiver by the parties to the suit.<sup>200</sup>

In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, Justice White confessed error.<sup>201</sup> There, he explained that the personal jurisdiction requirement "protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty."<sup>202</sup>

As developed below, once the interstate federalism rationale dropped out of the equation, the Court has not offered much of an explanation for why contacts with the forum state are a necessary condition for the assertion of jurisdiction.<sup>203</sup> Attempts at an explanation seem to fall back on implied consent to jurisdiction.<sup>204</sup> Thus, a defendant from Memphis, Tennessee cannot be compelled to respond to a suit in West Memphis, Arkansas — a short drive across the Mississippi River — but can be compelled to respond to a suit almost 400 miles away in Knoxville, Tennessee. Obviously, the minimum contacts are not about convenience to the defendant, but are about something else altogether.

*World-Wide* signaled battle lines within the Court.<sup>205</sup> Always favoring expanded jurisdiction, Justice Brennan dissented in *World-Wide*.<sup>206</sup> In *Burger King Corp. v. Rudzewicz*, Justice Brennan would concede that, at a minimum, the Constitution requires some minimum contacts.<sup>207</sup> His *World-*

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<sup>198</sup> *Id.* at 704.

<sup>199</sup> *Id.* at 703-04.

<sup>200</sup> *Id.* at 703.

<sup>201</sup> *Id.* at 701.

<sup>202</sup> *Id.* at 702.

<sup>203</sup> See *infra* text accompanying notes 206-13.

<sup>204</sup> Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 912-13 (1981) (arguing that minimum contacts and purposeful availment are simply a "reincarnation of the old implied consent fiction.")

<sup>205</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

<sup>206</sup> *Id.* at 300; see also *Shaffer v. Heitner*, 433 U.S. 186, 220-29 (1977) (Brennan, J., dissenting) (arguing that the majority should not have reached the minimum contacts question, but if such analysis is necessary, then finding minimum contacts met for a corporation chartered under Delaware law).

<sup>207</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). There, the Court found that defendants, businessmen who entered into a franchise agreement with Burger King, a Florida corporation, had acted with purpose in the forum state. *Id.* at 479-82. In such a case, only upon a strong showing that the forum was an unreasonable one would a defendant be able to avoid that court's jurisdiction. *Id.* at 482-83, 486-87. In dicta, Justice Brennan suggested

*Wide* dissent stated in passing that the defendants had contact with the forum.<sup>208</sup> But most of his dissent focused on modern commerce and on the minimal burden on the defendants. For him, a court had to balance all of the various factors identified in *McGee*.<sup>209</sup>

The Court did not always adhere to the majority's insistence that contacts had to come about through the defendant's activity purposefully directed at the forum, as insisted upon in Justice White's majority opinion in *World-Wide*. For example, in an opinion that at best can be described as opaque, *Calder v. Jones* stated in broad terms that a writer and editor for the *National Inquirer* were subject to jurisdiction in California because they knew that their conduct would have an effect in the forum state.<sup>210</sup> Other parts of the opinion insisted that the defendants targeted the forum state.<sup>211</sup> Without explanation, the unanimous opinion cited *World-Wide* as support for its discussion of the "effects" felt in the forum state.<sup>212</sup>

*World-Wide* signaled a narrower view of personal jurisdiction than the view of many lower courts<sup>213</sup> and Justice Brennan.<sup>214</sup> Even without an explanation for the necessity of contacts with the forum, *World-Wide* was in place. A court could not merely ask whether the assertion of jurisdiction was too burdensome to deprive a defendant of an opportunity to defend;<sup>215</sup> it had to find some threshold of contacts with the forum state.<sup>216</sup> And as discussed above, taking the requirement of purposeful activity directed at the forum as the necessary minimum could significantly limit the jurisdictional reach of state courts.<sup>217</sup>

Not surprisingly, *World-Wide* created uncertainty for lower courts.<sup>218</sup> In a passing reference to *Gray*, Justice White seemingly approved its result.<sup>219</sup> The facts before the Court were distinguishable because the stream of

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that upon a lower showing of minimum contacts, i.e., not purposeful activity, jurisdiction might be proper when the fairness factors weighed heavily in favor the forum. *Id.* at 485-86.

<sup>208</sup> *World-Wide*, 444 U.S. at 304 (Brennan, J., dissenting).

<sup>209</sup> *Id.* at 303 (Brennan, J., dissenting).

<sup>210</sup> *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

<sup>211</sup> *Id.* at 789.

<sup>212</sup> *Id.*

<sup>213</sup> Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 264-73 (1989) (detailing the limiting effect *World-Wide* had on lower courts' stream of commerce analysis as opposed to the expansive analysis followed after *Gray*).

<sup>214</sup> *World-Wide*, 444 U.S. at 300 (Brennan, J., dissenting).

<sup>215</sup> *Id.* at 294 (majority opinion).

<sup>216</sup> *Id.*

<sup>217</sup> *See supra* pp. 230-232.

<sup>218</sup> *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 110 (1987) (O'Connor, J., concurring).

<sup>219</sup> *World-Wide*, 444 U.S. at 298.

commerce ended in New York when the ultimate consumer purchased the vehicle. But applied literally, the Court's test suggested that in a case like *Gray*, a component-parts manufacturer like Titan Valve was not subject to jurisdiction because it did not ship its product to or direct other purposeful activity to the forum state.

As a result of the division among lower courts, the Court granted certiorari to resolve that issue in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*.<sup>220</sup> There, the plaintiff and his wife were involved in an accident when the tire on his motorcycle deflated.<sup>221</sup> The plaintiff was injured and his wife died.<sup>222</sup> He sued a Taiwanese company that manufactured the tire.<sup>223</sup> The Taiwanese company filed a third party complaint against Asahi, thought to be the manufacturer of the valve stem.<sup>224</sup> The original plaintiff settled his case.<sup>225</sup> The jurisdictional issue arose between the original defendant and the third-party defendant.<sup>226</sup>

The Court was unanimous in finding that California could not assert jurisdiction over Asahi.<sup>227</sup> Eight Justices agreed that the assertion of jurisdiction was unreasonable.<sup>228</sup> They focused on the lack of any interest that California had in the litigation, the lack of any special need that the original defendant had in having the dispute resolved in California, and on the significant burden on Asahi in defending the case in California.<sup>229</sup> However, eight Justices believed that the threshold question was the sufficiency of contacts with the forum.<sup>230</sup> Justice Stevens concurred in the result and believed that the case should be resolved by reference only to the reasonableness analysis.<sup>231</sup>

Because the remaining eight Justices were equally divided on the sufficiency of the contacts, Justice Stevens, no doubt pressured by his fellow Justices, addressed the sufficiency of the contacts.<sup>232</sup> Justice O'Connor, writing for four Justices, held that contacts that come about through operation of the stream of commerce without more are insufficient to satisfy

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<sup>220</sup> *Asahi*, 480 U.S. at 108 (majority opinion).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 106.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 105.

<sup>228</sup> *Id.* at 114 (majority opinion).

<sup>229</sup> *Id.* at 114-15.

<sup>230</sup> *Id.* at 112-13 (O'Connor, J., concurring).

<sup>231</sup> *Id.* at 121 (Stevens, J., concurring).

<sup>232</sup> *Id.* at 122.

the contacts part of the Court's test.<sup>233</sup> Awareness that the product would end up in the forum was not enough.<sup>234</sup> Here was *Hanson* coming back to roost.<sup>235</sup> Justice Brennan, also writing for four Justices, found the contacts sufficient and would so hold as long as the product arrived in the forum state through the stream of commerce.<sup>236</sup>

Justice Stevens would have found that the contacts in the case before the Court were sufficient.<sup>237</sup> While more tentative than Justice Brennan, he stated that in the case before the Court, the contacts were sufficient in light of the volume, value and hazard of the product placed in the stream of commerce.<sup>238</sup>

*Asahi* seemed to resolve little. Although some lower courts relied on Justice O'Connor's opinion,<sup>239</sup> ignoring the fact that her contacts analysis had only four votes, one could hardly state with much confidence what the law was. Five Justices endorsed the view that on the facts of the case before the Court, the contacts would have been sufficient.<sup>240</sup> But line drawing based on Justice Stevens' opinion was speculative at best.

As bad as was the Court's division in *Asahi* it got worse in the Court's last foray into personal jurisdiction between 1990 and 2010. *Burnham v. Superior Court of California* was, according to all nine Justices, an extremely easy case.<sup>241</sup> Dennis Burnham's family moved to California, leaving him residing in New Jersey.<sup>242</sup> After a three-day visit to California, as he returned one of his children to his wife's home, Burnham was served in hand with a court summons and divorce petition.<sup>243</sup> At issue was the continued vitality of what remained of *Pennoyer*: was in-hand, in-state service of process sufficient to satisfy due process?<sup>244</sup> Speaking for four

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<sup>233</sup> *Id.* at 112 (O'Connor, J., concurring).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 109. *See also* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("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.").

<sup>236</sup> *Asahi*, 480 U.S. at 121 (1987) (Brennan, J., concurring).

<sup>237</sup> *Id.* at 122 (Stevens, J., concurring).

<sup>238</sup> *Id.*

<sup>239</sup> Levi McAllister, Comment, *Paddling the Stream of Commerce: The Supreme Court's Need to Cautiously Re-Examine One Aspect of Personal Jurisdiction, and the Judicial and Financial Consequences Resulting from Current Approaches*, 3 HIGH CT. Q. REV. 53, 57-58 (2007) (citing cases from the First, Sixth, and Fourth Circuits utilizing O'Connor's test).

<sup>240</sup> *Asahi*, 480 U.S. at 121 (Stevens, J., concurring).

<sup>241</sup> *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990).

<sup>242</sup> *Id.* at 607.

<sup>243</sup> *Id.* at 608.

<sup>244</sup> *Id.* at 610.

justices, Justice Scalia said yes.<sup>245</sup> He did so based on tradition; in fact, his opinion used the term “tradition” or “traditional” thirty-two times.<sup>246</sup> Despite the agreement that the result was easy, Justice Scalia spent considerable time attacking the soundness of Justice Brennan’s reasoning in his concurring opinion.<sup>247</sup>

Also writing for four Justices, Justice Brennan, relying upon dicta from *Shaffer*, insisted that all assertions of jurisdiction must satisfy due process.<sup>248</sup> He found that the defendant’s contacts were sufficient to make the assertion of jurisdiction reasonable.<sup>249</sup> He left open whether one’s contact with the forum may be too transient to support jurisdiction even if the defendant was served in hand.<sup>250</sup>

Justice Stevens’ concurring opinion in *Asahi* offered some limited guidance to lower courts. His brief concurring opinion in *Burnham* offered none at all.<sup>251</sup>

*Asahi* and *Burnham* demonstrated the deep divisions within the Court. In both cases, the Court squandered the opportunity to offer much guidance to lower courts because of the split in the Court. Some have speculated with good reason that the Court did not grant certiorari in a personal jurisdiction case until Justice Stevens retired.<sup>252</sup>

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<sup>245</sup> *Id.* at 607.

<sup>246</sup> *Id.* at 604.

<sup>247</sup> *Id.* at 622-28.

<sup>248</sup> *Id.* at 628-40 (Brennan, J., concurring).

<sup>249</sup> *Id.* at 637-38 (Brennan, J., concurring).

<sup>250</sup> *Id.* at 638-39 (Brennan, J., concurring).

<sup>251</sup> *Id.* at 640 (Stevens, J., concurring). Cases that would force a court to resolve differences between the different opinions in *Burnham* are unlikely to arise outside of law school classrooms. For example, one can envision a case where a defendant’s presence in-state is so transient that Justice Brennan would have found that the assertion of jurisdiction violated due process. Sources like case books cite one over-flight case where a defendant was served when he was flying over the forum-state. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959). Such a case might have forced Justice White to decide whether a defendant not intentionally in the forum state was subject to jurisdiction based only on transient presence. *Burnham*, 495 U.S. at 640 (Stevens, J., concurring). But a look at cases citing *Burnham* suggests that most cases of transient presence raised a different issue: was the defendant voluntarily in the state when he was served? *See, e.g.*, *Rutherford v. Rutherford*, 193 Ariz. 173 (Ariz. Ct. App. 1998) (finding a father was voluntarily in the state when visiting his son); *Santa Escolastica, Inc. v. Pavlovsky*, 736 F. Supp. 2d 1077 (E.D. Ky. 2010) (holding that an Argentine citizen was properly served and subject to personal jurisdiction in Kentucky because he was voluntarily in the state on business). Most law school hypotheticals in which a defendant is in state briefly but voluntarily are unrealistic because a plaintiff is highly unlikely to be able to anticipate the defendant’s brief stay in state without inducing the defendant to come into the state (and thereby, implicating the voluntariness question).

<sup>252</sup> Citron, *The Last Common Law Justice*, *supra* note 4, at 469 (“Despite — or more likely because of — his refusal to provide a fifth vote to any opinion in *Asahi* or *Burnham*, the

## 2. General Jurisdiction

The Court also took a begrudging view of general jurisdiction during the 1980s. Plaintiffs in *Helicopteros Nacionales de Colombia, S.A. v. Hall* were the representatives and survivors of four Americans who died in a helicopter crash in Peru.<sup>253</sup> They were employed by a Peruvian alter ego of an American company based in Texas.<sup>254</sup> The employer contracted with Helicopteros, a Colombian corporation, to provide transportation to the Peruvian worksite where the crash occurred.<sup>255</sup> Helicopteros' contacts with Texas, where the plaintiffs brought suit, were limited but meaningful.<sup>256</sup> The chief executive officer of the company negotiated the contract in Texas.<sup>257</sup> The company accepted payments drawn on a Texas bank.<sup>258</sup> More substantially, it sent personnel to Texas for training and, over a period spanning several years, it made substantial purchases of equipment there.<sup>259</sup>

The Court found that the contacts were not continuous and systematic.<sup>260</sup> The defendant did not maintain an office in Texas and it did not apply for a license to do business there.<sup>261</sup> In reliance on pre-*International Shoe* precedent, the Court observed that purchases and related trips to the forum do not constitute sufficient contacts with the forum.<sup>262</sup>

The opinion offered little guidance about where the line existed between the kinds of contacts in *Perkins* where the Court upheld jurisdiction and those in *Helicopteros*, where they were not.<sup>263</sup> But the Court did not limit general jurisdiction only to a corporation's principal place of business or state of incorporation.<sup>264</sup> It denied jurisdiction on facts where many lower courts would have granted jurisdiction.<sup>265</sup> Undoubtedly, many lower courts

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Supreme Court did not revisit the doctrinal disputes at issue in those cases until after Stevens retired.”).

<sup>253</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409-10 (1984).

<sup>254</sup> *Id.* at 410.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 411.

<sup>257</sup> *Id.* at 410-11.

<sup>258</sup> *Id.* at 411.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 416.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 417.

<sup>263</sup> Rhodes, *supra* note 54, at 816 (“Instead, there is a qualitative aspect to the analysis as well, requiring that the defendant’s forum contacts must be ‘thought so substantial and of such a nature’ to support the exercise of general jurisdiction. But a question left unanswered by both *Perkins* and *Helicopteros* is the type of forum activities that satisfy the qualitative aspect of this analysis.”).

<sup>264</sup> *Helicopteros*, 466 U.S. at 415-16.

<sup>265</sup> George, *supra* note 147, at 1112 (“[C]ourts have based the assertion of general

would have been influenced by the plaintiffs' need for a finding that Texas was a proper forum for suit because it was the only plausible venue within the United States.<sup>266</sup> The alternative was to file the action in a foreign country, which almost certainly would provide less favorable law and where fact-finders might not have been sympathetic to foreign nationals.<sup>267</sup>

One problem with the Court's general jurisdiction case law was the lack of an explanation of the underlying theory making general jurisdiction appropriate. As in *Perkins*, the Court was silent on the underlying theory for why general jurisdiction was appropriate.<sup>268</sup> The Court might have explained *Perkins* as a case of jurisdiction by necessity; if suit were not proper in Ohio, the plaintiff would have had no practical venue in which to bring suit.<sup>269</sup> But in neither *Perkins* nor *Helicopteros* did the Court attempt to explain *Perkins* on such a narrow ground.<sup>270</sup> As such, general jurisdiction would be a limited safety valve. But the Court has had opportunities to limit *Perkins* to its facts but has never done so. In addition, the Court did not discuss the relative convenience or burdens faced by the parties.<sup>271</sup> In both cases, the Court has

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jurisdiction on a history of regular business activities. An Illinois court in *Huffman v. Inland Oil & Transport Co.* considered the availability of jurisdiction in a suit brought by a Missouri resident against a Missouri corporation involving an injury that occurred in Alabama. Jurisdiction was found based on evidence that the defendant had regularly sailed its vessels on Illinois waters for a six-month period.”)

<sup>266</sup> Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 916 (1985) (“Among the facts that should have had bearing was that the alternative forum for the *Helicopteros* plaintiffs would not have been some other state. Helicol was amenable to suit in no state if not in Texas; the alternative would have been a foreign country.”).

<sup>267</sup> *Id.* at 933-34 (Discussing the difficulties presented by trying a tort case in a foreign country like Peru, including a lack of sympathy for claims of actual damages similar to those a tort plaintiff would claim in the United States, damages being awarded in local currencies, the unavailability of contingency fee arrangements, and the possibility of being required to pay the winning party's attorney's fees).

<sup>268</sup> *Helicopteros*, 466 U.S. 408; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). See also Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 641 (1988) (“As in *Perkins v. Benguet Consolidated Mining Co.*, the Court's general jurisdiction analysis consisted of a catalogue of the defendant's contacts with the forum, which culminated in a finding that they were insufficient to support general jurisdiction. The Court's rationale offered no new insight into general jurisdiction theory or the range of contacts that might support general jurisdiction. Instead, it merely found that Helicol's commercial contacts with the forum — although arguably ‘continuous,’ ‘systematic,’ and ‘substantial’ — could not support general jurisdiction.”).

<sup>269</sup> *Perkins*, 342 U.S. 437. See also, *Helicopteros*, 466 U.S. 408; Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 124 (2001) (“[T]he lack of any alternative forum might make *Perkins* a case of jurisdiction by necessity, rather than a clear example of contacts-based general jurisdiction.”).

<sup>270</sup> *Helicopteros*, 466 U.S. 408; *Perkins*, 342 U.S. 437.

<sup>271</sup> *Helicopteros*, 466 U.S. 408; *Perkins*, 342 U.S. 437.

focused on the continuous and systematic nature of the defendants' contacts with the forum: in *Perkins* they were substantial,<sup>272</sup> in *Helicopteros* they were not.<sup>273</sup> Left open was whether contacts alone — or contacts plus the additional fairness factors that developed in specific jurisdiction cases — applied to general jurisdiction analysis.<sup>274</sup>

Scholars have debated various rationales for general jurisdiction.<sup>275</sup> But even among scholars, no theory has emerged as a coherent explanation for general jurisdiction.<sup>276</sup> For example, Professor Twitchell identified the origins of general jurisdiction in history when jurisdiction was based on sovereign power, consent or allegiance.<sup>277</sup> At that time, courts did not consider the relationship of the suit to the defendant's conduct in the forum.<sup>278</sup> Thus, in the pre-*International Shoe* era, general jurisdiction may have been an important doctrine to assure a plaintiff a forum against a corporation in a jurisdiction other than the corporation's state of incorporation.<sup>279</sup> But with the expansion of specific jurisdiction in the modern era, according to Professor Twitchell, the need for general jurisdiction has diminished.<sup>280</sup> She argued that it should be reserved for "its most essential function: providing one forum where a defendant may always be sued."<sup>281</sup> Twitchell argued in favor of retention of general jurisdiction even with the modern expansion of specific jurisdiction. But she urged a

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<sup>272</sup> *Perkins*, 342 U.S. at 447.

<sup>273</sup> *Helicopteros*, 466 U.S. at 418-19.

<sup>274</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 765-66 (2014) (Sotomayor, J., dissenting) ("As the majority points out, all of the cases in which we have applied the reasonableness prong have involved specific as opposed to general jurisdiction. Whether the reasonableness prong should apply in the general jurisdiction context is therefore a question we have never decided, and it is one on which I can appreciate the arguments on both sides.").

<sup>275</sup> See generally Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549 (2012) (discussing general jurisdiction as providing a gap filling function); Brilmayer, Haverkamp & Logan, *supra* note 46 (identifying four justifications for general jurisdiction; convenience for the defendant, convenience for the plaintiff, to ensure the power of states, and the quid pro quo theory of general jurisdiction); Cornett & Hoffheimer, *supra* note 9 (arguing that general jurisdiction gives traditional power to the states to require non-resident corporations to appear in their courts); Twitchell, *supra* note 268 (arguing that general jurisdiction should be limited to its essential function of ensuring that there is at least one location where a defendant can be sued).

<sup>276</sup> Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1012 (2012) ("The Court rarely has addressed the particular policies underlying general jurisdiction, and this silence has caused academic commentators and courts to propose various theories and applications of general jurisdiction.").

<sup>277</sup> Twitchell, *supra* note 268, at 614.

<sup>278</sup> *Id.* at 621.

<sup>279</sup> *Id.* at 622, 669.

<sup>280</sup> *Id.* at 622-30.

<sup>281</sup> *Id.* at 667.

much narrower view of its availability, basically to where it had its principal place of business or state of incorporation.<sup>282</sup> Her test would provide predictability.<sup>283</sup>

Professor Lea Brilmayer identified four justifications for general jurisdiction.<sup>284</sup> The first was convenience for the defendant.<sup>285</sup> The rationale parallels the Court's holding that a natural person's state of residence is a proper forum.<sup>286</sup> A second justification is convenience to the plaintiff.<sup>287</sup> Third is, on the basis of power, a state must be able to "compel the appearance of defendants"<sup>288</sup> in order to adjudicate the rights of a party. This essentially equates to the state border concept of *Pennoyer*.<sup>289</sup> Critical of the first three justifications, Professor Brilmayer found the "most satisfactory basis" for general jurisdiction to be the quid pro quo theory between a state and its domiciliaries.<sup>290</sup> Having sufficient contacts with the forum state gives the defendant a stake in the political process: "the basic inquiry must be whether the defendant's level of activity rises to the level of activity of an insider, so that relegating the defendant to the political processes is fair."<sup>291</sup> Although she wrote about general jurisdiction long before recent Court cases extending the right of corporations to give political contributions,<sup>292</sup> her theory would seemingly have increasing relevance today. That would be so even though a corporation cannot vote. In addition to a corporation's power to influence politics through monetary contributions, the numerous employees living in the forum state vote and, presumably, represent the interests of their employer.<sup>293</sup>

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<sup>282</sup> *Id.* at 668-71.

<sup>283</sup> *Id.* at 669.

<sup>284</sup> Brilmayer, Haverkamp & Logan, *supra* note 46, at 730.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 730-31.

<sup>288</sup> *Id.* at 731.

<sup>289</sup> *Id.* at 731-32.

<sup>290</sup> *Id.* at 732-33.

<sup>291</sup> *Id.* at 742.

<sup>292</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

<sup>293</sup> See Brendan Fischer, *On NFIB Conference Call, Romney Urges Employers to Tell Employees How to Vote, Just Like the Kochs*, COMMON DREAMS (Oct. 18, 2012), <http://www.commondreams.org/view/2012/10/18-5> (Presidential candidate Mitt Romney encouraged business owners to tell their employees how to vote: "I hope you make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections. And whether you agree with me or you agree with President Obama, or whatever your political view, I hope — I hope you pass those along to your employees. Nothing illegal about you talking to your employees about what you believe is best for the business, because I think that will figure into their election decision,

Professor Brilmayer's approach would be more consonant with more liberal theories of general jurisdiction.<sup>294</sup> For example, the presence of many Walmart stores in a state would provide Wal-Mart Stores, Inc. with political clout and should therefore justify the assertion of jurisdiction even in cases unrelated to the forum contacts.<sup>295</sup> Limiting general jurisdiction to the state of incorporation and principal place of business creates greater certainty but ignores the fact that a corporation may gain extraordinary benefits from the forum state even if that is not its principal place of business.<sup>296</sup>

Many lower courts adopted broad interpretations of general jurisdiction.<sup>297</sup> They often have done so to provide the plaintiff, often a state resident, a convenient place to sue. Some courts, for example, have held that general jurisdiction was proper only upon a showing of systematic and continuous contacts with the forum, allowing suit, for example, against large corporations in almost any state in the United States.<sup>298</sup> That view often allows creative forum-shopping to assure favorable law applies to the

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their voting decision and of course doing that with your family and your kids as well.”).

<sup>294</sup> Roy L. Brooks, *The Essential Purpose and Analytical Structure of Personal Jurisdiction Law*, 27 IND. L. REV. 361, 375 (1993). Others are comfortable with a more liberal application of the doctrine. See Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) (positing that general jurisdiction exists for companies and corporations that have a large presence in a state).

<sup>295</sup> Brilmayer, Haverkamp & Logan, *supra* note 46, at 742 (indicating that the systematic activity of a defendant within a forum, “such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an ‘insider’ that he may safely be relegated to the State’s political process.”).

<sup>296</sup> In the 2013 fiscal year, Walmart U.S. net sales reached \$274.5 billion. *Walmart 2013 Annual Report 5*, [http://c46b2bcc0db5865f5a76-91c2ff8eba65983a1c33d367b8503d02.r78.cf2.rackcdn.com/88/2d/4fdf67184a359fdef07b1c3f4732/2013-annual-report-for-walmart-stores-inc\\_130221024708579502.pdf](http://c46b2bcc0db5865f5a76-91c2ff8eba65983a1c33d367b8503d02.r78.cf2.rackcdn.com/88/2d/4fdf67184a359fdef07b1c3f4732/2013-annual-report-for-walmart-stores-inc_130221024708579502.pdf) (last visited Feb. 7, 2015). Walmart operated 4005 Walmart stores in the United States in fiscal 2013, with 217 of those stores in California. *Id.* at 59. The estimated average net sales per store was \$70 million and the net sales in California alone is estimated at \$15,190,000. *Id.* at 5, 59.

<sup>297</sup> Rhodes, *supra* note 54, at 830-55 (detailing some of the many approaches lower courts have taken to general jurisdiction including the Ipse Dixit approach, precedential comparisons, factor analysis, central business activities, and quid pro quo).

<sup>298</sup> *Id.* at 830 nn.118-21 (Citing cases in Connecticut, Florida, Indiana, and Texas where the courts simply concluded there was jurisdiction based on a limited showing of continuous and systematic contacts); see, e.g., *Atlanta Auto Auction, Inc. v. G & G Auto Sales, Inc.*, 512 So. 2d 1334, 1334-36 (Ala. 1987) (holding that nonresident corporation’s repeated wholesale auction sales of automobiles to dealers in Alabama, including the automobile at issue in the underlying lawsuit, was purposefully directed forum activity that constituted a “‘continuous and systematic’ course of conduct in Alabama” supporting jurisdiction); *Waters v. Deutz Corp.*, 479 A.2d 273, 274-76 (Del. 1984) (holding German corporation was “doing business” in Delaware by shipping its manufactured tractors, including the tractor injuring the Delaware plaintiff, through its wholly owned American subsidiary into Delaware).

plaintiff's suit.<sup>299</sup> And while courts may be influenced in how broadly they read general jurisdiction precedent by their views of forum-shopping,<sup>300</sup> little in the theoretical underpinnings of general jurisdiction explains why a plaintiff's successful forum-shopping is relevant to the breadth of general jurisdiction.

### C. Summary of the 1980s

The 1980s did more than demonstrate deep divisions within the Court.<sup>301</sup> In some instances, like *Calder v. Jones*, the Court upheld jurisdiction.<sup>302</sup> But some ominous themes emerged.

Despite upholding jurisdiction in *Burnham*, the conservatives on the Court demonstrated a desire to limit jurisdiction in other cases.<sup>303</sup> The notion that jurisdiction turned on convenience was at risk. Instead, in reliance on *Hanson*, the conservative wing of the Court was trying to develop a narrow theory of jurisdiction.<sup>304</sup>

Entering the 1980s, one could have argued that *McGee's* due process

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<sup>299</sup> Even though the defendant did not raise a personal jurisdictional challenge, the facts of *Ferens v. John Deere* suggest the forum-shopping potential of the liberal view of general jurisdiction. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). There, the plaintiff was injured when he was using a John Deere combine in Pennsylvania where he lived. *Id.* at 519. He waited to contact a lawyer until after the statute of limitations had run on his tort claim. *Court Reinstates Suit of Pa. Farmer*, Observer-Reporter (Washington, Pa.), Mar 6, 1990 at A-5. To revive the tort claim, the plaintiff's lawyer filed the action in Mississippi. *Ferens*, 494 U.S. at 519. Under Mississippi conflict of law rules, its longer statute of limitations applied to the plaintiff's tort claim. *Id.* at 519-20. The issue before the Court in *Ferens* was whether, when the plaintiff sought a transfer of venue to Pennsylvania, Mississippi's choice of law rules traveled with the suit. *Id.* at 520. The Court held that they did. *Id.* at 532.

<sup>300</sup> See, e.g., Hoffheimer, *supra* note 275, at 609. ("The consensus of the Supreme Court in *Goodyear Dunlop Tires* conceals important areas of divergence with immediate practical consequences. On the one hand, the opinion can be read narrowly as affirming the exclusive classification of cases into specific and general jurisdiction and disallowing general jurisdiction over foreign manufacturers based solely on sporadic sales through intermediaries. On the other hand, it can be read broadly as effectively ending general jurisdiction over nonresident corporations by restricting general jurisdiction to corporations that incorporate under the laws of the state, maintain their principal place of business in the state, or have such a comparably close connection with the state so that they are 'at home' in the state.").

<sup>301</sup> See discussion *supra* Part III.b.

<sup>302</sup> See *supra* text accompanying note 211.

<sup>303</sup> See *supra* pp. 14-15.

<sup>304</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). In *World-Wide*, the Court found that the contacts part of the due process analysis was related to interstate federalism. *Id.* at 292. While it attempted to distance itself from the "shibboleth" of *Pennoyer* (the idea that the Fourteenth Amendment protected states' rights), the concept that state borders still matter is rooted in *Pennoyer's* reliance on principles of international law. See *id.* at 293-94; see also *Pennoyer v. Neff*, 95 U.S. 714, 729-30 (1878).

analysis was the dominant theme. At that time, procedural due process meant that a defendant could be hauled into court as long as the forum provided the defendant with adequate notice and an opportunity to be heard.<sup>305</sup> Consistent with *McGee*, a court needed to determine the extent of the burden on the defendant in light of other competing needs, including those of the plaintiff.<sup>306</sup> The ease of travel and communications made state borders less important in a modern society.<sup>307</sup> As argued above, that is a coherent theory of the relevance of due process to the jurisdictional analysis.<sup>308</sup>

But *Pennoyer*'s questionable theory of federalism still lurked in the Supreme Court at the end of the 1980s.<sup>309</sup> That is, state borders still mattered — even though the Court failed to offer a compelling explanation for why that was so.<sup>310</sup> Further, *Hanson*'s flawed analysis was now front and center.<sup>311</sup> A result-oriented decision, motivated by an understandable desire to avoid a gross injustice, now reemerged as important precedent.<sup>312</sup> Lost in its reemergence were the facts that it was not only result-oriented but it was also decided by a slim majority.<sup>313</sup> Further, the Court now cited its approach to the contacts part of the due process test as a threshold question to the assessment of reasonableness, despite the fact that *Hanson* did not engage in such a two-step analysis.<sup>314</sup> The Court ignored ways in which *Hanson* could have been narrowed.<sup>315</sup>

Finally, although it occurred in the 1970s and not the 1980s, the Court's new in rem jurisprudence — conflating in rem and in personam due process analysis — would have unexpected ramifications in the future.<sup>316</sup> At the

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<sup>305</sup> See discussion *supra* Part II.d.

<sup>306</sup> See *supra* p. 217.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> See *supra* pp. 231.

<sup>310</sup> *Id.*

<sup>311</sup> The Court could have focused on *Hanson*'s conclusion that the defendant's contacts with Florida were unrelated to the claim. It might have emphasized the unusual nature of the facts, suggesting that *Hanson* should not be the major premise of due process analysis, but instead, that *McGee* should have. Instead, *World-Wide* was a full-throated endorsement of a broad reading of *Hanson*. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980).

<sup>312</sup> See *supra* pp. 219-222.

<sup>313</sup> See generally *World-Wide*, 444 U.S. 286 (omitting any discussion of the flaws in *Hanson*).

<sup>314</sup> See generally *Hanson v. Denckla*, 357 U.S. 235 (1958) (finding no contacts despite continued payments and correspondence between the decedent and the Delaware trust company, the Court did not analyze the reasonableness of allowing jurisdiction).

<sup>315</sup> See generally *World-Wide*, 444 U.S. 286 (applying *Hanson* without discussion of limiting it to its facts because it was a result-oriented decision).

<sup>316</sup> See generally *Shaffer v. Heitner*, 433 U.S. 186 (1977) (applying the *International Shoe*

time, *Helicopteros*' implications may not have been obvious. On its face, the decision indicated that purchases, even if substantial, did not amount to continuous and systematic contacts that could justify an assertion of general jurisdiction.<sup>317</sup> But as Professors Cornett and Hoffheimer have argued, narrowing in rem jurisdiction made more important the use of general jurisdiction.<sup>318</sup> Thus, prior to *Shaffer*, plaintiffs could have commenced suit by attaching property even if it had no relationship to the underlying dispute.<sup>319</sup> After *Shaffer*, plaintiffs gained little by attaching property — without satisfying *International Shoe*, the assertion of in rem jurisdiction violated due process. In such cases, plaintiffs might need to rely on general jurisdiction; but retrenchment in general jurisdiction meant that those plaintiffs would no longer be able to file suit in a plaintiff-friendly venue. Again, as Professor Hoffheimer has pointed out, as *Shaffer*'s author, Justice Marshall would no doubt be surprised at the effect of the Court's decision.<sup>320</sup> But the full effects of *Shaffer* are coming into focus only now. That is part of the rest of the story.<sup>321</sup>

#### IV. THE REEMERGENCE OF PERSONAL JURISDICTION

##### A. Modern Developments

Between 1990 and 2010, a lot changed in the world. The Internet created a globalized market and made information available around the

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minimum contacts test to in rem cases as well as in personam cases).

<sup>317</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

<sup>318</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 8) (“After in rem actions became subordinated to due process limits governing actions in personam, courts began to address substantive limits on general jurisdiction irrespective of the form of litigation. The Court held in *Shaffer v. Heitner* that quasi in rem jurisdiction violated due process in the absence of minimum contacts. Justice Marshall required broadly that ‘all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.’ But no one at that time thought general jurisdiction was limited to a corporation’s base of operations, and Justice Marshall would have been astonished to learn that his words would one day have the effect of eliminating state power over large corporations active in states where they were routinely required to answer lawsuits in 1977.” (quoting *Shaffer*, 433 U.S. at 212)).

<sup>319</sup> *See supra* pp. 224.

<sup>320</sup> Hoffheimer, *supra* note 275, at 549 (“This holding did not alter the reach of in rem jurisdiction when the legal claims related to attached property, but it meant that so-called quasi in rem jurisdiction was no longer permissible when the defendant had no ties in the state and when the claims in litigation were unrelated to the property that had been seized to secure jurisdiction. In other words, *Shaffer* restricted the permissible scope of quasi in rem jurisdiction to the scope of specific jurisdiction.”).

<sup>321</sup> *See infra* text accompanying note 606.

world in an instant.<sup>322</sup> Trade agreements opened borders around the world, making international transactions increasingly common.<sup>323</sup> Without Supreme Court guidance, lower courts had to make do with the Court's earlier divided precedent.<sup>324</sup>

Many courts have addressed, with differing results, the way in which contacts analysis works in Internet cases.<sup>325</sup> Lower courts faced cases where defendants caused harm by circulating false information over the Internet,<sup>326</sup>

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<sup>322</sup> See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring) (“[T]here have been many recent changes in commerce and communication, many of which are not anticipated by our precedents.”); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) (calling the Internet and its impact on commerce “perhaps the latest and greatest . . . historical, globe-shrinking trend”); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (stating that the Internet “makes it possible to conduct business throughout the world entirely from a desktop”).

<sup>323</sup> Veronica Hernandez, Comment, *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011): *Personal Jurisdiction and the Stream of Commerce Doctrine*, 44 U. Tol. L. Rev. 431, 433 (noting that “the globalization of commerce over the past 50 years presents a dramatic shift in American society” and that “the abandonment of a manufacturing-based economy in the late twentieth century has resulted in the explosive growth in foreign goods, which necessitates . . . enabl[ing] states to provide redress to their citizens for injuries caused by defective goods manufactured abroad”); see also THOMAS A. DICKERSON, *LITIGATING INTERNATIONAL TORTS IN U.S. COURTS* § 1:1 (2013) (“As the world’s economy becomes more integrated, products and services move with increasing frequency across national borders . . . American courts and lawyers wrestle with . . . [p]roviding redress when foreign products cause harm in the U.S.”). These changes came at the same time as tort reform and other changes like statutes of repose that made choice of forum more crucial than ever. See HENRY COHEN, CONG. RESEARCH SERV., RL32560, *SELECTED PRODUCTS LIABILITY ISSUES: A FIFTY-STATE SURVEY 20-23* (2005), available at <https://stuff.mit.edu/afs/sipb.mit.edu/contrib/wikileaks-crs/wikileaks-crs-reports/RL32560.pdf> (listing statutes of repose in all fifty state); see also *The Effects of Tort Reform: Evidence from the States*, Congress of the United States Congressional Budget Office, (June 2004), available at [http://www.cbo.gov/sites/default/files/report\\_2.pdf](http://www.cbo.gov/sites/default/files/report_2.pdf) (discussing the prevalence of tort reform since the mid-1980s).

<sup>324</sup> See, e.g., *Zippo*, 952 F. Supp. 1119 (establishing the “sliding scale” Internet jurisdiction test that considers the level of interactivity or passivity of a defendant’s website rather than purposeful availment); *CompuServe*, 89 F.3d 1257 (holding that the defendant purposefully availed himself of the privilege of doing business in the forum state, despite never having traveled there, by creating an ongoing marketing relationship with the plaintiff corporation headquartered in the forum); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (surveying approaches adopted by other courts, including the *Zippo* test, as well as tests that examine the number of “hits” a website receives and other evidence that the Internet activity was directed at the forum state).

<sup>325</sup> See Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1267 (2011) (noting that lower courts have “divided sharply” regarding personal jurisdiction in Internet cases).

<sup>326</sup> See, e.g., *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (holding that an allegedly defamatory article about the plaintiff posted online by the defendant did not constitute a substantial enough contact to establish personal jurisdiction, since the article targeted the plaintiff and not the forum).

engaging in deceptive business practices, or violating the intellectual property rights of in-state citizens from remote locations.<sup>327</sup> In response, many courts extended their state's jurisdictional reach.<sup>328</sup> Often, they ignored the teachings of cases like *World-Wide* and *Hanson* that required a demonstration of purposeful activity directed at the forum.<sup>329</sup> Instead, they relied on *Calder*, which required knowledge that the harm would take place in the forum.<sup>330</sup>

After *Asahi*, courts continued to struggle with the analysis when a product was swept into the forum via the stream of commerce.<sup>331</sup> But many courts relied on the stream of commerce theory to extend jurisdiction.<sup>332</sup> They did so by applying some mix of Justice Brennan's liberal test and Justice Stevens' narrower test in *Asahi* or by relying on dicta from *World-Wide* in which Justice White cited *Gray* with approval.<sup>333</sup> Again, that seemed consonant with the two themes developed above: modern commerce has increased instances in which out-of-state companies may create in-state harm, and a court can uphold jurisdiction as long as the defendant has a reasonable opportunity to be heard.<sup>334</sup> That is, due process is not offended if the burden on the defendant is not overwhelming.<sup>335</sup>

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<sup>327</sup> See, e.g., *Fenn v. Mleads Enterprises, Inc.*, 137 P.3d 706 (Utah 2006) (adopting a version of the *Zippo* "sliding scale" test, but holding that a single unsolicited e-mail advertisement sent to the forum state by the defendant was not a significant enough contact to render jurisdiction proper); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (holding that defendant's mere creation of a website in another state, although viewable in the forum state, did not render defendant amenable to suit in the forum state for allegedly infringing on plaintiff's trademark).

<sup>328</sup> See, e.g., *Inset Systems, Inc., v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (exercising jurisdiction over a defendant whose website *could have* been viewed in the forum state, whether or not it actually was).

<sup>329</sup> See, e.g., *Verizon Online Services, Inc. v. Ralsky*, 203 F. Supp. 2d 601, 618-19 (E.D. Va. 2002) (finding jurisdiction proper where defendants allegedly sent millions of e-mails through plaintiff's servers in the forum state, even though defendants did not know where plaintiff's servers were located. "By allegedly transmitting millions of e-mails to make money at Verizon's expense, knowing or reasonably knowing that such conduct would harm Verizon's e-mail servers, Defendants should have expected to get dragged into court where their actions caused the greatest injury.").

<sup>330</sup> *Id.* at 614 ("In tort cases involving Web sites, some courts have . . . applied the 'effects test' set forth in *Calder*.").

<sup>331</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (acknowledging that lower courts were struggling with "decades-old questions left open in *Asahi*.").

<sup>332</sup> See *Hernandez*, *supra* note 323, at 438 ("The deep split and narrow holding in *Asahi* left state courts great latitude in finding minimum contacts through the stream-of-commerce theory when analyzing the contacts prong of the *World-Wide Volkswagen* test.").

<sup>333</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

<sup>334</sup> See *supra* pp. 217-218, 242.

<sup>335</sup> See *supra* pp. 217-218.

General jurisdiction remained an available option as well. Many courts took a liberal view of general jurisdiction.<sup>336</sup> For example, the Ninth Circuit found that jurisdiction over L.L. Bean was proper, despite the absence of any physical assets in the forum state.<sup>337</sup> Again, while not all courts joined the trend, many courts continued the trend towards extending the jurisdictional reach of their courts. But as with the trend towards liberalization culminating in the 1970s, the Court seems to be in the process of a second retrenchment.

### *B. The Recent Cases: A Quick Overview*

With Justice Stevens' retirement, the Court quickly granted certiorari in two personal jurisdiction cases.<sup>338</sup> Three years later, the Court again granted the writ in two more personal jurisdiction cases.<sup>339</sup> This section provides an overview of those decisions.

#### 1. Easy Cases Make Bad Law: General Jurisdiction

##### i. Goodyear Dunlop Tires Operations, S.A. v. Brown

The parents of two boys who died in a bus accident near Paris sued Goodyear USA and three foreign subsidiaries in state court in North Carolina.<sup>340</sup> Goodyear USA, which had plants in North Carolina, did not contest the court's jurisdiction but the three foreign companies did.<sup>341</sup>

The state court of appeals recognized that the claim did not arise out of any contact with the forum because the accident took place in France and the tire that caused the wreck was manufactured abroad.<sup>342</sup> But it found that some tires manufactured by the foreign subsidiaries arrived in North

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<sup>336</sup> See RICHARD D. FREER & WENDY C. PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 102 (6th ed. 2012) (discussing cases in which courts exercised general jurisdiction based on limited contacts with the forum state).

<sup>337</sup> Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), *vacated en banc*, 366 F.3d 789 (9th Cir. 2004).

<sup>338</sup> Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011); J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2796 (2011). Justice Stevens had been viewed as having prevented the Court from gathering a majority of votes previously. See, e.g., Citron, *The Case of the Retired Justice*, *supra* note 4, at 644 ("After [Justice Stevens] retired in 2010 and was replaced by Justice Elena Kagan, the Court apparently saw an opportunity to resolve the conflict . . . Stevens could have determined the legal standard in Asahi by voting with either Justice Brennan or Justice O'Connor.").

<sup>339</sup> Walden v. Fiore, 134 S. Ct. 1115 (2014); Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

<sup>340</sup> *Goodyear*, 131 S. Ct. at 2850.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 2851 (citing Brown v. Meter, 199 N.C. App. 50, 57-58 (2009)).

Carolina through the stream of commerce.<sup>343</sup> The contacts that resulted were sufficient to satisfy due process.<sup>344</sup> A unanimous Supreme Court disagreed.<sup>345</sup>

As observed by the Court, it has seldom addressed general jurisdiction.<sup>346</sup> But it did little to elucidate its test in this case.<sup>347</sup> The primary fault of the lower court seemed to be the reliance on the stream of commerce theory in a general jurisdiction case. As the Court put it, “The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction.”<sup>348</sup> The primary discussion was short, consisting of a description of its holdings in *Perkins* and *Helicopteros* and the conclusion that the defendants’ contacts with North Carolina fell short of the line because, as in *Helicopteros*, they were not continuous and systematic.<sup>349</sup> Had the Court ended there, the decision would have presaged no radical change in the law.<sup>350</sup>

But Justice Ginsberg went further. She quoted Professor Brilmayer’s view that general jurisdiction over a corporation is akin to finding domicile for an individual — a place where the corporation is “fairly regarded as at home.”<sup>351</sup> In a parenthetical, she indicated that the “paradigm” where a corporation would be at home is in the state of incorporation or in the state where it has its principal place of business.<sup>352</sup> In concluding, she observed that the foreign subsidiaries “are in no sense at home in North Carolina.”<sup>353</sup>

The insertion of “at home” into the opinion divided commentators.<sup>354</sup>

<sup>343</sup> *Id.* (citing *Brown v. Meter*, 199 N.C. App. 50, 57-58 (2009)).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* See also Hoffheimer, *supra* note 275 (discussing the Court’s holding and its potential implications).

<sup>346</sup> *Goodyear*, 131 S. Ct. at 2854.

<sup>347</sup> Hoffheimer, *supra* note 275, at 551 (noting that *Goodyear* failed to achieve its goal of providing guidance to lower courts, since “it can be read in radically different ways.”).

<sup>348</sup> *Goodyear*, 131 S. Ct. at 2855.

<sup>349</sup> *Id.* at 2856-57.

<sup>350</sup> See Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 527-28 (2012) (noting that *Goodyear* could have been easily resolved under existing precedent, and that the Court did not need to go further).

<sup>351</sup> *Goodyear*, 131 S. Ct. at 2853-54.

<sup>352</sup> *Id.* at 2854.

<sup>353</sup> *Id.* at 2857.

<sup>354</sup> See, e.g., Hoffheimer, *supra* note 275, at 551-52 (observing that *Goodyear* can be interpreted as “approv[ing] general jurisdiction in multiple states where a foreign corporation has strong permanent connections,” while “equally support[ing] a restrictive approach that limits general jurisdiction to the place of incorporation and the . . . Principal place of business”); Stein, *supra* note 350, at 547 (arguing that general jurisdiction over a corporation should not necessarily be limited to its principal place of business, but also in any jurisdiction where it is sufficiently “invested” and has “insider status”).

Some saw the opinion as limiting general jurisdiction to those two venues.<sup>355</sup> Others pointed out that, had the Court intended to limit general jurisdiction in that manner, it could have stated such a rule unequivocally.<sup>356</sup> As stated, those two venues were “paradigms,” not exclusive places where general jurisdiction would be permitted.<sup>357</sup>

Justice Ginsburg made no effort to explain the theoretical underpinnings of general jurisdiction.<sup>358</sup> Her analogy to domicile is intriguing, but not particularly helpful. *Pennoyer* recognized domicile as a basis of the assertion of jurisdiction.<sup>359</sup> At that time, the explanation would have been that a person within the state’s borders is within the court’s exclusive jurisdiction, just as was property.<sup>360</sup> Once the Court moved away from formalism, the Court explained that a person’s domicile is a suitable place for suit against the defendant because he or she derives benefits from residing in the state.<sup>361</sup> In *Burnham*, when the Court returned to the rule that a non-resident is subject to jurisdiction in a state when served in hand, in state, Justice Scalia relied on tradition as a sufficient justification for adherence to the rule.<sup>362</sup> Even Justice Brennan’s concurring opinion indicated that, in an expanded *International Shoe* analysis, the historic rule upholding in-hand service put a defendant on notice that he was subject to a court’s jurisdiction.<sup>363</sup>

As a matter of tradition, state of incorporation was a proper place to sue a corporation by analogy to domicile.<sup>364</sup> The Court needed some place where

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<sup>355</sup> See James R. Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969 (2012) (arguing that *Goodyear* clarifies and limits general jurisdiction to where a defendant is “at home” only).

<sup>356</sup> See Hoffheimer, *supra* note 275, at 590-92.

<sup>357</sup> *Goodyear*, 131 S. Ct. at 2854; *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

<sup>358</sup> Hoffheimer, *supra* note 275, at 551 (“The opinion avoided dissension by omitting any discussion of the theoretical bases of jurisdiction and by withholding any examples of ‘substantial’ or ‘systematic and continuous’ activity.”).

<sup>359</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1878).

<sup>360</sup> *Id.* at 722 (“[E]very State possesses exclusive jurisdiction and sovereignty over person and property within its territory.”).

<sup>361</sup> *Miliken v. Meyer*, 311 U.S. 457, 463 (1940) (“The state which accords [one of its citizens] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.”).

<sup>362</sup> *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 619 (1990) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”).

<sup>363</sup> *Id.* at 636 (Brennan, J., concurring) (“[O]ur common understanding now, fortified by a century of judicial practice, is that jurisdiction is often a function of geography. The transient rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process.”).

<sup>364</sup> *Pennoyer*, 95 U.S. at 735-36. See also FREER & PERDUE, *supra* note 336, at 125.

suit was proper and the state of incorporation was a fixed place, like one's domicile.<sup>365</sup> Later, when the Court shifted its focus to its benefits-burden analysis, one could argue that a corporation willingly affiliates with a state in which it incorporates.<sup>366</sup> Its board of directors makes a conscious choice almost certainly with an eye towards tax and liability issues.<sup>367</sup>

"Principal place of business" has a shorter history. In some pre-*International Shoe* cases, courts found personal jurisdiction proper in states where the corporation had its principal place of business.<sup>368</sup> But the case law did not equate general jurisdiction with the principal place of business.<sup>369</sup>

As indicated, an individual is subject to suit wherever she is domiciled because she has accepted benefits and protections of the law of that state.<sup>370</sup> She cannot complain that the suit did not arise out of any conduct in the forum. By analogy, a corporation that does a substantial amount of business in a particular state is certainly accepting benefits and protections of the state where a suit might be filed.<sup>371</sup> Further, given a host of decisions supporting jurisdiction based only on contacts,<sup>372</sup> a corporation cannot claim surprise when it is haled into court for conduct unrelated to forum conduct.<sup>373</sup>

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<sup>365</sup> Stein, *supra* note 350, at 547 ("[I]n the nineteenth century, [state of incorporation] was the only place that a corporation could be sued in personam insofar as its corporate status as a juridical person was only recognized in its state of incorporation.").

<sup>366</sup> See Brilmayer et al., *supra* note 46, at 733-34 ("[T]he corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state's substantive and procedural laws. Such a choice creates a unique relationship that justifies general jurisdiction over the corporation."); Stein, *supra* note 350, at 547 ("An entity's choice of incorporation in a particular state is entirely voluntary and involves continuing responsibility to and regulatory governance by the state.").

<sup>367</sup> See Cornett & Hoffheimer, *supra* note 9 (manuscript at 55) (noting that corporations often negotiate valuable tax benefits and other concessions from states in exchange for doing business there).

<sup>368</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930)).

<sup>369</sup> *Id.* at 317-19.

<sup>370</sup> *Id.* at 319. See also *supra* text accompanying note 53; *Miliken v. Meyer*, 311 U.S. 457, 463 (1940) ("The state which accords [one of its citizens] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); Brilmayer et al., *supra* note 46, at 732 ("Domicile creates a unique relationship between the domiciliary and the forum state, a relationship composed of the benefits provided to the domiciliary and the burdens imposed by the state in consideration for those benefits.").

<sup>371</sup> See Brilmayer et al., *supra* note 46, at 741 ("[T]he reciprocal benefits rationale obtains when the defendant carries out substantial activities, which implicate the police powers and public facilities of the state.").

<sup>372</sup> See Rhodes, *supra* note 54 (reviewing case law concerning jurisdiction based on defendants' contacts with the forum).

<sup>373</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311, n.18 (1980) (Brennan, J., dissenting), for a similar argument in Justice Brennan's dissent when he countered Justice White's argument that a defendant could not foresee being haled into court

Many lower courts did not pick up on a change in the rules governing general jurisdiction if the Court intended to make such a change. As two scholars found, courts were back to business as usual after *Goodyear*.<sup>374</sup> The reasons may be obvious; many courts favor a long jurisdictional reach to protect injured plaintiffs. But the Court was about to narrow general jurisdiction further.<sup>375</sup>

ii. Daimler AG v. Bauman

In 2004, twenty-three citizens of South American countries sued Daimler AG in a federal district court in California.<sup>376</sup> The complaint alleged that Daimler collaborated with the military dictatorship in Argentina between 1976 and 1983 during the “Dirty War.”<sup>377</sup> Specifically, the complaint alleged that the defendant was responsible for killing, torturing, and kidnapping the plaintiffs and members of their families.<sup>378</sup>

The defendant filed a motion to dismiss for lack of personal jurisdiction.<sup>379</sup> The plaintiffs argued that the defendant’s contacts with California were sufficient because of the extensive contacts of its subsidiary, Mercedes-Benz USA (MBUSA), which is incorporated in Delaware with its principal place of business in New Jersey.<sup>380</sup> MBUSA distributes the defendant’s vehicles to independent dealerships throughout the United States.<sup>381</sup>

The district court granted the defendant’s motion to dismiss for lack of personal jurisdiction.<sup>382</sup> After initially affirming the district court, the Ninth Circuit reconsidered its decision and reversed.<sup>383</sup> It concluded that MBUSA

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unless the defendant directed purposeful activity toward the forum-state. The majority’s argument was entirely circular because a party cannot foresee where it will have to answer a suit until the Supreme Court has resolved the question.

<sup>374</sup> See, e.g., J.B. ex rel. Benjamin v. Abbott Labs., Inc., No. 12-cv-385, 2013 WL 452807, at 3 (N.D. Ill. 2013) (holding that the Court in *Goodyear* “did not replace or redefine the well-established standard for establishing general jurisdiction”); see also Camilla Cohen, Comment, *Goodyear Dunlop’s Failed Attempt to Refine the Scope of General Jurisdiction*, 65 FLA. L. REV. 1405, 1414-15 (2013); Cornett & Hoffheimer, *supra* note 9 (manuscript at 3 n.14) (noting that “leading treatises assumed the law remained well settled even after [*Goodyear*]”).

<sup>375</sup> See discussion *infra* Part IV.b.ii.B. See also Cornett & Hoffheimer, *supra* note 9 (manuscript at 4).

<sup>376</sup> Daimler AG v. Bauman, 134 S. Ct. 746, 750 (2014).

<sup>377</sup> *Id.* at 750-51.

<sup>378</sup> *Id.* at 751.

<sup>379</sup> *Id.* at 751-52.

<sup>380</sup> *Id.* at 752.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 753

was the defendant's agent and attributed its forum contacts to the defendant.<sup>384</sup> The Ninth Circuit did not address *Goodyear*.<sup>385</sup>

The Supreme Court reversed.<sup>386</sup> The Court had at its disposal relatively narrow approaches that it could have used to decide the case before it. Apart from forum non-conveniens analysis,<sup>387</sup> the Court could have found simply that MBUSA's contacts were not attributable to the defendant and that the remaining contacts were insufficient.<sup>388</sup> It could also have concluded that, even if the contacts were continuous and systematic, the assertion of jurisdiction was otherwise unreasonable.<sup>389</sup> Instead, the Court went further.

Justice Ginsburg made several observations, suggesting other possible arguments that may surface in the future. For example, she observed that the defendant "failed to object to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA."<sup>390</sup> She also found that the Court did not have to decide on the standard to be used when a plaintiff seeks to impute contacts of a subsidiary to its parent corporation.<sup>391</sup> Thus, the Court did not reach the defendant's argument that the subsidiary's contacts were to be imputed to the parent company "only when the former is so dominated by the latter as to be its alter ego."<sup>392</sup> Instead, the Court rejected the Ninth Circuit's view because "[t]he Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were 'important' to [the defendant], as gauged by [the defendant's] hypothetical readiness to perform those services itself if MBUSA did not exist."<sup>393</sup> That proved too much.<sup>394</sup>

The Court assumed that MBUSA was "at home" in California and that

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<sup>384</sup> *Id.* at 753, 758-59.

<sup>385</sup> *Id.* at 753.

<sup>386</sup> *Id.* at 763.

<sup>387</sup> *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981); Cornett & Hoffheimer, *supra* note 9 (manuscript at 62-63) (observing the lack of plaintiff ties to the forum and the weak forum state interest in *Daimler*).

<sup>388</sup> *See Daimler*, 134 S. Ct. at 759-60 (declining to decide if the contacts of a subsidiary would confer jurisdiction on the parent).

<sup>389</sup> *Id.* at 764 (Sotomayor, J., dissenting) ("The Court can and should decide this case on the far simpler ground that, no matter how extensive *Daimler*'s contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct . . .").

<sup>390</sup> *Id.* at 758 (majority opinion).

<sup>391</sup> *Id.* at 760.

<sup>392</sup> *Id.* at 759.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 759-60 ("The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep even beyond the 'sprawling view of general jurisdiction' we rejected in *Goodyear*.").

its contacts were “imputable to Daimler.”<sup>395</sup> Even on the assumption that MBUSA’s contacts were imputable to the defendant, “Daimler’s slim contacts with the State hardly render it at home [in California].”<sup>396</sup> The analysis focused on *Goodyear*’s discussion of general jurisdiction.<sup>397</sup>

While “*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,” Justice Ginsburg found that the plaintiffs’ alternative reading of general jurisdiction swept too broadly.<sup>398</sup> According to her, the plaintiffs’ position would make a corporation subject to jurisdiction “in every State in which [it] ‘engages in a substantial, continuous, and systematic course of business.’”<sup>399</sup> Such a formulation — despite the view of many lower courts to the contrary — “is unacceptably grasping.”<sup>400</sup>

At that point in her opinion, Justice Ginsburg discussed an issue only hinted at in *Goodyear*. Recognizing that a corporation could have such extensive contacts with the forum to make it “at home” even if that state was not its state of incorporation or principal place of business, Justice Ginsburg found that was not plausible with regard to the defendant.<sup>401</sup> That was so because even if a corporation had substantial connections with the forum, “the same global reach would presumably be available in every other State in which MBUSA’s sales are sizeable.”<sup>402</sup> The explanation of that statement was placed in a footnote where she dropped a bombshell: the general jurisdiction inquiry does not “focu[s] solely on the magnitude of the defendant’s in-state contacts.”<sup>403</sup> Instead, a court must appraise a corporation’s activities in their entirety. Even if a corporation conducts billions of dollars’ worth of business in the forum, that does not render the corporation “at home” in that state.<sup>404</sup>

Justice Ginsburg, citing comity as a partial justification for the Court’s holding, wrote “[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”<sup>405</sup> The

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<sup>395</sup> *Id.* at 760.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 760-62.

<sup>398</sup> *Id.* at 760-61.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 761.

<sup>401</sup> *Id.* at 761-62.

<sup>402</sup> *Id.* at 761.

<sup>403</sup> *Id.* at 762, n.20. Commentators have criticized Justice Ginsburg’s opinion for being too zealous in protecting corporations from the “perceived evils of forum shopping,” to the detriment of injured individuals who will now have more difficulty bringing lawsuits. *See, e.g.*, Cornett & Hoffheimer, *supra* note 9 (manuscript at 5).

<sup>404</sup> *Daimler*, 134 S. Ct. at 762, n.20.

<sup>405</sup> *Id.* at 763. Of course, even were her statement universally true, one can ask why an

Court observed that in the European Union, a corporate defendant generally may be sued only where it is domiciled — unless the claim arises out of the corporation’s conduct in another location.<sup>406</sup> The clear suggestion in *Daimler* is that the Court is bringing U.S. law into conformity with the prevailing European view.

But Justice Ginsburg’s suggestion that *Daimler* was bringing United States law in line with European law tells only part of the story. Regulations promulgated under the European Union Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters<sup>407</sup> provide that an EU member state may normally exercise general jurisdiction over a European corporation only in a forum in which the corporation is domiciled.<sup>408</sup> Thus, one might argue that Justice Ginsburg is recognizing “best practices” within the EU.<sup>409</sup> But the convention and regulations do not

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international norm should limit a state’s constitutional power.

<sup>406</sup> *See id.* (“In the European Union, for example, a corporation may generally be sued in the nation in which it is ‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’”). That definition of “domicile” may parallel the new general jurisdiction rule: *Daimler* does not limit general jurisdiction to the state of incorporation and principal place of business. Instead, it suggests there may be a state in which the corporation is nonetheless at home beyond the state of incorporation and state where it has its principal place of business. If one thinks about the seemingly unrelated context where the Court has redefined “principal place of business,” as used in the diversity statute, the Court in *Hertz Corp. v. Friend* used the “nerve center,” the state where high level administrative decisions are made, as the test for determining the principal place of business. 559 U.S. 77, 92-93 (2010). In doing so, the Court recognized that there may be some instances where the overwhelming majority of day-to-day activity took place in a state other than where top level management decisions were made. *Id.* at 96. Potentially, that parallels domicile in the EU, since under the Brussels Regulation, domicile is defined by the domestic laws of each country, making it possible for a defendant to be domiciled in multiple countries. Council Regulation 44/2001, art. 59(1), 2001 O.J. (L 12) 1 (EC).

<sup>407</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32. This Convention, also known as the Brussels Convention, was largely superseded in 2001 by the Brussels Regulation with few changes. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels I].

<sup>408</sup> Brussels I, *supra* note 407. An important exception to this general rule is that a defendant corporation domiciled in the EU may be sued in a country where a co-defendant is domiciled, so long as the two claims “are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” *Id.*

<sup>409</sup> As developed below, even if following the Brussels I regulation on general jurisdiction adheres to EU best practices, the Court may be putting plaintiffs suing in the United States at a disadvantage because the Supreme Court, or at least a substantial wing of the Court, is not committed to following the EU’s liberal approach to specific jurisdiction. *See infra* notes 437-44, 548-59, 566-69 and accompanying text; *see also* Brussels I, *supra* note 407, art. 5(3) (permitting a defendant to be sued “where the harmful event occurred or may occur,” regardless of domicile); Cornett & Hoffheimer, *supra* note 9 (manuscript at 60) (predicting

govern when a plaintiff seeks to assert jurisdiction over a corporation that is domiciled outside of Europe.<sup>410</sup>

Some European countries take a narrow view when a plaintiff seeks to assert jurisdiction over a non-European corporation on a claim that does not arise out of forum contacts.<sup>411</sup> But other member states take a much more expansive approach. For example, German law allows the exercise of jurisdiction over a defendant who owns property in Germany even if the property is unrelated to the claim.<sup>412</sup>

France, Greece, Luxembourg and the Netherlands have adopted jurisdictional rules that allow their citizens to sue any non-European defendant without regard to the defendant's contacts with the forum.<sup>413</sup> Obviously, plaintiffs securing judgments in such cases experience difficulty when seeking enforcement outside the forum nation.<sup>414</sup> But as long as the defendant has assets in the forum, plaintiffs can enforce their judgments.<sup>415</sup>

In light of the different approaches to jurisdiction among European and other trading partners, the Court's adoption of a restrictive interpretation of the Due Process Clause does not seem to be the most efficacious approach to international comity. Surely, comity would be advanced by an international compact regulating enforcement of judgments.<sup>416</sup>

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that the Court will continue to reject any attempts by plaintiffs to expand specific jurisdiction).

<sup>410</sup> See THOMAS O. MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 83 (Franklin A. Gevurtz, ed., 2006).

<sup>411</sup> See *id.* at 82 (discussing various approaches to personal jurisdiction in Europe; for instance, Italian courts will not exercise personal jurisdiction over non-Europeans in contracts cases if the contract was not formed in Italy).

<sup>412</sup> FREER & PERDUE, *supra* note 336, at 137.

<sup>413</sup> MAIN, *supra* note 410, at 85.

<sup>414</sup> FREER & PERDUE, *supra* note 336, at 137.

<sup>415</sup> 3 LINDA SILBERMAN, LAWS OF INTERNATIONAL TRADE § 97:6, PROCEDURE FOR ENFORCEMENT OF A FOREIGN JUDGMENT (2015). While the *Daimler* Court seemed intent on joining the perceived European trend towards narrowing general jurisdiction, the European Court of Justice (EJC) may be expanding general jurisdiction, at least when the plaintiff is bringing a privacy claim. In the ECJ's recent decision, *Google Spain SL v. Agencia Espanola de Proteccion de Datos*, the court held that Google, Inc., a California corporation, was subject to suit in Spain, not for the violation of a Spanish law, but for the violation of an EU directive protecting against violations of privacy. Case C-131/12, *Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD)* (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=69003>. Although Google's conduct took place outside of Spain, the ECJ found that Google's Spanish subsidiary's marketing activities in Spain were attributable to Google. *Id.*

<sup>416</sup> The United States currently has no treaty or federal statute governing the enforcement of judgments rendered in foreign countries; procedures for enforcing foreign judgments vary by state. See DICKERSON, *supra* note 323, § 6.2 (discussing procedure for enforcing foreign judgments); SILBERMAN, *supra* note 415 (detailing the various procedures of states for the enforcement of a foreign judgments). Negotiations are currently underway regarding a possible

*iii. General Implications for General Jurisdiction*

As developed in more detail below in the discussion below,<sup>417</sup> the implications for foreign corporations who seek to avoid litigation in the United States are significant. But even for a plaintiff suing a domestic corporation and seeking a convenient forum in the United States, the implications may be significant.

Think back to the example that I borrowed from *Ferens v. John Deere*.<sup>418</sup> There, the plaintiff engaged in some creative forum shopping made possible by our federal judicial system. John Deere did not challenge personal jurisdiction.<sup>419</sup> Counsel for the defendant may have assumed that jurisdiction would have been upheld because the defendant's contacts with the forum state were so extensive. Alternatively, the jurisdiction might have been based on consent; that is, in many states, domestic corporations must appoint an agent for service of process in order to conduct business within the state.<sup>420</sup>

Domestically, as long as legislatures keep in place such consent statutes and as long as the Court upholds such slightly coerced consent, plaintiffs may not lose their forum-shopping ability based on *Goodyear* and *Daimler*. That could change if industry groups pressure legislatures to narrow their consent statutes. In fact, some states already limit the scope of the appointment of an agent for receiving service of process to cases arising out of business conducted within the state.<sup>421</sup> Thus, those states allow consent only in specific jurisdiction cases. In states with narrower statutes, *Goodyear* and *Daimler* will already have a significant impact.

Consider the John Deere example. If Mississippi lacked a broad consent statute and the plaintiff relied on a general jurisdiction theory, the plaintiff would have to prove that John Deere was "at home" in Mississippi.<sup>422</sup> Prior to *Goodyear* and *Daimler*, the plaintiff would have to prove that John Deere had continuous and systematic contacts with the forum state (and perhaps

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Hague Convention on the enforcement of judgments. 3 E. CHARLES ROUTH, LAWS OF INT'L TRADE § 76:4, ENFORCEMENT OF FOREIGN JUDGMENTS: ARBITRATION AWARDS – UNDER UNITED NATIONS CONVENTION (2015).

<sup>417</sup> See discussion *infra* Part V.

<sup>418</sup> See *supra* note 299.

<sup>419</sup> *Ferens v. John Deere Co.*, 494 U.S. 516, 520 (1990).

<sup>420</sup> See *supra* text accompanying notes 150-53.

<sup>421</sup> *Id.*

<sup>422</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations . . . when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."). See also *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (quoting *Goodyear*, 131 S. Ct. 2846, 2851 (2011)).

that the assertion of jurisdiction was otherwise reasonable).<sup>423</sup> John Deere's substantial business activity in the state, including large number of dealerships, would almost guarantee a finding of jurisdiction.<sup>424</sup> Today, that is no longer true.

The plaintiff would have to prove something more than John Deere's Mississippi contacts. As Justice Ginsburg stated in *Daimler*, John Deere would not necessarily be "at home" there.<sup>425</sup> The court would have to examine John Deere's nationwide and worldwide contacts. With little guidance in the majority opinion, a plaintiff presumably would have to show that the forum state was the state in which an overwhelming majority of the defendant's activity took place in the forum state, even if that state was somehow not its principal place of business.<sup>426</sup>

This approach is a dramatic departure from a significant body of case law.<sup>427</sup> Until *Goodyear*, the Court did not suggest such a narrow view of general jurisdiction.<sup>428</sup> And the overwhelming body of lower court case law was to the contrary.<sup>429</sup>

Justice Ginsberg's opinion implies that the goal for her new test is twofold. First, it avoids unfair forum shopping.<sup>430</sup> As she explained, without the narrowing of general jurisdiction, a Polish driver injured in Poland could sue *Daimler* in the United States.<sup>431</sup> Second, despite the imprecision of her

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<sup>423</sup> Rhodes, *supra* note 54, at 893-99 (discussing the development of the "continuous and systematic" contacts requirement, as well as the reasonableness or fairness factors).

<sup>424</sup> John Deere sells agricultural, construction, and forestry equipment at 38 dealerships throughout the state. *John Deere Dealers in Mississippi*, <https://www.machinefinder.com/ww/en-US/john-deere-dealers/mississippi> (last visited Feb. 8, 2014).

<sup>425</sup> *Daimler*, 134 S. Ct. at 762, n.20.

<sup>426</sup> See *id.* at 770 (Sotomayor, J., concurring) ("[T]he majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's 'nationwide and worldwide' activities."). See also Cornett & Hoffheimer, *supra* note 9 (manuscript at 30-31) (noting that Justice Ginsburg stopped short of saying a corporation would *never* be subject to general jurisdiction outside its state of incorporation or principal place of business, but that such a case would be "exceptional").

<sup>427</sup> See *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (referring to the test announced by the majority as "a new rule of constitutional law that is unmoored from decades of precedent").

<sup>428</sup> See discussion *supra* Part IV.b.i.A.

<sup>429</sup> See Hoffheimer, *supra* note 275, at 549 (reviewing general jurisdiction pre-*Goodyear*).

<sup>430</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 5) (describing the majority as being in "a rush to protect defendants from the perceived evils of forum shopping").

<sup>431</sup> *Daimler*, 134 S. Ct. at 751. The Court had no need to limit general jurisdiction to avoid allowing such a suit to proceed in a court in the United States. A defendant could easily invoke forum non conveniens to have the case dismissed. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248-49 (1981). Alternatively, as Justice Sotomayor's concurring opinion in *Daimler* made

test,<sup>432</sup> Justice Ginsburg believes that it offers greater clarity than does, for example, Justice Sotomayor's more traditional test which considers contacts and fairness factors.<sup>433</sup>

Her analysis begs a question discussed above: what is the underlying justification for general jurisdiction?<sup>434</sup> Neither *Goodyear* nor *Daimler* offer very compelling answers.<sup>435</sup> By comparison, if due process protects a defendant's right to fair notice and an opportunity to be heard, rejecting general jurisdiction in a venue where a corporation may conduct extensive day-to-day activity makes little sense. Perhaps limiting general jurisdiction does not matter. After all, the scholars who proposed limiting general jurisdiction did so with the expectation that specific jurisdiction would be readily available.<sup>436</sup> But as developed in the next section, some members of the Court are ready to narrow specific jurisdiction as well.<sup>437</sup>

## 2. Specific Jurisdiction: Up in the Air

In *Daimler*, Justice Ginsburg stated that, in effect, specific jurisdiction has expanded dramatically since it was "cut loose from *Pennoyer*'s sway," while general jurisdiction has "followed [a] markedly different trajector[y]."<sup>438</sup> Her statement concerning specific jurisdiction may be premature.

As indicated above, by 1990, the Court was deeply divided over the appropriate rules governing jurisdiction.<sup>439</sup> This is most evident in *Asahi*, where the Court could not agree on the relevance of contacts that came about through the stream of commerce.<sup>440</sup> At the root of the division was a disagreement dating back to the 1950s when the Court decided *McGee* and *Hanson*: must contacts come about through purposeful activity on the part of a defendant?<sup>441</sup> Since 2010, the Court has revisited specific jurisdiction twice. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court remained deeply

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clear, the Court could have held that even if defendant's contacts with the forum are substantial, jurisdiction is nonetheless unreasonable. *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

<sup>432</sup> *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring); see *supra* p. 35.

<sup>433</sup> *Daimler*, 134 S. Ct. at 764-65 (majority opinion).

<sup>434</sup> See *supra* pp. 30-31.

<sup>435</sup> See discussion *supra* Parts IV.b.i.A, IV.b.i.B.

<sup>436</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 58).

<sup>437</sup> See discussion *infra* Part IV.b.ii.

<sup>438</sup> *Daimler*, 134 S. Ct. at 757-58.

<sup>439</sup> See *supra* Part III.b.i.

<sup>440</sup> See *supra* pp. 234-235.

<sup>441</sup> See *supra* text accompanying notes 101-05.

divided over the same issues that divided the Court in *Asahi*.<sup>442</sup> And while the Court's most recent specific jurisdiction decision was unanimous,<sup>443</sup> it signals the Court's willingness to limit the scope of specific jurisdiction.<sup>444</sup>

i. J. McIntyre Machinery, Ltd. v. Nicaastro

After Justice Stevens retired, commentators expected the Court to clarify the test for determining the sufficiency of the stream of commerce when it granted certiorari in *Nicaastro*.<sup>445</sup> That did not happen.<sup>446</sup>

The plaintiff, Robert Nicaastro, seriously injured his hand when he was operating a machine manufactured by J. McIntyre, Ltd., a British corporation.<sup>447</sup> The plaintiff sued in New Jersey where he worked and was injured.<sup>448</sup> Perhaps because the plaintiff's lawyer engaged in limited discovery, the record demonstrated little contact between the defendant and the forum state.<sup>449</sup> As observed by Justice Kennedy in his plurality opinion, "[t]he question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there."<sup>450</sup> The quantity and quality of the defendant's contacts with New Jersey were a matter of dispute within the Court, with each of the three opinions offering a different view of

<sup>442</sup> J. McIntyre Machinery, Ltd. v. Nicaastro, 131 S. Ct. 2780 (2011) (plurality opinion).

<sup>443</sup> Walden v. Fiore, 134 S. Ct. 1115 (2014).

<sup>444</sup> See discussion *infra* Part V.a.

<sup>445</sup> See, e.g., Jonathan A. Berkelhammer, *Supreme Court to Readdress Stream of Commerce Theory of Personal Jurisdiction*, 78 DEF. COUNS. J. 350, 351 (2011) ("The contours of the stream of commerce theory of personal jurisdiction . . . have remained uncertain, at least, perhaps, until now."); Kendall Gray, *J. McIntyre Machinery v. Nicaastro: Declarifying Asahi*, APPELLATE RECORD (June 28, 2011), <http://www.appellaterecord.com/2011/06/articles/new-opinions/j-mcintyre-machinery-v-nicaastro-declarifying-asahi> ("Professors and law nerds everywhere had the vapors because the Supreme Court of the United States had a chance to clear [*Asahi*] up in *J. McIntyre Machinery Ltd. v. Nicaastro*.").

<sup>446</sup> See *infra* text accompanying notes 451-82. See also Elisabeth A. Beal, Note, *J. McIntyre Machinery, Ltd. v. Nicaastro: The Stream-of-Commerce Theory of Personal Jurisdiction in a Globalized Economy*, 66 U. MIAMI L. REV. 233, 241-42 (2011) ("[N]o member of the Court could obtain a majority of the votes, and thus the status of the stream-of-commerce theory of personal jurisdiction remains unclear."); Greg Saetrum, Note, *Righting the Ship: Implications of J. McIntyre v. Nicaastro and How to Navigate the Stream of Commerce in Its Wake*, 55 ARIZ. L. REV. 499, 536 (2013) ("The Nicaastro decision has once again divided the stream-of-commerce analysis, with three separate paths emerging in the wake of the decision.").

<sup>447</sup> *Nicaastro*, 131 S. Ct. 2780, 2786 (plurality opinion).

<sup>448</sup> *Id.*; see also Beal, *supra* note 446, at 242.

<sup>449</sup> *Nicaastro*, 131 S. Ct. at 2792-93 (Breyer, J., concurring) ("There may well have been other facts that Mr. Nicaastro could have demonstrated in support of jurisdiction . . . the factual record leaves many open questions . . .").

<sup>450</sup> *Id.* at 2786 (plurality opinion).

the facts.<sup>451</sup>

Apparently, the defendant created a subsidiary, J. McIntyre America, to market its products in the United States.<sup>452</sup> By the time of trial, the subsidiary was bankrupt.<sup>453</sup> In addition, as hinted at by Justice Breyer in his concurring opinion, the plaintiff's lawyer did not make an effort to show the degree of control exercised by the defendant over its American distributor.<sup>454</sup> As a result, the record was sparse. According to Justice Breyer's opinion, the record included evidence of the sale of only one machine in New Jersey, that the defendant hoped to sell its machines to anyone in the United States, and that its employees attended trade shows in the United States, but not in New Jersey specifically.<sup>455</sup> Justice Kennedy's plurality opinion also observed that the plaintiff did not allege that J. McIntyre America was under the defendant's control.<sup>456</sup> He observed that the New Jersey Supreme Court relied in part on the fact that J. McIntyre America "structured [its] advertising and sales efforts in accordance with [the defendant's] direction and guidance whenever possible."<sup>457</sup>

Justice Ginsburg's dissent, joined by Justices Sotomayor and Kagan, focused on efforts by the defendant to market its products in the United States.<sup>458</sup> The defendant "engaged McIntyre America to attract customers 'from anywhere in the United States.'"<sup>459</sup> It sought to "reach and profit from

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<sup>451</sup> See *id.* at 2790 ("[U]p to four machines ended up in New Jersey"); *id.* at 2791 (Breyer, J., concurring) ("The American Distributor on one occasion sold and shipped one machine to a New Jersey customer . . ."); *id.* at 2803 n.15 (Ginsburg, J., dissenting) ("The plurality notes the low volume of sales in New Jersey . . . A \$24,900 shearing machine, however, is unlikely to sell in bulk worldwide, much less in any given state. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in New Jersey \$24,900 worth of flannel shirts . . . [t]he Court would presumably find the defendant amenable to suit in that State."). Justice Ginsburg also cited information concerning the robust scrap metal industry in New Jersey while Justice Kennedy did not consider this information — perhaps because he viewed it as not properly part of the record. Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 494-95 (2012).

<sup>452</sup> *Nicastro*, 131 S. Ct. at 2796 (Ginsburg, J., dissenting).

<sup>453</sup> *Id.* at 2796 n.2.

<sup>454</sup> *Id.* at 2792-93 (Breyer, J., concurring).

<sup>455</sup> *Id.* at 2791 (Breyer, J., concurring). In fact, the case did not turn out to be a stream-of-commerce case. The facts did not present the Court with an assertion of jurisdiction over a component parts manufacturer who shipped the product to another company that then incorporated the component part into a finished product and that then shipped the product to the forum. *Id.*

<sup>456</sup> *Id.* at 2786 (plurality opinion).

<sup>457</sup> *Id.*

<sup>458</sup> *Id.* at 2794, 2797 (Ginsburg, J., dissenting).

<sup>459</sup> *Id.* at 2796-97 (Ginsburg, J., dissenting).

the United States market as a whole.”<sup>460</sup> Justice Ginsburg found that the defendant must have intended to sell its product in the “largest scrap metal market” in the United States when it targeted the national market.<sup>461</sup>

Six Justices disagreed with her approach. Using *Hanson* as the starting point for his analysis, Justice Kennedy and four Justices<sup>462</sup> agreed that “[a]s a general rule, 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.’”<sup>463</sup> The plurality rejected the idea that due process involved a general notion of fair process on the grounds that “[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”<sup>464</sup> Citing *Hanson* again, Justice Kennedy emphasized the fact that a defendant must act with purpose towards the forum.<sup>465</sup> According to the plurality, a defendant must submit to the state’s authority and may do so in a number of ways, including through explicit consent, presence within the state, citizenship or domicile, incorporation in the state or establishment of a principal place of business in the state.<sup>466</sup> These examples demonstrate circumstances or a course of conduct from which to infer “an intention to submit to the laws of the forum State.”<sup>467</sup> For out-of-state defendants, acting with purpose towards the state provides similar evidence that the defendant submits to the state’s authority with regards to suits arising out of the forum contact.<sup>468</sup> As developed below, the plurality staked out a radical position, harking back to the rejected theory of consent.<sup>469</sup>

For Justices Breyer and Alito, the case before the Court did not raise many of the yet unresolved challenges facing courts around the country.<sup>470</sup>

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<sup>460</sup> *Id.* at 2797 (Ginsburg, J., dissenting).

<sup>461</sup> *Id.* at 2801 (Ginsburg, J., dissenting).

<sup>462</sup> *Id.* at 2785 (plurality opinion).

<sup>463</sup> *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Justice Kennedy acknowledged that exceptions may exist, “for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called ‘stream-of-commerce’ doctrine cannot displace it.” *Id.*

<sup>464</sup> *Id.* at 2787.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 2787-88.

<sup>469</sup> *See id.* at 2798-99 (Ginsburg, J., dissenting) (“[I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably . . . ‘implied consent,’ should be discarded . . . . Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court.”).

<sup>470</sup> *Id.* at 2791-95 (Breyer, J., concurring).

Recognizing that many changes in commerce and communications may require rethinking the Court's precedent, Justice Breyer found that *Nicastro* did not present those questions.<sup>471</sup> He underscored that the plaintiff failed to meet his burden of demonstrating sufficient contacts with the forum state.<sup>472</sup> McIntyre America was "an independent distributor."<sup>473</sup> The distributor had only made one sale in New Jersey even though the defendant was willing to sell machines to anyone interested in buying them anywhere in the United States.<sup>474</sup> Justice Breyer rejected the idea that the Court's precedent allowed the assertion of jurisdiction based on a single sale "accompanied by the kind of sales effort indicated here."<sup>475</sup> The concurring opinion suggested that the two Justices might be open to a stream of commerce argument but found that the record showed no regular flow of goods into the forum.<sup>476</sup>

The concurring opinion rejected the idea that the mere arrival of the product in the forum state should lead to jurisdiction.<sup>477</sup> The opinion left open a number of questions and suggested participation by the Solicitor General, presumably to provide a better insight into broad concerns about modern commercial circumstances.<sup>478</sup>

Discussed in more detail below, the current state of affairs after *Nicastro* is troubling.<sup>479</sup> Justice Kennedy is one vote short of significantly narrowing specific jurisdiction. The dissent<sup>480</sup> and others<sup>481</sup> have commented

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<sup>471</sup> *Id.* at 2791 (Breyer, J., concurring).

<sup>472</sup> *Id.* at 2792 (Breyer, J., concurring). ("Mr. Nicastro, who bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers . . . And he has not otherwise shown that the British Manufacturer 'purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users.")

<sup>473</sup> *Id.* at 2791 (Breyer, J., concurring).

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* at 2792 (Breyer, J., concurring). No doubt, he had in mind the fact that the defendant did not create the contact. Surely, he did not intend to disavow single contact cases like *McGee*.

<sup>476</sup> *Id.* at 2792-93 (Breyer, J., concurring) ("Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.")

<sup>477</sup> *Id.* at 2792 (Breyer, J., concurring).

<sup>478</sup> *Id.* at 2794 (Breyer, J., concurring).

<sup>479</sup> See discussion *infra* Part V; see also Saetrum, *supra* note 446, at 519 ("If the plurality opinion in *Nicastro* was subsequently adopted by a majority of the Court, foreign manufacturers would have a blueprint for escaping U.S. jurisdiction while simultaneously exploiting the U.S. market. This would place U.S. manufactures at a severe competitive disadvantage to their foreign counterparts and force many U.S. consumers to suffer the burdens of litigating products-liability claims overseas.")

<sup>480</sup> *Nicastro*, 131 S. Ct. at 2798-99 (Ginsburg, J., dissenting) ("[I]n *International Shoe*

on the theory implicit in the plurality opinion, which is the idea that one had to consent to jurisdiction. In *Nicastro*, Justice Ginsburg argued that the theory was rejected long ago and finds no support in the Court's modern case law.<sup>482</sup>

Justice is a reminder of the point raised above that hard cases make bad law.<sup>483</sup> A decision that seemed out of line with the Court's then current view of due process evidenced in *McGee* and grounded in overt result orientation has become the centerpiece of the conservative Justices' due process jurisprudence.<sup>484</sup> Unlike Justice White's opinion in *World-Wide*, where he linked the contacts part of the Court's test to sovereignty,<sup>485</sup> Justice Kennedy does not fall into that morass. Instead, he gives predominant importance to a defendant's choice to make itself amenable to suit in the forum.<sup>486</sup> Hence, a defendant who can point to no great inconvenience or lack of opportunity to be heard may avoid suit in a forum despite benefiting indirectly from the sales of its product in the forum state.

#### ii. *Walden v. Fiore: Closing Open Questions?*

The Court's split in *Nicastro* has left lower courts with little guidance.<sup>487</sup> A number of lower courts have continued to uphold jurisdiction in cases where the defendant did not direct purposeful activity towards the forum state.<sup>488</sup> For example, some state courts continue to adhere to the

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itself, and decisions thereafter, the Court has made plain that legal fictions, notably . . . 'implied consent,' should be discarded . . .").

<sup>481</sup> See Steinman, *supra* note 451, at 497 ("A second aspect of Justice Kennedy's opinion is his insistence that jurisdiction is appropriate only when a person 'submi[ts] to a State's authority"); see also Saetrum, *supra* note 446, at 516 (noting that very few corporations ever consciously submit to the power of a state).

<sup>482</sup> *Nicastro*, 131 S. Ct. at 2798-99 (Ginsburg, J., dissenting) ("Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court.").

<sup>483</sup> *Id.* at 2787. See also *supra* Part II.c.

<sup>484</sup> See discussion *supra* Part II.c.; see also Borchers, *supra* note 325, at 1246 (criticizing the plurality opinion as an attempt "to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before").

<sup>485</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

<sup>486</sup> *Nicastro*, 131 S. Ct. at 2787-88.

<sup>487</sup> See Steinman, *supra* note 451, at 491 ("The lack of any majority opinion in *McIntyre* largely thwarts the possibility of 'greater clarity'"); see also Amanda Iler, Comment, *Bridging the Stream of Commerce: Recommendations for Living in the Post-Nicastro Era*, 45 MCGEORGE L. REV. 407, 409 (2013) ("[I]n *Nicastro*, a divided Court issued no clear guidance or test . . .").

<sup>488</sup> Iler, *supra* note 487, at 415 (citing a Louisiana decision where the judge stated that

stream of commerce theory to assure a convenient forum for the plaintiff.<sup>489</sup> Some commentators expected the Court to use the second personal jurisdiction case on the 2013 docket, *Walden v. Fiore*, to clarify some of the ongoing issues.<sup>490</sup> It did not.

Transportation Security Administration agents searched Gina Fiore and Keith Gipson and their carry-on luggage as they departed from the San Juan, Puerto Rico airport.<sup>491</sup> The agents found a large amount of cash in their luggage.<sup>492</sup> Fiore explained to Drug Enforcement Administration (DEA) agents in San Juan that she and Gipson were professional gamblers and had been gambling at a San Juan casino.<sup>493</sup> A law enforcement official in San Juan contacted DEA agents in Atlanta and told them about Fiore and Gipson.<sup>494</sup>

Upon their arrival in Atlanta, Fiore and Gipson were stopped by Anthony Walden, a Covington, Georgia police officer, deputized as part of a task force in the DEA's airport drug interdiction program.<sup>495</sup> Fiore and Gipson told Walden and another agent that the cash they were carrying was their gambling "bank" plus winnings.<sup>496</sup> The agents retained the cash after they exposed it to a drug-sniffing dog.<sup>497</sup> Fiore and Gipson flew home without the cash.<sup>498</sup>

The DEA refused to return the cash despite the efforts of Fiore and

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Justice Breyer's opinion was binding, but that Justice Breyer had declined to accept a new rule, the court declined to depart from Fifth Circuit precedent).

<sup>489</sup> See *Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174, 179 (5th Cir. 2013) (reading *Nicastro* narrowly and disagreeing that it prohibited the application of the stream-of-commerce theory in other types of cases); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) ("Because *McIntyre* did not produce a majority opinion, we must follow the narrowest holding among the plurality opinions in that case. . . that the law remains the same after *McIntyre*."); see also Levi McAllister, Comment, *Paddling the Stream of Commerce: The Supreme Court's Need to Cautiously Re-Examine One Aspect of Personal Jurisdiction, and the Judicial and Financial Consequences Resulting from Current Approaches*, 3 HIGH CT. Q. REV. 53, 57-58 (2007) (discussing splits among lower courts following *Nicastro*).

<sup>490</sup> See, e.g., Stephen Higdon, Comment, *If It Wasn't on Purpose, Can a Court Take It Personally? Untangling Asahi's Mess that J. McIntyre Did Not*, 45 TEX. TECH L. REV. 463, 496 n.259 ("[T]he Court has granted certiorari to another personal jurisdiction case . . . . Perhaps, then, clarity — rather than continued confusion — is on the horizon.").

<sup>491</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014).

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

Gipson's attorney.<sup>499</sup> Instead, Walden helped draft an affidavit as part of forfeiture proceedings and forwarded it to the U.S. Attorney's Office.<sup>500</sup> The government did not pursue forfeiture and eventually returned the money to Fiore and Gipson.<sup>501</sup>

Fiore and Gipson filed suit against Walden in federal court in Nevada.<sup>502</sup> Their complaint alleged a violation of their Fourth Amendment rights based on illegal seizure and detention of their cash.<sup>503</sup> Furthermore, they alleged that Walden's affidavit was false and misleading in that it misrepresented the encounter at the airport and excluded exculpatory information.<sup>504</sup> Walden filed a motion to dismiss for lack of personal jurisdiction.<sup>505</sup> The district court granted the motion, which the Ninth Circuit reversed.<sup>506</sup> While it agreed that the illegal search part of the claim could not support jurisdiction in Nevada, the court could exercise jurisdiction based on the "false probable cause aspect of the case."<sup>507</sup> According to the Ninth Circuit, under *Calder v. Jones*, Walden "expressly aimed" his conduct at Nevada<sup>508</sup> when he submitted the affidavit because he knew that it would affect the plaintiffs — who had a significant connection with the forum.<sup>509</sup>

Justice Thomas delivered the opinion for a unanimous Court.<sup>510</sup> The opinion laid out the general rules governing specific jurisdiction.<sup>511</sup> A defendant must create the contacts with the forum.<sup>512</sup> Due process protects a litigant's liberty interest, "not the convenience of plaintiffs or third parties."<sup>513</sup> A plaintiff's act in creating contacts with the forum does not

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<sup>499</sup> *Id.*

<sup>500</sup> *Id.* at 1119-20.

<sup>501</sup> *Id.* at 1120.

<sup>502</sup> *Id.* ("Respondents alleged that petitioner violated their Fourth Amendment rights by (1) seizing the cash without probable cause; (2) keeping the money after concluding it did not come from drug-related activity; (3) drafting and forwarding a probable cause affidavit to support a forfeiture action while knowing the affidavit contained false statements; (4) willfully seeking forfeiture while withholding exculpatory information; and (5) withholding that exculpatory information from the United States Attorney's Office.").

<sup>503</sup> *Id.* at 1119-20.

<sup>504</sup> *Id.* at 1120.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *Id.* (quoting *Fiore v. Walden*, 688 F.3d 558, 577 (9th Cir. 2011)).

<sup>508</sup> *Id.* (quoting *Fiore*, 688 F.3d at 577).

<sup>509</sup> *Id.* at 1119-20.

<sup>510</sup> *Id.* at 1119-22.

<sup>511</sup> *Id.* at 1122 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

<sup>512</sup> *Id.*

<sup>513</sup> *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)).

count.<sup>514</sup> A defendant's contacts must be with the forum state, not with an individual in the state.<sup>515</sup> But those general rules did not squarely address the plaintiffs' strongest argument, their reliance on *Calder v. Jones*.<sup>516</sup>

Lower courts are divided over how broadly to read *Calder*.<sup>517</sup> Justice Thomas gave it a narrow reading. "These same principles," as laid out above, "apply when intentional torts are involved."<sup>518</sup> He explained that *Calder* turned on "the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story."<sup>519</sup> The crux of *Calder* was that the effects of the defendants' conduct connected the defendants with the forum; defendants' intentional tort of libel occurred in California where the loss of the plaintiff's reputation took place.<sup>520</sup>

By contrast, none of Walden's conduct took place in Nevada.<sup>521</sup> He never traveled to, sent anything to, or took any action in Nevada.<sup>522</sup> The plaintiffs, not the defendant, formed the contacts with the forum.<sup>523</sup> Justice Thomas rejected the Ninth Circuit's view that Walden's knowledge that Fiore and Gipson had forum connections was dispositive.<sup>524</sup> Even if the focus is on the continuation of the seizure of the funds, those effects are not attributable to Walden; the plaintiffs chose where to go after they were deprived of their funds.<sup>525</sup>

Post-*Walden* analysis has focused on the difficult line drawing between *Calder* and *Walden*.<sup>526</sup> Some commentators conclude that *Walden* was a

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<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 1122-23.

<sup>516</sup> *Id.*

<sup>517</sup> Compare *Janmark v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) ("[T]here can be no serious doubt after *Calder* that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor."), with *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3rd Cir. 1998) ("[W]e . . . agree with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits that jurisdiction under *Calder* requires more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum.").

<sup>518</sup> *Walden*, 134 S. Ct. at 1123.

<sup>519</sup> *Id.* at 1123-24.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 1124.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* at 1125.

<sup>526</sup> See, e.g., *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (addressing the split that had existed among courts regarding *Calder*, and stating that *Walden* helped resolve some of the ambiguity: "[A]fter *Walden* there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the

fairly easy case.<sup>527</sup> For example, at the time of the stop in San Juan, the plaintiffs showed the agents California identification.<sup>528</sup> They maintained residences in Nevada and California.<sup>529</sup> As a result, the fact that effects may have been felt in Nevada appears random. Other scholars have defended the Ninth Circuit's position and suggest that the court's unanimous opinion downplayed the effects in Nevada.<sup>530</sup>

As developed by Justice Thomas, one might agree that even under a broad reading of *Calder*, the case for jurisdiction was weak. Walden presumably knew that the plaintiffs were going to Nevada — they were taking a flight to Las Vegas — but may not have been aware that they resided in California.<sup>531</sup> Somewhat more troubling is that Justice Thomas interpreted the black letter law as requiring the application of the same principles from intentional tort cases in personal jurisdiction cases; meaning jurisdiction must be based on “intentional conduct by the defendant that creates the necessary contacts with the forum.”<sup>532</sup> Although not without ambiguity, that language sounds narrower than the language in *Calder*, where the Court observed that the defendants “knew” that the effects would be felt in the forum state.<sup>533</sup>

Justice Thomas joined Justice Kennedy's plurality opinion in *Nicastro*, where Justice Kennedy insisted that only purposeful contacts with the forum are sufficient.<sup>534</sup> It remains uncertain whether Justice Thomas has moved the Court closer to adopting that narrow view of minimum contacts. As developed below, such a position would have significant implications for the state courts attempting to assert jurisdiction over foreign and many out-of-

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forum.” (quoting *Walden*, 134 S. Ct. at 1122)).

<sup>527</sup> See Howard Wasserman, *More Personal Jurisdiction from SCOTUS*, PRAWFSBLAWG (Feb. 25, 2014, 4:14 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/02/more-personal-jurisdiction-from-scotus.html>; see also *Supreme Court Says P's Gambling Winnings, Seized by Drug Agent in State A, Can't Support Jurisdiction of Agent in State B*, 267 SIEGEL'S PRAC. REV. 4 (2014) (“Considering the court's decision in *Daimler AG v. Bauman* only a few months ago . . . the *Walden* case is no surprise. In *Daimler* the U.S. Supreme Court severely circumscribed the ‘presence’ test as a basis for personal jurisdiction over foreign corporations. The claim itself must have local roots, the [C]ourt held, and if it hasn't, the corporation's overall contacts with the state won't support jurisdiction.”).

<sup>528</sup> *Walden*, 134 S. Ct. at 1119.

<sup>529</sup> *Id.*

<sup>530</sup> See, e.g., Charles W. Rhodes & Cassandra B. Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 227-230 (2014) (suggesting that the Ninth Circuit was justified in finding jurisdiction proper under *Calder* given the state of the law prior to *Walden*).

<sup>531</sup> *Walden* 134 S. Ct. at 1119, 1125.

<sup>532</sup> *Id.* at 1123.

<sup>533</sup> *Calder v. Jones*, 465 U.S. 783, 789 (1984).

<sup>534</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787-88 (2011).

state defendants.<sup>535</sup>

## V. AVOIDING SUIT IN THE UNITED STATES

*Goodyear* and *Daimler* are clear on one thing: plaintiffs will be able to invoke general jurisdiction in fewer locations than before those cases were decided.<sup>536</sup> Seldom will a plaintiff be able to invoke general jurisdiction when the defendant is a foreign corporation.<sup>537</sup> Harder questions arise with regard to specific jurisdiction.<sup>538</sup> This section begins with some speculation about the various Justices' motivations in aligning themselves on jurisdictional questions.<sup>539</sup> It then explores the implications that the Court's new retrenchment has for foreign corporations.<sup>540</sup>

### A. *Pity the Poor Defendant?*

A good place to start is accusing the conservative wing of the Court of a pro-corporate bias.<sup>541</sup> Cases like *Citizens United v. Federal Election Commission* support such a conclusion.<sup>542</sup> Of course, that cannot explain the

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<sup>535</sup> See discussion *infra* Part V.

<sup>536</sup> See *supra* Part IV.b.i.; see also Cornett & Hoffheimer, *supra* note 9 (manuscript at 4) (discussing the shrinking of general jurisdiction in the wake of *Goodyear* and *Daimler*).

<sup>537</sup> Foreign corporations are not incorporated in the United States and do not have their principal places of business in the United States. Finding a case in which the largest amount of a foreign corporation's business nonetheless takes place in a state within the United States seems highly unlikely.

<sup>538</sup> See *infra* text accompanying notes 548-59, 565-71; see also Cornett & Hoffheimer, *supra* note 9 (manuscript at 60) (predicting that the Court will continue to reject any attempts by plaintiffs to expand specific jurisdiction).

<sup>539</sup> See discussion *infra* Part V.a.

<sup>540</sup> See discussion *infra* Part V.b.

<sup>541</sup> See Ian Millhiser, *Supreme Court Ruled in Favor of the Nation's Top Corporate Interest Group in 7 of 8 Cases This Term*, THINKPROGRESS (March 13, 2014), <http://thinkprogress.org/justice/2014/03/13/3398661/supreme-court-ruled-in-favor-of-the-nations-top-corporate-interest-group-in-7-of-8-cases-this-term> (reporting that during the current term, the Court has sided with the U.S. Chamber of Commerce in almost every case where the Chamber has filed a brief); see also Cornett & Hoffheimer, *supra* note 9 (manuscript at 64-65) ("Taken to their logical conclusion, Justice Ginsburg's formal rules introduce a new era of vested rights for corporations . . . cloaking corporations with unprecedented immunities that were never suggested by earlier decisions . . .").

<sup>542</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibited a law limiting political expenditures by corporations and labor unions); See also Woody R. Clermont, *Business Associations Reign Supreme: The Corporatist Underpinnings of Citizens United v. Federal Election Commission*, 27 T.M. COOLEY L. REV. 477 (2010) (criticizing *Citizens United* and the conservative members of the Court for favoring corporate personhood over the rights of individuals); Cornett & Hoffheimer, *supra* note 9 (manuscript at 64) (arguing that Justice Ginsburg's opinion in *Daimler* demonstrated her desire

result in *Walden*, where the defendant was not a business entity.<sup>543</sup> The conservative wing of the Court might also be accused of an anti-plaintiff bias — willing to narrow the courthouse door in cases involving the historically liberal pleading rules.<sup>544</sup>

As mentioned above, *Daimler* suggested that the Court was intent on bringing United States law in line with European law.<sup>545</sup> Elsewhere, some of the conservatives on the Court have railed against reliance on international norms in interpreting domestic law.<sup>546</sup> They were, however, silent on Justice Ginsburg's reliance on European law.

While one might see the conservative Justices' pro-corporate bias at work in their views, dismissing the "liberal" wing as pro-corporate seems too facile an explanation for their positions in *Goodyear*, *Daimler*, and *Walden*. Justice Ginsburg's dissent in *Nicastro* suggests a different possibility. As argued by Professors Cornett and Hoffheimer, Justice Ginsburg's general jurisdiction opinions relied on the views of prominent scholars who urged the narrowing of general jurisdiction.<sup>547</sup> They faulted the Court for not recognizing that the argument for narrowing general jurisdiction was premised on the expansion of specific jurisdiction.<sup>548</sup> At least in light of Justice Ginsburg's *Nicastro* dissent, she and Justices Sotomayor and Kagan would have found specific jurisdiction on the facts of *Nicastro* by relying on traditional case law.<sup>549</sup>

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to "effectuat[e] corporate planning track arguments repeatedly advanced by the Chamber of Commerce of the U.S.").

<sup>543</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014).

<sup>544</sup> See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (dismissing a case because it failed to plead sufficient facts to state a claim despite liberal pleading rules); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1325-26 (2010) (discussing *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* as examples of "the Court's recent pro-defendant leanings," stating that "the Court gave defendants one more tool for thwarting civil accountability by discarding the long-established, liberal pleading framework that was among the most notable aspects of the original Federal Rules of Civil Procedure.").

<sup>545</sup> See *supra* pp. 253-255.

<sup>546</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622-28 (2005) (Scalia, J., dissenting) (denouncing the majority opinion for citing as persuasive authority the international trend toward abolishing capital punishment for juveniles, stating that "the basic premise of the Court's argument — that American law should conform to the laws of the rest of the world — ought to be rejected out of hand.").

<sup>547</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 58) ("Justice Ginsburg's opinions advocate a particular agenda for reforming the law of personal jurisdiction proposed in the 1960s and 1970s by Professors von Mehren and Trautman.").

<sup>548</sup> *Id.* ("Given the expanding role [Professors von Mehren and Trautman] proposed for specific jurisdiction, they regarded most of the forms of general jurisdiction as unnecessary and irrational. They thus urged the elimination of almost all forms of general jurisdiction.").

<sup>549</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2804 (2011) (Ginsburg, J., dissenting) (stating that the defendant should have been subject under a specific jurisdiction

The four recent decisions are unsettling. While Justice Alito joined Justice Breyer's concurring opinion in *Nicastro*,<sup>550</sup> his usual alliance with the conservative wing of the Court is not reassuring.<sup>551</sup> It is unclear whether Justice Alito will join an opinion authored by Justice Kennedy, squarely requiring a plaintiff to show that a defendant purposefully directed activity in the forum state. Especially in light of other developments — limiting in rem actions and narrowing general jurisdiction — such a ruling would severely limit a plaintiff's ability to bring suit in their home state in a variety of cases.<sup>552</sup>

That the Court has limited the jurisdictional reach of United States courts seems odd at this point in history. As observed by Justice Breyer in his concurring opinion in *Nicastro*, commerce and communications may require rethinking the Court's traditional approach to personal jurisdiction.<sup>553</sup> The trend towards sweeping international trade agreements<sup>554</sup>

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theory).

<sup>550</sup> *Id.* at 2791 (Breyer, J., concurring).

<sup>551</sup> *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 316 (2010) (Justice Alito joined the majority opinion written by Justice Kennedy and joined by Chief Justice Roberts and Justice Scalia); *see also* General William K. Suter, *Supreme Court Report*, 44 TEX. TECH. L. REV. 333, 337 (2012) (“The so-called conservatives are the Chief Justice and Justices Scalia, Thomas, and Alito. Chief Justice and Justice Alito voted together about 95% of the time.”); Eric Alterman & Reed Richardson, *Splenetic Justice: Justice Samuel Alito's Role on the Roberts Court*, THE NATION (June 28, 2013), <http://www.thenation.com/blog/175026/splenetic-justice-justice-samuel-alitos-role-roberts-court> (“Thanks to Alito, who replaced the moderate Justice O'Connor on the Court, the conservative bloc has scored one triumph after another, and increasingly it's been in service of corporation-friendly organizations like the Chamber of Commerce.”); Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html> (finding that over the last four terms, Justice Alito has voted with Justice Roberts 93% of the time, Justice Scalia 86% of the time, Justice Thomas 90% of the time, and Justice Kennedy 85% of the time, while only voting with Justices Ginsburg, Sotomayor, and Kagan far less often — 65, 69, and 69%, respectively); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), <http://www.nytimes.com/2010/07/25/us/25roberts.html> (stating that Justice Alito is one of the six most conservative Justices that have sat on the Court out of the 44 Justices who have served since 1937, calling him “exceptionally conservative”); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450 (2013) (finding that Justice Alito is one of the two most business-friendly justices to serve on the Court since 1946).

<sup>552</sup> *See* discussion *infra* Part V.b.

<sup>553</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791, 2795 (2011) (Breyer, J., concurring) (discussing increasing globalization and advances in technology, suggesting that a change in current law may be justified given “a better understanding of the relevant contemporary commercial circumstances.”).

<sup>554</sup> Hernandez, *supra* note 323, at 432-33 (noting that “the globalization of commerce over the past 50 years presents a dramatic shift in American society” and that “the abandonment of a manufacturing-based economy in the late twentieth century has resulted in the explosive growth in foreign goods, which necessitates . . . enabl[ing] states to provide redress to their

and the access to information via the Internet<sup>555</sup> multiply the instances in which United States plaintiffs may seek to force an injury-causing foreign defendant to respond to suit in the United States, rather than in a foreign country.<sup>556</sup> At a minimum, injured plaintiffs want to avoid the added expense of trying their cases abroad. Often, doing so involves not just added expense, but less favorable substantive law<sup>557</sup> and possible costs, including attorneys' fees assessed to the losing party.<sup>558</sup> Further, foreign judges and juries may be unsympathetic to Americans seeking damages in their courts.<sup>559</sup> Given these considerations, one might have expected the trend to be more protective of injured citizens.

*B. How Real is the Problem?*

Currently, a plaintiff suing a domestic corporation in a convenient forum may be able to do so without difficulty. That is, *Goodyear* and *Daimler* may have limited effect as long as the state where the plaintiff files the action requires the corporation to appoint an agent for purposes of

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citizens for injuries caused by defective goods manufactured abroad.”); *see also* THOMAS A. DICKERSON, *LITIGATING INTERNATIONAL TORTS IN U.S. COURTS* § 1. (2013) (“As the world’s economy becomes more integrated, products and services move with increasing frequency across national borders . . . American courts and lawyers wrestle with . . . Providing redress when foreign products cause harm in the U.S.”).

<sup>555</sup> *See, e.g.,* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (establishing the “sliding scale” Internet jurisdiction test that considers the level of interactivity or passivity of a defendant’s website rather than purposeful availment); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (holding that the defendant purposefully availed himself of the privilege of doing business in the forum state, despite never having traveled there, by creating an ongoing marketing relationship with the plaintiff corporation headquartered in the forum); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (surveying approaches adopted by other courts, including the *Zippo* test, as well as tests that examine the number of “hit” a website receives and other evidence that the Internet activity was directed at the forum state).

<sup>556</sup> For instance, following *Nicastro*, the plaintiff would have to sue in the UK in order to recover for his injuries — resulting in added expenses, inconvenience, and other disadvantages associated with litigating overseas.

<sup>557</sup> *FREER & PERDUE, supra* note 336, at 62-63.

<sup>558</sup> *See* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 n.18 (1975) (“As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims had terminated, to conduct separate hearings before special ‘taxing Masters’ in order to determine the appropriateness and the size of an award of counsel fees.”).

<sup>559</sup> *FREER & PERDUE, supra* note 336, at 62.

accepting service of process.<sup>560</sup> This is the case at least in states where the state statute allows suit on any claim, not just one arising out of in-state activity.<sup>561</sup> As mentioned above, one might expect business organizations to lobby state legislatures to narrow such statutes.<sup>562</sup> But even after *Goodyear* and *Daimler*, a plaintiff suing a domestic corporation ought to be able to find at least one state in which it has its principal place of business or state of incorporation.<sup>563</sup> That forum may not be convenient for the plaintiff and may not be able to provide favorable choice of law rules as in the past.<sup>564</sup> Nonetheless, the impact on plaintiffs may be muted.

As to specific jurisdiction, if the Court adopts a hard-and-fast purposeful availment rule, an injured plaintiff may be at a real disadvantage even when suing a domestic corporation in the state where the injury took place. Think back to Mrs. Gray, injured when her hot water heater exploded.<sup>565</sup> If the stream of commerce does not allow her to bring her claim against Titan Valve, she may be forced to bifurcate her claim, try her case in an inconvenient forum, or sue only the manufacturer that sold the product in the forum with the risk of having the primary tortfeasor absent from the suit.

The implications are even more pronounced for United States plaintiffs suing foreign corporations. *Goodyear* and *Daimler* appear to leave little room for an American injured by a foreign corporation to sue that corporation in the United States based on an accident occurring abroad. Unlike the plaintiffs in *Daimler*, the plaintiffs in *Goodyear* were United States citizens.<sup>566</sup> But for the fact that Goodyear USA, the parent corporation, was subject to suit somewhere in the United States,<sup>567</sup> the

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<sup>560</sup> See *supra* text accompanying notes 150-53.

<sup>561</sup> *Id.*

<sup>562</sup> See *supra* text accompanying note 421. A litigant might also attempt to challenge such statutes as coercive and in violation of the Commerce Clause. Early precedent suggested that argument. *Flexner v. Farson*, 248 U.S. 289 (1919).

<sup>563</sup> One might wonder whether a corporation's state of incorporation is a suitable forum for all-purpose jurisdiction. That corporation would have chosen that forum for tax purposes and perhaps because of favorable forum law. Those considerations have little to do with convenience to any of the litigants. Despite that, as *Goodyear* and *Daimler* demonstrate, courts routinely recite the black letter law that the state of incorporation is an appropriate forum. I find the staying power of that rule of law odd. I have not been able to find any modern case in which the corporate defendant's only contact with the forum state is its state of incorporation.

<sup>564</sup> See generally *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (finding that although the injury occurred in Pennsylvania, the plaintiffs were able to file suit in Mississippi and take advantage of a favorable statute of limitations because John Deere Co. had continuous and systematic contacts there).

<sup>565</sup> See *supra* p. 11.

<sup>566</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

<sup>567</sup> *Goodyear*, 131 S. Ct. at 2850 ("Goodyear USA, which had plants in North Carolina

plaintiffs' only recourse would have been to sue abroad in France, Luxembourg, or Turkey. Few foreign corporations, if any, are likely to satisfy Justice Ginsburg's "at home" test in any state within the United States.<sup>568</sup> Even if they conduct a massive amount of business in a particular state, that alone is not enough.<sup>569</sup> Her test focuses not only on the amount of business in state, but it also requires that the amount of business in that state predominates; systematic and continuous contacts are not sufficient.<sup>570</sup> That standard is a major departure from precedent and far more rigorous than the previous standard. Predicting how the new test applies may be difficult, but the test seems to require a showing of more than substantial contacts with the forum: "[g]eneral jurisdiction . . . calls for 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."<sup>571</sup>

Surprisingly, only Justice Sotomayor picked up on the significant change in the law that the Court made in the *Daimler* decision.<sup>572</sup> Instead of focusing on in-state contacts, the Court also now requires an inquiry into contacts elsewhere. As she quipped, some corporations are "too big for general jurisdiction."<sup>573</sup> She may have understated the extent to which the Court has changed the law, as can be seen by comparing the new standard to some earlier cases.

In *Daimler*, the defendant conceded that its subsidiary MBUSA would be subject to general jurisdiction in California.<sup>574</sup> That is hardly unusual. In *Goodyear*, Goodyear USA did not contest jurisdiction based on the fact that it had factories and a workforce in state.<sup>575</sup> Those corporate defendants seemed to concede that at some point, a large enough presence in state was all that a plaintiff had to demonstrate for general jurisdiction.

Some foreign corporations seemed to have that same understanding of

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and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it.").

<sup>568</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 36) ("[T]he ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions." While the majority expressed little concern for foreign plaintiffs suing a foreign defendant for foreign conduct, Justice Sotomayor observed that its decision reached farther. She provided examples of cases where the majority opinion appears to preclude jurisdiction over claims by U.S. plaintiffs in appropriate state courts." (quoting *Daimler*, 134 S. Ct. at 773)).

<sup>569</sup> *Daimler*, 134 S. Ct. at 761-62 n.20.

<sup>570</sup> *Id.* at 762 n.20 (2014); *see also supra* p. 28.

<sup>571</sup> *Daimler*, 134 S. Ct. at 762 n.20.

<sup>572</sup> *Id.* at 763-73 (Sotomayor, J., concurring); *see also* Cornett & Hoffheimer, *supra* note 9 (manuscript at 5-6).

<sup>573</sup> *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

<sup>574</sup> *Id.* at 758.

<sup>575</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

the law. *World-Wide* offered a dramatic instance to measure the change effected by *Daimler*. There, not only did the plaintiffs sue the New York seller and tri-state distributor.<sup>576</sup> They also sued Volkswagen of America and Audi.<sup>577</sup> Volkswagen initially objected to jurisdiction, but did not pursue the matter before the Court.<sup>578</sup> Audi apparently did not object even in the trial court.<sup>579</sup> Presumably, the plaintiffs would have relied on a showing of the extensive contacts between Audi and the forum state.

After *Daimler*, jurisdiction over Audi in Oklahoma would be doubtful. Despite substantial sales in that state, Audi almost certainly does not have a large enough percentage of its sales in state to be “at home” there.<sup>580</sup> That begs the question of what options would be open to the plaintiffs in such a case?

As implicit in Justice White’s opinion, Oklahoma was a convenient forum.<sup>581</sup> The seriously burned plaintiffs were treated there, the accident took place there, and the wreckage of the vehicle remained there.<sup>582</sup> Had the driver of the vehicle who slammed into the Audi been solvent, suit against him in Oklahoma would have been appropriate.<sup>583</sup> Indeed, suing him elsewhere would not have been feasible.<sup>584</sup> Whether jurisdiction over Volkswagen in Oklahoma would have been proper is also uncertain, but again, as with Audi, doubtful.<sup>585</sup>

New York would not have been a convenient forum.<sup>586</sup> But even if the plaintiffs sought to file their action there, jurisdiction may not have been proper over all of the parties. Surely, the Oklahoma driver who caused the accident was beyond the jurisdictional reach of a New York court.<sup>587</sup> Jurisdiction may have been proper there based on specific jurisdiction as to Volkswagen (on the assumption that it acted with purpose vis-à-vis the New

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<sup>576</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

<sup>577</sup> *Id.*

<sup>578</sup> *Id.* at 288 n.3.

<sup>579</sup> *Id.* at 288.

<sup>580</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014).

<sup>581</sup> *World-Wide*, 444 U.S. at 294.

<sup>582</sup> Charles W. Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 NEB. L. REV. 1122, 1123 (1993). *See also supra* note 185.

<sup>583</sup> Adams, *supra* note 582, at 1127.

<sup>584</sup> Unless the plaintiffs could serve him in hand in some other state, presumably he would not be subject to jurisdiction in any other state.

<sup>585</sup> *Daimler*, 134 S. Ct. at 762 n.20.

<sup>586</sup> Most of the events and witnesses were in Oklahoma, not New York. *World-Wide*, 444 U.S. at 583-84.

<sup>587</sup> Unless the plaintiffs served the driver in New York, jurisdiction would have been improper. Presumably, he had no contacts with New York and certainly none that related to the claim against him for negligence.

York defendants).<sup>588</sup> Whether Audi could make a plausible objection to specific jurisdiction in New York depends on which wing of the Court wins the *Nicastro* debate.<sup>589</sup>

Audi is a lot larger than is J. McIntyre Ltd.<sup>590</sup> But assume that attorneys for corporations like Audi reconfigure how they do business with their United States subsidiaries. For example, J. McIntyre Ltd., at least according to the record, did not direct its subsidiary's marketing activity in the United States.<sup>591</sup> Thus, creating a business relationship that formally cedes control to one's United States distributor may create immunity from suit even in specific jurisdiction cases.<sup>592</sup>

Such a result depends on whether Justice Kennedy can persuade either Justice Breyer or Alito to join his restrictive view of due process. Given Justice Alito's generally pro-corporate views, further limiting the jurisdictional reach of domestic courts is not farfetched.<sup>593</sup>

Nor should one take much comfort in Justice Kennedy's assurances that, were Congress to act, federal courts may be amenable to suit in cases where a defendant may not have sufficient contacts with a particular state, but does with the United States as a whole.<sup>594</sup> His statement is premised on the fact that such a case would be determined based on Fifth, not Fourteenth, Amendment due process.<sup>595</sup> In such a case, the contacts would be with the

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<sup>588</sup> See *supra* p. 17.

<sup>589</sup> See *supra* Part IV.b.ii.A. For example, if a United States subsidiary markets the product and solicits business, not the foreign company, the foreign corporation would not have act with purpose towards the forum under Justice Kennedy's strict formulation of purposeful availment.

<sup>590</sup> Audi's revenue in 2008 was €34,196 million. *Audi 2008 Financial Report*, AUDI AG (2009), [http://www.audi.com/content/dam/com/EN/investor-relations/financial\\_reports/annual-reports/2008\\_audi\\_annual\\_financial\\_report.pdf](http://www.audi.com/content/dam/com/EN/investor-relations/financial_reports/annual-reports/2008_audi_annual_financial_report.pdf). J. McIntyre Machinery, Ltd.'s revenue in 2008 was €6.90 million. *J. McIntyre Machinery, Ltd. Company Profile*, YAHOO! FINANCE, <http://biz.yahoo.com/ic/134/134152.html> (last visited Feb. 8, 2015).

<sup>591</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

<sup>592</sup> *Id.* at 2786, 2791.

<sup>593</sup> See *supra* note 22.

<sup>594</sup> *Nicastro*, 131 S. Ct. at 2790.

<sup>595</sup> James C. Smith, Comment, *Online Communities as Territorial Units: Personal Jurisdiction over Cyberspace after J. McIntyre, Ltd. v. Nicastro*, 57 ST. LOUIS U. L.J. 839, 858-59 (2013) ("Justice Kennedy's opinion in *J. McIntyre* obliquely refers to the fact that under Federal Rule of Civil Procedure 4(k), for state-law claims — which include garden-variety contract and defamation claims — the jurisdictional reach of the district courts is coextensive with that of state courts. Consequently, as of today, if a non-U.S. defendant avoids jurisdiction in each of the fifty states, that defendant has also succeeded in avoiding the jurisdiction of the federal courts. Of course, Congress could, through appropriate legislation, expand the jurisdiction of the district courts to the outer boundaries of the judicial power of the United States as circumscribed in Article III of the Constitution. This is the path that Congress must take in order for plaintiffs to have reasonable access to the courts to resolve disputes

United States as the relevant forum.<sup>596</sup> Two problems exist with that solution. For one, Congress is dysfunctional.<sup>597</sup> Corporations would almost certainly pour money into a campaign to defeat such legislation.<sup>598</sup> Secondly, some foreign corporations, even those shipping products to the United States, may not be subject to personal jurisdiction even in the event that Congress enacts a statute authorizing jurisdiction to the full extent of the Fifth Amendment.

Here are two hypotheticals to underscore the second point. Consider a case in which a German company has produced a component part incorporated into a product assembled by another foreign corporation.<sup>599</sup> The end producer may be subject to jurisdiction in the United States, but would the German company? On these facts alone, that company has not acted with purpose towards the United States.<sup>600</sup> At most, it has acted with *knowledge* that its product will end up in the forum. As long as the ultimate producer is solvent and cannot shift responsibility to the absent would-be defendant, a plaintiff may not be at a disadvantage. But if the ultimate producer is insolvent, the plaintiff's inability to bring suit against the part's manufacturer (who may be making millions of dollars from the United States market) places the injured plaintiff at an obvious disadvantage.<sup>601</sup>

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originating in online communities.”).

<sup>596</sup> *Id.*

<sup>597</sup> See generally Rep. Debbie Wasserman Schultz, *The Roots of Congressional Discord*, HUFFINGTON POST, (Oct. 18, 2013, 2:03 PM), [http://www.huffingtonpost.com/rep-debbie-wasserman-schultz/congress-discord\\_b\\_4123823.html](http://www.huffingtonpost.com/rep-debbie-wasserman-schultz/congress-discord_b_4123823.html) (detailing the struggles and conflict within Congress).

<sup>598</sup> See, e.g., Nicolas Marceau & Michael Smart, *Corporate Lobbying and Commitment Failure in Capitol Taxation*, 93 AM. ECON. REV. 241, 241 n.3 (2003) (“The impact of lobbyists on tax policy in the United States has been only informally documented, but the evidence suggests that taxation is a primary consideration determining contributions of political action committees for many corporations”).

<sup>599</sup> See, for example, LIGHTWEIGHT, <https://lightweight.info/us/en/>, which is a German Bicycle wheel manufacturer that produces specialty carbon bicycle wheels that then can be incorporated into any bicycle frame. The company does not manufacture a complete bicycle, therefore to use the wheels they must be attached to a bicycle made by another company, for example Raleigh, a British bicycle manufacturer.

<sup>600</sup> *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987).

<sup>601</sup> During oral argument in *Nicastro*, Justice Breyer asked counsel for the plaintiff a hypothetical about asserting jurisdiction over a potter in India who made pottery for a larger corporation. Transcript of Oral Argument at 22, *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 13-25). Justice Kennedy used a similar example of an Appalachian potter selling to a larger corporation. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011). The thrust of the questions was the obvious unfairness of compelling a producer of a product from a far-away venue to appear for suit unless that producer has directed activity to the forum. The examples are farfetched because a plaintiff would not bother to sue a person making small quantities of goods for a large corporation. Further, jurisdiction in such cases might fail because of the fairness aspect of the due process test. By contrast, some component

Harder though would be a case in which a company uses a subsidiary to market its product in the United States. Justice Kennedy seemed to assume that J. McIntyre Ltd. would have been subject to jurisdiction under a congressionally enacted long-arm statute.<sup>602</sup> But depending on how the foreign corporation structured its business, it may not have the requisite contacts even with the United States as a whole. A corporation that does not solicit business, but instead merely responds to another entity's request to sell and ship its product to the forum, may not act with the requisite intent to affiliate with the forum.<sup>603</sup> As *Walden* underscores, *knowledge* that one is dealing with the forum is not enough to meet the stringent purposeful availment component of the Court's test.<sup>604</sup> Thus, if instead of directing activity to the forum, a foreign corporation allows a middle man to create the contacts with the forum, it may be able to avoid jurisdiction in the United States even if Congress enacted an international long-arm statute.

## VI. CONCLUSION

Prior to 1977, a foreign company doing business in the United States would be subject to in rem jurisdiction if it maintained assets in the United States.<sup>605</sup> *Shaffer* closed that route to asserting jurisdiction when the Court conflated in rem and in personam jurisdiction.<sup>606</sup>

United States citizens injured abroad could still find a favorable forum if the foreign corporation maintained a large enough presence in the United States.<sup>607</sup> General jurisdiction could be useful in many instances.<sup>608</sup> But without a clear explanation of its underlying theory, the Court initially, and then radically, scaled back its availability.<sup>609</sup>

The developments seem at odds with the new smaller world in which we live. Commerce and communications bring United States citizens into contact with foreign companies far more frequently than at any other time in history.<sup>610</sup> The Court's begrudging view of due process may effectively

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parts manufacturers are worldwide companies doing millions of dollars of business in many states. *See, e.g.,* Newport Components Inc., v. NEC Home Electronics (U.S.A.), Inc., 671 F.Supp. 1525 (1987) (NEC is a Japanese computer parts manufacturer worth \$2 billion doing 35% of its business internationally with a number of U.S. subsidiaries).

<sup>602</sup> J. McIntyre Machinery, Ltd. v. Nicasro, 131 S. Ct. 2780, 2790 (2011).

<sup>603</sup> *Id.* at 2790-91; *Asahi*, 480 U.S. at 112.

<sup>604</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014).

<sup>605</sup> *See supra* text accompanying note 155.

<sup>606</sup> *Shaffer v. Heitner*, 433 U.S. 186, 207-13 (1977).

<sup>607</sup> For example, Audi did not object to the Oklahoma court's assertion of personal jurisdiction over it. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

<sup>608</sup> *Rhodes, supra* note 54.

<sup>609</sup> *See supra* pp. 22-23.

<sup>610</sup> *See supra* text accompanying notes 553-60.

close the courthouse door on United States citizens who are harmed through their interactions with foreign companies.

One might conclude that such a result, a narrowing of in rem and general jurisdiction, are justified because specific jurisdiction produces more sensible results and expands the reach of domestic courts.<sup>611</sup> No doubt, the former is often true as laying the venue in a place where a claim arises will often result in a convenient place for litigants and witnesses. But depending on which wing of the Court wins the purposeful avilment battle within the Court,<sup>612</sup> the jurisdictional reach of domestic courts may be shrinking at a time when access to justice may demand an expanded jurisdictional reach. Further, Justice Kennedy's suggestion of a congressional solution is cold comfort given the modern reality in Washington D.C.<sup>613</sup>

Plaintiffs' lawyers would be well advised to build detailed records during the pretrial motions stage of the proceedings. Figuring out how much a plaintiff must show to convince Justices Breyer and Alito that a foreign defendant has sufficient contacts with the United States now looms large.<sup>614</sup>

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<sup>611</sup> Cornett & Hoffheimer, *supra* note 9 (manuscript at 25) ("Justice Ginsburg repeated the theme from *Goodyear Dunlop Tires Operations, S.A.* that after *International Shoe* specific jurisdiction expanded to become the 'centerpiece of modern jurisdiction theory' while general jurisdiction has played 'a reduced role.' The Court views personal jurisdiction as comprising two separate sets and reasons that as specific jurisdiction increases, general jurisdiction must decrease. While the expanded opportunities for specific jurisdiction have reduced the number of situations where plaintiffs need general jurisdiction, the Court offers no explanation for why the constitutional expansion of one set would require a corresponding restriction in the other.").

<sup>612</sup> See discussion *supra* Part IV.b.ii.A.

<sup>613</sup> See *supra* text accompanying notes 597-98.

<sup>614</sup> See *supra* text accompanying notes 470-78.