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JURISDICTION: DEFINING STATE COURTS' AUTHORITY

PERSONAL JURISDICTION: ORIGINS, PRINCIPLES, AND PRACTICE

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Executive Summary

In Part I of her paper, Professor Grossi prompts us to recall the core principles of personal jurisdiction: fairness and efficiency, tempered by reason. Guided by the Due Process Clause of the Fourteenth Amendment, state courts abide by their constitutional imperative to embody its principles as a matter of enforceable law. Yet the imprecise nature of United State Supreme Court precedent and the sovereignty afforded to states, thanks to dual federalism, provide state courts considerable flexibility in the application of personal jurisdiction law. Professor Grossi introduces the dichotomy in the Supreme Court's approaches to the law of jurisdiction: one that is fluid and fact-based, and another that is doctrinal, mechanical, and heavily shaped by judicial partiality. Here, where judicial decision-making goes awry, state courts are in an ideal position to take the lead.

In Part II ("Fundamental Concepts of Due Process and Personal Jurisdiction"), Grossi outlines the foundations of due process and its bearing on personal jurisdiction, beginning with Magna Carta. She selects several cases that left their mark on legal history, demonstrating how lawmakers gradually committed themselves to the principles of the Great Charter—reflective of both substantive and procedural components of established law. Later, the Supreme Court's method of judicial inquiry shifted from its traditional pedigree and began to include more expansive, theoretical approaches. An increasingly integrated national economy arose concomitantly with what might be called a fictional approach to jurisdiction, as evidenced in Pennoyer v. Neff. *Professor Grossi then traces the development of this trend, analyzing the impact of* International Shoe Co v. Washington, *which gave rise to a fluid spectrum of possibilities within which lower courts could operate when faced with jurisdictional questions. The Supreme Court*

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carved out novel doctrinal areas to fit into their shifting conception of due process, adding now-commonplace terms to their analysis, such as "continuous and systematic contacts," and "traditional notions of fair play and substantial justice." Grossi goes on to explain how the once-fluid spectrum became constricted with cases that make it extraordinarily difficult to establish jurisdiction, such as Daimler AG v. Bauman, Burger King v. Rudzewicz, *and* J. McIntyre Mach., Ltd. v. Nicastro*. Grossi's framework sketches the seminal cases throughout jurisdiction history, but also touches upon her own persuasions about how the Supreme Court might have alternatively considered issues and how they might soon rule. Having filed an amicus brief with Professor Allan Ides in* Bristol-Myers, *Grossi argues in sum that the line between general and specific jurisdiction ought to be flexible, not artificially constricted.*

In Part III ("The Role of Discovery in Jurisdictional Disputes"), Professor Grossi expands upon her previously established concepts by outlining the consequences associated with heavily doctrinal approaches to jurisdiction. Because of heightened pleading standards and rigorous jurisdictional disputes, a "frontloading" trend has arisen that poses serious challenges to accessing the civil justice system, requiring plaintiffs to surmount procedural obstacles that are often practically impossible. Grossi explains how this fragmented and mechanical approach to the rules of civil procedure, in which "procedure prevails over substance," stifles the development of substantive law, and often prevents the vindication and enforcement of rights.

In Part IV ("Personal Jurisdiction in State Courts"), Grossi addresses five staple jurisdiction decisions coming out of state courts in recent years. Canvasing the broad, yet constricted, spectrum of jurisdictional possibilities, Grossi touches upon, inter alia*:* TV Azteca v. Ruiz*, where the Texas Supreme Court authored a long and serpentine discussion of "purposeful availment" as a universal requirement of the minimum contacts standard;* Tennessee v. NV Sumatra Tobacco Trading Co.*, where the Tennessee Supreme Court discussed the "stream of commerce plus" doctrine as opposed to a realistic assessment of the facts; and* Rilley v. MoneyMutual, LLC*, in which the Minnesota Supreme Court rejected a causal relationship between the defendant's purposeful contacts (e-mail marketing, television ads, and Google AdWords) and the harm suffered by the plaintiff (liability for loans issued in violation of various state consumer-protection laws) as a basis for jurisdiction.*

In her conclusion (Part V), Professorr Grossi relates her methodology to Roscoe Pound's formulation of jurisprudential thinking over time: "fundamental conceptions are worked out from traditional legal principles, and the rules . . . are deduced from these conceptions." In essence, Grossi has embodied the bipartite analytical framework that Pound postulated, underpinning the relationship between natural law and empirical jurisprudence, and has moved past it: "Rather than trying to fit judicial decision-making into any of Pound's categories, given our inherent democratic commitment to liberty and equality, I believe that an optimal judicial decision-making process would be one premised on, and truthful to, due process."

Contents

I. PREMISE

The law of personal jurisdiction should be principled, pragmatic and no more complicated than necessary to measure the constitutional scope of a state's power to adjudicate cases brought before its courts. From a constitutional perspective, the law of personal jurisdiction in state courts derives from the Due Process Clause of the Fourteenth Amendment. The core principles of due process are fairness and efficiency tempered by reason. The challenge is how to embody those principles as a matter of enforceable law.

Given our constitutional system, which embraces judicial review and includes a judicial hierarchy in which the U.S. Supreme Court is the ultimate expositor of the law of the Constitution, the law of personal jurisdiction is ultimately the law as envisioned by that Court. Over the years, the Supreme Court has offered two distinct approaches to the law of jurisdiction: one that is fluid, fact-based, and geared toward fundamental concepts of fairness and efficiency; and one that is heavily doctrinal, mechanical, and geared toward an ever-changing landscape of judicial predilections. This latter approach is fact-based only to the extent that each nuance of fact seems to lead to a new doctrinal path.

While the law of personal jurisdiction is largely framed within the Due Process Clause of the Fourteenth Amendment, which operates as a limit on state power, that clause also presumes and embraces the authority and interest of each state to provide a judicial forum for its citizens and for the agents of the state seeking to vindicate state law and policy. In other words, the Due Process Clause is not simply a limit on state power. It is also an implicit recognition of state power. The law of personal jurisdiction, as instructed by the Due Process Clause, should tell us what to do when the power of the state collides with the potential limits imposed by the due process of law.

Herein we see the dilemma that faces state courts. State courts exist to serve the legitimate interests of the state and the people of the state. Of course, in so doing, those courts must conform their actions to the U.S. Constitution, and, most significantly, to the Fourteenth Amendment guarantees of due process and equal protection. That translates into a respectful compliance with U.S. Supreme Court precedent. But in so doing, a state court cannot and should not overlook its essential role in the enforcement of state-created rights and in the vindication of legitimate state policy.

The question then becomes how to navigate in and around the principles, the doctrines, and the countervailing concerns that face every state court asked to dismiss a case for want of personal jurisdiction over a non-resident defendant. Of course, a state court must comply with the precise doctrines established by the U.S. Supreme Court. But we all know that in many contexts, those doctrines are far from precise. I would begin the jurisdictional analysis with principles: fairness and efficiency tempered by reason. Does it make sense to exercise the power of the state under the circumstances of this case? If so, and unless doctrine demands a different result, I would allow those principles to prevail. In other words, I would not attempt to discover or create more doctrine or to confine my judgment to the contours of doctrine; I would instead attempt to redirect the discussion back to fundamental principles—including those that focus on the interest of the state in providing a forum under the circumstances presented—and leave doctrine construction or deconstruction to the U.S. Supreme Court. The ultimate goal would be to return the law of personal jurisdiction to its fundamental core: fairness and efficiency tempered by reason, and state courts are in the ideal position to do so. It is here that state courts should take the lead.

II. FUNDAMENTAL CONCEPTS OF DUE PROCESS AND PERSONAL JURISDICTION

A. Due Process & Personal Jurisdiction: From Magna Carta to *Pennoyer v. Neff*

The idea of due process is an essential aspect of any democratic system of laws. It is premised on the concepts of fairness and efficiency tempered by reasonableness. Its ultimate goal is to serve as a bulwark against the imposition of arbitrary government action, and it operates both substantively and procedurally. My focus here is on the procedural aspect of due process.[1]

A survey of Supreme Court case law helps identify the essentials of procedural due process as requiring at least "minimum procedural safeguards,"[2] "rules . . . shaped by the risk of error inherent in the truth-finding process,"[3] rules reflective of "those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,"[4] and rules intended to promote an "accurate determination of decisional facts, and informed by unbiased exercises of official discretion."[5] As the Court has explained, the concept of due process is "flexible and calls for such procedural protections as the particular situation demands."[6] Procedural due process doesn't demand exactness.[7] It only demands that the procedure in place, balancing fairness and efficiency

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[1] *See* Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. __ (2017).

[2] Mitchell v. W.T. Grant Co., 416 U.S. 600, 623-624 (1974) (Powell, J. concurring).

[3] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985).

[4] De Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

[5] O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 797 (1980).

[6] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 53 (1991).

[7] Consider, for example, the standards of "more likely than not", "clear and convincing evidence,"—applicable in civil cases—and "beyond reasonable doubt"—applicable in criminal cases. None of these standards requires exactness or

concerns, including the opposing interests of the parties and the judicial system as a whole, reaches the optimal result.

The origins of the principle of due process can be traced back to Magna Carta. In *Kerry v. Din*,[8] the U.S. Supreme Court noted that

> [t]he Due Process Clause has its origin in Magna Carta. As originally drafted, the Great Charter provided that "[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or *by the law of the land*." Magna Carta, ch. 29, in 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797) (emphasis added).[9]

In 1354, under Edward III, Chapter 29 of the Magna Carta was revised and a new provision for the first time contained the phrase "due process."[10] At that time, the phrase was associated with a series of protections inherent in the trial process, like trial by jury,[11] and as the Court later explained, at the time of the Fifth Amendment's ratification, the words "due process of law" were understood "to convey the same meaning as the words 'by the law of the land'" in Magna Carta.[12]

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certainty. But they are all intended to achieve the optimal balance between the various conflicting interests and needs of the parties involved, of the judicial system, and society, as well as the needs of logic, efficiency, fairness, and democracy.

[8] 135 S. Ct. 2128 (2015).

[9] *Id*. at 2132.

[10] LEONARD W. LEVY & KENNETH L. KARST, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, Vol. II, at 828 (2002) ("A 1354 act of Parliament reconfirming MAGNA CARTA paraphrased its chapter 29 as follows: "That no man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law." This was the first reference to due process in English legal history. Chapter 29 of the 1225 issue of Magna Carta originally concluded with the phrase "by the LAW OF THE LAND.")" *Id.* (emphasis in original).

[11] Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1048 (1984) ("Well before our Constitution was drafted, British jurists had definitively associated this phrase with a variety of protections inherent in the trial process, most notably trial by jury. The framers of the Fifth Amendment could not have doubted that the due process concept included such protections, whatever they may have thought about its effect on substantive legislation. The framers of the Fourteenth Amendment were certainly of the same view. The extent to which the Fourteenth Amendment's due process clause was intended to incorporate the Bill of Rights may be disputed, but it was at least intended to incorporate the due process clause of the Fifth Amendment. And no subsequent interpretation of either provision has seriously called its applicability to judicial trials into question.")

[12] Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276, 15 L.Ed. 372 (1856); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, 663 (1833) ("Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law.") It is true that the phrase "due process of law" technically referred to writs and forms of the law (process), but writs and forms defined the content of the law of the land. *Cf.* RODNEY L. MOTT, DUE PROCESS OF LAW 87-95 (1973) (emphasizing the "process" aspect of the phrase, but failing to see the relationship between process and substantive law).

Of course, since the founding, "the amount and quality of process that our precedents have recognized as 'due' under the Clause has changed considerably."[13]

At its inception, Magna Carta's "law of the land" signified, at the very least, that a person could not be deprived of liberty or property except pursuant to established law. In other words, the "law of the land" imposed a rule of law principle.

The phrase "due process of law" then translated the law-of-the-land standard into a practical formula requiring the use of the appropriate ("due") writ or form ("process of law") in any act of potential deprivation. The required "process of law" reflected both the substantive and procedural components of the established law, drawing no distinction between the two. In short, all potential deprivations ought to proceed according to the process that encompassed the substantive standard. The due process standard, therefore, prohibited the King from imposing arbitrary deprivations on his subjects. Logically, it followed, a law that vested the King with arbitrary power would be invalid as inconsistent with the rule-of-law premise of due process. In short, to comply with due process an action ought to accord with an established, non-arbitrary standard of law.

Murray's Lessee

Murray's Lessee v. Hoboken Land & Improvement Co.[14] stands as the Supreme Court's first foray into the law of procedural due process. There the Court noted that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law."[15] The Court did not elaborate on the meaning of those phrases, and endorsed a mechanical method of analysis that was one large step removed from the principle:

> The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process…. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[16]

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[13] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28–36 (1991) (Scalia, J. concurring in judgment).

[14] 59 U.S. (18 How.) 272 (1856).

[15] *Id*. at 276. This was also the view endorsed by Justice Joseph Story in his influential treatise on the Constitution. STORY, COMMENTARIES, *supra* note 12, at 663.

[16] *Id*. at 276–277.

The *Hoboken* Court's method of judicial inquiry—relying exclusively on constitutional text and tradition—suggested that due process required nothing more than a pedigree of past practices. Indeed, the Court upheld the non-judicial issuance of the distress warrant based solely on its view that the Treasury had acted in conformity with a statute (law of the land) and that the statute found its roots in 18th century practices by the Crown (due process).[17]

A few years later, in *Hurtado v. California*,[18] a criminal proceeding, the Court seemed to endorse a slightly more expansive (and perhaps more theoretical) approach to due process. There it quoted with approval Justice William Johnson's views:

> As to the words from *Magna Charta* . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.[19]

And those of Thomas Cooley:

> The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.[20]

Arguably, the observations of Johnson and Cooley locate the principle of due process in a non-formalistic prescription against arbitrary laws and abjure considerations of mere form. But what the *Hurtado* Court may have given with one hand, it withdrew with another:

> The real syllabus of the passage quoted is that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law. . . . But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would

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[17] *Id*. at 276–279. *See also* Walker v. Sauvinet, 92 U.S. 90, 93 (1876) ("[d]ue process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land…. Art. 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.")

[18] 110 U.S. 516 (1884).

[19] *Id*. at 527 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 234, 244 (1819)).

[20] *Id*. at 527–529.

> be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[21]

Thus, the Court recognized that novel procedures could be deemed due process, but adhered to the view that established practices remained sufficient.

It was against this background that *Pennoyer v. Neff*,[22] the foundational personal jurisdiction case, was decided. At that time, personal jurisdiction was premised on, and limited by, the idea of territoriality:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, [a]n illegitimate assumption of power, and be resisted as mere abuse. . . . The several States of the Union are not, it is true, in every respect independent, many of the right and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . "Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunals."[23]

A judgment rendered in violation of the established principle of territoriality[24] would be invalid and, thus, unenforceable:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of [judgments rendered in the absence of jurisdiction] may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[25]

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[21] *Id.*

[22] 95 U.S. 714 (1878).

[23] *Id.* at 720, 722-723.

[24] *Id.* at 724.

[25] *Id.* at 733.

But the limits of the territoriality principle to the fair and efficient administration of justice were evident, and so the *Pennoyer* Court felt compelled to force those limits by introducing what might be called a fictional approach to jurisdiction:

> To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not . . . require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State.[26]

The fictions—e.g., treating conduct in the forum as consent to service on a designated agent—would allow the courts of the states to enforce rights and obligations created in the forum state. And this fictional approach blossomed over the course of the next several decades as courts struggled with the principle of territoriality in the context of an increasingly integrated national economy.[27]

B. *International Shoe Co. v. Washington*: From Fictions to Realism, and a Fluid Spectrum of Jurisdictional Possibilities

In *International Shoe Co. v. Washington*,[28] the jurisdictional question presented was "whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes."[29]

The Court answered the question in the affirmative, expanding the reach of personal jurisdiction beyond its traditional and fictional confines:

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the capias ad respondendum has given way

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[26] *Id.* at 734-735.

[27] *See* ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CIVIL PROCEDURE: CASES AND PROBLEMS 135-137 (5th ed. 2016); *see also* Hess v. Pawloski, 274 U.S. 352 (1927) (fiction of implied consent).

[28] 326 U.S. 310 (1945).

[29] *Id.* at 311.

> to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[30]

A "notion" is a conception or an idea about something.[31] Thus, a traditional notion of fair play and substantial justice connotes deeply held conceptions of fairness and justice, and not simply an obeisance to past practices. In approaching due process, therefore, we should also be mindful of "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke. That tradition is a living thing."[32]

In applying the above standard, the *International Shoe* Court offered a fluid approach to due process with a spectrum of jurisdictional possibilities,[33] and demanded a realistic, qualitative assessment of facts.[34] In so doing, it rejected the fictional approach to jurisdiction:

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of

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[30] *Id.* at 316 (internal citations omitted).

[31] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1545 (1993).

[32] *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[33] *International Shoe*, 326 U.S. at 318 (internal citations omitted) ("While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.")

[34] *Id.* at 319 ("It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.")

> the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.[35]

Consistent with the fair-play and substantial-justice standards, the *International Shoe* Court described a range of potential circumstances that would satisfy due process beyond the traditional categories: the commission of a single but substantively relevant act in the forum, the engagement in continuous and systematic activity in the forum giving rise to or related to the claim, and the engagement in continuous and systematic activity in the forum that was "so substantial" as to justify the exercise of jurisdiction over claims unrelated to that activity. From the foregoing description, we can see an inverse relationship between meaningful contacts and relatedness: as the contacts increase, the relatedness component relaxes, to the point of disappearing entirely once the contacts become "so substantial." The spectrum is fluid, and it is to be applied from a perspective of reasonableness focused on the specific circumstances of the case.

In the Court's estimation, the activities of the International Shoe Company in the State of Washington clearly fell within the jurisdictional spectrum, as those activities were

> systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.[36]

The *International Shoe* formula was principled and flexible. It did not distinguish between general and specific jurisdiction, and it did not contemplate the requirement of purposeful availment or any other doctrinal test.[37] Rather the Court's approach called for a realistic appraisal of the facts in light of traditional notions of fairness and justice. It balanced the interests of the defendant (being sued in a forum where it could expect to be sued), the plaintiff (suing in his selected forum), and the forum state and the judicial system as a whole (having lawsuits tried in a convenient forum with legitimate interest in the matter at hand). In short, the Court endorsed an approach to due process that centered on the core ideas of fairness and efficiency.

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[35] *Id.* at 316-317.

[36] *Id.* at 320.

[37] Allan Ides and I have shown how purposeful availment was not part of the *International Shoe* personal jurisdiction formula in Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CTS L. REV. 118 (2013).

C. Traditional Notions of Fair Play and Substantial Justice Applied and Structured: *McGee v. International Life Insurance Co*. and *Hanson v. Denckla*

Less than a decade later, the Court applied the *International Shoe* formula in *McGee v. International Life Insurance Co.*,[38] a suit brought to enforce the provisions of a life insurance policy. An insurance company from Texas had solicited a reinsurance agreement with a resident of California via mail. The offer was accepted in California, and the insurance premiums were mailed from California to Texas. After the insured died, his mother, the beneficiary under the policy, filed a claim with the insurance company, but the company refused to pay. She then sued the company in a California state court, which upheld the exercise of personal jurisdiction over the insurance company and eventually entered a judgment in the plaintiff's favor. When the mother sought to enforce that judgment in Texas, however, Texas courts refused to give it full faith and credit on the theory that the California courts lacked jurisdiction over the Texas-based company.[39]

The central issue before the Court was whether a single contact with the forum—the solicitation of one policy—could serve as a proper basis on which to exercise personal jurisdiction.[40] In fact, *International Shoe* had addressed that question and explained that a single act could be "deemed sufficient" to establish jurisdiction depending on the "nature and quality and the circumstances of [its] commission."[41] And so, applying the *International Shoe* guiding principle, the *McGee* Court upheld jurisdiction[42] over the defendant, given that

> [t]he 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 the insurers refuse to pay claims.[43]

The *McGee* Court did not distinguish between general or specific jurisdiction, nor did it mention "purposeful availment." In other words, the personal jurisdiction formula established in *International Shoe* remained fluid and focused on the realistic assessment of the facts of the case, those "certain minimum contacts" with the forum that made the exercise of jurisdiction "consistent with the traditional notions of fair play and substantive justice." Thus, the Court's decision did not articulate any new doctrine. Rather, it applied established principles and reiterated those principles for the guidance of lower courts.

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[38] 355 U.S. 220 (1957).

[39] *Id.* at 221.

[40] *Id.* at 223.

[41] *International Shoe*, 326 U.S. at 318 (citing Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927)).

[42] *McGee*, 355 U.S. at 223.

[43] *Id.*

But later in that same term of Court, the jurisdictional inquiry took an abrupt U-turn with the decision in *Hanson v. Denckla*.[44] There the essential issue was whether the courts of Florida could exercise jurisdiction over a Delaware trust company, which was trustee of a trust whose settlor had moved to Florida after the creation of the trust.[45] The trustee continued to administer the trust on behalf of the Florida settlor for the following eight years, and the settlor exercised the power of appointment under the trust while in Florida. Yet, the Court found that the trustee lacked minimum contacts with Florida sufficient to establish personal jurisdiction.[46] This was because the Court read *International Shoe* as requiring 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 of protections of its laws."[47]

In so doing, the Court transformed what *International Shoe* had considered a natural consequence of a defendant's activities in a state—i.e., enjoying the benefits and protections of the laws of that state—into a necessary pre-condition for the exercise of jurisdiction. This is a clear example of the Court falling into a linguistic doctrinal trap.[48] And it may have taken this turn to insure a particular result in the case before it—forcing an equitable distribution of the decedent's assets.

In applying the new "purposeful-availment" test, the Court distinguished *McGee* by noting that, unlike the insurance company there, the trustee here had not performed any acts in the forum state that bore the same relationship to the trust as did the solicitation of the insurance contract at issue in *McGee*.[49] In fact, in the Court's view, the Florida proceeding could not be considered as one initiated to enforce an obligation arising from any privilege the nonresident defendant trustee had exercised in Florida.[50] Thus, according to the Court, the trustee had not "purposefully availed" itself of the benefits and protections of Florida law.[51]

Of course, as noted above, this purposeful-availment requirement was the *Hanson* Court's own creation and, most importantly, prior to *Hanson*, it had not been treated as an absolute precondition to making the exercise of personal jurisdiction consistent with due process.

It is certainly not true that the trust company lacked meaningful connections with the state. Nor is it necessarily the case that the company could not have reasonably expected to be sued in Florida on a matter related to the trust. After all, the company was aware that the settlor had moved to

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[44] 357 U.S. 235 (1958).

[45] *Id.* at 243-244.

[46] *Id.* at 251.

[47] *Id.* at 253 (emphasis added).

[48] *See* Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, note 37, *supra*.

[49] *Hanson*, 357 U.S. at 251-252.

[50] *Id.* at 252.

[51] *Id.* at 253.

Florida and continued to act as the trustee over the trust and to communicate with her in Florida with respect to trust business.

In his dissenting opinion, Justice Black—the author of *McGee*—found that Florida had personal jurisdiction over the Delaware trustee.[52] He observed that the object of the controversy was whether the settlor had properly exercised her power to appoint beneficiaries under the precise trust being administered by the trustee. In fact, the litigation arose when the legatees, under the settlor's will, brought an action in the Florida courts seeking a determination as to whether this appointment was valid.[53] This disposition of her property had very close and substantial connections with Florida, since the settlor had appointed the beneficiaries in Florida and all the beneficiaries lived there. Thus, Florida had an interest in exercising jurisdiction and applying Florida law to determine whether the appointment was indeed valid.

The connections between the appointment, the transaction, and the State of Florida were thus evident and, of course, the trustee was necessarily implicated in this action.

Therefore, in Justice Black's view, Florida courts should have the power to adjudicate a controversy arising out of transactions that were so connected to the state, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend "traditional notions of fair play and substantial justice."[54]

But, according to Justice Black, that was not the case, since the trustee "chose to maintain business relations with [the settlor] in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question."[55] Moreover, the trustee's burden of participating as a formal (and collateral) party to this dispute over the appointment would have been minimal at best.

While Justice Black's analysis was truthful to *International Shoe* and the basic idea behind the due process formula, the majority opinion shifted away from *International Shoe*'s fundamental principles toward a more technical and mechanistic approach to the details of doctrine.[56] With *Hanson*, the minimum contacts test began to lose its inherent coherence and strength.

D. Adding Layers to the Structure and Constricting the Spectrum: General and Specific Jurisdiction, Purposeful Availment, Reasonableness Factors

The modern law of personal jurisdiction has reduced *International Shoe*'s fluid jurisdictional spectrum to a mechanical, bright-line distinction between "specific" jurisdiction, which embraces

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[52] *Id*. at 256 (Black, J., dissenting).

[53] *Id*. at 258.

[54] *Id*. at 259.

[55] *Hanson*, 357 U.S. at 258-259.

[56] *Id*. at 253.

the first two *International Shoe* categories, and "general" jurisdiction, which embraces the third.[57] Both specific jurisdiction and general jurisdiction require that the non-resident defendant have engaged in purposeful activity in or directed toward the forum state. Specific jurisdiction also imposes a relatedness requirement that is often (but not exclusively) described as being premised on some type of causal link between the purposeful contacts and the claim, ranging from a but-for to a proximate-cause standard, though the phrase "related to" would seem to suggest a less rigid formula.[58] General jurisdiction imposes no such relatedness requirement. In determining whether general jurisdiction may be exercised, the Court has reduced *International Shoe*'s "so substantial" standard to a bright-line "at home" metaphor that mirrors the traditional domicile basis of jurisdiction.[59] The at-home standard has made it extraordinarily difficult to establish general jurisdiction, even where considerations of fairness and efficiency would overwhelmingly support its exercise.

More specifically, as to general jurisdiction, the category can be traced to *Perkins v. Benguet Consol. Mining Co.*[60] There, the President of Benguet, a corporation from the Philippines, moved to Ohio and carried out all of the corporation's activities there during World War II.[61] The Court held that due process did not prevent the Ohio court from exercising jurisdiction over Benguet, because the activities of Benguet in Ohio were continuous, substantial, and systematic, and Benguet could have reasonably expected to be haled into court there on any cause of action, even if it were unrelated to the corporation's contacts with the forum state.

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[57] *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (describing specific jurisdiction as embracing two separate scenarios: single-act and continuous-and-systematic); *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (same).

[58] The Court has not yet defined the scope of the relatedness requirement and has certainly not endorsed any specific causation standard. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) ("arises out of *or relates to*") (emphasis supplied). Lower federal courts have recognized the lack of instruction from the Court and have recognized a range of relatedness possibilities that typically operates within a causative chain between the contacts and the claim. That range begins with a minimal cause-in-fact requirement—a but-for test—and extends to a more rigorous legal-cause requirement—proximate cause or substantive relevance. *See, e.g.*, Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements, Ltd., 328 F.3d 1122, 1131-32 (9th Cir. 2003) (endorsing but-for standard); Beydoun v. Wataniya Restaurants Holding, Q.S.C., 768 F.3d 499, 506-06 (6th Cir. 2014) (endorsing a proximate-cause standard). Between these endpoints is a middle-ground standard, in which the contacts satisfy the but-for standard but are not substantively relevant to the claim. As to this middle ground, the due-process adequacy of the contacts depends on whether those contacts render suit in the forum fair or reasonable. The measure is sometimes stated in terms of foreseeability of suit in the forum and sometimes as a product of the reciprocal benefits and burdens of doing business there. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312, 321-24 (3rd Cir. 2007) (endorsing middle-ground approach premised on reciprocal benefits and burdens); Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 716 (1st Cir. 1996) (endorsing a middle-ground approach based on foreseeability of suit in the forum), *cert. denied*, 520 U.S. 1155 (1997). State courts, on the other hand, have sometimes found relatedness outside of the causal chain. *See, e.g.*, Al Rushaid v. Pictet & Cie, 68 N.E.3d 1, 11 (2016) (a "relatively permissive" standard that "does not require causation" in context of state long-arm statute). Some state courts as well as some lower federal courts have also adopted an approach to relatedness that is outside the chain of causation. *See* Part IV, *infra*.

[59] *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

[60] 342 U.S. 437 (1952).

[61] *Id.* at 447.

The opinion, truthful to *International Shoe* and the realistic assessment there demanded,[62] found jurisdiction because the corporate operations with the forum State were "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[63] The *Perkins* Court did not use phrases like "purposeful availment," or "general jurisdiction." It was evident, after carefully assessing the facts that significantly connected the foreign corporation to the forum, that the exercise of jurisdiction over that defendant on any cause of action—including those unrelated to those contacts—would be reasonable under the circumstances presented, that is, that the exercise of jurisdiction would comply with the traditional notions of fair play and substantial justice.

Years later, the idea of personal jurisdiction over causes of action unrelated to the nonresident defendant's contacts with the forum was revisited. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[64] the parents of two 13-year-old boys from North Carolina killed in a bus accident outside Paris sued The Goodyear Tire and Rubber Company (Goodyear USA) and several other foreign subsidiaries attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of Goodyear USA.[65]

In framing the question of jurisdiction, the Court described it in terms of "general jurisdiction"[66] over a foreign corporation when its activities within the forum "are so 'continuous and systematic' as to render them essentially at home in the forum State."[67] The Court held that the North Carolina court did not have personal jurisdiction over the foreign defendants:

> Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. . . [and a] connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction.[68]

The result in *Goodyear* might at first glance seem correct. If we accept the proposition that a nonresident defendant must be "at home" to satisfy the standards of general jurisdiction, it is clear that those standards were not satisfied under the facts presented. One could hardly have concluded that the slim contacts with the forum were sufficient to make the non-resident corporations at home there. But if we step back and assess the facts of the case in view of the opposing conflicting interests involved, we see how injured parties are deprived of an opportunity to sue in their chosen

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[62] *Id.* at 446 ("This conforms to the realistic reasoning in International Shoe Co. v. Washington.")

[63] *Id.*

[64] 564 U.S. 915 (2011).

[65] *Id.* at 918.

[66] *Id.* at 919.

[67] *Id.*

[68] *Id.* at 919-920.

forum to redress injuries that they have suffered as a consequence of the defendants' business. We also see an imbalance between the injured plaintiffs and the enriched defendants, so much so that it feels unjust and unfair to conclude that the plaintiffs will have to travel to foreign countries to have their injuries redressed. This is because the personal jurisdiction assessment mechanically stopped at the "contacts" requirements. The nonresident defendants' contacts were not sufficiently connected to the plaintiffs' claim for purposes of general jurisdiction, and they were not sufficient to rise to the fictional "at home" standard for purposes of general jurisdiction. But what if in between these two categories of contacts there was a third or a fourth one, where one could still argue that it would be reasonable to exercise jurisdiction under the specific circumstances of the case? Would this possibility be inconsistent with the *International Shoe* formula and with its underlying concept of due process? And isn't it true that such "considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required?"[69]

Consider a slightly different approach to jurisdiction. Suppose instead of beginning with an examination of "purposeful contacts," we began with an inquiry into the interest of the forum state in the controversy. The critical question would be whether the forum state has a legitimate interest in providing a forum for the resolution of the particular controversy. In answering that question, we would consider all relevant connections with the forum state. If our answer were in the negative, jurisdiction would not be permitted, its exercise being arbitrary and therefore in violation of due process. If our answer were in the affirmative, however, we would proceed to consider whether the exercise of jurisdiction would be unfair to the defendant or inconsistent with principles of efficiency.

The consequence of the rigid doctrinal approach has been to create a jurisdictional lacuna between specific and general jurisdiction where the purposeful contacts may be truly substantial but nonetheless inadequate to satisfy either standard, due either to a lack of a causal relatedness or to a failure to satisfy the at-home metaphor. But denying jurisdiction under such circumstances might be to stamp as unconstitutional a practice that readily comports with fair play and substantial justice as recognized by this Court in *International Shoe*.[70] Indeed, the notion that there should be a jurisdictional lacuna in the *International Shoe* spectrum runs against the grain of a flexible, fluid, and sensible law of due process. To value the doctrinal categories over the foundational principles on which they rest is to elevate an arid formalism over a realistic appraisal of the facts, while at the same time demeaning the pragmatic balancing of interests required by the due process of law. Where the non-resident's activities are "continuous and systematic," the relationship requirement must be understood as serving the conception of "fair play and substantial justice," rather than as imposing an artificial "causation" or "at home" barrier to the efficient resolution of controversies that implicate significant state interests.

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[69] *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985).

[70] The lacuna can be seen as a product of treating both aspects of specific jurisdiction—single-act and continuous-and-systematic—as raising identical due process concerns. That approach, however, fails to account for the context-specific principle of due process. Nor is it consistent with the oft-used phrase, "arise out of or relate to," Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985), *quoting* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984), which appears to recognize a broader spectrum of relatedness that ranges beyond causation.

Also, the addition of the "at home" layer to the general jurisdiction formula collapsed one of the modern bases of personal jurisdiction with a traditional one—domicile—essentially constricting the modern *International Shoe* spectrum to specific jurisdiction.

This constriction became even more evident with *Daimler A.G. v. B*auman.[71] There twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company that manufactures Mercedes-Benz vehicles in Germany, alleging that during Argentina's 1976-1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers.[72] Setting the analytical stage to address the case at hand, the Court indicated that there were "two categories of personal jurisdiction,"[73] one, specific jurisdiction, that had "become the centerpiece of modern jurisdiction theory," one that "'will come into sharper relief and form a considerably more significant part of the scene,'"[74] and the other, general jurisdiction, that played a "reduced role."[75] The Court recited the *Goodyear* decision's general jurisdiction substantial-continuous-systematic-at-home formula,[76] explaining that for an individual, "the paradigm forum" of general jurisdiction would be the individual's domicile,[77] and for corporations the place of incorporation and their principal place of business.[78] But the Court added that "[w]e do not foreclose the possibility that in an exceptional case, see, *e.g.*, *Perkins* . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[79]

The *Daimler* Court further clarified that "the general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' General jurisdiction instead 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. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States. . . . Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of … activity'

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[71] 134 S. Ct. 746 (2014).

[72] *Id.* at 751.

[73] *Id.* at 754.

[74] *Id.* at 755.

[75] *Id*. at 754; 758 ("As this Court has increasingly trained on the 'relationship among the defendant, the forum, and the litigation,' *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.")

[76] *Id.* at 754.

[77] *Id.* at 760.

[78] *Id.*

[79] *Id.* at 761, n. 19.

having no connection to any in-state activity."[80] And it added that "Justice Sotomayor's proposal to import . . . [a] 'reasonableness' check into the general jurisdiction determination . . . would indeed compound the jurisdictional inquiry. . . . Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of the litigation."[81]

Applying the structured framework, the Court found no jurisdiction as "Daimler's slim contacts with the State hardly render[ed] it at home there."[82] I think it would be fair to say that there would have been no unfairness to Daimler were the case to have been permitted to proceed in California.

Contrary to the Court's observation in *Daimler* that "general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*,"[83] the opposite seems to be true. Both categories suffer from the imposition of relatively inflexible doctrine. As is now true of general jurisdiction, specific jurisdiction has been significantly limited by doctrinal requirements, none of which were part of the original *International Shoe* formula.

Burger King v. Rudzewicz

In 1985, when *Burger King v. Rudzewicz*[84] was decided, the law of personal jurisdiction had been settled as a two-part test, for the two categories of general and specific jurisdiction, with the additional layer of "purposeful direction"[85] for the specific jurisdiction category.

The question presented in *Burger King* was whether a federal court sitting in Florida could exercise jurisdiction over a nonresident franchisee that had entered into a long-term franchise agreement with the plaintiff, a corporate resident of the state. The bulk of the Court's opinion focused on the purposeful availment requirement, but the Court added a potential "exit" to the jurisdictional analysis under which a strong presumption of jurisdiction established by the connecting factors and the reasonable expectation arising from those factors could be rebutted under "compelling" circumstances.[86] In describing this presumption-rebutting standard the Court suggested that it would apply only when the defendant established "the unconstitutionality of" the exercise of jurisdiction by showing a severe impairment of the defendant's ability to defend or

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[80] *Id.* at 762, n. 20.

[81] *Id.*

[82] *Id.* at 760.

[83] *Id.* at 757.

[84] 471 U.S. 462 (1985).

[85] *Id.* at 472 ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities.")

[86] *Id.* at 477.

assert a counterclaim.[87] The Court's application of this additional consideration essentially replicated *forum non conveniens* analysis, strongly suggesting doctrinal redundancy.[88] The Court concluded, however, that the heavy presumption in favor of jurisdiction was not rebutted in the case before it.[89]

Although the *Burger King* analysis was truthful to *International Shoe*, the additional and unnecessary doctrinal layers added to Justice Stone's jurisdictional formula paved the way for a marked departure from the opinion's foundational, due process, principled approach.

J. McIntyre Mach., Ltd. v. Nicastro

J. McIntyre Mach., Ltd. v. Nicastro[90] provides an apt example. In *McIntyre*, Nicastro, a resident of New Jersey, was severely injured while using a three-ton metal shearing machine manufactured by the British manufacturer McIntyre UK.[91] McIntyre UK had not directly shipped the machine to the forum—its exclusive distributor, McIntyre Machinery America, Ltd., had. But, despite the similar names, McIntyre UK and McIntyre America were separate and independent entities.[92] And since McIntyre UK "had no office in New Jersey; it [neither paid] taxes nor owned property there; and it [did not] advertise[] in, nor [send] any employees to, the State. . . [and did not] 'have a single contact with New Jersey short of the machine in question ending up in this state[,]'. . . [t]hese facts . . . do not show that J. McIntyre purposefully availed itself of the New Jersey market."[93] Hence, the New Jersey court had no personal jurisdiction over McIntyre UK.

The realistic appraisal of the facts, that is, of the defendant's contacts with the forum, is confined to the few paragraphs in Part I of the plurality opinion,[94] authored by Justice Kennedy. Justice Ginsburg offers a more accurate and comprehensive assessment of those facts in her dissenting opinion.[95] It is only there that we learn that Nicastro had severed four fingers of his right hand while using the machine;[96] that the price of one machine was $ 24,900;[97] that the machine ended up in New Jersey as a direct consequence of the successful marketing efforts of the

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[87] *Id.* at 482-484 (a case of "constitutional magnitude").

[88] *Id.* at 482-486.

[89] *Id.*

[90] 131 S. Ct. 2780 (2011).

[91] *Id.* at 894 (Ginsburg, J., dissenting).

[92] *Id.* at 896–897.

[93] *Id.* at 886.

[94] *Id.* at 878–879.

[95] *Id.* at 893–898.

[96] *Id.* at 894.

[97] *Id.*

defendant,[98] and in the regular course of the defendant's business;[99] and that McIntyre UK had instructed its exclusive American distributor to sell the machines "anywhere in the U.S,"[100] with no fear of successful litigation against McIntyre in the U.S. as "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine,"[101] and, in any event, "the manufacturer had products liability insurance coverage."[102] As Justice Ginsburg observed, the above realistic assessment of the facts coupled with a respect for tradition, should have led to a finding of jurisdiction:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?
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> Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, and subsequent decisions, one would expect the answer to be unequivocally, No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it."[103]

And, Ginsburg wrote, the opposite conclusion reached by the plurality and Justice Breyer's concurring opinion[104] took "a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe.*"[105]

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[98] *Id.* at 895 (Frank Curcio, Nicastro's employer, "first heard of [McIntyre UK's] machine while attending an Institute of Scrap Metal Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor.").

[99] *Id*. at 896 ("McIntyre UK representatives attended every ISRI convention from 1990 through 2005.")

[100] *Id.* at 898.

[101] *Id.* at 897.

[102] *Id*.

[103] *Id.* at 893–894. (internal citations omitted).

[104] *Id.* at 887–93 (Breyer, J., concurring).

[105] *Id.* at 910 (Ginsburg, J., dissenting).

The opinion in *McIntyre* also failed to balance the interest of the defendant against the interest of the plaintiff and the judicial system as a whole. Of course the defendant would be better off if sued in its own country, but what about the plaintiff, the individual who was injured in his forum while using the machine that the defendant has sold there, making a profit from it? And would the judicial system as a whole benefit from a denial of jurisdiction in the place of injury? Essentially denying access to justice to a citizen of the forum, asking him to submit to a foreign jurisdiction, and most likely to foreign law, to be compensated for the wrongful, and yet profitable, activity engaged in by the foreign corporation in the plaintiff's own state? Doesn't this result defy logic, common sense, the fundamental principles of liberty and justice?

If the answers to the above questions suggest that the opinion in *McIntyre* was not consistent with due process, then why did the Court reach that result? We may make an hypotheses and build assumptions. The Court may have been motivated by concerns for international relations.[106] Or perhaps the Court just thought it was properly interpreting and applying the precedents—*International Shoe*, *Hanson v. Denckla*,[107] *World-Wide Volkswagen Corp. v. Woodson*,[108] *Asahi Metal Industry Co., Ltd. v. Superior Court*,[109] *Burnham v. Superior Court*.[110] And it was some of the precedents that might have determined the outcome of the case, more specifically, *Hanson* and *Burnham*:

> The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[111]

And:

> The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant.[112]

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[106] *See, e.g.*, Daimler A.G. v. Bauman, 134 S.Ct. 746, 763 (2014) ("the Solicitor General informs us, in this regard, that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.").

[107] 357 U.S. 235 (1958).

[108] 444 U.S. 286 (1980).

[109] 480 U.S. 102 (1987).

[110] 495 U.S. 604 (1990).

[111] *McIntyre*, 564 U.S. at 882 (quoting *Hanson*).

[112] *Id.* at 883.

But the realistic appraisal demanded by *International Shoe* did not make purposeful availment a determinative factor of the jurisdictional inquiry. If you think about it, purposeful availment—or the defendant's intent to enjoy, avail itself of "the benefits and protection of the laws of the state,"[113] or "target,"[114] using Justice Kennedy's word—might be hard, and at times very hard, to determine. And the *International Shoe* Court's innovative contribution to the law of personal jurisdiction was to make clear that fictions—like the defendant's voluntary submission to the authority of the sovereign—should be abandoned in favor of a realistic approach.[115]

E. The latest developments: *Bristol-Myers Squibb v. Superior Court*

Bristol-Myers Squibb v. Superior Court, No. 16-466 (2017), is currently pending before the Supreme Court. The Court heard oral arguments on April 25, 2017. The suit filed against Bristol-Myers involves two sets of plaintiffs, those who are residents of California and those who are not. The resident plaintiffs' claims are centered on activity undertaken by Bristol-Myers in California. The claims of the non-resident plaintiffs, however, are the product of related activity undertaken by Bristol-Myers in states other than California. The question is whether the courts of California may exercise personal jurisdiction over Bristol-Myers with respect to those non-resident claims. The California Supreme Court answered that question in the affirmative.

The California Supreme Court based its finding of relatedness on the non-causal, factual relationship between the claims asserted by the resident plaintiffs and those asserted by the non-resident plaintiffs. Both sets of claims involved essentially identical allegations of the manufacture of a dangerous and defective drug—Plavix—and a unified nationwide marketing and distribution scheme targeting consumers—television, magazine, and internet advertising—that falsely and fraudulently promoted the sale of that drug.[116] There was no suggestion that either the drug or the marketing plan varied from state to state. Hence, the only difference between the claims of the resident plaintiffs and those of the non-resident plaintiffs was the location of the sale and use of the drug. In short, both sets of claims arose from the common core of the defendant's manufacture of Plavix and the nationwide marketing and distribution scheme used to promote its sale. That commonality was sufficient, in the California Supreme Court's estimation, to establish a "substantial connection" between Bristol-Myers' purposeful marketing and sales activities in the state (giving rise to the resident claims) and the virtually identical claims asserted against Bristol-Myers by the non-resident plaintiffs.

Once it determined that the non-resident plaintiffs satisfied the contacts and relatedness requirements of the minimum contacts test, the California Supreme Court turned to the question of reasonableness. The state high court examined reasonableness from the perspective of the

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[113] *International Shoe*, 326 U.S. at 319.

[114] *See, e.g., McIntyre*, 564 U.S. at 877.

[115] Along these lines, see Justice Ginsburg's dissenting opinion in *McIntyre* ("Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."). *Id.* at 900. (Ginsburg, J., dissenting).

[116] *Id*. at 652-53.

defendant, the plaintiffs, the forum state, and the interstate judicial system's interest in obtaining an efficient resolution of the case.[117] It prefaced this discussion by noting that Bristol-Myers did not contend that the exercise of jurisdiction over it in California would be "fundamentally unfair."[118] It then discussed and balanced each of the four relevant interests and concluded that Bristol-Myers had "failed to carry its burden of showing that the exercise of personal jurisdiction over it in this matter is unreasonable."[119]

In seeking review in the Supreme Court, Bristol-Myers couched the question presented as:

> Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant *had no forum contacts*.[120]

The last clause of this statement ignores the critical fact that the defendant had *substantial forum contacts*, contacts that concededly gave rise to the virtually identical claims of the resident plaintiffs. Thus, the true question before the Court seems to be whether, under the circumstances presented, the exercise of jurisdiction over Bristol-Myers with respect to the *additional* ―but essentially identical―claims of the non-resident plaintiffs is fair, just, and reasonable. Essentially, Bristol-Myers is asking the Court to fit the case into a narrow doctrinal category, rather than try to fit the principle to the case, as justice would instead demand.[121] The doctrine trumps the realistic assessment of the facts and, ultimately, due process.

Professor Allan Ides and I have filed an amicus brief in *Bristol-Myers* and there explained why we believe that the California Supreme Court is correct and should be affirmed.[122] There we argue that given Bristol-Myers' significant and purposeful contacts with California, the state high court's substantial-connection rationale comports with *International Shoe*'s fluid spectrum of jurisdiction in which the requirement of relatedness varies in intensity with the quality and quantity of the contacts. Specifically, the endorsement of non-causal relatedness when the non-resident's contacts are continuous, systematic and substantial fills the jurisdictional lacuna between cause-bound specific jurisdiction and at-home general jurisdiction. Instead of dissolving jurisdiction into an empty space, as is true with the cause-bound standard, the substantial connection standard permits a form of relatedness that moves seamlessly from specific to general jurisdiction. In short, we

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[117] *Id*. at 656-60.

[118] *Id*. at 656.

[119] *Id*. at 660.

[120] Petition for Certiorari, at (i) (emphasis supplied).

[121] Roscoe Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361, 365 (1913).

[122] *See* Simona Grossi, Allan Ides, *Amicus Brief*, available here: http://www.scotusblog.com/wp-content/uploads/2017/04/16-466_amicus_resp_professors_of_civil_procedure.pdf

argued that the line between specific and general jurisdiction should be blurred instead of artificially constricted.[123]

The Supplemental Jurisdiction Doctrine

Furthermore, the doctrine of supplemental jurisdiction provides an instructive perspective from which to assess the California Supreme Court's application of the relatedness standard. As is evident, the California Supreme Court's approach to relatedness operates much like the federal doctrine of supplemental jurisdiction. Under that doctrine, a federal court may exercise subject matter jurisdiction over an entire case, including claims over which there is no independent basis of subject matter jurisdiction, so long as that claim arises out of a "common nucleus of operative facts" with a claim over which there is an independent basis of jurisdiction.[124]

The ultimate determination of supplemental jurisdiction includes both a fact-based and efficiency-driven component of power and a reason-based component of discretion,[125] which is to say that the law of supplemental jurisdiction is a product of fairness and efficiency tempered by reasonableness. More generally, the doctrine is built on a common sense accommodation of litigational convenience and jurisdictional principle that strikes a due process balance among the relevant interests at stake. Thus although supplemental jurisdiction is not technically a doctrine of due process, it is in fact consistent with and conducive to due process.

The flexible model of supplemental jurisdiction translates nicely into the question presented in *Bristol-Myers*. The courts of California undoubtedly have jurisdiction over the claims of the resident plaintiffs, and it is equally clear that the claims of the resident and non-resident plaintiffs arise out of a common nucleus of operative facts—the manufacture and nationwide marketing scheme for the drug Plavix. In addition, the consolidated litigation of the resident and non-resident claims will unquestionably promote judicial economy and litigational convenience. Furthermore, as noted, the California Supreme Court carefully surveyed the question of reasonableness from all relevant perspectives and concluded that Bristol-Myers, in addition to having made no claim of fundamental unfairness, failed to show that the exercise of jurisdiction over the non-resident claims would be unreasonable. Petitioner has raised no challenge to those findings. In short, the California Supreme Court's analysis was a product of fairness, efficiency, and reasonableness.

Pendent Personal Jurisdiction

The applicability of supplemental-jurisdiction-type principles to the law of personal jurisdiction is now recognized in the emerging common law doctrine of "pendent personal

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[123] *See* Bristol-Myers Squibb v. Superior Court, Brief of Petitioner, at 32-37.

[124] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[125] 28 U.S.C. § 1367(a) & (c).

jurisdiction."[126] That doctrine vests federal district courts with the power to exercise personal jurisdiction over a non-resident defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as that claim "arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction."[127] The policy behind this doctrine is expressly premised on due process concerns. As the Ninth Circuit explained in *Action Embroidery v. Atlantic Embroidery, Inc*.,

> We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine.[128]

In accord with those principles and much like supplemental jurisdiction, a court may likewise decline to exercise pendent personal jurisdiction "where 'considerations of judicial economy, convenience and fairness to litigants' so dictate."[129] Every circuit that has expressly considered the doctrine of pendent personal jurisdiction has endorsed it.[130]

As noted, pendent personal jurisdiction is technically a federal common law doctrine. Yet the due process principles on which it rests—judicial economy, convenience, and fairness—are fully applicable to a state court's exercise of personal jurisdiction. While the California Supreme Court did not purport to apply the doctrine of pendent personal jurisdiction, that court's approach to relatedness and its overall reasoning—as described above—bears a striking resemblance in both theory and practice. As such, the decision is consistent with and conducive to due process. The critical point here is not that this Court should now endorse pendent personal jurisdiction, but that the California Supreme Court's application of relatedness is fully consistent with the due process principles reflected in the recognized parallel doctrine of pendent personal jurisdiction.

The principles of fairness and reasonableness at the heart of due process require, in the context of the minimum contacts test, a showing that the non-resident defendant has engaged in purposeful activity directed at the forum state. The substantial activities of Bristol-Myers in California surely satisfy that standard. Such purposefulness is the necessary first step in assuring that a state will not exercise its judicial power in an arbitrary manner, *i.e.*, in a manner that extends beyond its sovereign prerogative. The doctrinal categories of specific and general jurisdiction, both of which

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[126] For a lucid discussion of pendent personal jurisdiction and its essential role in the modern law of jurisdiction, see Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C.D. L. Rev. 207, 243-52 (2014).

[127] *Action Embroidery Corp. v. Atlantic Embroidery, Inc*., 368 F.3d 1174, 1180 (9th Cir. 2004).

[128] *Id*. at 1181.

[129] *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977) (citing *United Mine Workers v. Gibbs*, 383 U.S. at 726).

[130] *See*, *e.g.*, Avocent Huntsville Corp. v. Aten Intern. Co., Ltd., 552 F.3d 1324, 1339-1340 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d at 1180-1181 (9th Cir. 2004); United States v. Botefuhr, 309 F.3d 1263, 1272–1275 (10th Cir. 2002); Robinson Engineering Co., Ltd. Pension Plan & Trust v. George, 223 F.3d 445, 449–450 (7th Cir. 2000); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 628-629 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998) IUE AFL–CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056–1057 (2d Cir. 1993), *cert. denied*, 513 U.S. 822 (1994); Oetiker v. Werke, 556 F.2d at 5 (D.C. Cir. 1977); Robinson v. Penn Cent. Co., 484 F.2d 553, 555–556 (3d Cir. 1973).

depend on this premise of purposeful contacts, help map out the circumstances where the exercise of that power will presumptively comport with "traditional notions of fair play and substantial justice." But those doctrines are simply shorthand tools for advancing the underlying principles. The California Supreme Court's approach to relatedness bridges the gap between the doctrinally rigid categories of specific and general jurisdiction and, in so doing, honors the fluid concept of due process as applied in the context of personal jurisdiction. Whether one reads the state high court's decision as extending relatedness into the jurisdictional lacuna between specific and general jurisdiction or as implicitly reflecting the doctrine of pendent personal jurisdiction, there is no doubt that the California court's decision comports with the due process standards of fairness, reasonableness, and a balanced approach to the competing interests at stake.

III. THE ROLE OF DISCOVERY IN JURISDICTIONAL DISPUTES

A careful assessment of facts is essential to litigation and to a judicial decision-making that is truthful to due process. This is also true for personal jurisdiction purposes, and especially so when you consider that a decision dismissing an action for lack of personal jurisdiction might be the death knell to the case. That the determination of jurisdiction takes place at the outset of the case makes sense, as personal jurisdiction is a procedural condition of the action. Without personal jurisdiction, the court would not have power to hear the case and render a valid and binding judgment, entitled to full faith and credit. But the fact that the inquiry takes place at the outset should not come at the expense of a realistic assessment of the facts, and certainly should not lead to frontloading the merits analysis.

I have elsewhere addressed the frontloading trend and its dangers in procedural analysis.[131]There, I have explained how the procedural frontloading trend requires the plaintiff to establish all or part of her claim at the outset or to surmount procedural obstacles that make vindication of that claim pragmatically impossible.[132] This trend calls for an extensive analysis of the reasons why the court should not take the case, rather than a search for the fair and efficient methods and means of managing it. Under this scenario, the merits either play an essential role in the resolution of a pre-merits procedural issue, or the procedural rules ensure the demise of the merits in service of some other non-merits value. This frontloading trend also conflates the claim and the remedy, pulling the assessment of the remedy further and further into the procedural forefront.[133] The frontloading trend is the result of several intervening forces: the self-interested

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[131] *See* Simona Grossi, *Frontloading, Class Actions, and a Proposal for a New Rule 23*, __ LEWIS & CLARK L. REV. __ (2017).

[132] *See, e.g.*, Arthur R. Miller, *Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors?* (March 19, 2012) (www.law.nyu/edu/news/ECM_PRO_072088) ("The judiciary has shifted the procedural system dramatically against plaintiffs by moving the specter of case termination forward in time . . . converting screening motions into merit resolving dispositive motions.") *Id.* at 16.

[133] The risk of conflation of causes and remedies was a problem preceding the adoption of the Federal Rules of Civil Procedure. In 1937, the Fifth Circuit had warned that "[c]auses of action should be distinguished from remedies. One precedes and gives rise to the other, but they are separate and distinct. The cause of action is not only different from the remedy but also from the relief sought. At common law, an 'action' is defined by Lord Coke as a legal demand of

lobbies trying to affect the rulemaking process;[134] a fragmented and mechanical approach to the rules by their revisers and interpreters, both lacking a necessary holistic vision to comprehend the procedural design and make it effectively operate;[135] and the modern tension between judicial case-management and docket-clearing, with settlements in service of the first, the second, or both, taking cases farther and farther away from courts.[136] These forces have sometimes succeeded in shifting the analysis of the merits of the case from the post-discovery/pre-trial phase, to the very outset of the litigation, often before discovery has even started. When the frontloading trend succeeds, procedure prevails over substance, thus preventing the vindication and enforcement of rights and the development of substantive law.

Personal jurisdiction analysis runs the risk of frontloading the merits, and especially so in the context of specific jurisdiction. Since the jurisdictional inquiry is premised on the meaningful connections between the defendant, the state, and the claim, the overlap with the merits is almost inevitable. But even in the context of general jurisdiction, the frontloading phenomenon may be at play, since a dismissal could operate as the death knell to the litigation, the supposed "alternate

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one's right. Our Supreme Court says a cause of action comprises what a plaintiff must prove to obtain judgment." United States v. Smelser, 87 F.2d 799 (5th Cir. 1937).

[134] For a critical assessment of Rule 23, the amendment process, and the political forces at stake, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 145 (2011). *But see also* Arthur R. Miller, *Are They Closing the Courthouse Doors?*, *supra* note 132, at 16-17 ("Could it be that it's now the defense bar that has been empowered to extort settlements that are artificially low by subjecting plaintiffs to the costs, delays, and risks of running afoul of the various procedural stop signs that dot the pretrial landscape? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe the fault lies on both sides? Or maybe extortion really is a nonissue—a rhetorical illusion? . . . Yet despite this vacuum of knowledge, dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.") *Id*.

[135] The mechanical, fragmented, and hyper-technical nature of the current rules is probably a result of a profound distrust of the judges and juries. But as the drafters of the 1938 Federal Rules of Civil Procedure warned, there will never be a procedural reform if the reformers don't trust and give power to the judges. As Edmund Morgan, one of the members of the Advisory Committee, noted at the November 15, 1935 meeting,

> [a]s long as you have no confidence in your trial judges, you will never get any procedural reform. You do not care what kind of fellows they are, because you will not give them any power. And then you say you cannot give them any power, because they cannot be trusted. And there you are, in a continuous circle. That strikes every reform for procedure, evidence and pleading—that you will not trust your trial judges. It was found that all the way through all the uncertainty in regard to the right of the court to comment on the evidence, that there were floods of telegrams, and they said, 'If we had good judges we would be willing, but God help us, we do not have good judges;' and then you do not have good judges because they do not have any power. You must break that continuous circle in some place.

Charles E. Clark Papers, Box 94, Folder 2, at 506.

[136] *See, e.g.*, Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action*, 162 U. PA. L. REV. 1525, 1526-1527 (2014) ("Even as we have more terminations, our current system seems to give us fewer determinations. In 2013, only slightly over one percent of more than 250,000 civil terminations in the federal courts over the previous twelve consecutive months occurred after reaching trial. As Owen Fiss recognized three decades ago, such statistics call into question whether settlement is invariably a good thing, and whether, in too many cases, a fixation on achieving settlement has prioritized clearing dockets over doing justice.").

forum" being unavailable as a matter of practical reality (as in cases involving torture or human rights violations in a foreign nation).

As to specific jurisdiction, in *Burger King v. Rudzewicz*, the Court noted how

> [o]nce it has been decided that defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s] may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.[137]

Lower federal courts have interpreted the above passage as placing a prima-facie burden of proof of the existence of the minimum contacts on the plaintiff. Typically, under that standard, the plaintiff must show facts that if true would support personal jurisdiction over the defendant.[138] Once that burden is met, the burden shifts to the defendant[139] who, by showing the existence of the factors above, may establish the existence of a compelling case, or a case of "constitutional magnitude."[140] The burden of proving personal jurisdiction is treated as a sliding scale: the stronger

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[137] *Burger King*, 471 U.S. at 476-77 (internal citations omitted).

[138] *See* Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995); *see also* Porina v. Marward Shipping Co., Ltd., 521 F.3d 122, 126 (2d Cir. 2008) ("a "plaintiff[] need only make a prima facie showing of personal jurisdiction over the defendant[,][and]. . . we construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving all doubts in their favor"). When "substantial discovery" has been allowed, the burden on the plaintiff might change: *see, e.g.*, Burns & Russell Co. of Baltimore v. Oldcastle, Inc., 198 F. Supp. 2d 687 (D. Md. 2002) ("Nevertheless, as I have allowed plaintiffs to conduct extensive jurisdictional discovery, plaintiffs must do more than merely establish personal jurisdiction by the *prima facie* standard. Rather, plaintiffs must overcome, by substantial evidence based on the discovery that was permitted, OI's compelling showing that it lacks the requisite minimum contacts with Maryland to justify the court's exercise of personal jurisdiction over the defendant."). *See also* We're Talkin' Mardi Gras, LLC v. Davis, 192 F. Supp. 2d 635 (E.D. La. 2002) ("Where the alleged facts are disputed and the Court's jurisdiction is placed at issue, the party who seeks to invoke the jurisdiction of the district court bears the burden of establishing it. Consequently, in this case the burden is on the plaintiff. Where the district court rules on a motion to dismiss for lack of jurisdiction without conducting an evidentiary hearing, the plaintiff may carry his burden by presenting a prima facie case of jurisdiction. If the trial court holds an evidentiary hearing or the case proceeds to trial, the burden on the plaintiff shifts to a preponderance of the evidence.")(internal citations omitted).

[139] *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, 4 FED. PRAC. & PROC. CIV. §1067.6 (4d ed. 2016).

[140] *Burger King*, 471 U.S. at 484.

the showing of the minimum contacts made by the plaintiff, the stronger the showing of "unreasonableness" that must be made by the defendant.[141]

At times the prima facie showing of minimum contacts can be complex and resource consuming. For example, in general jurisdiction cases, the new proportionality test endorsed by the *Daimler* Court might indeed, as Justice Sotomayor pointed out in her concurring opinion,

> lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. Rather than ascertaining the extent of a corporate defendant's forum-state contacts alone, courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts. That considerable burden runs headlong into the majority's recitation of the familiar principle that "'[s]imple jurisdictional rules . . . promote greater predictability.'"[142]

The majority's response to that concern was almost a non-response:

> Justice Sotomayor fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.[143]

It is hard to see how the newly endorsed proportionality test won't lead to complex and expensive discovery. But to properly apply the *Goodyear* "at home" test, the inquiry that that test demands seems almost inevitable, necessary to a realistic and careful assessment of the facts of the case that would make the exercise of jurisdiction over a claim unrelated to the nonresident defendant's contacts with the forum consistent with due process. And still truthful to that idea and *International Shoe*, the *Daimler* Court explained that

> [a] corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . activity" having no connection to any in-state activity.[144]

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[141] *Id.* at 477.

[142] *Daimler*, 134 S.Ct. at 770-71 (Sotomayor, J., concurring).

[143] *Id.*. at 762, note 20.

[144] *Id.*

In other words, establishing jurisdiction would demand a careful, qualitative assessment of the facts of the case, that is, the defendant's contacts with the forum. This naturally leads to the need of discovery limited to the facts relevant to establish jurisdiction.

State courts adopt different approaches to the discovery of jurisdictional facts. Some courts allow such discovery only when the motion to dismiss for lack of personal jurisdiction articulates and proves, by way of affidavits and other evidence, facts outside the pleading.[145]

Along the same lines, and in order to conserve judicial resources, some courts have held that

> [j]urisdictional discovery generally is permitted before a court rules on a motion to dismiss for lack of personal jurisdiction. Such discovery is not mandated, however, and is unnecessary where the discovery is unlikely to lead to facts establishing jurisdiction. As with other discovery issues, the court has broad discretion in granting jurisdictional discovery.[146]

Other courts demand that "the plaintiff must carry the initial burden of demonstrating facts by a preponderance of evidence justifying the exercise of jurisdiction,"[147] of which she cannot be relieved by asking the court to draw inferences of liability from her allegations in the complaint,[148] even when doing so "would effectively require [the plaintiff] to prove the merits of [her] case at the outset of litigation."[149] And "when personal jurisdiction is asserted on the basis of a nonresident defendant's alleged activities in this state, facts relevant to jurisdiction may also bear on the merits of the complaint.[150] . . . Plaintiff must more than merely allege jurisdiction facts. It must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant. The plaintiff must provide affidavits and other authenticated documents in order to demonstrate competent evidence of jurisdictional facts. Allegations in an unverified complaint are insufficient to satisfy this burden of proof. Declarations cannot be mere vague assertions of

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[145] *See, e.g.*, Geo-Culture, Inc. v. Siam Inv. Management S.A., 147 Or. App. 536, 544 (1997) ("Because plaintiff's operative amended complaint failed to allege a *prima facie* basis for asserting jurisdiction over [the defendant], the court did not err in . . . limiting discovery pursuant to ORCP 21 A.")

[146] *See* Behm v. John Nuveen & Co., Inc., 555 N.W. 2d 301, *305 (Ct. App. Minn.). *See also* Goehring v. Superior Court 62 Cal.App.4th 894, * 911 (1998) (The trial court should be given the opportunity to rule on this issue. A plaintiff is generally entitled to conduct discovery with regard to a jurisdictional issue before a court rules on a motion to quash. The granting of a discovery request "lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse." Under the circumstances, the trial court should be provided the opportunity to exercise its discretion to determine whether jurisdictional discovery pertaining to petitioners would be appropriate in this case) (internal citations omitted).

[147] *See* In re Automobile Antitrust Cases I and II, 135 Cal.App.4th 100, *110 (2005).

[148] *Id.* at 112.

[149] *Id*.

[150] *Id.* at 110.

ultimate facts, but must offer specific evidentiary facts permitting a court to form an independent conclusion on the issue of jurisdiction."[151]

IV. PERSONAL JURISDICTION IN STATE COURTS

As I have shown, the Supreme Court has, over time, endorsed two strikingly different approaches to resolving jurisdictional disputes: one that is attentive to the specific facts of the case and to a proper balancing of the conflicting interests at stake—*International Shoe v. Washington* being a prime example—and one that values doctrinal tests as a substitute for core due process principles—*Daimler AG v. Bauman* and *J. McIntyre Mach., Ltd. v. Nicastro* being apt examples. Given the constitutionally mandated judicial hierarchy, state courts face the dilemma of accommodating these two incompatible strands of jurisprudence. Of course, state courts must also take seriously the obligation of each state to protect its citizens and to provide a forum for a vindication of their rights. In what follows, I will examine five relatively recent decisions by state high courts that reflect the tensions between principle, doctrine, and obligation, and which show the different ways state courts have attempted to navigate these sometimes murky waters.

Let's begin with doctrine. Clearly, given the judicial hierarchy, state courts recognize that they must grapple with the personal jurisdiction doctrines developed by the Supreme Court. Some state high courts see doctrinal adherence as a practical necessity, others see it as an opportunity to emulate the lead of the U.S. Supreme Court by taking doctrine to increasingly refined levels of nuance and intricacy.

TV Azteca v. Ruiz

A recent opinion by the Texas Supreme Court, *TV Azteca v. Ruiz*,[152] provides an illuminating example of the latter approach. The plaintiff in *Azteca* was a Mexican recording artist living in Texas at the time of the events giving rise to the lawsuit. She sued two Mexican broadcasting companies, as well as the news anchor for one of them, in a Texas state court, alleging that the defendants had defamed her in broadcasts that emanated from Mexico but that had also aired in Texas due largely to across-the-border broadcast spillover. The defendants filed a special appearance in which they challenged the trial court's jurisdiction. The trial court upheld jurisdiction and the court of appeals affirmed.

The essential question presented to the Texas Supreme Court was whether the airing of the defamatory broadcasts in Texas established a sufficiently meaningful connection with the state to sustain the exercise of jurisdiction over the plaintiff's defamation claim. The state high court eventually upheld the exercise of jurisdiction, but only after a lengthy discussion and application of jurisdictional doctrine. That discussion begins with a standard and sensible description of jurisdictional standards—minimum contacts measured by traditional notions of fair play and

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[151] *Id.*

[152] 490 S.W.3d 29 (Tex. 2016).

substantial justice[153]—but then melts into a highly detailed explication and application of doctrine and sub-doctrinal tests.

As to doctrine, the *Azteca* Court treated purposeful availment as a universal requirement of the minimum contacts standard. It also described that standard as designed to establish the fiction of implied consent.[154] There are two problems here. Sensibly understood, the so-called "effects test," which would be the applicable doctrinal standard in the given context, is premised on the effect of tortious conduct, not on the benefits received from that conduct. The language of the Restatement of Conflict of Laws is instructive:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37. The U.S. Supreme Court applied this principle in *Calder v. Jones*, and there made no reference to purposeful availment.[155] This makes sense. The question in a case falling within the ambit of the described standard is not whether the tortfeasor benefitted from the tort, but whether under the facts presented the tortfeasor should be subjected to suit in the forum. That question requires a careful assessment of the facts, not an extension of doctrine. By embracing purposeful availment in this context, the Texas high court adopts a "worst-case" approach to state-court jurisdiction under which the U.S. Supreme Court's case law is given an interpretation most restrictive of state power.

As to the *Azteca* court's reference to implied consent, *International Shoe* demolished the fictional approach to personal jurisdiction by insisting on a realistic appraisal of the facts.[156] More specifically, reliance on implied consent as a benchmark for and assessment of purposeful availment narrows the range of the due process inquiry from a search for meaningful connections to a search for only those connections indicative of a submission to the sovereignty. Again, the Texas high court has adopted the most restrictive interpretation of doctrine.

To advance its quest to find purposeful availment/implied consent, the *Azteca* court applied a palette of sub-doctrinal tests and formulas: directing a tort at the plaintiff (in the forum);[157]

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[153] *Id*. at 36.

[154] *Id*. at 37-38.

[155] 465 U.S. 783 (1984). Several courts have followed *Calder's* lead and substituted the phrase "purposeful direction" in place of purposeful availment as the appropriate standard in tort cases. *See, e.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

[156] *International Shoe*, 326 U.S., at 318 ("True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.") (internal citations omitted).

[157] *Id.* at 43.

broadcasting defamatory statements in the forum;[158] knowingly broadcasting defamatory statements in the forum;[159] and targeting the market in the forum.[160] As to the latter, two further tests were applied: a subject-and-sources test[161] and an intent-to-serve-the-forum-market test.[162] A less structured and more fluid approach might simply have examined the facts to see if they presented circumstances under which suit in the forum would be foreseeable and fair given the connections with the state.

Consider a simple hypothetical. Suppose a Mexican company operated a quarry just south of Mexico's border with Texas. In the course of its excavations, the company used explosives to loosen the rock from its bed. Some of the loosened rocks flew over the border (in a foreseeable way) and caused significant injury to persons and property in Texas. In suits filed against the company in Texas by injured parties, should jurisdiction over the company be limited by whether it had sought the benefits of Texas law or Texas infrastructure? Should it be premised on whether the Mexican company had impliedly consented to suit in Texas? Should we develop a specialized jurisdictional law of quarry-excavation torts? Or, alternatively to the above options, might we simply examine the facts and circumstances to see if they fell within the due process spectrum of jurisdictional possibilities described in *International Shoe*? Would it offend traditional notions of fair play and substantial justice to subject the Mexican company to jurisdiction in Texas over suits arising out of the foreseeable and proximate tortious consequences of the company's acts?

Ultimately, the *Azteca* court upheld the exercise of jurisdiction based on a narrow set of facts—defendants' efforts to exploit the Texas market—and a generous approach to non-causal relatedness. Perhaps the court's long and serpentine discourse on purposeful availment was meant as a shield to protect this precise ruling, but I would think that a more direct explanation of its reasoning would have been better suited to the project of due process.

Tennessee v. NV Sumatra Tobacco Trading Company

A similar doctrinal approach, with a less satisfying outcome, is found in the Tennessee Supreme Court's decision in *Tennessee v. NV Sumatra Tobacco Trading Company*.[163] At issue in *Sumatra* was whether the State of Tennessee could rely on the courts of its state to impose a statutory marketing penalty on a foreign tobacco company that had sold 11 million cigarettes in the state between 2000 and 2002. The penalty was designed to compensate the state for the reduction in payments it would receive from competitor tobacco companies pursuant to a nationwide settlement of claims filed by states against those companies. The defendant in *Sumatra* was not a party to that settlement and, hence, could sell its cigarettes at lower prices than the

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[158] *Id.* at 44-5.

[159] *Id.* at 45-7.

[160] *Id.* at 47-52.

[161] *Id.* at 47-8.

[162] *Id.* at 48-52.

[163] 403 S.W.3d 726 (Tenn. 2013).

companies that were subject to the settlement agreement. Those companies, in turn, could reduce their obligations to the state as a set-off to their competitive disadvantage.

Like the opinion of the Texas Supreme Court in *Azteca*, the opinion in *Sumatra* includes a lengthy, treatise-like dissertation on the law of personal jurisdiction, beginning with *International Shoe* and including descriptions and discussions of key U.S. Supreme Court decisions up through and including the plurality, concurring, and dissenting opinions in *J. McIntyre*.[164] It closes its survey with a revealing observation:

> The foregoing survey of United States Supreme Court's [sic] decisions reveals a pattern of key phrases and concepts that serve as guideposts marking the constitutional boundaries of specific personal jurisdiction. Although "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State," certain other phrases appear again and again. These include "meaningful contacts, ties, or relations," "actions by the defendant himself that create a substantial connection," "fair warning," "clear notice," "purposeful availment," "targeting" the forum, "not random, fortuitous, or attenuated contacts," not the "unilateral activity of another party or a third person," "predictability to the legal system that allows potential defendants to structure their primary conduct" to know where they will be liable to suit, and "foreseeability," meaning that the defendant "should reasonably anticipate being haled into court" in the forum state. Jurisdiction can be established by "purposefully direct[ing]" activities at residents of the forum, "deliver[ing] products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state," "purposefully deriv[ing] benefit" from the forum state, "deliberately" engaging in "significant activities" within the forum state, creating "continuing obligations" with residents of the forum state, and invoking the "benefits and protections" of the forum state's laws. Also, it is perfectly clear that placing a product into the stream of commerce, "without more," is not an act "purposefully directed" at the forum state, and "awareness" of where a product will end up is not purposeful direction. All of these guideposts remain standing after the United States Supreme Court's *J. McIntyre Machinery* decision.[165]

It is as if a thick fog of words and phrases has beclouded the otherwise elegant inquiry into traditional notions of fair play and substantial justice. In essence, doctrine, reduced to "key phrases and concepts," takes precedence over a realistic assessment of the facts and a fundamental inquiry into the principles of due process.

A core aspect of the Tennessee Supreme Court's decision involved a detailed exegesis of the opinions in *J. McIntyre*.[166] The central question for the *Sumatra* Court was whether those opinions

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[164] *Id*. at 741-751, 755-759.

[165] *Id*. at 750-751 (internal citation omitted).

[166] *Id*. at 755-759.

embraced some version of Justice O'Connor's "stream of commerce plus" standard.[167] Ultimately, the state high court concluded that the trio of *J. McIntyre* opinions was ambiguous from a doctrinal perspective, but by inference and careful reading not inconsistent with the "plus" standard; hence, the state court concluded, Tennessee courts remained free to impose that standard, though no particular rationale is offered for that choice other than that it represented "the approach traditionally employed by Tennessee's courts."[168] What the Tennessee Supreme Court failed to see was that the central conflict on the *J. McIntyre* Court was not over this or that doctrinal nuance, but over whether the inquiry should be driven by such nuances, as opposed to being driven by a realistic appraisal of the facts (à la Justice Ginsburg's opinion). By way of contrast, the dissent in the 3-to-2 *Sumatra* decision, while attentive to the doctrine, focused on the facts, which, in the dissent's view, told a story that supported the fundamental fairness of exercising jurisdiction over the foreign manufacturer.[169]

Book v. Doublestar Dongfeng Tyre Co., Ltd.

In stark contrast to the majority opinion in *Sumatra* is the opinion of the Iowa Supreme Court in *Book v. Doublestar Dongfeng Tyre Co., Ltd.*[170] In that case a tire manufactured by Doublestar exploded while being inflated. The explosion seriously injured a teenager who was working in his father's auto repair shop in Iowa at the time of the accident. His mother sued Doublestar (among others) in an Iowa state court on her own behalf and on behalf of her son. Doublestar challenged the exercise of personal jurisdiction over it.

The jurisdictional facts established that Doublestar manufactured tires in China and that hundreds of thousands of those tires were shipped to the United States in the year preceding the accident. Two independent U.S. distributors were responsible for the domestic sales of those tires. The tire at issue was shipped to one of those distributors in Tennessee and later sold by that distributor to a retailer in Iowa. In addition, Doublestar, at the instruction and choice of its Tennessee distributor, sometimes shipped tires directly into Iowa, but not of the specific type involved in the explosion. Relying on a combination of the stream of commerce sales and the direct shipments, the Iowa Supreme Court upheld the exercise of jurisdiction over Doublestar. In so ruling, the state high court assessed the impact of the decision in *J. McIntyre*.

Like the Tennessee Supreme Court, the *Doublestar* Court offered a detailed survey of the law of personal jurisdiction and, also like the Tennessee high court, concluded that the scope of *J. McIntyre* was controlled by Justice Breyer's concurrence.[171] Unlike the Tennessee Supreme Court, however, the Iowa Supreme Court did not search for clues in Justice Breyer's opinion (or in Justice Ginsburg's dissent) that would support or require adherence to a stream-of-commerce-plus (or

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[167] *Asahi*, 480 U.S., at 108-113 (plurality).

[168] 403 S.W.3d, at 755.

[169] *Id*., at 766-781 (Wade, C.J., dissenting).

[170] 860 N.W. 2d 576 (S. Ct. Iowa 2015).

[171] *Id*. at 592.

targeting) standard. Rather, the Iowa Supreme Court read Breyer's opinion as literally endorsing no change in the law—"Justice Breyer's concurrence expressly relies on existing precedent and disclaims any new stream-of-commerce test."[172] Hence, Justice Brennan's more nuanced approach to stream-of-commerce analysis remained an acceptable due process option,[173] and the Iowa Supreme Court chose to adhere to that option. In so doing, the Iowa Supreme Court relied in part on Iowa precedent, but tellingly observed:

> We decline to overrule our precedents to impose a more restrictive test that would limit access to justice in Iowa courts for residents of our state injured by allegedly defective products purchased here. Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law. Moreover, sound policy reasons cut against a more stringent test for jurisdiction over high-volume manufacturers in products-liability cases.
>
> "'Fairness is the crux of the minimum-contacts analysis.'" Is it unfair to compel a manufacturer selling thousands of products nationwide to defend its allegedly unsafe design in a state where its product was sold and injured a resident using it? We think not.[174]

Russell v. SNFA

In *Russell v. SNFA*,[175] the Illinois Supreme Court engaged in a similar detailed analysis of the *J. McIntyre* opinions and arrived at a similar conclusion to that of the *Doublestar* court, specifically that the holding in *J. McIntyre* was a narrow one that did not require state courts to adhere to a "plus" standard beyond the context of a single sale in the forum: "Thus, going forward, specific jurisdiction should *not* be exercised based on a single sale in a forum, even when a manufacturer or producer 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'"[176]

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[172] *Id*.

[173] The Brennan model endorsed by the Iowa Supreme Court was not one of mere foreseeability (as described by Justice Kennedy in *J. McIntyre*). In Justice Brennan's words:

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

Asahi, 480 U.S., at 117 (Brennan, J., concurring). See Allan Ides, *Forward: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 361-366 (2012) (criticizing Justice Kennedy's flawed description of Justice Brennan's stream-of-commerce standard).

[174] *Id*. at 594-595.

[175] 987 N.E. 2d 778 (S. Ct. Minn. 2013).

[176] *Id*. at 793 (emphasis in original).

Of course, keeping in mind the decision in *Sumatra*, it is not surprising that the courts of one state would interpret the scope of a Supreme Court precedent differently, but it is somewhat surprising that a state court would favor a submit-to-sovereignty or targeting rationale (when not required to do so), as did the Tennessee Supreme Court in *Sumatra*. If the exercise of jurisdiction is both fair and consistent with U.S. Supreme Court precedent, one would think that a state court would favor providing its citizens or its government with a forum in which to redress grievances against foreign manufacturers whose products or actions cause injury to the state or its citizens.

Rilley v. MoneyMutual, LLC

The Minnesota Supreme Court's decision in *Rilley v. MoneyMutual, LLC* was also decided in the wake of *J. McIntyre*.[177] At issue in *Rilley* was whether the courts of Minnesota could exercise personal jurisdiction over MoneyMutual, a non-resident defendant that operated a website that matched consumers with payday lenders who allegedly issued loans in violation of various Minnesota consumer-protection laws. MoneyMutual's contacts with Minnesota fell into three categories: emails to Minnesota residents, a televised national advertising campaign, and online advertising through a Google AdWords campaign.

MoneyMutual argued that its emails to Minnesota consumers, which numbered in the thousands, could not, as a matter of law, be counted as purposeful contacts with the state. The essential argument was that emails, unlike regular mail, do not require an address that identifies the recipients' location. The *Rilley* Court described three potential approaches to that question: emails could never be used as purposeful contacts, emails could only be used in addition to other purposeful contacts, or emails could only be used if "the sender knew or had reason to know that the recipient was located, and would receive the email within, a certain forum."[178] The Minnesota high court very sensibly held that the third approach was most consistent with the standards of due process and that no special doctrine was needed to establish whether emails constituted a sufficiently substantial connection with the state.[179] On the facts presented, the Court found that the emails at issue satisfied that standard.

The *Rilley* court next addressed whether the plaintiffs could rely on MoneyMutual's televised national ad campaign, some of whose messages aired in Minnesota but none of which specifically *targeted* Minnesota. Here the Court turned to a brief consideration of *J. McIntyre* and arrived at a somewhat surprising and mechanical conclusion:

> Most significantly, relying on purely national marketing activity to support minimum contacts appears to be in tension with the United States Supreme Court's

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[177] 884 N.W. 2d 321 (S. Ct. Minn. 2016).

[178] *Id*. at 331.

[179] Id. at 332.

> holding in *J. McIntyre* … (plurality opinion) (holding that national "marketing and sales efforts" did not support personal jurisdiction; although it "may reveal an intent to serve the U.S. market," "it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant"). *Nicastro* may be distinguishable here because the "marketing efforts" in that case consisted solely of attending several national trade shows outside of New Jersey, rather than advertising content that actually appeared in the forum state. *Id.* Ultimately, however, *Nicastro* provides a guiding principle that efforts to target the national market of the United States do not equate to contacts with a particular state simply because that state is a part of the national market. *Id.*[180]

The Court then held that the national ad campaign could not be considered as part of the minimum contacts analysis.[181] Given the recognized ambiguity of the *J. McIntyre* decision, the Minnesota Supreme Court's holding here is a bit surprising, and even more so since the Court recognized that the case before it was readily distinguishable from the facts of *J. McIntyre*. The fact that the ads aired in Minnesota is surely not irrelevant. Those ads were likely part of the chain that led some Minnesota consumers to access MoneyMutual's website. Yet, the Court for some inexplicable reason found it necessary to excise those ads from the minimum contacts equation.

The Court returned to a more realistic appraisal of the facts with respect to MoneyMutual's Google AdWord campaign. Since that campaign was "specifically designed and calibrated to target potential Minnesota customers," the Court found that contacts with Minnesota generated by those ads constituted purposeful contacts with the state.[182] The Court then concluded that the combination of the emails and the Google contacts were sufficient to satisfy the standards of due process under the circumstances presented.[183]

Four of the five state high court decisions here referenced upheld the exercise of personal jurisdiction over a non-resident defendant. They share another common characteristic. Each of them endorsed a relaxed, non-causal approach to relatedness, not unlike the approach endorsed and applied by the California Supreme Court in *Bristol-Myers*. In *Azteca*, for example, the contacts that satisfied purposeful availment were not relevant to the plaintiff's defamation claim.[184] Yet, the Texas Supreme Court deemed them jurisdictionally significant since they were conceptually related to the operative facts of the claim, which themselves were not deemed purposeful.[185] In *Doublestar*, the Iowa Supreme Court upheld the exercise of jurisdiction based in part on the non-resident defendant's direct shipment of tire models other than of the specific type at issue in that

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[180] *Id*. at 334.

[181] *Id*.

[182] *Id*. at 337.

[183] *Id*. at 338.

[184] *Azteca*, 490 S.W. 3d, at 52-55.

[185] Id. at 53.

case.[186] Similarly, the Minnesota Supreme Court in *Rilley* rejected the non-resident defendant's argument that the plaintiff was required to show a causal relationship between the defendant's purposeful contacts and the harm suffered by the plaintiff.[187] And finally, in *Russell v. SNFA*, the Illinois Supreme Court endorsed and applied a non-causal "lenient" and "relaxed" standard of relatedness.[188] To me, this pattern suggests that, in jurisdictional areas where the U.S. Supreme Court has yet to impose doctrine at the micro level, state courts retained the flexibility to mold the doctrine to the underlying due process principles of fairness and efficiency. And this is precisely what they do. Of course, as of this writing, we await the U.S. Supreme Court's decision in *Bristol-Myers*.

A Final Thought on Discovery

The scope of jurisdictional discovery should conform to the relevant forum's law of personal jurisdiction. I would think that in those jurisdictions that impose a relatively strict doctrinal approach, the scope of discovery would be more generous. Whereas in those states that focus more on the fundamentals of fairness and efficiency, the scope of discovery might be more circumscribed. For example, a state court that insists on causal relatedness should give the plaintiff a generous opportunity to discover the facts pertaining to causation. On the other hand, a state court that endorsed non-causal relatedness might be less inclined to require intrusive discovery on that point. If I am correct here, it would seem that the rigid doctrinal approach might be both unfair to the extent that it frontloads the merits and inefficient in that it requires additional resources to assess a pre-merits proposition.

V. CONCLUSION

Roscoe Pound described the jurisprudential thinking over time in terms of a jurisprudence of conceptions, a jurisprudence of premises, and an empirical jurisprudence.[189] Under the jurisprudence of conceptions "[c]ertain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process."[190] The jurisprudence of premises takes "the rules of a traditional system . . . as premises and … develop[s] these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social condition of the time being."[191] Here, pure logic is tempered by consideration of the consequences, but still the analysis is cabined within the abstract legal standards and categories. Finally, an empirical jurisprudence

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[186] *Doublestar*, 860 N.W. 2d, at 598-597.

[187] *Rilley*, 884 N.W. 2d, at 336-337.

[188] *Russell*, 987 N.E. 2d, at 796-797.

[189] Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1913).

[190] *Id.* at 371.

[191] *Id.*

begins with the facts and operates through a "process of inclusion and exclusion" and a method of "trial-hypothesis and confirmation" to discover the law.[192]

Pound thought that the first two categories of jurisprudence—conceptions and premises—were inadequate, as both were premised to some extent on the perceived immutability of established legal standards. If not based on natural law itself, they operated on the natural-law understanding that law can be perfectly established and, once so established, can serve as a sufficient tool for solving present claims and controversies, even those that were unanticipated by the law maker. Pound thought that the empirical jurisprudence was problematic too: the law would develop too slowly through the case-by-case approach, and courts were "over-ambitio[us]" when "lay[ing] down universal rules," turning the empirical jurisprudence into a jurisprudence of conceptions.[193] Pound still considered the empirical jurisprudence to be the best of the alternatives, despite its flaws.

Rather than trying to fit judicial decision-making into any of Pound's categories, given our inherent democratic commitment to liberty and equality, I believe that an optimal judicial decision-making process would be one premised on, and truthful to, due process.

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[192] *Id.*

[193] *Id.* at 372.