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Back to the Future: The Revival of *Pennoyer* in Personal Jurisdiction Doctrine and the Demise of *International Shoe*

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Back to the Future: The Revival of *Pennoyer* in Personal Jurisdiction Doctrine and the Demise of *International Shoe*

ROBERT M. BLOOM*
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I. INTRODUCTION

Answering the personal jurisdiction question—that is, whether a court has power over a party—has required an ever-evolving analysis since the U.S. Supreme Court’s 1878 holding in *Pennoyer v. Neff* that a state’s exercise of jurisdiction must be consistent with due process.¹ Under *Pennoyer*, the due process analysis centered on the state’s power over people and property, as well as its ability to regulate the status of people and entities operating within its borders.²

While the introduction of due process to the jurisdiction equation was an important innovation, *Pennoyer*’s emphasis on borders has confounded generations of law students.³ How was it that notice in a local newspaper, which an out-of-state resident would probably never see, could permit the state to seize his property?⁴ And why was this form of notice insufficient in this case? As the United States became increasingly mobile and industrialized, the Supreme Court went through various machinations in an attempt to ease the tension between border-bound notions of state power and a changing society.⁵

Finally in 1945, in *International Shoe Co. v. Washington*, the Supreme Court articulated a new standard: due process is satisfied so long as a defendant has “certain minimum contacts” with the state such that “the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁶ Jurisdiction would no longer be determined by defendants’ property or presence, or lack thereof, in a state, but rather whether their contacts with it made it fair and reasonable for them to defend a suit there.⁷

1. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding that under the Fourteenth Amendment, “proceedings in a court of justice to determine personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law”).

2. *Id.* at 722, 734–35.

3. See Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 33–34 (1978).

4. See *Pennoyer*, 95 U.S. at 727 (“Substituted service by publication, or any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act.”).

5. See *Shaffer*, 433 U.S. at 202–03 (discussing the difficulties in defining personal jurisdiction based on “implied consent to service” and “corporate presence” in an increasingly mobile society); see also Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1408 (2018) (noting the struggle of courts and legislatures to square economic realities with *Pennoyer*’s conception of personal jurisdiction).

6. 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

7. *Shaffer*, 433 U.S. at 203 (quoting *Int’l Shoe*, 326 U.S. at 317).

For the next forty-five years, *International Shoe*'s minimum contacts framework guided the Court's personal jurisdiction analysis.⁸ But in 1990, *Pennoyer*'s focus on physical presence resurfaced in *Burnham v. Superior Court*.⁹ In a plurality decision by Justice Scalia, the Court held that jurisdiction based on personal service of process over a nonresident defendant who happens to be within a state's borders satisfies due process because of long standing tradition preceding even *Pennoyer*.¹⁰ Justice Scalia observed, "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."¹¹

Although it took twenty years before the Court next considered personal jurisdiction,¹² the focus on *Pennoyer*'s traditional bases of jurisdiction that began with *Burnham* took off. For instance, in the 2011 case of *J. McIntyre Machinery, Ltd. v. Nicaastro*, a plurality of the Court described jurisdiction as a matter of state authority, not fairness.¹³ And in *Bristol-Myers Squibb Co. v. Superior Court*, decided in 2017, the majority framed restrictions on jurisdiction as a consequence of "territorial limitations" on state power.¹⁴ This revived focus on state borders has resulted in the Court striking down six instances of a state court's exercise of jurisdiction over a nonresident defendant.¹⁵

This Article argues that the Court's recent decisions have effectively revived *Pennoyer*'s focus on physical presence and status, at the expense of the fairness and contact considerations set forth in *International Shoe*,

8. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413–14 (1984); *Shaffer*, 433 U.S. at 212 ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* . . ."); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

9. See generally *Burnham v. Superior Court*, 495 U.S. 604 (1990).

10. See *id.* at 607, 610–16, 619 (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system . . .").

11. *Id.* at 610.

12. Steinman, *supra* note at 5, 1410–11.

13. 564 U.S. 873, 883 (2011) (plurality opinion).

14. 137 S. Ct. 1773, 1780 (2017) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

15. See *id.* at 1781; *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017); *Walden v. Fiore*, 571 U.S. 277, 279 (2014); *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918–20 (2011); *McIntyre*, 564 U.S. at 877 (plurality opinion).

as the bases for asserting personal jurisdiction. Part II details the jurisdictional analysis under both *Pennoyer* and *International Shoe*.¹⁶ Part III discusses the evolution of personal jurisdiction doctrine under *International Shoe*.¹⁷ Part IV demonstrates that the Court's recent decisions have revitalized *Pennoyer*'s territorially based regime, and consequently diminished the thrust of *International Shoe*.¹⁸

II. PENNOYER AND INTERNATIONAL SHOE: THE PARADIGMS OF PERSONAL JURISDICTION JURISPRUDENCE

This Part describes the two paradigmatic approaches to personal jurisdiction: physical presence and status under *Pennoyer v. Neff*¹⁹ and minimum contacts and fairness under *International Shoe Co. v. Washington*.²⁰ Section A details *Pennoyer*'s territorially bound conception of personal jurisdiction. Section B describes the tensions between *Pennoyer*'s territorially based approach and an increasingly mobile society. Section C explains the expansive contacts-focused approach to personal jurisdiction ushered in by *International Shoe*.

A. Phase One: Pennoyer

The controversy in *Pennoyer* surrounded the validity of an Oregon court's judgment resulting in the sale of property owned by Neff, a nonresident, to Pennoyer.²¹ Although Neff was neither personally served with process nor appeared in the state, the Oregon court claimed jurisdiction pursuant to a statute that authorized service of process via publication to nonresident property owners like Neff.²² While the appellate court struck down the judgment based on perceived defects in service, the Supreme Court focused on the lower court's jurisdictional reach.²³ The Supreme Court held that

16. See *infra* notes 19–83 and accompanying text.

17. See *infra* notes 84–142 and accompanying text.

18. See *infra* notes 155–233 and accompanying text.

19. 95 U.S. 714, 723 (1878), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

20. 326 U.S. 310, 316 (1945).

21. *Pennoyer*, 95 U.S. at 719. The underlying litigation that resulted in the sale began when J.H. Mitchell sued Neff for unpaid legal fees. *Id.* at 717. The court awarded Mitchell less than \$300. *Id.* at 719. Neff's land sold in satisfaction of the judgment was allegedly worth \$15,000. *Id.*

22. *Id.* at 719–20. Mitchell and his attorneys issued a summons pursuant to the statute. See *id.* at 717. The summons ran for six weeks in a weekly newspaper that circulated in the county in which Neff's land was situated. *Id.*

23. *Id.* at 719–22.

because the Oregon court did not attach Neff's property prior to rendering judgment against him, the court lacked jurisdiction.²⁴

The Court's analysis began with "two well-established principles of public law."²⁵ First, states have "exclusive jurisdiction and sovereignty over persons and property" within their borders.²⁶ Second, states cannot exercise "direct jurisdiction and authority over persons or property" outside their borders.²⁷ Therefore, if a state seeks to exercise jurisdiction over a nonresident, the nonresident must either be personally served with process within state borders or own property within the state.²⁸

While neither of these principles were remarkable, *Pennoyer* innovated personal jurisdiction doctrine by linking a state's exercise of power to the Due Process Clause of the Fourteenth Amendment.²⁹ *Pennoyer* defined due process as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."³⁰ The process that is due varies based on the nature of the action.

Where an action concerns the "personal rights and obligations of the defendant," the proceeding is in personam,³¹ whereas actions concerning

24. *Id.* at 720, 736. Because the Oregon court never obtained jurisdiction—either by attachment or otherwise—over Neff's property before rendering the judgment, the judgment was in personam, meaning that the action concerned Neff's personal rights and obligations. *Id.* at 727, 734. Because Neff was not personally served, the judgment against him violated due process. *See id.* at 736 ("The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him . . .").

25. *Id.* at 722.

26. *Id.*

27. *Id.*

28. *See id.* at 723–24 ("It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.").

29. *See Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (noting that American courts refused to recognize judgments where jurisdiction was lacking "long before the Fourteenth Amendment was adopted," and, "[i]n *Pennoyer v. Neff*, . . . we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment" (citation omitted)); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law.").

30. *Pennoyer*, 95 U.S. at 733.

31. *Id.* at 727.

property or an interest therein are in rem.³² For proceedings in rem, due process allows for constructive—fictional—service of process based on the theory that “property is always in the possession of its owner, in person or by agent.”³³ Accordingly, so long as the court obtains jurisdiction over the property and the summons meets the state’s notice requirements, whether the defendant actually appears is irrelevant.³⁴ This rationale does not apply to matters in personam because it is unlikely defendants would ever see the summons, and even if they did, the state has no way to compel them to appear.³⁵

Although the thrust of the Court’s analysis focused on the defendant’s physical presence and property in the state,³⁶ the Court also provided for jurisdiction based on “status,” possibly recognizing the limitations of borders.³⁷ First, the Court noted that every state has jurisdiction “to determine the civil *status* and capacities of all its inhabitants.”³⁸ Therefore, a state has jurisdiction to dissolve a marriage—the status of being married—where a spouse is absent because the aggrieved spouse would otherwise be left without recourse.³⁹ Second, states may require nonresidents seeking to enter partnerships, associations, or contracts within their borders to appoint a representative to receive service so as to maintain state power.⁴⁰ Finally, states have the power to regulate corporations so there is “a mode in which their conduct may be investigated, their obligations enforced, or their charter revoked.”⁴¹ These status-based theories assume consent to jurisdiction.⁴²

32. *See id.* at 726–27. Essentially, a matter in rem is an action to determine title to or status of real property. *Id.* at 714.

33. *Id.* at 727 (comparing the need for personal service of process for in personam actions with service by publication for matters relating to property).

34. *See id.* *But see* *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (holding that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

35. *See Pennoy*, 95 U.S. at 727 (“[W]here the suit is merely *in personam*, constructive service . . . upon a non-resident is ineffectual for any purpose. . . . Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing.”).

36. *See id.* at 722–34 (discussing jurisdiction in personam and in rem).

37. *See id.* at 734–36 (observing that states may determine the “*status* of one of its citizens towards a non-resident,” and to make requirements of partnerships, associations, and corporations doing business within their borders).

38. *Id.* at 734.

39. *Id.* at 734–35.

40. *See id.* at 735 (explaining that a state can require nonresidents operating or contracting within its borders to appoint an agent to receive service of process or notice of proceedings).

41. *Id.*

42. *See id.* (noting that it is just to require an individual who has agreed to a mode of service to be bound by a judgment so served); *see also* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ALAN N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 1066, at 354–56

B. Problems with Pennoyer

The Court's allowance for status-based jurisdiction in *Pennoyer* foreshadowed the limitations of a jurisdictional regime driven by territorial boundaries in an increasingly complex and mobile world.⁴³ Two cases in particular highlight the odd results this regime engendered: *Harris v. Balk*⁴⁴ and *Hess v. Pawloski*.⁴⁵

Harris concerned the validity of exercising jurisdiction based on the attachment of debt.⁴⁶ Harris, a North Carolina resident, owed Balk, another North Carolina resident, \$180.⁴⁷ Balk owed Epstein, a Maryland native, \$300.⁴⁸ When Harris was visiting Baltimore, Epstein attached the \$180 debt Harris owed to Balk and garnished it.⁴⁹ Balk's debt was considered property found within Maryland's borders.⁵⁰ Balk subsequently sued Harris for the \$180 in North Carolina, arguing that the Maryland court's judgment was invalid because the debt arose in North Carolina.⁵¹

The Supreme Court upheld Maryland's exercise of jurisdiction based on the notion that, "The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."⁵² Because the debt was thought to be a form of property, the attachment of it was in rem. Thus, Balk did not need to be personally served with process because he had property, in

(4th ed. 2015) (noting that Justice Field, the author of the Court's opinion in *Pennoyer*, articulated the consent theory based on the idea that a corporation had no inherent right to do business in a state under then existing interpretations of the Privileges and Immunities Clause of the Constitution).

43. See Steinman, *supra* note 5, at 1408 (noting that prior to *International Shoe*, "courts and legislatures struggled to fit new social realities . . . into notions of jurisdiction that fixated on the defendant's 'presence' in the territory . . ." (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945))).

44. 198 U.S. 215 (1905), *overruled by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

45. 274 U.S. 352 (1927).

46. *Harris*, 198 U.S. at 216.

47. *Id.*

48. *Id.*

49. *Id.* A Maryland statute permitted attachment of debts. *Id.* Regarding the statute, the Court said, "If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him." *Id.* at 222.

50. See *id.* at 223; see also *Shaffer v. Heitner*, 433 U.S. 186, 200 (1977) ("This Court reasoned that the debt Harris owed Balk was an intangible form of property belonging to Balk, and that the location of that property traveled with the debtor.>").

51. See *Harris*, 198 U.S. at 216–17, 221.

52. *Id.* at 222.

the form of Harris' debt to him, in Maryland.⁵³ That Harris had been personally served was enough to give Balk notice of the suit.⁵⁴

The *Hess* case, while more conceptually comprehensible, required its own legal fiction.⁵⁵ In *Hess*, the Court examined a Massachusetts statute that permitted the exercise of in personam jurisdiction over a nonresident who caused an automobile accident.⁵⁶ Specifically, the statute provided that by driving on Massachusetts' roads, nonresidents named the registrar of motor vehicles as their agent to receive service of process for any claims related to their driving.⁵⁷ *Hess* claimed that the statute deprived him of due process, but the Court was unpersuaded.⁵⁸ Instead, the Court found the statute to be a reasonable exercise of the state's power to regulate use of its roadways.⁵⁹ The Court also held that there is little difference between requiring an individual to formally appoint an agent for service as opposed to impliedly doing so.⁶⁰ Because an earlier case held that a state could

53. See *id.* at 223 (reasoning that because debt is intangible “[n]otice to the debtor (garnishee) of the commencement of the suit, and notice not to pay his creditor, is all that can be given”); see also *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878) (allowing for constructive service of process for matters in rem because “law assumes that property is always in the possession of its owner”), *overruled in part by Shaffer*, 433 U.S. 186.

54. See *Harris*, 198 U.S. at 226. Balk had notice of the attachment because he sued Harris in North Carolina within a few days of his return from Baltimore, at which point Harris presented the Maryland court's judgment. *Id.* at 228. Balk did not contest the Maryland court's judgment directly. *Id.*

55. See *Shaffer*, 433 U.S. at 202 (“The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further modification of the territorial limits on jurisdictional power.”).

56. *Hess v. Pawloski*, 274 U.S. 352, 353–54 (1927). Pawloski sued Hess, a Pennsylvania resident, for negligently operating a motor vehicle. *Id.* at 353.

57. *Id.* at 354. The statute read:

[T]he operation by a non-resident of a motor vehicle on a public way in the commonwealth . . . shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally.

Id. (quoting MASS. GEN. LAWS ch. 431, § 2 (1923)). The statute also required plaintiffs to send notice of service to the defendant and to produce an affidavit to that effect. *Id.* (quoting § 2).

58. *Id.* at 354, 356.

59. *Id.* at 356.

60. *Id.* at 357 (“The difference between the formal and implied appointment [of an agent on whom process may be served] is not substantial so far as concerns . . . the due process clause of the Fourteenth Amendment.”).

formally require motorists to name an agent for service of process, there was no reason a state could not do so impliedly.⁶¹

Following *Hess*, states enacted various statutes regulating the activity of nonresidents.⁶² Laws regulating the operation of aircraft and watercraft, the sale of securities, and construction work broadened personal jurisdiction beyond the traditional boundaries envisioned by *Pennoyer*.⁶³ Yet the traditional framework remained, leaving the issue ripe for reconsideration by the Court.

C. Phase Two: International Shoe

While personal jurisdiction based on implied consent to service proved simple enough to regulate, the legal fictions that permitted the exercise of jurisdiction over nonresident corporations created more difficulties.⁶⁴ Courts grappled with what it means for a corporation to be present within a state, leading to a multitude of decisions interpreting whether the corporation was “doing business.”⁶⁵ By the time *International Shoe* came before the Court, there was no discernible rule to follow.⁶⁶

Against this backdrop, the Supreme Court decided to tell it like it was. Consent, either real or implied, amounts to the defendant’s contacts within the state.⁶⁷ Therefore, a nonresident defendant may be subject to in personam jurisdiction if “he ha[as] certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁶⁸ Additionally, because due process is implicated by a state’s exercise of jurisdiction, fairness must be considered. The fairness inquiry depends “upon the quality and nature of the activity [of the defendant] in relation to the fair and orderly administration of the laws

61. *Id.* at 356–57 (citing *Kane v. New Jersey*, 242 U.S. 160, 167 (1916)).

62. *See* 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1065.

63. *Id.*

64. *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

65. *Id.*; *see* 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1066.

66. 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1066, at 360 (“[I]t became apparent that ‘it is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.’” (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930))).

67. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (noting that consent traditionally was implied by the presence of a corporation’s authorized agents in the state, “[b]ut more realistically it may be said that those authorized acts were of such a nature as to justify the action” (citing *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915))).

68. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

which it was the purpose of the due process clause to ensure.”⁶⁹ Whereas *Pennoyer* defined due process in terms of tradition, *International Shoe* contemplated a fact-specific inquiry grounded in fairness.⁷⁰

Among the relevant fairness considerations are the benefits and privileges a corporation receives from doing business within a state.⁷¹ Thus, in considering whether the state of Washington could sue International Shoe Company for unpaid contributions to the state’s unemployment fund, the Court examined the company’s contacts with the state.⁷² The Court held that the privilege of doing a “large volume of interstate business” in Washington with the state’s sanction and protection, combined with its continuous and systematic contacts from which the unemployment payments were owed, supported jurisdiction.⁷³

The Court also distinguished between instances in which the number of contacts, as opposed to the nature of the claim, support jurisdiction. In some cases, the corporation’s activities may be “so substantial and of such a nature as to justify” the maintenance of a claim on matters unrelated to its activities.⁷⁴ Such jurisdiction came to be known as “general jurisdiction.”⁷⁵ Conversely, where the corporation has only a “casual” presence in the forum, the claim must be related to its activities for the state to assert jurisdiction.⁷⁶ In these instances, courts exercise “specific jurisdiction.”⁷⁷

Interestingly, the Court suggested that there may be instances in which fewer contacts support jurisdiction despite minimal connection between

69. *Id.* at 319.

70. *See id.* (rejecting “mechanical or quantitative” analyses of jurisdiction); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) (defining due process as “a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights”), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

71. *Int’l Shoe*, 326 U.S. at 319.

72. *Id.* at 311, 320. Washington’s Unemployment Compensation Act provided for personal service of process for orders and notices of assessment for unpaid contributions within the state or service via registered mail to the employer’s last known address. *Id.* at 311–12. The notice was personally served upon a sales solicitor in the state and was also mailed to International Shoe’s principal place of business in St. Louis, Missouri. *Id.* at 312. International Shoe was incorporated in Delaware, had no offices in Washington, and kept no stock of its product within Washington. *Id.* at 311, 313. Between the years 1937 and 1940—the years for which unemployment compensation was owed—it had a sales force of eleven to thirteen individuals who were managed by the St. Louis office. *Id.* at 313.

73. *Id.* at 320.

74. *Id.* at 318.

75. Steinman, *supra* note 5, at 1409 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984)).

76. *Int’l Shoe*, 326 U.S. at 317.

77. Steinman, *supra* note 5, at 1409.

the contacts and the defendant's activities.⁷⁸ But beyond the observation that the "boundary line" between activities that support the maintenance of jurisdiction and those that do not "cannot be simply mechanical or quantitative," the Court did not elaborate.⁷⁹ As this Article will demonstrate, the gray area between general and specific jurisdiction has caused much judicial consternation.⁸⁰

Justice Hugo Black, in a concurring opinion, upheld Washington's assertion of jurisdiction, but objected to the majority's reasoning as needlessly inviting judicial interpretation of state power.⁸¹ According to Justice Black, introducing words like "'reasonableness,' 'justice,' or 'fair play,' makes judges the supreme arbiters of this country's laws and practices."⁸² As a result, "tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice."⁸³ As it happens, Justice Black's observation was prescient.

78. See *Int'l Shoe*, 326 U.S. at 318–19.

79. See *id.* at 319.

80. See, e.g., *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting) ("[B]y refusing to consider any distinction between controversies that 'relate to' a defendant's contacts with the forum and causes of action that 'arise out of' such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum."). In *Helicopteros*, the majority did not consider specific jurisdiction, nor did it find enough contacts to support an exercise of general jurisdiction. See *id.* at 415–16 (majority opinion). Justice Brennan believed the defendant's contacts with the forum were "sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable" for the forum to exercise jurisdiction. *Id.* at 420 (Brennan, J., dissenting); see also *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 429 (Ct. App. 2014) (noting the Supreme Court's failure to define "what it means for a suit to 'arise out of' or 'relate' to a defendant's contacts with the state"), *aff'd*, 377 P.3d 874 (2016), *rev'd and remanded*, 137 S. Ct. 1773 (2017). Given this void, the California Supreme Court developed its own test for specific jurisdiction in these instances—"whether the cause of action *arises out of or has a substantial connection with*" defendant's activity in the forum, combined with party convenience and the state's interest in litigating the dispute. *Bristol-Myers*, 175 Cal. Rptr. 3d at 429 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1094 (Cal. 1996)).

81. See *Int'l Shoe*, 326 at 322–26 (Black, J., concurring).

82. *Id.* at 326 (first citing *Polk Co. v. Glover*, 305 U.S. 5, 17–18 (1938) (Black, J., dissenting); and then citing *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 600 & n.4 (1942) (Black, Douglas & Murphy, JJ., concurring)).

83. *Id.*

III. INTERPRETING *INTERNATIONAL SHOE*

International Shoe's minimum contacts analysis initially supported expansive findings of jurisdiction. It has since undergone significant refinement. Section A discusses developments in specific jurisdiction, including the concept of purposeful availment, the stream of commerce theory, the court's elaboration of "fair play and substantial justice," and jurisdiction for intentional torts. Section B details developments in general jurisdiction. Section C discusses the refinement of property concepts under *International Shoe* and its progeny.

A. *Specific Jurisdiction*

The requirements for exercising specific jurisdiction have developed over time from requiring very little contact between the defendant, the claim, and the forum, to substantial contact between the three.⁸⁴ The liberality with which the Court first approached the issue is demonstrated by *McGee v. International Life Insurance Co.*⁸⁵ In *McGee*, a unanimous Court upheld a California court's exercise of jurisdiction over an out-of-state insurance company based on a single life insurance contract.⁸⁶ Although International Life had never solicited any business in California aside from the single policy at issue, the Court noted a "clearly discernible" trend of expanding jurisdiction over nonresident defendants.⁸⁷ So although the Court recognized that requiring International Life to defend the suit in California would be inconvenient, it held that the inconvenience did not outweigh California's interest in providing relief for its citizens.⁸⁸

84. See Scott Dodson, *Jurisdiction in the Trump Era*, 87 *FORDHAM L. REV.* 73, 75–77 (2018) (comparing the Court's relaxation of the "nexus" between the defendant and the forum with its more recent restrictive approach).

85. 355 U.S. 220 (1957).

86. See *id.* at 223. Lulu B. McGee sued International Life in California to recover the proceeds of her son's insurance policy. *Id.* at 221–22. A California statute permitted the exercise of jurisdiction over insurance contracts made with California residents. *Id.* at 221.

87. *Id.* at 222. International Life acquired the insurance policy after it purchased another insurance company. *Id.* at 221. Following the acquisition, International Life mailed a certificate of reinsurance to McGee's son in California. *Id.* He accepted the policy and mailed premiums from his home in California to International Life's Texas office until his death. *Id.* at 221–22.

88. See *id.* at 223–24 (discussing the remedial nature of California's insurance statute and the "severe disadvantage" residents would face in having to defend against an insurance company in a distant state as compared to International Life's inconvenience).

I. Purposeful Availment

A year after *McGee*, the Court added an additional criterion to the minimum contacts analysis: purposeful availment.⁸⁹ Purposeful availment, or the defendant's action of invoking the "benefits and protections" of the forum state, emerged in *Hanson v. Denckla*.⁹⁰ The case concerned the validity of a Florida court's exercise of jurisdiction over a Delaware trust.⁹¹ The Supreme Court found that Florida could not exercise jurisdiction over the trust because it conducted no business in the state.⁹² The Court distinguished the trust from the insurance contract in *McGee* by noting that the insurance company had solicited the contract in the forum state, whereas the trust had no connection to Florida.⁹³ Although the trustee sent payments to Florida after the settlor moved there, the Court found that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."⁹⁴ Rather, the defendant must commit some act targeted toward the proposed forum.⁹⁵

While the *Hanson* decision created much controversy, the concept of purposeful availment became a touchstone in the Court's later decisions.⁹⁶ For instance, in *World-Wide Volkswagen Corp. v. Woodson*, the Court rejected an Oklahoma court's exercise of jurisdiction over a New York-based Audi dealer, distinguishing between the concepts of foreseeability and purposeful

89. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.") (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

90. *Id.*

91. *Id.* at 238. The facts of the case were fairly complex and are presented in an abbreviated fashion here. In 1935, Dora Browning Donner, a Pennsylvania resident, executed a trust instrument naming a Delaware bank trustee. *Id.* In 1944, Mrs. Donner moved from Pennsylvania to Florida, where she lived until her death in 1952. *Id.* at 239. Following her death, Mrs. Donner's estate was probated in a Florida court, with her daughter Elizabeth Donner Hanson serving as executor of the estate. *Id.* at 239–40. Pursuant to the residual clause of the trust, Ms. Hanson appointed the remaining \$400,000 in the trust to her two children. *Id.* at 240. At this point, Mrs. Donner's two other daughters, Katherine N.R. Denckla and Dorothy B.R. Stewart, challenged Elizabeth Hanson's power of appointment. See *id.*

92. *Id.* at 251.

93. *Id.* at 251–52.

94. *Id.* at 253.

95. See *id.* (requiring the defendant to "purposefully avail[] itself of the privilege of conducting activities within the forum State").

96. See generally 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1067.1.

availment.⁹⁷ The Oklahoma Supreme Court had upheld jurisdiction based on an automobile's inherent mobility and an inference that the dealer derived income from automobiles used in the state.⁹⁸ Rejecting this argument, the U.S. Supreme Court held that foreseeability relevant to the due process analysis derives from purposeful availment in the form of defendant's efforts to target the particular market.⁹⁹ Where a defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State," then the state's exercise of jurisdiction is proper.¹⁰⁰ The mere fact that a product might end up in a state is not enough to support jurisdiction.¹⁰¹ It should be noted that in dicta the Court clearly indicated that a manufacturer or distributor who has targeted many states with its product may be subject to jurisdiction in each.¹⁰²

2. *The Stream of Commerce*

The stream of commerce theory mentioned in *World-Wide Volkswagen* took center stage in *Asahi Metal Industry Co. v. Superior Court*.¹⁰³ A California resident sued Cheng Shin, a Taiwanese tube manufacturer, following a fatal motorcycle accident.¹⁰⁴ Cheng Shin subsequently sought to indemnify Asahi, the Japanese manufacturer of the tube's valve assembly.¹⁰⁵ Although Asahi had essentially no contact with the state of California, a lower court held that Asahi's act of placing its products into the stream of

97. 444 U.S. 286, 297–98 (1980). *World-Wide Volkswagen* was a products liability action brought by Harry and Kay Robinson after their Audi crashed and burst into flames, causing serious burns to Kay Robinson and the couple's children. *Id.* at 288. The Robinsons' only connection to Oklahoma was that the accident had happened there—they previously lived in New York and were in the process of moving to Arizona at the time of the accident. *See id.* Apparently, juries in the county in which the crash occurred were known to be sympathetic to personal injury plaintiffs. *See* STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, *CIVIL PROCEDURE* 112 (9th ed. 2016). In order to prevent removal to federal court, Seaway, the regional Audi-dealer and a New York resident, had to remain a party to the case. *Id.*

98. *See World-Wide Volkswagen*, 444 U.S. at 290.

99. *See id.* at 297.

100. *Id.* at 297–98.

101. *See id.* at 298.

102. *See id.* at 297 (“[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”).

103. 480 U.S. 102 (1987).

104. *Id.* at 105–06 (plurality opinion).

105. *Id.* at 106.

commerce, knowing that some of those products would end up in California, made it amenable to suit in the state.¹⁰⁶

A unanimous Supreme Court held that California's exercise of jurisdiction was improper, but the justices split in their interpretation of the stream of commerce theory.¹⁰⁷ Joined by Chief Justice Rehnquist and Justices Powell and Scalia, Justice O'Connor found that merely placing a product into the stream of commerce, without more, does not constitute purposeful availment.¹⁰⁸ Rather, the defendant must demonstrate an intent to target the particular market, which may be manifested by advertising in the forum, establishing channels of distribution, and the like.¹⁰⁹

Moreover, Justice O'Connor's opinion emphasized various factors that made California's exercise of jurisdiction unreasonable.¹¹⁰ Chief among these was the fact that the litigation, at the point it reached the Court, was primarily an indemnification action between a Taiwanese corporation and a Japanese corporation.¹¹¹ As such, the burden on Asahi to defend the suit would be severe and both Cheng Shin and the state of California had minimal interest in litigating the dispute in California.¹¹²

Justice Brennan rejected the idea that the stream of commerce requires something more to establish jurisdiction.¹¹³ Relying on *World-Wide Volkswagen*, Justice Brennan articulated the view that the stream of commerce merely requires the defendant's awareness that its product is marketed in the forum state.¹¹⁴ Accordingly, Asahi's numerous sales to a manufacturer that made regular sales to California sufficed to establish minimum contacts.¹¹⁵ Despite these minimum contacts, Justice Brennan concurred with Justice

106. See *id.* at 106–07.

107. See *id.* at 103–04 (explaining that all the justices joined with the Court's conclusion in Part II-B of the opinion, which found the exercise of jurisdiction unreasonable).

108. *Id.* at 102, 112.

109. See *id.* at 112.

110. See *id.* at 113–16.

111. *Id.* at 114. The original plaintiff's claims against Cheng Shin and other defendants had been settled and dismissed. *Id.* at 106.

112. *Id.* at 116. Although the justices thought that California's interest in the suit was minimal, the California Supreme Court had argued that the state had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." *Id.* at 114 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 553 (Cal. 1985), *rev'd*, 480 U.S. 102 (1987)).

113. *Id.* at 116–17 (Brennan, J., concurring in part and concurring in the judgment).

114. See *id.* at 118–21.

115. *Id.* at 121.

O'Connor's reasonableness analysis.¹¹⁶ Justice Brennan viewed *Asahi* as the "rare" case in which a corporate defendant that purposefully availed itself of a forum is not subject to jurisdiction due to fair play and substantial justice concerns.¹¹⁷

3. Fair Play and Substantial Justice

International Shoe's minimum contacts inquiry ensures that "maintenance of [a] suit does not offend "traditional notions of fair play and substantial justice,"" by preventing unreasonable exercises of jurisdiction.¹¹⁸ In *World-Wide Volkswagen*, the Court directly equated fair play and substantial justice with reasonableness and fairness, and drawing on precedent, set forth additional factors beyond the burden on the defendant that bear on the inquiry.¹¹⁹ These factors include: (1) "the forum State's interest in adjudicating the dispute," (2) "the plaintiff's interest in obtaining convenient and effective relief," (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (4) "the shared interest of the several States in furthering fundamental substantive social policies."¹²⁰

In *Burger King Corp v. Rudzewicz*, Justice Brennan, a stalwart proponent of the fairness considerations articulated in *International Shoe*, finally got the opportunity to write a majority opinion.¹²¹ The Court suggested that the factors named in *World-Wide Volkswagen* "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."¹²² In effect, Justice Brennan established a sliding scale wherein the more reasonable it is for the forum

116. *Id.* at 116 ("I do agree [] with the Court's conclusion . . . that the exercise of personal jurisdiction over *Asahi* in this case would not comport with 'fair play and substantial justice.'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945))).

117. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985)).

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

119. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that the relationship between the defendant and the forum must be such that the exercise of jurisdiction is reasonable).

120. *Id.* These are the factors Justice O'Connor considered in her *Asahi* reasonableness analysis. *See Asahi*, 480 U.S. at 113 (plurality opinion).

121. *See Burger King*, 471 U.S. at 463-87; *see also* Kenneth J. Vandavelde, *Ideology, Due Process, and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 299, 304-07 (1993) (describing Justice Brennan's rejection of purposeful availment and embrace of *International Shoe's* focus on fairness and reasonableness).

122. *Burger King*, 471 U.S. at 477. In *Burger King*, a Michigan-based defendant challenged Florida's assertion of jurisdiction over its franchise agreement with Burger King Corporation. *See id.* at 463-66. The franchise agreement contained a forum selection clause, which provided Florida law would govern the contract. *Id.* at 465-66.

to assert jurisdiction, the less contacts are required.¹²³ Under this model, a defendant who has purposefully availed itself of the forum is presumed to be subject to jurisdiction.¹²⁴ Of course, Justice Brennan's conception of purposeful availment was sufficiently more expansive than most of his colleagues.¹²⁵

4. *Intentional Torts*

Initially, the Court's analysis of intentional tort claims suggested a willingness to extend jurisdiction based on fairness considerations and the location of the victim's injury.¹²⁶ More recent cases suggest that this theory is no longer viable in personal injury actions.¹²⁷ But in *Keeton v. Hustler Magazine, Inc.*, fair play and substantial justice concerns, as opposed

123. Vandeveld, *supra* note 121, at 306.

124. *Burger King*, 471 U.S. at 477. In fact, the Court afforded little consideration to the reasonableness factors given that the defendant deliberately "reached" into the forum state. *See id.* at 479–80, 482–85 ("Nor has [Defendant] pointed to other factors that can be said persuasively . . . to establish the *unconstitutionality* of Florida's assertion of jurisdiction.").

125. *See* Vandeveld, *supra* note 121, at 291–92, 296–97 (noting Justice Brennan's resistance to the notion of purposeful availment in *Hanson v. Denckla* and *Shaffer v. Heitner*).

126. *See infra* notes 128–133 and accompanying text; *see also* *Calder v. Jones*, 465 U.S. 783, 788–89 (1984) (finding jurisdiction proper based on the effects of the defendant's conduct in the forum). In *Calder*, Shirley Jones, an actress, sued the *National Enquirer*, its local distributing company, and two of its employees, South and Calder, for libel, invasion of privacy, and intentional infliction of emotional distress in a California court. *Id.* at 784–85. South and Calder were both Florida residents and had worked on the story in Florida. *Id.* at 785–86. Aside from South's frequent business trips and calls to California and Calder's two visits to the state, neither had relevant contacts with the state. *Id.* at 786. The defendants argued that the foreseeability of the article's circulation in California was insufficient to support jurisdiction. *Id.* at 789. The Court disagreed, finding that their actions were "expressly aimed" at California because the article "concerned the California activities of a California resident," whose acting career was based in California. *Id.* at 788–89. Additionally, the article's sources were from California and "the brunt of the harm . . . was suffered in California." *Id.* The *Calder* effects test that emerged from the decision permits courts to exercise jurisdiction where a defendant intentionally and wrongfully aims tortious conduct at a state. Anderson Bailey, Note, *Purposefully Directed: Foreign Judgments and the Calder Effects Test for Specific Jurisdiction*, 62 N.Y.U. ANN. SURV. AM. L. 671, 677 (2007).

127. *Compare* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (rejecting a California court's assertion of jurisdiction because the plaintiff's injury did not occur in the state), *with* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality opinion) (denying a New Jersey court's exercise of jurisdiction over a defendant whose product injured the plaintiff in the forum state).

to the location of the injury, figured prominently in the Court's analysis of a New Hampshire court's exercise of jurisdiction in a libel action.¹²⁸ Keeton, a resident of New York, sued *Hustler Magazine*, an Ohio corporation with its principal place of business in California, in New Hampshire because of the state's lengthy statute of limitations.¹²⁹ Beginning with the minimum contacts analysis, the Court found that *Hustler's* monthly magazine sales in the state could not "be characterized as random, isolated, or fortuitous," making it "unquestionable" that a complaint based on these contacts would ordinarily satisfy due process.¹³⁰

Upon finding sufficient minimum contacts, the Court then engaged in a fairness analysis centered on New Hampshire's interest in litigating the dispute.¹³¹ Although the plaintiff was not a New Hampshire resident, the Court found that the state had a significant interest in the matter because libelous statements harm both the subject and the reader wherever they are circulated.¹³² The Court concluded its analysis by noting that *Hustler* targets a nationwide audience; thus, "[t]here is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed."¹³³

B. General Jurisdiction

Following *International Shoe*, the Supreme Court first considered general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*¹³⁴ The case concerned an Ohio court's exercise of jurisdiction over Benguet Consolidated

128. 465 U.S. 770, 775–76 (1984) (considering the fairness of haling an out-of-state defendant into court).

129. *Id.* at 772–73. Because of its six-year statute of limitations, New Hampshire was the only state in which Keeton's claim was not time-barred. *Id.* at 773.

130. *Id.* at 774. *Hustler* sold between 10,000 and 15,000 copies of its magazine per month in the state. *Id.* at 772.

131. *Id.* at 775–76; *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (listing the "forum State's interest in adjudicating the dispute" as a relevant factor bearing on the reasonableness of jurisdiction). The Court also suggested that judicial economy favored New Hampshire's exercise of jurisdiction because New Hampshire provided a single forum in which all issues and damages could be litigated. *Keeton*, 465 U.S. at 777; *see also* *World-Wide Volkswagen*, 444 U.S. at 292 (listing "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" as a reasonableness factor).

132. *See Keeton*, 465 U.S. at 776–77 (finding the state interest in preventing wrongful conduct within its borders extends to nonresidents). Even if a libel plaintiff has previously been anonymous in a state, he or she may still suffer reputational injury there. *Id.* at 777.

133. *Id.* at 781.

134. 342 U.S. 437 (1952); *see* 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1067.5, at 510 (citing *Perkins* as the "roots of contemporary doctrine of 'general jurisdiction'").

Mining Company, a Philippine's corporation.¹³⁵ During the Japanese occupation of the Philippines, the company's mining operations stopped and the interim president of the company returned to his home in Ohio, where he continued to act as president and general manager.¹³⁶ Although the president's activities constituted only a limited portion of the company's business, the Court found the activities were sufficiently continuous and systematic to support maintenance of a suit, despite no discernable connection to the cause of action in Ohio.¹³⁷

It took thirty years before the Court next considered general jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.¹³⁸ Following a helicopter crash in Peru that killed four U.S. citizens, the surviving family members brought wrongful-death actions in Texas district court.¹³⁹ Helicopteros Nacionales de Colombia (Helicol), the Colombia-based corporation that owned the helicopter involved in the crash, challenged jurisdiction.¹⁴⁰ After concluding that the claims did not "arise out of" activities that took place in Texas, the Court proceeded to examine whether the company engaged in continuous and systematic activities in the forum.¹⁴¹ Although Helicol purchased more than \$4 million worth of helicopters and equipment from another helicopter company in Fort Worth, Texas, and sent its prospective pilots there for training, the Court found such contacts

135. *Perkins*, 342 U.S. at 438–39. Idonah Slade Perkins, a stockholder of Benguet, sued the company claiming she was owed over \$2,500,000. *Id.*

136. *Id.* at 447–48. While in Ohio, the president kept files for the company; carried on correspondence related to the business and its employees; drew and distributed salary checks for himself and two company secretaries who worked with him; used and maintained two bank accounts; held directors' meetings; supervised policies dealing with the rehabilitation of the company's properties; and dispatched funds to cover purchases of machinery in support of rehabilitation. *Id.* at 448.

137. *Id.* at 438.

138. 466 U.S. 408 (1984); 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1067.5, at 510.

139. *Helicopteros*, 466 U.S. at 410, 412. The decedents were employees of a joint venture that had contracted with a Peruvian state-owned oil company to build an oil pipeline. *Id.* at 410. The joint venture purchased helicopters from Helicol to move employees, material, and equipment around the construction site. *Id.*

140. *Id.* at 409–10, 412.

141. *Id.* at 415–16. The majority thought that the respondents had conceded the issue of specific jurisdiction. *Id.* at 415. In the dissent, however, Justice Brennan argued that the majority failed to consider the distinction between claims relating to a defendant's contacts as opposed to those arising out of such contacts. *Id.* at 420 (Brennan, J., dissenting). Justice Brennan found the claims sufficiently related to Helicol's Texas activities to support the exercise of specific jurisdiction. *See id.* at 426.

insufficient to support general jurisdiction.¹⁴² The ruling foreshadowed the more restrictive approach to come.

C. Property Concepts

In *Pennoyer v. Neff*, the Supreme Court distinguished between the due process requirements for actions in personam versus those in rem.¹⁴³ In *Shaffer v. Heitner*, the Court revisited, and ultimately rejected, this categorical approach to the due process analysis.¹⁴⁴

As in *Pennoyer*, the controversy in *Shaffer* surrounded an attachment of property. In this shareholder's derivative suit, a Delaware court attached stock owned by the individually named defendants in order to gain jurisdiction over them.¹⁴⁵ Although the stock certificates were not physically present in the state, a statute deemed Delaware the place of ownership for all stock in Delaware corporations.¹⁴⁶ The Delaware courts rejected the individuals' challenge to jurisdiction based on the belief that attachment of property,

142. *Id.* at 411, 416–17. Helicol also sent its chief executive officer to Houston, Texas, to attend a negotiation session related to the Peruvian joint venture. *See id.* at 410. And in addition to sending its pilots for training in Fort Worth, Texas, Helicol also sent its management and maintenance personnel. *Id.* at 411. Helicol also received over \$5 million in payments from the joint venture's Texas bank. *Id.*

143. 95 U.S. 714, 727 (1878) (comparing the need for personal service of process for in personam actions with service by publication for matters relating to property), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

144. *See Shaffer*, 433 U.S. at 212 (describing the distinction between jurisdiction over the person and jurisdiction over the person's property as a "fiction").

145. *See id.* at 189–93. Heitner, the plaintiff, brought the shareholder derivative suit against Greyhound Corporation, its subsidiary, and twenty-eight present or former directors of the corporations. *Id.* at 189–90. According to Heitner, who owned one share of Greyhound stock, the individual defendants caused Greyhound and its subsidiary to incur substantial financial losses as a result of an antitrust lawsuit and a criminal contempt matter. *Id.* Pursuant to a Delaware sequestration statute, Heitner made a motion to have the stock of the individual defendants seized. *Id.* at 190. The court approved Heitner's motion and took possession of 82,000 shares of stock as well as options belonging to twenty-one of the defendants. *Id.* at 191–92. Notice of the suit was published in a local paper and mailed to the defendants' last known addresses. *Id.* at 192. Attachment of the stock was the sole basis of jurisdiction—the defendants had no connection to Delaware and none of the actions that gave rise to Heitner's claims took place in the state. *Id.* at 213.

146. *Id.* at 192. The statute provided:

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purposes of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as this State.

Id. at n.9 (citing DEL. CODE ANN. tit. 8, § 169 (1975)).

as a matter quasi in rem, is not subject to *International Shoe*'s minimum contacts analysis.¹⁴⁷

Yet such an analysis “assume[d] the continued soundness of the conceptual structure” of *Pennoyer*.¹⁴⁸ According to Justice Marshall, the distinction between matters in rem and in personam was purely fictional and a historical relic.¹⁴⁹ Just as in *Harris v. Balk*, where the debt was used to gain jurisdiction over the person, the stock served the same purpose for Heitner.¹⁵⁰ Thus, after wading through the various legal fictions that were necessary to support *Pennoyer*, the Court stated “that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”¹⁵¹

This language represents the zenith of *International Shoe*. By overturning *Pennoyer*, *Shaffer* made *International Shoe* the center of every jurisdictional analysis.¹⁵² But the concurring opinions of Justice Powell and Justice Stevens indicated that maybe *Pennoyer* still had some life. Both concurrences suggested that the minimum contacts analysis may not apply in cases involving real property.¹⁵³ Thirteen years later, Justice Scalia took *Shaffer*'s perceived ambiguities and ran with them.¹⁵⁴

147. *Id.* at 196. Claims that are quasi in rem refer to actions in which the plaintiff is either seeking to secure a “pre-existing claim in the subject property” or “to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.” *Id.* at 199 n.17 (citing *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958)).

148. *Id.* at 196.

149. *See id.* at 212.

150. *Id.* at 209.

151. *See id.* at 198–211 (discussing the evolution of personal jurisdiction), 212.

152. *See* Silberman, *supra* note 3, at 34–35 (describing *Shaffer* as *Pennoyer*'s death knell).

153. *Shaffer*, 433 U.S. at 217 (Powell, J., concurring) (“In the case of real property, in particular, the preservation of the common-law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard”); *id.* at 219 (Stevens, J., concurring) (“I agree with Mr. Justice Powell that [the opinion] should not be read to invalidate *quasi in rem* jurisdiction where real estate is involved. I would also not read it as invalidating other long-accepted methods of acquiring jurisdiction over persons”).

154. *See* *Burnham v. Superior Court*, 495 U.S. 604, 620–21 (1990) (plurality opinion) (describing *Shaffer* as applying the minimum contacts analysis *only* to quasi in rem actions).

IV. A RETURN TO *PENNOYER*

Between 1990 and 2017, the Supreme Court decided seven personal jurisdiction cases, with six of those decisions coming since 2011.¹⁵⁵ These decisions mark a significant departure from the Court's *International Shoe* jurisprudence discussed in Part III. This Part analyzes the ways in which these decisions have revived *Pennoyer*'s traditional approach to personal jurisdiction. Section A discusses *Burnham v. Superior Court*, where the Court explicitly based its holding on traditional concepts of jurisdiction. Section B describes how the Court's curtailment of general jurisdiction has essentially made it a question of the defendant's status. Finally, Section C explains the erosion of the reasonableness calculus in specific jurisdiction.

A. Tradition as Due Process

In January of 1988, Dennis Burnham was personally served with a summons and a petition for divorce while visiting the state of California.¹⁵⁶ Burnham had been in the state on business and proceeded to spend the weekend with one of his children, who had moved to California with his wife following their separation.¹⁵⁷ A divided Supreme Court determined that California could exercise general jurisdiction over Burnham because he was personally served with process in the state.¹⁵⁸ The Court achieved this result by first engaging in an extensive historical analysis of the practice and then narrowly recasting the premise of *International Shoe*.¹⁵⁹

Relying on *Shaffer*'s admonishment that all assertions of jurisdiction must be analyzed in light of *International Shoe*, Burnham argued that California's exercise of jurisdiction offended due process given his lack of contacts

155. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017); *Walden v. Fiore*, 571 U.S. 277, 279 (2014); *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918–20 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality opinion); *Burnham*, 495 U.S. at 607 (plurality opinion).

156. See *Burnham*, 495 U.S. at 608 (plurality opinion).

157. *Id.* The Burnhams separated in July 1987. *Id.* at 607. In October of that year, Mr. Burnham filed for divorce in New Jersey state court, but he did not obtain summons nor did he attempt to serve Mrs. Burnham. *Id.*

158. See *id.* at 607, 619 (upholding jurisdiction over claims unrelated to Burnham's activities in the state based on personal service of process). Justice Scalia authored the opinion and was joined by Chief Justice Rehnquist and Justices White and Kennedy. *Id.* 604.

159. See *id.* at 610–16 (reviewing the history of courts exercising jurisdiction over nonresident defendants who are served while physically present in the state); *id.* at 616–19 (reframing *International Shoe*).

with the state.¹⁶⁰ According to Justice Scalia, Burnham’s argument constituted a “thorough misunderstanding” of the Court’s jurisprudence.¹⁶¹ In Justice Scalia’s estimation, *International Shoe* merely abolished the legal fictions of consent and presence to reveal the underlying truth that “[d]ue process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction” from *Pennoyer*.¹⁶² From here, Justice Scalia went on to conclude that “jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system.”¹⁶³ Following this rationale, real property attachment comports with due process because it is also a continuing tradition of American law.¹⁶⁴

Although Justice Brennan concurred in the judgment, he rejected Justice Scalia’s tradition-bound analysis and continued to adhere to *International Shoe*.¹⁶⁵ In fact, Justice Brennan believed that the Court’s decisions in *International Shoe* and *Shaffer* mandated a more holistic inquiry.¹⁶⁶ Justice Brennan reasoned that under *International Shoe*, Burnham’s voluntary presence in California constituted purposeful availment because he reaped the benefits of the state’s protection and economy while he was there.¹⁶⁷ Moreover, given advancements in communication and travel, it would not be unfair or unreasonable to require him to travel to California to defend the suit.¹⁶⁸

160. Brief for Petitioner at 16–23, 46–49, *Burnham v. Superior Court*, 495 U.S. 604 (1990) (No. 89-44).

161. *Burnham*, 495 U.S. at 616 (plurality opinion).

162. *Id.* at 618.

163. *Id.* at 619.

164. See *Pennoyer v. Neff*, 95 U.S. 714, 723–26 (1878) (discussing cases in which attachment of property served as the basis of jurisdiction), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977); 4 WRIGHT, MILLER & STEINMAN, *supra* note 42, § 1070 (noting the common law history of actions in rem and quasi in rem).

165. See *Burnham*, 495 U.S. at 629–30 (Brennan, J., concurring in the judgment). Justices Marshall, Blackmun, and O’Connor joined Justice Brennan’s concurrence. *Id.* at 628.

166. See *id.* at 629 (finding “reliance solely on historical pedigree” “foreclosed” by *International Shoe* and *Shaffer*).

167. See *id.* at 637–38. Specifically, “[Burnham’s] health and safety are guaranteed by the State’s police, fire, and emergency medical services; he is free to travel on the State’s roads and waterways; he likely enjoys the fruits of the State’s economy as well.” *Id.*

168. *Id.* at 638–39.

Although Justice Scalia’s tradition-focused due process analysis garnered only three votes, *Burnham* represented an early and important sign of *Pennoyer*’s resurgence and *International Shoe*’s demise.¹⁶⁹

B. General Jurisdiction as a Matter of Status

In *International Shoe*, the Court contemplated situations in which a corporation’s activities within a state are so continuous and systematic as to justify causes of action unrelated to those activities.¹⁷⁰ First in *Perkins v. Benguet Consolidating Mining Co.* and later in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court affirmed that general jurisdiction may be supported where a corporation has continuous and systematic contacts with the forum.¹⁷¹ However, the Court’s most recent decisions have shifted the focus away from the contacts analysis to one focused on the corporation’s status.¹⁷²

In *Daimler AG v. Bauman* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court held that general jurisdiction may only be asserted over a corporation where its “affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home.”¹⁷³ The Court cited

169. See Vandeveld, *supra* note 121, at 314–15 (describing *Burnham* as an opportunity for the Court’s conservative Justices—Scalia, Rehnquist, and Kennedy—to attack *International Shoe*’s flexible approach to jurisdiction).

170. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945).

171. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (permitting Ohio to exercise jurisdiction over claims unrelated to the corporation’s activities in the state given continuous and systematic contacts); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416–17 (1984) (denying jurisdiction because the company’s contacts were not “continuous and systematic general business contacts”).

172. See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (finding a corporation’s place of incorporation and principal place of business to be the paradigms of general jurisdiction (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011))).

173. *Id.* at 127 (quoting *Goodyear*, 564 U.S. at 919). It should be noted that both cases involved foreign defendants. See *Daimler*, 571 U.S. at 120–21 (noting *Daimler* is a German public stock company with headquarters in Stuttgart); *Goodyear*, 564 U.S. at 920 (noting that the various Goodyear subsidiaries named in the suit are incorporated in Luxembourg, Turkey, and France). In *Goodyear*, the parents of two children who were killed in a bus accident in Paris, France attempted to sue Goodyear USA, an Ohio corporation, and its foreign subsidiaries in North Carolina. *Goodyear*, 564 U.S. at 918. Goodyear USA did not challenge jurisdiction, but the foreign subsidiaries did. *Id.* The Supreme Court struck down North Carolina’s finding of jurisdiction. *Id.* at 920. In *Daimler*, neither the defendants nor the plaintiffs were from the United States. 571 U.S. at 120. The Argentinian plaintiffs alleged that *Daimler*’s Argentinian subsidiary had “collaborated with state security forces to kidnap, detain, torture, and kill” employees of the subsidiary during Argentina’s “Dirty War.” *Id.* at 121. The plaintiffs based jurisdiction on Mercedes-Benz USA’s (MBUSA) contacts with California. *Id.* MBUSA is a *Daimler* subsidiary “incorporated in Delaware with its principal place of business in New Jersey.” *Id.*

International Shoe for this proposition, but in fact, *International Shoe* said nothing about the corporation being at home.¹⁷⁴ Further, neither *Helicopteros* nor *Perkins* employed this language.¹⁷⁵ Both cases merely emphasized that the contacts must be continuous and systematic to support general jurisdiction.¹⁷⁶

This idea that the corporation must be at home in the state harkens back to *Pennoyer v. Neff*, where the Court considered incorporation within a state as representing consent to the state's regulation of status.¹⁷⁷ Thus by limiting general jurisdiction to a corporation's place of incorporation, its principal place of business, or states in which it is essentially at home, the Court is really looking at the corporation's status rather than its contacts.¹⁷⁸ In fact, the Court said it would be an "exceptional case" for a corporation to be at home outside of its place of incorporation or principal of place of business.¹⁷⁹ Thus, in *Daimler*, the Court analyzed the corporation's contacts

174. See *Daimler*, 571 U.S. at 127 (citing to *International Shoe*); *Goodyear*, 564 U.S. at 919 (citing to *International Shoe*). But see *Int'l Shoe*, 326 U.S. at 318 (noting 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").

175. See generally *Helicopteros*, 466 U.S. 408; *Perkins*, 342 U.S. 437. While the word "home" appears in *Perkins*, it has nothing to do with the corporation's home. See *Perkins*, 342 U.S. at 447–48. The Court merely notes that the president of the company returned to his home. See *id.*

176. *Helicopteros*, 466 U.S. at 414 ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts . . ." (footnote omitted)); *Perkins*, 342 U.S. at 445–46 (discussing precedent related to the "continuous and systematic" activities requirement).

177. See *Pennoyer v. Neff*, 95 U.S. 714, 735–36 (1878) ("[A] state, on creating corporations . . . may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members."), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

178. See *Daimler*, 571 U.S. at 137–38 (rejecting general jurisdiction "in every state in which a corporation 'engages in substantial, continuous, and systematic course of business'" (quoting Brief for Respondents at 16–17 & nn.7–8, *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (No. 11-965))). In fact, the Court has not even defined what constitutes a corporation's principal place of business for purposes of the jurisdictional analysis. Steinman, *supra* note 5, at 1411 n.58. However, it is assumed that the test put forward for corporate citizenship in federal diversity cases applies. *Id.*; see also *Hertz Corp v. Friend*, 559 U.S. 77, 92–93 (2010) (defining the principal place of business as the corporation's "nerve center").

179. See *Daimler*, 571 U.S. at 139 n.19.

with the forum state in light of its greater affiliations with the place of incorporation and principal place of business.¹⁸⁰

The Court's decision in *BNSF Railway Co. v. Tyrrell* reveals how limiting the general jurisdiction standard has become. Unlike the defendants in *Daimler* and *Goodyear*, which were both foreign corporations, BNSF is a Delaware corporation with its principal place of business in Texas.¹⁸¹ Two plaintiffs sued BNSF in Montana seeking compensation under the Federal Employers' Liability Act of 1908 for workplace injuries they suffered while employed by the company.¹⁸² Utilizing the at-home test articulated in *Daimler* and *Goodyear*, the Court struck down Montana's exercise of jurisdiction as inconsistent with due process.¹⁸³ The Court reached this conclusion despite finding that BNSF employs approximately 2,100 people, owns over 2,000 miles of railroad track, and runs an automotive facility in Montana.¹⁸⁴

Justice Sotomayor dissented, arguing that the Court's at home test replaced *International Shoe*'s "nuanced contacts analysis backed by considerations of fairness and reasonableness" with "rote identification of a corporation's principal place of business or place of incorporation."¹⁸⁵ Moreover, Justice Sotomayor critiqued the majority's use of the comparative contacts analysis that appeared in *Daimler*, noting that no such comparisons were made in *International Shoe*.¹⁸⁶ She recognized that such an analysis makes it "virtually inconceivable that [large multistate or multinational corporations that operate across many jurisdictions] will ever be subject to general jurisdiction in any

180. See *id.* at n.20 ("General jurisdiction [] calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them."). Justice Sotomayor, who concurred in the opinion based on her assessment of the reasonableness factors, described the majority's approach as "too big for general jurisdiction." *Id.* at 143–46 (Sotomayor, J., concurring in judgment).

181. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017); *Daimler*, 571 U.S. at 120–21 (noting *Daimler* is a German public stock company with headquarters in Stuttgart); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011) (noting that the Goodyear subsidiaries named in the suit are incorporated in Luxembourg, Turkey, and France).

182. See *BNSF*, 137 S. Ct. at 1554. Neither plaintiff was from Montana, nor did the injuries take place in Montana. *Id.*

183. *Id.* at 1558–59.

184. *Id.* at 1554. BNSF had also recently invested almost \$500 million in the state. *Civil Procedure—Personal Jurisdiction—BNSF Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333, 339 (2017).

185. *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part).

186. *Id.* at 1561; see also *Daimler*, 571 U.S. at 139 n.20 ("General jurisdiction [] calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.").

location other than their principal places of business or of incorporation.”¹⁸⁷ As a result of the at home test, general jurisdiction over corporations has been reduced to a question of status.

C. Specific Jurisdiction

In addition to curtailing general jurisdiction, the Court’s recent cases have also narrowed acceptable exercises of specific jurisdiction. Perhaps the most egregious example of this trend is *J. McIntyre Machinery, Ltd. v. Nicastro*.¹⁸⁸ Robert Nicastro filed a products-liability suit against J. McIntyre Machinery (McIntyre UK), an English corporation, after cutting off four of his fingers while using a metal-shearing machine manufactured by the company.¹⁸⁹ Nicastro sued McIntyre UK in New Jersey, where the accident took place.¹⁹⁰ The New Jersey Supreme Court upheld the lower court’s exercise of jurisdiction because the accident happened in the state and based on its understanding of the stream of commerce theory.¹⁹¹

In a plurality decision, six justices held that New Jersey’s exercise of jurisdiction violated due process.¹⁹² Justice Kennedy, writing for the Court, began with what he perceived to be the “principal inquiry” in stream of commerce cases—“whether the defendant’s activities manifest an intention to submit to the power of the sovereign.”¹⁹³ Although McIntyre UK targeted

187. *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part).

188. 564 U.S. 873 (2011).

189. *Id.* at 878, 894 (plurality opinion).

190. *Id.* at 878.

191. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010), *rev’d*, 564 U.S. 873 (2011). The New Jersey Supreme Court devoted nearly ten pages of its decision to analyzing the dueling conceptions of the stream of commerce theory that emerged from *Asahi*. See *id.* at 581–91. Under New Jersey’s stream of commerce theory:

A foreign manufacturer will be subject to this State’s jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. . . . The focus is not on the manufacturer’s control of the distribution scheme, but rather on the manufacturer’s knowledge of [it]

Id. at 591–92 (citing *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1137 (N.J. 1986)). Thus, McIntyre UK was subject to jurisdiction because it had established a U.S. distributor to target the entire U.S. market, including New Jersey. *Id.* at 593.

192. See *McIntyre*, 564 U.S. at 879–87 (plurality opinion). Chief Justice Roberts and Justices Scalia and Thomas joined Justice Kennedy’s opinion. *Id.* at 877. Justice Breyer filed a concurring opinion, in which Justice Alito joined. *Id.* at 887 (Breyer & Alito, JJ., concurring).

193. *Id.* at 882 (plurality opinion). As Justice Ginsburg noted, Kennedy’s submission theory “seems scarcely different from the long discredited fiction of implied consent.” *Id.* at 901 n.5 (Ginsburg, J., dissenting).

the entire U.S. market and even established a U.S. distributor, the plurality found that McIntyre UK had not purposefully availed itself of the forum.¹⁹⁴

But as Justice Ginsburg noted in her dissent, the fact that the machine ended up in New Jersey was not “random[] or fortuitous[]” but a result of McIntyre’s deliberate connections to the United States.¹⁹⁵ Moreover, New Jersey’s status as the primary U.S. market for scrap metal made it especially likely that its metal shearing machines would end up there.¹⁹⁶ While foreseeability alone does not constitute purposeful availment, under *World-Wide Volkswagen Corp. v. Woodson*, a corporation’s efforts to target a market, either “directly or indirectly” make it amenable to suit.¹⁹⁷

Moreover, the reasonableness factors set forth in *World-Wide Volkswagen* also pointed towards maintenance of the suit.¹⁹⁸ First, the New Jersey Supreme Court articulated the state’s manifest interest in litigating a products liability suit involving injury to one of its citizens.¹⁹⁹ Second, requiring Nicastro to travel to England to seek relief for an injury that took place in New Jersey made little sense, especially given McIntyre UK’s international reach.²⁰⁰ If McIntyre UK could send its agents to trade shows all across the United States, requiring it to defend suit in a single state hardly seems burdensome.²⁰¹ Under no “measure of reason and fairness” would New Jersey’s exercise of jurisdiction create an undue burden for a company that sought to market its products “anywhere and everywhere in the United States.”²⁰²

194. *Id.* at 886 (plurality opinion). McIntyre Machinery America, Ltd. served as the exclusive U.S. distributor from around 1995 until filing for bankruptcy in 2001. *Id.* at 896 & n.2 (Ginsburg, J., dissenting).

195. *Id.* at 898.

196. *See id.* at 895 (noting that New Jersey processed 30% more scrap metal than its nearest competitor).

197. 444 U.S. 286, 297 (1980) (emphasis added).

198. *See id.* at 292 (listing 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” as relevant factors in the reasonableness inquiry (citations omitted)).

199. *See Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 590–91 (N.J. 2010), *rev’d*, 564 U.S. 873 (2011).

200. *McIntyre*, 564 U.S. at 904 (Ginsburg, J., dissenting).

201. *Nicastro*, 987 A.2d at 591 (“If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury.”). Between 1990 and 2005, McIntyre officials, including the company president, attended events in Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. *Id.* at 579.

202. *McIntyre*, 564 U.S. at 904 (Ginsburg, J., dissenting).

But according to Justice Kennedy, “jurisdiction is in the first instance a question of authority rather than fairness.”²⁰³ Under *Pennoyer*, that certainly was true, but ever since *International Shoe*, fairness had been a central concern of the jurisdictional analysis.²⁰⁴ In *McGee v. International Life Insurance Co.*, a single contact between the defendant and the forum had supported jurisdiction because the Court recognized that changes in the economy had broadened the reach of corporate defendants.²⁰⁵ Those changes only intensified in the five intervening decades between *McGee* and *McIntyre*. But just as the Court was willing to revert to tradition in *Burnham v. Superior Court*, it did so again in *McIntyre*.²⁰⁶

The Court further narrowed permissible exercises of specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court*.²⁰⁷ A group of 678 plaintiffs, 86 of whom were California residents, sued Bristol-Myers Squibb (BMS) in California state court seeking damages for injuries they allegedly suffered from taking the drug Plavix.²⁰⁸ Initially, the California courts found BMS subject to general jurisdiction, but after the Court’s decision in *Daimler*, jurisdiction was reframed as specific.²⁰⁹

203. *Id.* at 883 (plurality opinion).

204. *See id.* at 903 (Ginsburg, J., dissenting) (“The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.”).

205. 355 U.S. 220, 222–23 (1957) (describing a “clearly discernable” trend of “expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents”).

206. *See McIntyre*, 564 U.S. at 883 (plurality opinion) (relying on *Burnham* for the proposition that “jurisdiction is in the first instance a question of authority rather than fairness”). It should be noted that Justices Breyer and Alito did not join in Justice Kennedy’s reasoning. *Id.* at 893 (Breyer, J., concurring in the judgment). They believed that the case did not “implicate modern concerns,” and was an “unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.” *Id.* 890. Interestingly, the concurring justices believed the New Jersey Supreme Court had employed a “new approach to personal jurisdiction.” *Id.* at 892. But as Justice Ginsburg noted, both *Asahi* and *World-Wide Volkswagen* support the New Jersey court’s analysis. *See id.* at 906 (Ginsburg, J., dissenting).

207. 137 S. Ct. 1773 (2017).

208. *Id.* at 1777–78. Plavix is a prescription blood thinner that is manufactured and sold by BMS. *Id.* at 1778. The plaintiffs alleged that Plavix caused “bleeding, bleeding ulcers, gastrointestinal bleeding, cerebral bleeding, rectal bleeding, heart attack, stroke, hemorrhagic stroke, subdural hematoma, thrombotic thrombocytopenic purpura, and death.” *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 878 (Cal. 2016), *rev’d*, 137 U.S. 1773 (2017).

209. *Bristol-Myers*, 377 P.3d at 883. Specifically, the California Supreme Court held:

The United States Supreme Court’s at home rule for general jurisdiction over a corporation, as articulated in *Goodyear* and *Daimler* . . . defeats the nonresident

Utilizing a sliding scale analysis, the California Supreme Court found that specific jurisdiction over the nonresidents claims was appropriate because BMS's "wide ranging" contacts "more readily" created a connection with the forum.²¹⁰ BMS's contacts with California included: marketing and promoting Plavix in the state; employing 250 sales representatives in the state; contracting with McKesson Corporation, which is headquartered in San Francisco, for Plavix's distribution; operating research and laboratory facilities in the state; and maintaining a lobbying office in the state capitol.²¹¹ The court reasoned that these extensive contacts, combined with the fact that all of the plaintiffs' injuries resulted from the same drug, required less of a direct connection between BMS's California activities and the plaintiffs' claims.²¹²

The U.S. Supreme Court did not subscribe to this analysis. Instead, it found no adequate relationship between the nonresidents claims and the litigation because "the nonresidents were not prescribed Plavix in California,

plaintiffs' claim that California may assert general jurisdiction over BMS. BMS may be regarded as being at home in Delaware, where it is incorporated, or perhaps in New York and New Jersey, where it maintains its principal business centers. Although the company's ongoing activities in California are substantial, they fall far short of establishing that [it is] at home in this state for purposes of general jurisdiction.

Id. In finding specific jurisdiction, the California Supreme Court specifically discussed the *Daimler* majority's response to Justice Sotomayor's concurring opinion. *See id.* at 884–85 ("[G]iven the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the 'deep injustice' Justice Sotomayor predicts as a consequence of our holding that California is not an all-purpose forum for suits against [Daimler]." (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 157 & n.10 (2014) (Sotomayor, J., concurring in the judgment))).

210. *Id.* at 889 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1098 (Cal. 1996)).

211. *Id.* at 879, 884, 886. BMS also sold \$918 million worth of Plavix in the state between 2006 and 2012. *Id.* at 879. Based on these activities, the California court held that there was "no question" that BMS purposefully availed itself to the state. *Id.* at 886.

212. *See id.* at 889. Specifically, the court found that "BMS's forum contacts, including its California-based research and development facilities, are substantially connected to the nonresident plaintiffs' claims because those contacts are part of the nationwide marketing and distribution of Plavix, [the] drug . . . that gave rise to all the plaintiffs' claims." *Id.* Given the Supreme Court's lack of guidance in this area, the circuit courts have taken varying approaches. *See* John V. Felliccia, Note, *Bristol Myers Squibb Co. v. Superior Court: Reproaching the Sliding Scale Approach for the Flexible Fault of Sliding Too Far*, 77 Md. L. REV. 862, 878–85 (2018). Relying on causation concepts from torts, most circuits employ some version of the "but-for" test—that is, but for the defendant's contacts with the forum, the claim would not have occurred. *Id.* at 878–79. Other circuits modify this approach by requiring proximate cause to prevent too much attenuation between the contacts and the claims. *Id.* at 880–82. The Sixth Circuit Court of Appeals also relies on proximate cause, but as it relates to a "substantial connection" between the defendant's activities and the cause of action. *Id.* at 882–84. Finally, other circuits employ a sliding scale approach to the attenuation analysis. *See id.* at 884.

did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”²¹³ The majority’s concern about the place of injury represents a marked departure from *McIntyre*, where the fact that the plaintiff sawed off four of his fingers in New Jersey was considered irrelevant.²¹⁴

Furthermore, in *Keeton v. Hustler Magazine, Inc.*, the Court had held that the plaintiff need not have minimum contacts with the forum state.²¹⁵ In that case, even after acknowledging that the plaintiff suffered the bulk of her harm outside of the state, the Court upheld jurisdiction based on the defendant’s contacts with the market.²¹⁶ Those contacts—monthly sales of 10,000 to 15,000 magazines—pale in comparison to BMS’s contacts with California.²¹⁷ Moreover, in *Keeton*, the Court cited the defendant’s “nationwide audience” for the proposition that there is “no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.”²¹⁸ One would think that this logic should also apply to BMS since it marketed Plavix nationwide and sold \$918 million worth of it in California.²¹⁹ Yet because *Keeton* was a libel action, the majority believed it was “amply distinguish[ed]” from BMS.²²⁰

Moreover, the majority’s reasoning is inconsistent with the 2014 case *Walden v. Fiore*, in which the Court held that the place of injury is relevant only as far as it proves minimum contacts between the defendant and the

213. *Bristol-Myers*, 137 S. Ct. at 1781.

214. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878, 885–87 (2011) (plurality opinion) (acknowledging that the accident happened in New Jersey but finding a lack of purposeful availment because McIntyre UK targeted the U.S. market as a whole, not New Jersey specifically).

215. 465 U.S. 770, 779 (1984).

216. *Id.* at 780–81.

217. See *id.* at 772 (“[Defendant’s] contacts with New Hampshire consist of the sale of some 10,000 to 15,000 copies of *Hustler Magazine* in that State each month.”); see also *Bristol-Myers*, 377 P.3d at 879 (“BMS sold almost 187 million Plavix pills to distributors and wholesalers in California in 2006–2012.”).

218. *Keeton*, 465 U.S. at 781.

219. See *Bristol-Myers*, 377 P.3d at 879, 889.

220. *Bristol-Myers*, 137 S. Ct. at 1782. Specifically, the Court described *Keeton* as determining “the scope of a claim involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in state injury and no injury to residents of the forum state.” *Id.* Conversely, Justice Sotomayor recognized that “this is a distinction without . . . difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.” *Id.* at 1788 (Sotomayor, J., dissenting).

forum.²²¹ The *Walden* plaintiffs, who were Nevada residents, argued that Nevada had jurisdiction over their claim because that is where they suffered their injury.²²² A unanimous Court flatly rejected the plaintiffs argument, holding that “[t]he proper question is not *where* the plaintiff experienced a particular injury or effect *but whether the defendant’s contact connects him to the forum in a meaningful way.*”²²³

The *Bristol-Myers* majority, however, cited *Walden* for the proposition that the injurious conduct must have occurred in the forum state.²²⁴ But in fact, *Walden* stands for unremarkable proposition that the defendant must purposefully avail itself of the forum.²²⁵ Unlike the defendant in *Walden*, BMS clearly purposefully availed itself of the forum by establishing numerous connections with the state.²²⁶

In her dissent, Justice Sotomayor indicated that the majority’s decision represents a significant curtailment of specific jurisdiction in the name of “territorial limitations” on state power.²²⁷ By naming federalism as the “decisive” inquiry,²²⁸ the Court elevated traditional notions of power above

221. 571 U.S. 277, 290 (2014) (rejecting a Nevada court’s exercise of jurisdiction because the defendant had no contacts with the forum other than the fact that plaintiffs’ injury occurred there).

222. Brief for Respondents at 14–16, *Walden v. Fiore*, 571 U.S. 277 (2014) (No. 12-574). The plaintiffs alleged that the defendant, a deputized agent of the Drug Enforcement Agency, had violated their Fourth Amendment rights by knowingly filing a false affidavit that resulted in the seizure of \$97,000 cash. *See id.* at 1–2, 6. All of the conduct giving rise to the claim had occurred in Atlanta, Georgia, where the plaintiffs were waiting to board a flight to Las Vegas, Nevada. *See id.* at 1–4. When the plaintiffs arrived in Nevada, they compiled documentation that indicated they had legally obtained the cash through their careers as professional gamblers. *See id.* at 4. Despite this evidence, the defendant filed an affidavit in an attempt to institute forfeiture proceedings. *Id.* at 5.

223. *Walden*, 571 U.S. at 290 (emphasis added). Relying on *Calder v. Jones*, the Ninth Circuit Court of Appeals had upheld Nevada’s exercise of jurisdiction because the defendant’s conduct was “expressly aimed” at Nevada residents. *Id.* at 282 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). The Court distinguished the case based on the fact that *Calder* was a libel action and the defendants had “ample contacts” with the forum. *Id.* at 287–88, 290.

224. *See Bristol-Myers*, 137 S. Ct. at 1781–82 (“[A]s in *Walden*, all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”).

225. *Id.* at 1787 (Sotomayor, J., dissenting) (describing *Walden* as concerning purposeful availment, not whether the claim arises out of or relates to the defendant’s contacts with the forum).

226. *Compare Walden*, 571 U.S. at 279 (noting that defendant’s only contact with Nevada was his allegedly tortious conduct aimed at Nevada residents), *with Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 879, 884, 886 (Cal. 2016) (describing BMS’s marketing, lobbying, research, employment, and contract connections with California), *rev’d*, 137 S. Ct. 1773 (2017).

227. *See Bristol-Myers*, 137 S. Ct. at 1784, 1788 (Sotomayor, J., dissenting) (describing the majority’s holding as allowing territorial limitations to trump fairness to the parties).

228. *Id.* at 1780 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)). It is not even clear that *World-Wide Volkswagen* supports this proposition because in a later case the Court held:

fairness.²²⁹ But this analysis is utterly inconsistent with *International Shoe*, for as the Court acknowledged in *Shaffer v. Heitner*, “[t]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [are] the central concern of the inquiry into personal jurisdiction.”²³⁰ *International Shoe*’s “immediate effect . . . was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants.”²³¹

By emphasizing federalism and territorial limitations on state power, the Court has breathed new life into *Pennoyer*’s antiquated notions of jurisdiction.²³² Given that specific jurisdiction is “the centerpiece of modern jurisdiction theory,” and the Court’s curtailment of general jurisdiction, plaintiffs appear to have little course against nonresident defendants.²³³

V. CONCLUSION

In *Pennoyer v. Neff*, the Supreme Court innovated personal jurisdiction analysis by making it an issue of constitutional concern under the Due Process Clause. Yet, despite this innovation, the Court adhered to traditional and territorially-bound notions of state power. *Pennoyer*’s framework began to fray as people became increasingly mobile and the economy became increasingly national. As a result, the Court had to develop various legal fictions to adapt *Pennoyer* to new realities.

The Court’s decision in *International Shoe* marked the beginning of a new jurisdictional era. No longer would the Court be concerned with boundaries, presence, and consent. Instead, jurisdiction would be determined by the

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself *makes no mention of federalism concerns.*

J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 900 (2010) (Ginsburg, J., dissenting) (emphasis added) (quoting *Ins. Corp. of Ir. v. Campagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982)).

229. See *Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

230. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (citation omitted).

231. *Id.*

232. See *id.*

233. *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014) (describing specific jurisdiction as the “centerpiece of modern jurisdiction theory” (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011))); see *Bristol-Myers*, 137 S. Ct. at 1788–89 (Sotomayor, J., dissenting) (“The effect of the Court’s opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is ‘essentially at home.’”).

defendant's contacts with the forum. Due process became a matter of fairness—so long as “traditional notions of fair play and substantial justice” would not be offended by the exercise of jurisdiction, then due process was satisfied.

Although this doctrine underwent significant refinement through the years, *International Shoe* continued to drive the Court's analysis. But beginning with its decision in *Burnham*, the Supreme Court has launched a revival of *Pennoyer*'s focus on traditional bases of jurisdiction. This trend only accelerated with the Court's decisions in *McIntyre*, *Daimler*, and *Bristol-Myers*.

In *McIntyre*, the Court asserted that authority is the central concern of the jurisdictional analysis, not fairness. *Daimler*'s at home test has reduced general jurisdiction to a question of status—whether a defendant is incorporated within a state or has its principal place of business there. And in *Bristol-Myers*, federalism became the animating concern of specific jurisdiction.

The result of these decisions is that people visiting a state for a day may be subject to general jurisdiction so long as they are personally served with process, but a multinational corporation with numerous contacts with a state can only be sued under general jurisdiction at home. At the same time, it has become increasingly difficult to predict whether a corporate defendant is subject to specific jurisdiction even when its product grievously injures an individual in the targeted forum. Such an absurd system indicates that the fairness analysis that was central to *International Shoe* has given way to *Pennoyer*'s traditional notions of power and consent. Personal jurisdiction analysis has truly gone backwards.