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Personal Jurisdiction: A Doctrinal Labyrinth with No Exit

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PERSONAL JURISDICTION: A DOCTRINAL LABYRINTH WITH NO EXIT

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I. INTRODUCTION

At its heart, the law of personal jurisdiction is simple and elegant. It is premised on two fundamental concepts that together establish the core of due process: *connecting factors* and *reasonable expectations*.[1] More specifically, to properly establish personal jurisdiction, connecting factors must link the defendant to the forum under circumstances that should invest the defendant with a reasonable expectation of being sued there.

Yet, despite this simple elegance, the United States Supreme Court has proven incapable of providing a coherent vision of the law of personal jurisdiction. In essence, the Court's fact-specific, case-by-case approach has produced an ever-widening doctrinal morass. As a consequence, the fundamental principles have been submerged beneath mechanistic formulas that are both too broad and too narrow and that, all too often, are open to subjective interpretations and applications. Moreover, the various "tests" are sometimes redundant in that they endorse alternative case-specific formulas that could easily be reduced to one test.

After carefully considering and critiquing the current body of

1. In my view, the due process standards of personal jurisdiction are not the proper vehicle through which to address questions of sovereignty or state power. Due process pertains to liberty, not to sovereignty. The sole constitutional issue in that context is whether a state could rationally conclude that the exercise of jurisdiction over a particular set of facts might rationally advance its interest in the protection of the health, safety, or welfare of its constituents. The sovereignty and liberty questions may be related, but they are not the same. In fact, the Court has made it clear that there was no independent sovereignty analysis in the determination of whether personal jurisdiction would be consistent with due process. *See* Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729 (2012).

jurisdictional doctrine, this Article suggests a return to fundamental principles.[2] To that end, I propose that the law of personal jurisdiction be codified in a statute that says more than "conform to due process" but does not resemble a highly formalistic, tailored long-arm statute. Rather, my proposed statute defines due process in a manner that captures the essence of personal jurisdiction at a principled level, providing a durable standard capable of application across a wide range of cases. Thus, the statute avoids the "mechanistic and 'transcendental nonsense' of legal formalism,"[3] while offering effective guidance to the courts that would apply the statute. As such, the statute invites results that are premised on "predictable and nonsubjective conclusions."[4]

Of course, all statutes are subject to judicial interpretation and the power of judicial review. That combination puts any statutory text at risk. Hence, my goal is not simply to propose a model statute but also to lay the foundation for a different way of thinking about the law of personal jurisdiction. In other words, my goal is to turn the Supreme Court back to the fundamental principles of due process.

The dominant academic view of the Supreme Court's personal jurisdiction jurisprudence is that it constitutes a body of decisions that have progressively fined-tuned the relevant doctrine through a self-correcting process of trial and error.[5] Scholarship tends to work around the edges of this process. Thus, there is a body of literature that attempts to organize the developed doctrine into useful subcategories;[6] another

2. For a discussion of my theoretical approach to procedure, *see* Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961 (2013).

3. Robert Post, *Theorizing Disagreement, Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1320 (2010).

4. Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L. Q. 1085, 1090 (1995).

5. *See, e.g.*, 4 CHARLES ALAN WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE § 1067.1 (3d. ed. 2013) (offering a positive narrative of the Court's personal jurisdiction jurisprudence); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 133-46 (4th ed. 1999) (describing the Court's refinement of the *International Shoe* standard) (hereinafter FRIEDENTHAL, CIVIL PROCEDURE). *But see* Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753 (2003) (arguing for the abandonment of the *International Shoe* minimum contacts test).

6. *See, e.g.*, Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-53 (1966) (drawing a distinction between general and specific jurisdiction); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (endorsing a more careful consideration of the distinction between general and specific jurisdiction); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998) (noting the emergence of a form of jurisdiction that is a "hybrid" of the general and specific categories). *See also* Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999 (2012) (assessing the current status of general jurisdiction).

that argues in favor of or against various doctrinal developments;[7] and still another that focuses its attention on potential novel applications of established doctrine to emerging economic and social trends.[8] This scholarly endeavor is valuable indeed, in that it contributes to a better understanding of the courts' overall approach to the law of personal jurisdiction, thereby giving guidance to the legal profession and the scholarly community. I do something different. My goal is not to categorize, critique, or refine existing doctrine, but to challenge the idea that the Supreme Court's case-by-case approach to personal jurisdiction represents an arc of progress. In my view, all too often the Court's apparent refinements operate as detours from the fundamental principles at stake. The result is a clutter of doctrinal tests that is inconsistent with principle and confuses more than it informs.

In Part II, I briefly explore the traditional bases of jurisdiction and the Court's elaboration of the minimum contacts test in *International Shoe Co. v. State of Washington*.[9] Here, I show that both the traditional and minimum contacts approaches are premised largely on the existence of connecting factors and reasonable expectations. In short, each form operates (with one exception) from the perspective of fundamental principles unadorned by doctrinal explication. Part III shows how the Court's post-*International Shoe* jurisprudence has elevated fact-driven and case-specific doctrine over the underlying fundamental principles. This phenomenon is particularly apparent with respect to the purposeful availment requirement and with the standards applied to the stream-of-commerce and effects tests. Here, I also examine some of the resulting confusion in lower courts. Part IV offers and defends a model statute that is designed to return personal jurisdiction to a fundamental-

7. *See, e.g.*, Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163 (2013) (critique on the current direction of doctrinal development); Allan Ides, *A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341 (2012) (critique of the Court's stream of commerce decisions); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867 (2012) (same); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101 (2010) (criticizing the Court for its lack of guidance as to the timeframe within which minimum contacts should be analyzed); Mona A. Lee, Burger King*'s Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry Impedes Judicial Economy and Threatens a Defendant's Due Process Rights*, 66 TEMP. L. REV. 945 (1993).

8. *See, e.g.*, Sarah H. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541 (2012); Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43 (2010); Veronica M. Sanchez, *Taking a Byte Out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes*, 46 UCLA L. REV. 1671 (1999).

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

principles approach shorn of restrictive and redundant doctrine. Part V offers concluding remarks.

II. JURISDICTION PREMISED ON CONNECTING FACTORS AND REASONABLE EXPECTATIONS

The standards of personal jurisdiction have been shaped primarily by decisions of the Supreme Court.[10] Those decisions recognize two broad categories of circumstances under which jurisdiction may be exercised consistently with due process. The first category includes those exercises of jurisdiction that can be described as traditional, tracing their origins to at least the late nineteenth century. The second category includes those exercises of jurisdiction that fall within the general contours of the "minimum contacts" test.

A. The Traditional Category

The traditional bases of personal jurisdiction include domicile, voluntary appearance, consent to service of process, and physical presence. Each of these forms is consistent with the sovereignty principle announced in *Pennoyer v. Neff*.[11] There, the Court saw due process as reflecting a principle of "territoriality" under which a state had complete jurisdictional dominion within its territory but virtually none beyond its borders (with some exceptions).[12] When jurisdiction is asserted on one of these traditional bases—that were widely recognized at the time the Fourteenth Amendment was ratified in 1868—it categorically satisfies due process.[13]

Territoriality aside, another way to describe the traditional bases is as a reflection of connecting factors and expectations that make the exercise of jurisdiction reasonable (and hence consistent with due process). The fit is not perfect, as we will see, but the parallels are significant. Thus, one's status as a domiciliary can be seen as a connecting factor that creates a reasonable expectation of being subject to suit within the state of domicile given the tangible and intangible benefits that flow from citizenship. Essentially, a domiciliary has consented to the jurisdictional authority of the state in which he is

10. *See generally* ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROCEDURE 53-200 (4th ed. 2012); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 2-17 (1993).

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

12. *Id*. at 722.

13. IDES & MAY, *supra* note 10, at 66-76.

domiciled. Similarly, a person who has voluntarily appeared in court or contractually consented to jurisdiction within the forum has, by so acting, created a connecting factor that leads inexorably to a reasonable expectation of forum-based jurisdiction.

The fit is not quite as comfortable with respect to persons or property found within the forum. Although this form of jurisdiction is premised on a rather obvious geographic connection with the forum, it is not equally obvious that the connection universally creates (or ought to be seen as creating) a reasonable expectation of jurisdiction within the forum.[14] One could argue that physical presence in the forum creates an expectation of jurisdiction based on *Pennoyer*'s territoriality principle. But that is a circular argument in which due process is dependent on a legal abstraction. Certainly, an expectation of jurisdiction is not an inherent characteristic of one's temporary presence within the territory (or from the fact that property is temporarily located within the jurisdiction). The "reasonableness" of any such expectation might well depend on the nature of the presence and the relationship between that presence and the claim asserted.

In sum, certain traditional forms of jurisdiction, although based on a sovereignty principle, can be seen as reflective of the due process principles of connecting factors and reasonable expectations. Domicile, voluntary appearance, and consent all fall into this category. On the other hand, the category of persons or property found within the jurisdiction, at least when applied rigidly, may be inconsistent with the reasonable expectation principle.

B. Tradition Extended—Minimum Contacts

Whenever a defendant is sued in a place other than his domicile and whenever jurisdiction cannot be established on some other traditional bases, due process requires that there must be some indication that the defendant was otherwise on reasonable notice of the possibility of being sued there. Reasonable notice can be established either because he performed activities in that state or because his contacts with the state are such that the exercise of jurisdiction by a court of that state does not come as an unfair surprise to him. More specifically, in *International Shoe Co. v. Washington*,[15] the Supreme Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he *have*

14. Shaffer v. Heitner, 433 U.S. 186, 211-12 (1977).

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

certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[16]

While *International Shoe* did not overrule *Pennoyer*, it did adopt a model of due process that is premised less on sovereignty than it is on the connecting factors that make the exercise of jurisdiction reasonable. To state the matter very generally, under the minimum contacts test, states would be allowed to reach out beyond their territorial limits when connecting factors make it fair and reasonable to do so. Thus, under the minimum contacts test, a nonresident defendant must have directed her conduct toward the forum state, for example, by engaging in activities there,[17] entering into contracts with residents of the forum state,[18] marketing or selling a dangerous or defective product there,[19] or causing an effect there.[20] In addition, the activities or contacts with the state must be related to the claim (specific jurisdiction)[21] or be so "continuous, substantial and systematic" that it is as if the nonresident defendant were "at home" there (general jurisdiction).[22] If these standards are satisfied, the exercise of jurisdiction is presumed to be reasonable, i.e., it is consistent with due process. A nonresident defendant may, however, rebut that presumption by a strong showing to the contrary.[23]

16. *Id*. at 316 (second emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

17. *Id.* at 317.

18. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985).

19. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

20. *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

21. *See* Nowak v. Tak How Inv. Ltd., 899 F. Supp. 25, 28 (D. Mass. 1995).

22. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-46 (1952). One can see general jurisdiction as an extension of the traditional basis of jurisdiction premised on domicile. In essence, the principle that jurisdiction is proper in the place of the defendant's domicile is expanded to say that, even when individuals or corporations are not formally "domiciled" in a state, if their activity there is continuous, substantial, and systematic, they may still be treated as if they were domiciled in that state, and the court may exercise general jurisdiction over them. Doing extensive activity in the forum state, however, is not considered a traditional basis of personal jurisdiction that, as such, does not require any fact-specific scrutiny to establish its consistency with due process and, therefore, its validity. A fact-specific analysis will always be required to find that, indeed, the activity done in the forum state is extensive and, by its very nature, a contact that should put the defendant on notice of the possibility of being haled into court there on any cause of action.

23. *Asahi*, 480 U.S. at 115-16; *Nowak*, 899 F. Supp. at 33. In Daimler AG v. Bauman, 134 S.Ct. 746, 762 n.19 (2014), a majority of the Court ruled that the "second step" reasonableness inquiry is superfluous in once the standards for general jurisdiction have been satisfied.

We can see then that both the traditional bases for asserting jurisdiction and the minimum contacts test share a salient characteristic in common—namely, they are both based on connecting factors that give rise to a reasonable expectation of being sued in the forum.

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Since the decision in *International Shoe*, which focused more on fundamental principles than it did on the niceties of doctrine, the Supreme Court has gradually but steadily moved toward a technical and specialized approach to the law of personal jurisdiction,[24], such that we can now think in terms of categories and subcategories of problems: activities in the forum, contracts with forum residents, tortious effects in the state, products liability cases, internet cases and so forth. To put it differently, the Court in *International Shoe* endorsed fundamental principles discovered in the case law from a somewhat removed perspective, and it described those fundamental principles in broad and nontechnical terms. Since *International Shoe*, however, the Court has moved from the fundamental principles approach to a form of line drawing that one might expect to find in an ever-morphing code. As will be discussed below, rather than serving the fundamental principles of due process, this fragmented, piecemeal discipline has often resulted in a disservice of the basic principles it sought to further.

III. PROBLEMS WITH THE CURRENT APPROACH TO PERSONAL JURISDICTION

A. The Ascendance of Doctrine

What came in the wake of *International Shoe* was a process of redirecting the fundamental principles approach into more specific doctrinal categories. Some of that process has been informative as to the basic reach of the model, and respectful of its fundamental principles. Other parts of the redirecting process, however, seem to have elevated doctrine over those principles, or at least have insinuated doctrine between the fundamental principles and the facts.

1. Fundamental Principles Adrift: *McGee* and *Hansen*

In its October 1957 term, the Supreme Court decided two personal

24. *See* IDES & MAY, *supra* note 10, at 90-150 (providing the opinions of major cases discussed in this paper and a short commentary on how the Court's opinions have changed from case to case).

jurisdiction cases, one of which might be characterized as informative but unnecessary, while the other may have begun the drift away from the fundamental-principles approach established in *International Shoe*. The first, *McGee v. International Life Insurance Co.*,[25] involved a suit to enforce the provisions of a life insurance policy. The facts were simple. An insurance company from Texas solicited a reinsurance agreement with a resident of California via mail. The offer was accepted in California, and the insurance premiums were mailed from California to Texas, until the insured died. His mother, the beneficiary under the policy, filed a claim with the insurance company, but the company refused to pay. She then sued the company in a California state court, which upheld the exercise of personal jurisdiction over the insurance company and eventually entered a judgment in the plaintiff's favor. When the mother sought to enforce that judgment in Texas, however, Texas courts refused to give it full faith and credit on the theory that the California courts lacked jurisdiction over the Texas company.[26]

The central issue before the Supreme Court was whether a single contact with the forum—the solicitation of one policy—could serve as a proper basis on which to exercise personal jurisdiction.[27] In fact, the Court in *International Shoe* had already given this question an affirmative response when it observed that a single act could be "deemed sufficient" to establish jurisdiction depending on the "nature and quality and the circumstances of [its] commission."[28] With that principle having been established, there was little more the Supreme Court needed to say about it. In upholding the California courts' exercise of personal jurisdiction, the Court explained, "[W]e think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."[29]

In so ruling, the *McGee* Court did no more than conform its judgment to the fundamentals of due process announced in *International Shoe*. The essence of the ruling was that the insurance company's solicitation of a contract in California established a connecting factor with that state and created a reasonable expectation in the insurance

25. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

26. *Id.* at 221.

27. *Id.* at 223.

28. Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 318 (1945) (citing Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927)).

29. *McGee*, 355 U.S. at 223.

company that it might be sued in California for breach of that contract. Thus, the Court's decision did not articulate any new doctrine. Rather, it policed the application of established principles and reiterated them for the guidance of lower courts. One might criticize the Court for being too engaged in correcting case-specific errors, but one could also say that its opinion served as a useful reminder of the fundamental principles established twelve years earlier in *International Shoe*.

Six months after the decision in *McGee*, the Court returned to personal jurisdiction in *Hanson v. Denckla*[30] to specify that a plaintiff's unilateral contacts with the forum are not relevant for purposes of establishing personal jurisdiction over a nonresident defendant. But was that really necessary? And was that actually the issue presented to the Court? As to the first question, the Court in *International Shoe* had made it clear that it is the *defendant*'s contacts alone that are relevant to the minimum contacts analysis.[31] As to the second question, the essential issue in *Hanson* was whether the courts of Florida could exercise jurisdiction over a Delaware trustee of a trust whose settlor had moved to Florida after the creation of the trust.[32] The trustee continued to administer the trust on behalf of the Florida settlor for the following eight years. And the settlor exercised the power of appointment under the trust while in Florida. Still, the Court found that the trustee lacked minimum contacts with Florida sufficient to allow personal jurisdiction.[33] The Court, relying on *International Shoe*, described the due process standard as follows: "it 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 of protections of its laws."[34] Thus, the Court transformed what *International Shoe* had considered a natural consequence of a defendant's activities in a state—i.e., enjoying the benefits and protections of the laws of that state—into a necessary pre-condition for the exercise of jurisdiction. This is a clear example of the Court falling

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

31. In *International Shoe*, the Court had, in fact, already stated that:

> [N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a *defendant* to a judgment *in personam*, defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have *certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice*.' Milliken v. Meyer, 311 U.S. 457, 463 (1940) (emphasis added).

Int'l Shoe, 326 U.S. at 316.

32. *Hanson*, 357 U.S. at 243-44.

33. *Id.* at 251.

34. *Id.* at 253.

into a linguistic doctrinal trap.[35]

In applying the new "purposeful-availment" test, the Court distinguished *McGee* by noting that, unlike the insurance company there, the trustee here had not performed any acts in the forum state that bore the same relationship to the trust as did the solicitation of the insurance contract at issue in *McGee*.[36] In fact, in the Court's view, the Florida proceeding could not be considered as one initiated to enforce an obligation arising from any privilege the nonresident defendant trustee had exercised in Florida.[37] Thus, according to the Court, the trustee had not "purposefully availed" itself of the benefits and protections of Florida law.[38] Of course, as noted above, this purposeful-availment requirement was a product of the *Hanson* Court's own creation and, most importantly, it was not an absolute precondition to making the exercise of personal jurisdiction consistent with due process.

Even if the Florida courts' judgment may have made it necessary for the Court to clarify the minimum contacts standards, in doing so, the Court unfortunately did just the opposite by creating confusion over the nature of the contacts that would qualify as meaningful. It is certainly not true that the trust company lacked meaningful connections with the state. Nor is it necessarily the case that the company could not have reasonably expected to be sued in Florida on a matter related to the trust. After all, the company was aware that the settlor had moved to Florida and continued to act as the trustee over the trust and to communicate with her in Florida with respect to trust business.

In his dissenting opinion, Justice Black argued that Florida had personal jurisdiction over the Delaware trustee.[39] He observed that the object of the controversy was whether the settlor had properly exercised her power to appoint beneficiaries under the precise trust being administered by the trustee. In fact, the litigation arose when the legatees, under the settlor's will, brought an action in the Florida courts seeking a determination as to whether this appointment was valid.[40] This disposition of her property had very close and substantial connections with Florida, since the settlor had appointed the beneficiaries in Florida and all of the beneficiaries lived there. Thus,

35. *See* Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CTS. L. REV. 118 (2013).

36. *Hanson*, 357 U.S. at 251-52.

37. *Id.* at 252.

38. *Id.* at 253.

39. *Id.* at 256 (Black, J., dissenting).

40. *Id.* at 258.

Florida had an interest in exercising jurisdiction and applying Florida law to determine whether the appointment was indeed valid. The connections between the appointment, the transaction, and the State of Florida were thus evident and, of course, the trustee was necessarily implicated in this action. Therefore, in Justice Black's view, Florida courts should have the power to adjudicate a controversy arising out of transactions that were so connected to the state, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend "traditional notions of fair play and substantial justice."[41] But, according to Justice Black, that was not case, since the trustee "chose to maintain business relations with [the settlor] in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question."[42] Moreover, the trustee's burden of participating as a formal (and collateral) party to this dispute over the appointment would have been minimal at best.

Justice Black's conclusion seems more consistent with *International Shoe* and the rationale behind the jurisdictional formula the Court there endorsed—a formula that considers the meaningful *contacts* of the nonresident defendant with the forum and that seeks to ensure that the exercise of jurisdiction does not come as an unfair surprise to the defendant. In other words, Justice Black was willing to attend to all of the connecting factors and expectations of the parties, while the majority, with its myopic focus on "purposeful availment," was not.

With the decision in *Hanson*, we see the beginning of a shift away from the fundamental principles that animated the decision in *International Shoe* toward a more technical and mechanistic approach to the details of doctrine.[43] With *Hanson*, the minimum contacts test began to lose its inherent coherence and strength.

2. Fundamental Principles Altered: *Burger King* and *Asahi*

At issue in *Burger King v. Rudzewicz*[44] was whether a federal court sitting in Florida could exercise jurisdiction over a nonresident franchisee that had entered into a long-term franchise agreement with the plaintiff, a corporate resident of the state. The bulk of the Court's opinion focused on the purposeful availment requirement, but the Court

41. *Id.* at 259.
42. Hanson v. Denckla, 357 U.S. 235, 258-59 (1958).
43. *Id*. at 253.
44. Burger King v. Rudzewicz, 471 U.S. 462 (1985).

added a potential "exit" to the jurisdictional analysis under which a strong presumption of jurisdiction established by the connecting factors and the reasonable expectation arising of those factors could be rebutted under "compelling" circumstances.[45] In describing this standard the Court suggested that it would apply only when the defendant established "the unconstitutionality of" the exercise of jurisdiction by showing a severe impairment of the defendant's ability to defend or assert a counterclaim.[46] The Court's application of this additional consideration essentially replicated *forum non conveniens* analysis, strongly suggesting this element's redundancy.[47] The Court concluded, however, that the heavy presumption in favor of jurisdiction was not rebutted in the case before it.[48]

Two years later, in *Asahi Metal Industry Co. v. Superior Court*,[49] a case that involved the enforcement of an indemnification agreement between two foreign entities, the Court applied the "unreasonableness" exit. In concluding that the exercise of jurisdiction would be unreasonable, the Court balanced the interests of the forum, the interest of the U.S. judicial system, potential foreign policy considerations, and the interests of the parties,[50] Again, the Court's analysis sounded more like a *forum non conveniens* analysis than one that focused on the basics of personal jurisdiction, that is, an analysis premised on connecting factors and reasonable expectations.[51] Nor did the Court's analysis in *Asahi* suggest that there was any fundamental unfairness in the exercise of jurisdiction in the case before it.

The net result of *Burger King* and *Asahi* is that even if a plaintiff satisfies the connecting factors and the reasonable expectation requirements, a court may decline to exercise jurisdiction under what is essentially a balancing of interests, including the court's own interest in the exercise of jurisdiction.[52]

3. Fundamental Principles Extended and Withdrawn: *Shaffer* and

45. *Id.* at 477.
46. *Id.* at 482-83.
47. *Id.* at 482-86.
48. *Id.*
49. Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987).
50. *Id.* at 113-16 (plurality opinion); *see also id.* at 116 (Brennan, J. concurring).
51. *Id.*
52. The *Burger King/Asahi* jurisdictional exit is remarkably similar to the subject matter jurisdiction exit used by the Court in the context of arising under jurisdiction. *See* Gunn v. Minton, 133 S. Ct. 1059 (2013). I examine this phenomenon in detail in *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, *supra* note 2.

Burnham

In 1977, the Court revisited the theme of personal jurisdiction and, specifically, *quasi in rem* jurisdiction, in *Shaffer v. Heitner*.[53] There, Heitner filed a shareholder's derivative suit in Delaware against the Greyhound Corporation, its officers, members of its board of directors, and one of its subsidiaries.[54] Heitner seized approximately 82,000 shares of Greyhound stock owned by twenty-one of the defendants in an attempt to establish *quasi in rem* jurisdiction over them in the Delaware court. However, the Supreme Court held that exercising jurisdiction would be inconsistent with due process because the property that was attached—i.e., the shares—was not related to the plaintiff's claims, and thus the minimum contacts test had not been satisfied.[55] Because these defendants had no apparent contacts with Delaware other than the shares that were attached, their contacts were insufficient to exercise personal jurisdiction consistent with due process.[56] Since the defendants could not reasonably expect to be haled into court in Delaware on claims unrelated to their contacts there, said the Court, the Delaware court's exercise of jurisdiction over them was inconsistent with the connecting-factors and reasonable-expectations principles of due process.[57]

Thus, in *Shaffer*, the Court took the fundamental principles of *International Shoe* and extended them to a traditional basis of jurisdiction, i.e., the presence of the property within the forum state. In contrast to the Court's intervention in *Hanson*, which was not doctrinally necessary, the Court's taking of this case was appropriate to endorse a new approach to *quasi in rem* jurisdiction and to make that form of jurisdiction consistent with due process. The Court, however, failed to be adhere to this fundamental-rights approach and the rationale behind it when, a few years later, it decided *Burnham v. Superior Court*[58] and concluded that not all the traditional bases of personal jurisdiction need be consistent with the idea of connecting factors and reasonable expectations, i.e., with due process.

In *Burnham*, the nine Justices concluded that a California state court could exercise personal jurisdiction over a nonresident defendant who was in the state for only three days attending to matters unrelated to the pending action, because he was personally served with process while

53. Shaffer v. Heitner, 433 U.S. 186 (1977).
54. *Id*. at 189.
55. *Id.*, at 213.
56. *Id.* at 216.
57. *Id.*
58. Burnham v. Super. Ct., 495 U.S. 604 (1990).

voluntarily present within the state.[59] The Court's majority (the plurality and Justice White) believed that the exercise of this so-called tag jurisdiction did not violate the "'traditional notions of fair play and substantial justice'"[60] because, as the plurality puts it, "its validation is its pedigree."[61] Thus, the Court's majority failed to conform this traditional method of jurisdiction to the fundamental principles of due process and instead relied on "pedigree" as a substitute for those principles. In this sense, tag jurisdiction—at least until the Court revisits it—remains a fundamental-principles anomaly.[62]

4. Fundamental Principles Suppressed: The Effects Test

In *Kulko v. Superior Court*,[63] the Court considered whether a California court could exercise personal jurisdiction "over a nonresident, nondomiciliary parent of minor children domiciled within the State."[64] The California Supreme Court had upheld the exercise of jurisdiction under the "effects test," the father having sent his daughter into California to live permanently with her mother.[65] In so ruling, the state high court explained why it thought that the father had purposefully availed himself of the benefits and protections of California law:

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59. *Id*. Interestingly, however, Justice Brennan, commenting on Justice Scalia's reliance on historical precedents to justify transient jurisdiction in his concurring opinion, observed:

> [R]eliance solely on historical pedigree . . . is foreclosed by our decisions in *International Shoe Co. v. Washington* and *Shaffer v. Heitner* . . . . The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. . . .
>
> While our *holding* in *Shaffer* may have been limited to *quasi in rem* jurisdiction, our mode of analysis was not.

Id. at 629-30 (Brennan, J., concurring) (citations omitted). However, Justice Brennan's minimum contacts analysis, as applied to transient jurisdiction, was so broad as to be meaningless for the purpose of subjecting the transient jurisdiction analysis to the minimum contacts test. In fact, his test was such that persons transitorily present in the forum state would almost always have the necessary minimum contacts to make the exercise of transient jurisdiction valid. *See* Robert Taylor-Manning, *An Easy Case Makes Bad Law*—Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990)*, 66 WASH. L. REV. 623, 631-32 (1991).

60. Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

61. *Burnham*, 495 U.S. at 621.

62. *See* FRIEDENTHAL, CIVIL PROCEDURE, *supra* note 5, at 171-72 (questioning whether the efficiencies of *Burnham*'s bright-line rule "outweigh the costs of the injustices it may allow"); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens* 65 YALE L.J. 289, 303-04 (1956) (criticizing transient jurisdiction as a relic of *Pennoyer v. Neff*).

63. Kulko v. Super. Ct., 436 U.S. 84 (1978).

64. *Id*. at 86.

65. *Id.* at 89.

> [P]robably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state's laws, institutions and resources—its police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums, to mention only a few.[66]

The U.S. Supreme Court reversed, concluding that *Hanson*'s purposeful availment "requirement" had not been satisfied here.[67] The Court disagreed with the California Supreme Court's purposeful availment analysis in a single sentence placed in a footnote: "[I]n the circumstances presented here, these services provided by the State were essentially benefits to the child, not the father, and in any event were not benefits that appellant purposefully sought for himself."[68]

The *Kulko* Court approached purposeful availment as a technical, non-contextual requirement. Instead of engaging in a realistic appraisal of the facts, as the California Supreme Court had done, the U.S. Supreme Court simply concluded, without elaboration, that it was the child that was benefitting from California laws and protections, not the father. Thus, the *Kulko* Court overlooked the meaningful contacts that the father had with California. In this way, *Kulko* is quite similar to *Hanson* in that the Court in both cases used a technical doctrine to avoid a realistic appraisal of the facts.[69]

The *Kulko* Court further confused the law of jurisdiction by observing, "In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an 'effect' in California was misplaced."[70] Here, the Court was referring to § 37 of the Restatement (Second) of Conflict of Laws, the so-called "effects test."[71] Of course, that test contains no

66. Kulko v. Super. Ct., 564 P.2d 353, 356 (1977), *rev'd*, 436 U.S. 84 (1978).

67. *Kulko*, 436 U.S. at 94.

68. *Id.* at 94 n.7.

69. It is possible that the Court tortured the standard of personal jurisdiction in order to advance a policy of fairness in the context of child-support proceedings. But even that instinct was misplaced, since the father in *Kulko* had in fact waived any objection to personal jurisdiction in the child-custody proceeding (as opposed to the child-custody aspect of the proceeding). *Kulko*, 436 U.S. at 88. Thus, any unfairness to the father in being required to defend the support proceeding would seem to have been misplaced.

70. *Id.* at 96.

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). Section 37 provides:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from

purposeful availment requirement. In fact, the test was specifically designed to embrace circumstances where purposeful availment could not logically be satisfied and yet where the exercise of jurisdiction would be consistent with due process.[72] By suggesting that purposeful availment was nonetheless a prerequisite to the effects test, the *Kulko* Court strayed further from the fundamentals of due process by allowing a court to deny the exercise of jurisdiction when due process would in fact be satisfied.

After *Kulko*, the case-by-case approach continued to erode the coherence and strength of the minimum contacts formula. In *Calder v. Jones*,[73] the Court applied the effects test in the context of an intentional tort. There, the Court held that California courts could exercise jurisdiction over nonresident defendant journalists who had written and edited a libelous story concerning the California activities of Jones, a California resident, knowing that Jones would feel the brunt of the harm there.[74] The Court explained:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. . . .
>
> [Petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being hauled into court there" to answer for the truth of the statements made in their article.[75]

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these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

Id.

72. *Id*. at cmt. a.
73. Calder v. Jones, 465 U.S. 783 (1984).
74. *Id.* at 791.
75. *See id.* at 788-89.

If we were to take the above passage as merely descriptive of the Court's reasoning, it might be seen as an unremarkable application of the law of minimum contacts to the facts of the particular case. But if this passage is meant to signify the endorsement of a particular doctrinal model, it is troubling for two reasons.

First, it is completely unnecessary in light of the more general principles established in *International Shoe*. Clearly, both the writer and the editor who were sued in *Calder* had significant claim-related connections with California (as the above passage makes clear). These connecting factors should have led to an expectation of being subject to jurisdiction in a California court on a claim so closely tied to those connections. In other words, no special test was needed to establish jurisdiction under these facts.

Second, the doctrinal formula described by the Court is significantly narrower than the Restatement's version of the effects test. Under the Court's doctrinal formula, jurisdiction may be established under the effects test if: (1) the nonresident defendant had committed an intentional tort, (2) that was aimed at the forum State, and (3) with the knowledge that the plaintiff would feel the "brunt" of the harm in the forum State.[76] The effects test under the Restatement (Second) of Conflict of Laws, however, can be satisfied "when the defendant did not intend to cause the particular effect in the state but could reasonably have foreseen that it would result from his act done outside the state."[77] This formula includes no requirement of "aim" or "brunt;" nor is this formula limited to intentional torts. In this way, the Restatement version of the effects test more fully embraces the fundamental principles of due process since it calls for examinations of all meaningful contacts. The *Calder* formula, by contrast, is completely mechanical and, as such, inflexible and incapable of taking into account and measuring connections and expectations beyond the narrow contours of the doctrinal formula.

One possible response is to say that the *Calder* formula merely described a sufficient basis for asserting jurisdiction, not a necessary one. That would be a welcome reading, but it is unfortunately not the reading that a majority of lower federal courts have adopted.[78] Even if

76. *Id*.

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

78. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir.) *cert. denied*, 547 U.S. 1163 (2006); Fielding v. Hubert Bunda Media, Inc., 415 F.3d 419, 429 (5th Cir. 2005); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998). *See also* IDES & MAY, *supra* note 10, at 137-38; *infra* notes 86-103 and accompanying text.

this sufficient-but-not-necessary reading of *Calder* were to be adopted, we would still be left with the "why-bother" question, i.e., why add to the doctrinal jargon if the basic standards would have been sufficient to resolve the questions presented? In short, *Calder* presents a classic example of the technicalities of doctrine supplanting the fundamental principles on which the doctrine is based.

5. Fundamental Principles Submerged: The Stream of Commerce Test

The "stream of commerce" doctrine provides yet another example of mechanistic doctrine deflecting the jurisdictional inquiry from the fundamental principles that ought to govern. Moreover, this example of the phenomenon is particularly troubling since "stream of commerce" is a completely redundant doctrine in that the effects test (as contemplated in the Restatement) is itself fully capable of embracing all the situations to which stream of commerce potentially applies. In fact, there is not a single stream of commerce decision that could not be fully and adequately resolved under the Restatement's effects test. In this sense, stream of commerce is a double-filtered deflection from the fundamental inquiry into due process.

The stream of commerce refers to the chain of distribution of a product that goes from the manufacturer to the ultimate consumer. A manufacturer producing a product in a state or foreign nation, and intentionally selling it through a chain of distribution that may employ exporters, importers, distributors and retailers, is considered to have purposefully affiliated itself with the state where the ultimate consumer is located and the injury occurs.

This test traces its roots to *Gray v. American Radiator & Standard Sanitary Corp*., a sensible 1961 decision by the Illinois Supreme Court that was premised largely on the fundamentals of due process and in which the phrase "stream of commerce" never appears.[79] In *Gray*, the plaintiff was injured when a water heater she purchased in Illinois exploded there, allegedly due to a defective safety valve. The valve was manufactured in Ohio and then shipped to Pennsylvania where it was placed on the water heater. The water heater was then shipped into Illinois for retail purchase. Plaintiff sued both the manufacturer of the water heater, a Pennsylvania company, and the manufacturer of the valve, an Ohio company, in an Illinois court. The valve manufacturer

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

moved to quash service, arguing that it was not subject to personal jurisdiction in Illinois, as it did not do business there and had no registered agent for service there.[80] The trial court quashed service, but the Illinois Supreme Court reversed.[81] After holding that the Illinois long-arm statute was sufficiently broad to permit the exercise of jurisdiction over the valve manufacturer, the court turned to the question of whether the exercise of jurisdiction would comport with due process.[82]

Interestingly enough, the Illinois Supreme Court did not use the phrase "stream of commerce" nor did it purport to be creating a new jurisdictional doctrine. Rather, the court simply relied on fundamental principles derived from *International Shoe* and *McGee*, among other cases, to explain why the exercise of jurisdiction over the foreign manufacturer comported with due process:

> In the case at bar defendant does not claim that the present use of its product in Illinois is an isolated instance. While the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its valves are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State. To the extent that its business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves.[83]

Eventually, the Illinois Supreme Court's careful consideration of due process principles acquired the "stream of commerce" label. That label then evolved into a doctrine and, nearly twenty years after the decision in *Gray*, the U.S. Supreme Court, in *World-Wide Volkswagen Corp. v. Woodson*,[84] endorsed the doctrine by way of dicta:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *Cf. Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176

80. *Id.* at 762.
81. *Id.* at 762 & 767.
82. *Id.* at 763.
83. *Id*. at 766.
84. World-Wide Volkswagen Corp. V. Woodson, 444 U.S. 286 (1980).

N.E.2d 761 (1961).[85]

Given the fundamentals of the due process standard as embodied in the minimum contacts test, this endorsement would seem to have been completely superfluous. After all, the Illinois state court had properly understood *International Shoe* and applied it in a "stream of commerce" context, reaching the same result the official "stream of commerce" doctrine would have achieved.

Of course, the specific act or conduct sufficient to meet the due process requirement must be identified and described by a court applying the minimum contacts test, but this description need not, in itself, create new doctrine. If each such description creates a new jurisdictional doctrine or an offshoot of settled doctrine, the law of due process becomes nothing more than a complex web of fact-specific outcomes, further and further removed from the core principles of the due process standard. Under such an evolving-standards model, each fact-specific decision by the Supreme Court will inevitably offer new possibilities for gaps in the existing web, generating yet another neatly labeled jurisdictional doctrine.

A few years after *World-Wide Volkswagen* incanted the magic phrase "stream of commerce," the Court granted certiorari in *Asahi Metal Industry Co. v. Superior Court*[86] to resolve a conflict that had arisen in lower courts over the scope of what had become the stream-of-commerce test. Some of those courts required that a manufacturer, whose goods reached the forum state through the stream of commerce, to have also taken some affirmative action to promote the sales of its products within that state, i.e., a so-called "plus factor."[87] Other courts did not require the plus factor.[88] The Supreme Court was unable to resolve the conflict and instead split four-to-four, with one Justice declining to address the question.[89]

While the *Asahi* Court did not provide any direction to the lower courts as to the scope of the stream-of-commerce test, it did do one thing with respect to cases arising in this context. It made it clear that the unresolved question—plus or no plus?—was quintessentially technical and doctrinal, and not premised on the fundamental due process questions pertaining to connecting factors, expectations or, more

85. *Id*. at 298-99.

86. Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987).

87. *Id.* at 111-12 (citing cases).

88. *Id.* at 111 (citing cases).

89. *See id.* at 116 (Brennan, J. concurring in the judgment); *id*. at 121 (Stevens, J. concurring).

generally, fairness and reasonableness. Basically, *Asahi* pressed *International Shoe* further into the background.

The Court's most recent foray into the stream of commerce test came in 2011 with the decision in *J. McIntyre Machinery Ltd. v. Nicastro*.[90] In *McIntyre*, the plurality admitted that "[t]his Court's *Asahi* decision may be responsible in part for [the state] court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity."[91] In short, it was time to eliminate the confusion.[92] However, despite the Court's good intentions, no greater clarity was provided and, worse, as Justice Ginsburg convincingly explained in her dissent, *International Shoe* and the minimum contacts test would have easily resolved the case and demanded a different outcome.[93]

In many ways, the decision in *McIntyre* provides a perfect exemplar of the potential deficiencies of the modern case-by-case doctrinal approach to due process. In *McIntyre*, the plaintiff, Nicastro severely injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (McIntyre UK). Nicastro filed a products-liability action against McIntyre UK and others in a New Jersey state court. The accident occurred in New Jersey, but the machine was manufactured in England, where McIntyre UK was incorporated and operated. McIntyre UK did not directly market its products in New Jersey nor did it ship any of them there. However, McIntyre UK had a relationship with an independent distributor, McIntyre Machinery America, Ltd. (McIntyre America), that promoted and sold McIntyre's machines in the United States market. In addition, McIntyre UK's representatives attended trade shows in Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco, all to promote sales of its products throughout the United States. At one of those conventions in Las Vegas, where McIntyre UK was an exhibitor, Nicastro's employer learned of McIntyre UK's machine, and decided to buy one. McIntyre America then shipped the machine to New Jersey where it eventually injured Nicastro. The New Jersey Supreme Court upheld the exercise of jurisdiction in New Jersey over McIntyre UK.[94]

On appeal, the U.S. Supreme Court reversed. There was no

90. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

91. *Id*. at 2786.

92. As Professor Arthur Miller has observed, "Trying to determine what the diverging opinions [in *McIntyre*] mean to counsel in the coming years presents a bit of a mystery." 4 FED. PRACTICE AND PROCEDURE § 1067.4 (3d. ed. 2013).

93. *McIntyre*, 131 S. Ct. at 2794-95 (Ginsburg, J., dissenting).

94. *Id.* at 2786 (plurality).

majority opinion for the Court.[95] The four-person plurality opinion authored by Justice Kennedy correctly observed that the stream of commerce test—which it called a "metaphor"—was not a substitute for due process analysis, but then went on to define stream of commerce in a manner that created a shield to any consideration of the due process fundamentals.[96] The plurality's definition of stream of commerce was concise, but virtually empty of content. In the words of the *McIntyre* plurality, "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum."[97] The "target" metaphor is left unexplained, though it seems akin to the "aim" element of the effects test. It would seem then that the plurality endorsed a narrow, doctrinal "metaphor" that, while not a "substitute" for due process analysis, operates to prevent a court from ever getting to a true due process analysis by creating a gate-keeping standard that prevents consideration of the fundamental fairness principles established in *International Shoe*. Similarly, Justice Breyer's concurring opinion adopted his own "single-sale" limitation on use of the stream-of-commerce approach, thereby obviating any need to look into the fundamental due process concerns triggered by the facts in such cases.[98]

As Justice Ginsburg noted in her dissent:

> McIntyre UK's regular attendance and exhibitions . . . was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.[99]

Justice Ginsburg was right. *International Shoe* would have recognized these connecting factors as creating a reasonable expectation of a lawsuit

95. *Id.* at 2785 (plurality); *id.* at 2791 (Breyer, J., concurring).
96. *Id.* at 2785 (plurality).
97. J. McIntyre Machinery, Ltd., v. Nicastro, 131 S. Ct. 2780, 88 (2011).
98. *Id*. at 2792 (Breyer, J., concurring).
99. *Id*. at 2797 (Ginsburg, J. dissenting).

in those forums where the marketing strategy succeeded and where a product-based injury occurred.[100] Although her instinct was correct, Justice Ginsburg also took a misstep. Rather than focusing on the fundamental principles established in *International Shoe*, she then tried to fit the case into her own reformulation of the stream-of-commerce test, one with a "national contacts" overlay. Specifically, she noted:

> In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself" of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.[101]

One of the ironies of *McIntyre* is that the New Jersey state courts seemed to have understood the fundamental principles at stake, and displayed a stronger intuitive sense of their scope and operation of those principles[102] than did the Supreme Court. Unfortunately, the Justices of the Supreme Court appeared to be trapped in and confused by their own personalized tests and by the interpretations of their own interpretations. As a consequence, what was in fact a relatively simple case of a nonresident defendant whose commercial activities manifested its intent to affiliate itself through commercial activity in the forum state set the

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100. Justice Ginsburg observed:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in International Shoe Co. v. Washington, 326 U. S. 310 (1945), and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." (citing Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

Id. at 2794 (Ginsburg, J. dissenting).

101. *Id.* at 2801 (Ginsburg, J. dissenting).

102. Nicastro v. McIntyre Mach. Am., Ltd., 945 A.2d 92, 109 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010).

stage for yet further confusion and new doctrinal twists.[103] In short, the New Jersey Supreme Court recognized what was obvious and fundamental, and thus got it right, but the U.S. Supreme Court, engaged in doctrinal contretemps, did not.

As noted above, stream of commerce is, in essence, a specialized version of the effects test. By manufacturing a product outside of the state and then placing it into the "stream of commerce" with the expectation and, indeed, the hope that it will reach the forum state, the manufacturer has caused a totally foreseeable effect in the forum state through activities undertaken elsewhere if the product in fact reaches that state and injures a consumer there. Not surprisingly, the Restatement therefore considers "stream of commerce" to be an expression of the effects test:

> The causing of effects in a state by means of an act done outside the state is today a jurisdictional basis of immense importance. Many of the current court decisions involve this basis. It plays a particularly significant role in the area of product liability. A common situation is where a product is taken from one state to another and there causes injury or is the subject of some other claim as, for example, one for breach of warranty. The question then arises whether the state to which the product has been taken has judicial jurisdiction over, as the case may be, the out-of-state manufacturer, assembler, importer, distributor or ultimate seller. Frequently, the answer will be in the affirmative.[104]

Thus, for the same reasons that the effects test (as contemplated by the Restatement) is a product of the fundamentals of due process—connecting factors and reasonable expectations—so, too, is the stream of commerce test. However, to the extent that either the effects test or the stream of commerce test operates as a mechanistic gatekeeper to the fundamental questions of due process, the test undermines the principles it should in fact serve.

From this review of the Supreme Court's post-*International Shoe* cases, it should now be clear that the increasing lack of any uniform rules, and the development of redundant, misguided, increasingly fact-specific tests, have confused the Supreme Court as to the real scope of the minimum contacts test. As a consequence, the results have been often contradictory and inconsistent, and increasingly distant from the fundamental principles of due process.

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103. *See* Ides, *supra* note 7 at 345.

104. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Commentary to § 37 (1971).

B. Doctrinal Confusion in State and Lower Federal Courts

1. The Post-*Hanson* Meaning of "Purposeful Availment"

The "purposeful availment" requirement established in *Hanson* has led not only to confusion, but also to the rejection of jurisdiction in cases where its exercise would comport with the due process principles endorsed in *International Shoe*. The decision of the California Supreme Court in *Sibley v. Superior Court*[105] provides an illustrative example. In that case, the question was whether an out-of-state guarantor on a contractual performance to be undertaken in California could be subjected to jurisdiction in a California court based simply on having caused an effect in the state.[106] The California Supreme Court held that despite the obvious effect caused by the guarantor—the guaranty led to a contract that was to be performed in California—jurisdiction could not be exercised over the nonresident guarantor.[107] This is consistent with *Hanson*, since the guarantor had not sought any California benefit from the transaction or, stated differently, he had not "purposefully availed himself of the privilege of conducting business in California or of the benefits and protections of California laws."[108] In essence, *Sibley* applied "purposeful availment" literally,[109] thus creating a doctrinal limitation on jurisdiction wholly inconsistent with due process principles of connecting factors and reasonable expectations.

The decision in *Sibley* should not be seen as aberrational or a maverick. As recently as 2012, the Supreme Court of Kansas declared that "the 'effects' test in *Calder* does not, however, replace the need to demonstrate minimum contacts that constitute purposeful availment—that is conduct by the non-resident defendant that invoked the benefits and protections of the state or was otherwise purposefully directed toward a state resident."[110] Under this approach, the effects test is rendered superfluous since whether it is satisfied, the jurisdictional decision must ultimately rest on the principle of "purposeful availment." While the Kansas court, to its credit, rejected a mechanical reliance on the "effects test," it then fell back on another mechanical test, namely, "purposeful availment."[111]

105. Sibley v. Super. Ct., 546 P.2d 322 (1976), *cert. denied*, 429 U.S. 826 (1976).
106. *Id.* at 323.
107. *Id.*
108. *Id*. at 325.
109. *Sibley* was overruled by Kulko v. Superior Court, 564 P.2d 353(1977).
110. *See* Aeroflex Wichita, Inc. v. Filardo, 275 P.3d 869, 885 (Kan. 2012).
111. *Id.* at 889.

Hanson and its absolute "purposeful availment" requirement, has even infected the realm of statutory interpretation—to the extent that courts seek to interpret jurisdictional statutes so as to preserve their constitutionality. Thus, in *Ehrenfeld v. Bin Mahfouz*,[112] the New York Court of Appeals, interpreting the state's long-arm statute, imposed a type of purposeful availment requirement on the exercise of jurisdiction that excluded use of the effects test in situations where its application would have been totally consistent with due process. Hence, the doctrinal error of *Hanson* was imported into the statutory law of New York.

At the same time, other courts were construing "purposeful availment" to embrace jurisdiction premised on a nonresident defendant's causing an effect in the forum state.[113] Eventually, some courts came to recognize that the purposeful availment standard was, at best, incomplete since it did not encompass anything like the full range of jurisdiction permitted under the due process clause. As the Ninth Circuit explained in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*,[114] the phrase "purposeful availment" is inappropriate in situations where a nonresident has committed an intentional tort outside the state with foreseeable effects in the state. In that context, even though the defendant cannot be said to have availed himself of the forum's benefits, the exercise of jurisdiction would nevertheless be consistent with due process. It is enough, according to the Ninth Circuit, that the defendant's relationship with the state was a product of "purposeful direction."[115] Thus, by asking the right question—what factors connect the defendant's activity to the forum state—the Ninth Circuit wisely moved the doctrine back toward the fundamentals of due process by its willingness to jettison a requirement of "purposeful availment" in favor of a realistic appraisal of a connecting factor.[116]

112. Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830 (N.Y. 2007).

113. *See, e.g.*, Rosenblatt v. Am. Cyanamid Co., 86 S. Ct. 1 (1965) (in chambers opinion of Justice Goldberg) (holding that the purposeful availment standard generally requires "requirement that the defendant must have taken voluntary action calculated to have an effect in the forum state." (quoting David P. Currie, *The Growth of the Long Arm*, 1963 U. ILL. L. F. 533, 549 (1963))); Walker v. Newgent, 583 F.2d 163, 168 (5th Cir. 1978) (purposeful availment satisfied if defendant's out of state actions have "foreseeable effects" in the forum). Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (caused consequences in the forum).

114. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).

115. *Id*. at 1206.

116. *Id*. at 1205-08.

2. The Effects Test

As I have noted, the measure of jurisdiction for activities taking place outside a state that cause an effect within the state should require no more than a straightforward application of the due process standards described by the Court in *International Shoe*. If that activity causes a foreseeable effect in the state, the party who engaged in that activity will likely have a reasonable expectation of being sued in the forum on a claim arising out of that effect. The Restatement version of the effects test was written to capture the wide range of possibilities that might arise in this context.[117] The doctrinal version of the effects test that has emerged from the decision in *Calder v. Jones*,[118] however, appears to be more circumscribed and less likely to embrace the full range of due process possibilities. As a consequence, plaintiffs are often denied access to a forum to which they are entitled.

Lower federal court opinions applying the effects test can be correctly described as including a "mixture of broad and narrow interpretations."[119] As one court phrased it, in an obvious understatement, federal courts "have struggled somewhat with *Calder*'s import."[120] The range of interpretations does, however, appear to share a common premise: the elements that the *Calder* Court identified as being sufficient to satisfy due process—i.e., an intentional tort, aimed at the forum, with the brunt of the harm felt there—have been transformed from the sufficient into the necessary. Hence, a set of circumstances under which due process was deemed to have been satisfied is now treated as defining the limits of due process. In this way, the doctrine has come to trump the constitutional due process standard.

Consistent with the foregoing, the Third Circuit has limited the effects test to the following circumstances:

> The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious

117. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 37 (1971), Reporter's Note (explaining that the many cases described involve different factual situations).

118. Calder v. Jones, 465 U.S. 783 (1984).

119. IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 261 (3d Cir. 1998).

120. Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082, 1087 (9th Cir. 2000). *See generally* IDES & MAY, *supra* note 10, at 137-38.

> activity. . . .[121]

As to the first element, the First Circuit has taken even a narrower view and suggested that the effects test should be limited to defamation cases only.[122] As to the third element, "aim," the Fifth Circuit requires that (1) the subject matter of and (2) the sources relied upon for the article to have been from the forum state.[123] On the other hand, the Ninth Circuit has somewhat softened the edges of the second element, the "brunt" requirement, by demanding only a "foreseeable harm" in the forum.[124] At the same time, however, it has refused to apply the effects test to a contracts claim,[125] which is somewhat peculiar since the effects test was specifically designed to reflect personal jurisdiction decisions involving contracts.[126] The one circuit court decision that appeared to adopt a more open-ended approach to the effects test has been limited by a subsequent decision of that same circuit.[127]

Ironically, in some cases where the elements of the three-part effects test would be satisfied, a federal court will nonetheless conclude that the assertion of jurisdiction would violate due process, without reference to the effects test. For example, in *Fox v. Boucher*,[128] a landlord in New York brought diversity action for a *prima facie* tort against the father of a tenant. The defendant was a resident of Massachusetts. The plaintiff landlord alleged that the defendant made a single telephone call from Massachusetts to the plaintiff in New York, and that the comments of the defendant during that phone call caused the plaintiff extreme mental and physical suffering.[129] Finding that the defendant's contacts with New York were not sufficient to satisfy due process, a New York court held that:

> One single telephone call made to New York State is insufficient contact to support a suit initiated in that forum against an out-of-state resident under either the contract or tort provisions [of New York's long-arm statute] of CPLR 302. The mere possibility of foreseeable

121. *See IMO Indus., Inc.*, 155 F.3d at 265–66.

122. *See* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 624 (1st Cir. 2001).

123. Fielding v. Hubert Bunda Media, Inc., 415 F.3d 419, 426 (5th Cir. 2005).

124. Fiore v. Walden, 657 F.3d 838, 848-53 (9th Cir. 2011).

125. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 817 (9th Cir. 1988).

126. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 37 (1971), cmt. a.

127. *See* Janmark, Inc. v. Reidy, 132 F.3d 1200 (7th Cir. 1997) ("effects" jurisdiction sustained in the absence of aim); *but see* Tamburo v. Dworkin, 601 F.3d 693, 705-06 (7th Cir.), *cert. denied*, 131 S. Ct. 567 (2010) (interpreting *Janmark* as requiring "something more" directed at the forum).

128. Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986).

129. *Id.* at 36-37.

> consequences in New York does not give New York *in personam* jurisdiction. As the Supreme Court states there must 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." It would offend "minimum contacts" due process principles to force [the defendant], a Massachusetts resident, to litigate in a New York forum on the basis of one telephone call.[130]

Here, although the tort consisted in a single contact, i.e., a single phone call to the state, the three-part effects test seems to have been satisfied: (1) the defendant committed an intentional tort (i.e., an act constituting intentional infliction of emotional distress), (2) the phone call was aimed at the plaintiff in the forum state (in fact, the defendant dialed the New York area code when making the phone call), and (3) the defendant knew that the plaintiff lived in New York and, thus, that he would have felt the brunt of the harm there. The doctrinal "tripping" point for the *Fox* court seems to have been the abstraction of purposeful availment, an appendage to the principles of due process imposed by the Court in *Hanson*.[131] However, the Court in *International Shoe* made it clear that even a single contact could be a sufficient basis on which to assert jurisdiction,[132] and reaffirmed that principle in *McGee*.[133] Perhaps the exercise of jurisdiction in *Fox* would have been unreasonable under the circumstances, but that question differs markedly from issues pertaining to the sufficiency of the connecting factors.[134]

State courts, often relying on federal precedents, have adopted similarly narrow versions of the effects test. *Pavlovich v. Superior Court*,[135] a decision by the California Supreme Court, provides a good example. In that case, the licensor of encryption technology used to prevent the copying of DVDs containing motion pictures sued a resident of Texas for misappropriation of trade secrets for having posted on the internet the source code that would allow the decryption and copying of those DVDs. The suit was filed in a California state court. The

130. *Id*. at 37 (citations omitted).

131. *See supra* text accompanying notes 30-38.

132. Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 318 (1945) (citing Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927)).

133. *See supra* text accompanying notes 25-29.

134. To be precise, it is not proper to talk about "purposeful availment" in a tort situation. As the Ninth Circuit has correctly indicated, in torts contexts it is more appropriate to say that, by committing the tort, the nonresident defendant "purposefully directs" his activity towards the forum State, rather than saying that he "purposefully avails" himself of the benefit and protection of the laws of the state. Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2006).

135. Pavlovich v. Super. Ct., 58 P.3d 2 (Cal. 2002).

assertion of jurisdiction was premised on the theory that the defendant should have known that his actions would have an adverse impact on the motion picture industry located in that state.[136] In ruling that jurisdiction could not be asserted consistently with due process, the California Supreme Court relied largely on federal precedents interpreting the scope of the effects test, and in so doing, endorsed the Third Circuit's three-part formula.[137] The specific issue before the California Supreme Court was whether the "aim" prong of the test could be satisfied by the mere knowledge that the posting would have an adverse effect in California.[138] The court concluded that mere knowledge was insufficient to satisfy that prong.[139] Thus, the California Supreme Court participated in the refinement of a doctrine—knowledge does not satisfy aim—that is ever more precise and yet ever more removed from the fundamental due process inquiry.[140]

As one might infer from the *Pavlovich* decision, the case-by-case method can be expected to give rise to yet further doctrinal complications in cases involving the internet. While beyond the scope of this discussion, it is fair to note that jurisdictional law relating to the internet, like the effects test itself, tends to deflect the jurisdictional consideration away from the fundamentals of due process and into the technicalities of the "*Zippo*" doctrine[141] and other like "refinements" on the law of jurisdiction.

3. The Stream of Commerce Test

The stream of commerce test has provided a considerable source of confusion in lower federal courts. As one commentator observed,

> Personal jurisdiction analysis now varies depending on which circuit a litigant files in. If a plaintiff is savvy enough to pick a circuit embracing Brennan's foreseeability view, minimum contacts will likely be found. This is particularly true where that same jurisdiction,

136. *Id.* at 6.

137. *Id*. at 8.

138. *Id.* at 9-10.

139. *Id.* at 11.

140. State courts have taken an array of approaches to the effects test. *See, e.g.*, Aeroflex Wichita, Inc. v. Filardo, 275 P.3d 869 (Kan. 2012) (effects test requires a separate showing of purposeful availment); Davis v. Simon, 963 N.E.2d 46, 54 (Ind. Ct. App. 2012) (noting that some federal courts treat the three-part test as mandatory, but declining to take a position on that question); Baldwin v. Fischer-Smith, 315 S.W.3d 389, 393 (Mo. Ct. App. 2010) (three-part test, but "knowledge that the effects would be felt" in the forum substituted for "brunt"); Pitts v. Fink, 698 S.E.2d 626, 632 (S.C. Ct. App. 2010) (strict three-part test).

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

> after finding "purposeful conduct" then transfers the burden to the defendant to demonstrate "unfairness." Conversely, if a plaintiff files in the First, Fourth, Sixth, or Eleventh Circuits, a finding of personal jurisdiction may be less likely, given the same facts, because those circuits employ the O'Connor test requiring a much more specialized showing to reach "purposeful conduct."[142]

Prior to the 2011 decision in *McIntyre*, the First,[143] Fourth,[144] and Sixth,[145] Circuits had adopted the O'Connor stream of commerce plus test, while the Fifth,[146] Seventh,[147] and Eighth[148] Circuits opted for Brennan's pure stream of commerce formula.[149] Other federal circuit courts declined to decide the issue and instead used both tests, as well as Justice Stevens' alternate approach.[150] Panels in the Eleventh Circuit have both adopted and declined to adopt the plus test.[151] At least one circuit has noted the substantial confusion over the content of the doctrine.[152] Federal district courts are in an equal state of disarray[153] and

142. Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U.L. REV. 681, 682-83 (2009). Note that the Eleventh Circuit has taken contrary positions on this issue. *Compare* Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990) (O'Connor plus) *with* Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir.), *cert. denied*, 508 U.S. 907 (1993) (opting not to make a choice).

143. Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992) (same).

144. Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945–46 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995) (same).

145. Fortis Corporate Ins. v. Viken Ship Mgmt., 450 F.3d 214, 220 (6th Cir. 2006).

146. Luv N' Care v. Insta-Mix, Inc., 438 F.3d 465, 470 (5th Cir.), *cert. denied*, 548 U.S. 904 (2006).

147. Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992).

148. Clune v. Alimak AB, 233 F.3d 538, 542 (8th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

149. *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994) (following Justice Brennan's stream of commerce test); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) (same); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (same).

150. S*ee, e.g.*, Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999); Pennzoil Products Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 205 (3d Cir. 1998); Akro Corp. v. Luker, 45 F.3d 1541, 1545 (Fed. Cir. 1995), *cert. denied*, 515 U.S. 1122 (1995) (following *International Shoe* purposeful availment test for patent infringement cases); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir.), *cert. denied*, 508 U.S. 907 (1993).

151. *Compare* Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1993) (O'Connor plus) *with* Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir.), *cert. denied*, 508 U.S. 907 (1993) (opting not to make a choice).

152. *See* Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1322 (Fed. Cir. 2005).

153. *See, e.g.*, Askue v. Aurora Corp. of Am., No. 1:10-cv-0984-JEC, 2012 WL 843939, at *5-6 (N.D. Ga. Mar. 12, 2012); Newman v. European Aero. Def. & Space Co., No. 09-10138-DJC, 2011 WL 2413792, at *5 (D. Mass. June 16, 2011); Belden Tech., Inc. v. LS Corp., 829 F. Supp. 2d

as I have noted, the decision in *McIntyre* did nothing to allay that confusion.

Not surprisingly, state courts have also struggled with the stream of commerce concept. Some have adopted the stream of commerce plus test,[154] sometimes leading to results that fly in the face of fundamental due process principles.[155] Others have adopted the Brennan model.[156] Still others have declined to resolve the question altogether.[157] In addition, various state courts have come up with their own unique formulations of the doctrine. Here are a few examples of those variations with rising and falling levels of specificity and generality:

> It is sufficient that, as here, the defendant purposefully sets his product or his designs into the stream of commerce, knowing or having reason to know that they will reach the forum state and *that they create a potential risk of injury*.[158] (Alaska Supreme Court)
>
> This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, *because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state*.[159] (Washington Supreme Court)
>
> [I]njuries were caused by products introduced into the stream of commerce by defendants *whose primary interest was to benefit economically from their use in other states*. Correspondingly, the

260, 269 (D. Del. 2010); Step2 Co., LLC v. Parallax Group Intern., LLC, No. 5:08CV2580, 2010 WL 3783151, at *6 (N.D. Ohio Sept. 17, 2010).

154. *See, e.g.*, Spir Star AG v. Kimich, 310 S.W.3d 868, 873 (Tex. 2010); State v. N. Atl. Ref. Ltd., 999 A.2d 396, 406 (N.H. 2010); CSR, Ltd. v. Taylor, 983 A.2d 492, 507 (Md. 2009).

155. *See, e.g.*, *CSR, Ltd.*, 983 A.2d at 508 (For example, a Maryland court of appeals applied the O'Connor stream of commerce test and held that cargo "introduced into the stream of commerce with the expectation that it w[ill] arrive in th[e] forum" was sufficient to constitute purposeful availment to Maryland. Hence, after granting foreign distributor's petition for writ of certiorari, the court held that the foreign distributor's act of shipping raw asbestos through port at which stevedores worked, did not constitute the requisite purposeful availment for a Maryland court to be able to exercise jurisdiction over the distributor).

156. *See, e.g.*, Ex parte DBI, Inc., 23 So. 3d 635, 647 (Ala. 2009); Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 674-65 (Wis. 2001), *cert. denied*, 534 U.S. 1079 (2002).

157. *See, e.g.*, State *ex rel.* Edmondson v. Native Wholesale Supply, 237 P.3d 199, 207 (Okla. 2010), *cert. denied*, 131 S. Ct. 2150 (2011); Etchieson v. Cent. Purchasing, LLC, 232 P.3d 301, 307 (Colo. Ct. App. 2010); State v. Grand River Enter., Inc., 757 N.W.2d 305, 313-15 (S.D. 2008); Ruckstuhl v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 889 (La.), *cert. denied*, 528 U.S. 1019 (1999).

158. Modern Trailer Sales, Inc. v. Traweek, 561 P.2d 1192, 1196 (Alaska 1977) (emphasis added).

159. Grange Ins. Ass'n v. State, 757 P.2d 933, 938 (Wash. 1988) (emphasis added).

> forum states had an overriding interest in the protection of their citizens from injuries resulting from the use of these products.[160] (Hawai'i Supreme Court)
>
> In placing their goods in the flow of interstate commerce, the respondents must have had the reasonable expectation that such items *would be shipped indiscriminately throughout the United States*. If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves *wherever injury should occur*.[161] (Idaho Supreme Court)

The critical point here is that the stream of commerce test has no set meaning in federal or state courts and it has no apparent utility that could not be achieved more effectively by reference to the fundamental standards of due process (or by application of the effects test). Moreover, given its elasticity, it necessarily invites an arbitrary pattern of results that violate fundamental principles of due process.

4. A Lesson from Tailored Long-Arm Statutes

Tailored long-arm statutes provide relatively detailed specifications of the circumstances under which a court may exercise personal jurisdiction. As a consequence, one might think that the relatively precise guidance provided by such statutes would eliminate the never-ending layering of doctrine upon doctrine caused by the case-by-case minimum contacts approach. Yet this has not been so for three reasons. First, if jurisdiction is to be exercised, the application of a tailored long-arm statute is merely a prelude to the application of due process, not a substitute. Thus, any application of a long-arm statute must still be tested against the Due Process Clause. Second, as noted above, in an effort to capture the fact-specific rulings of due process doctrine, states find themselves in a never-ending process of amending and interpreting their long-arm statutes. Thus, case-by-case due process doctrine constantly invades the territory of the tailored long-arm statute and often end up distorting their wording and original rationales. This is especially true in those states that do not interpret their tailored long-arm statutes as embracing the full extent of due process.[162] Finally, the highly specified nature of a tailored long-arm statute operates much like

160. Kailieha v. Hayes, 536 P.2d 568, 572 (Haw. 1975) (emphasis added).

161. Doggett v. Elecs. Corp. of Am., 454 P.2d 63, 68–69 (Idaho 1969) (emphasis added).

162. These states are Georgia, Mississippi, New York, Ohio, Vermont, West Virginia, and Wisconsin as well as the Commonwealth of Puerto Rico.

fact-specific doctrine in that it deflects courts from a direct consideration of the fundamental due process principles at stake in the personal jurisdiction analysis, and instead focuses a court's attention on the technicalities of the statutory specifications.

The struggle to conform Georgia's tailored long-arm statute to modern reality is instructive.[163] Section 9-10-91(2) of the Georgia long-arm statute provides Georgia courts the authority to exercise jurisdiction over a nonresident defendant who "[c]ommits a tortious act or omission within this State. . . ." Georgia courts initially interpreted this statutory language as not covering tortious acts committed outside the state.[164] In response, the legislature added subsection (3) to § 9-10-91, expressly vesting Georgia courts with the power to exercise jurisdiction over a nonresident defendant who caused an effect in the state by a tortious act or omission committed outside the state "if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct,

163. The current Georgia long-arm statute provides:

> A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he or she were a resident of this state, if in person or through an agent, he or she:
> (1) Transacts any business within this state;
> (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (4) Owns, uses, or possesses any real property situated within this state; or
> (5) With respect to proceedings for divorce, separate maintenance, annulment, or other domestic relations action or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not, notwithstanding the subsequent departure of one of the original parties from this state and as to all obligations arising from alimony, child support, apportionment of debt, or real or personal property orders or agreements, if one party to the marital relationship continues to reside in this state. This paragraph shall not change the residency requirement for filing an action for divorce.
> (6) Has been subject to the exercise of jurisdiction of a court of this state which has resulted in an order of alimony, child custody, child support, equitable apportionment of debt, or equitable division of property, notwithstanding the subsequent departure of one of the original parties from this state, if the action involves modification of such order and the moving party resides in this state, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

GA. CODE ANN. § 9-10-91 (West 2012).

164. Castleberry v. Gold Agency, 185 S.E.2d 557 (1971); O'Neal Steel v. Smith, 169 S.E.2d 827 (1969).

or derives substantial revenue from goods used or consumed or services rendered in this state."[165] In a case interpreting both sections, and despite the text of subsection (2), the Georgia Supreme Court, somewhat oddly, held that both subsections (2) and (3) permitted the exercise of jurisdiction over defendants who had committed tortious acts or omissions outside the state.[166] The state high court later revisited that decision and returned to a "literal construction" of § 9-10-91, ruling that only subsection (3) permitted the exercise of jurisdiction when the tortious act occurred outside the state.[167]

While interpreting subsections (2) and (3) of § 9-10-91, Georgia courts were also busy interpreting subdivision (1) of the same statute and held that that provision, which was triggered when a nonresident defendant transacted "any business within the state," applied only in contract cases or where the nonresident defendant was physically present within the state. The Georgia courts reached this conclusion even though the text of the statute did not literally impose either requirement.[168]

This was the state of the law when the Georgia Supreme Court granted certiorari in *Innovative Clinical & Consulting Services, LLC v. First Nat. Bank of Ames*,[169] a case involving a combination of tort and contract claims premised largely on activities arising outside of the state, but having an adverse effect in the state. The state court of appeals had held that jurisdiction could not be asserted over the tort claims under subsections (1), (2), or (3) of the state's long-arm statute.[170] The Georgia Supreme Court agreed that neither subsection (2) nor (3) was satisfied under the facts presented, but concluded that subsection (1)—the transacting business section—could be used in tort cases since it vested Georgia courts with jurisdiction to the full extent permitted by due process of law.[171]

The serpentine interpretation of the Georgia long-arm statute is instructive.[172] A tailored long-arm statute operates in much the same

165. GA CODE ANN. § 9-10-91(3) (West 2014).

166. Coe & Payne Co. v. Wood-Mosaic Corp., 195 S.E.2d 399, 400-01 (1973).

167. Gust v. Flint, 356 S.E.2d 513, 514 (1987).

168. *See* Innovative Clinical & Consulting Serv., LLC v. First Nat. Bank of Ames, 620 S.E.2d 353, 355 (Ga. 2005) (discussing this state of affairs).

169. *Id.* at 353.

170. *Id*. at 355.

171. *Id*.

172. In fact, we have described only the tip of iceberg of the interpretive complexities generated by Georgia's long-arm statute. *See* Jeffrey A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine* International Shoe *After Its*

fashion as judge-made doctrine. The focus of the jurisdictional inquiry is deflected from the fundamentals of due process—connecting factors and reasonable expectations—and centers instead on the details of the text and on judicial interpretations and re-interpretations of that text. Instead of attending to fundamental principles, courts and litigants fight over the words, the gaps between words, and the inconsistencies that form within any body of interpretation. Hence, while a tailored long-arm statute may seem like a path to clarity, the opposite has often been true.

We can observe these same patterns and interpretive stretches in other states that have not construed their long-arm statutes as going to the full extent of due process. For example, in West Virginia, a commentary on the West Virginia's long-arm statute expands the scope of the term "business" to include noncommercial activities:

> To assume that the legislature intended W.Va. Code § 56-3-33 to apply only to commercial activities of unincorporated businesses would be to apply an unduly limited meaning to that phrase. The term "business" need not necessarily imply an activity tinged with commercial aspects; it is enough if the activity undertaken by the non-resident defendant is such that the non-resident can or should expect to derive a benefit therefrom. The non-resident defendant's activity must be purposeful but it need not be intimately intertwined with the defendant's livelihood.[173]

It is, however, hard to describe "business," as an activity from which the nonresident defendant might gain only a moral or personal benefit.[174] Still, such noncommercial activity would seem to be covered by the West Virginia long-arm statute, as explained by the relevant commentary.[175] However, in a way, all of this is beside the point, for whether a particular form of activity can be properly characterized as a "business" has no bearing on whether that activity represents a due-process-sufficient connecting factor with the forum.

First Sixty Years, 3 SETON HALL CIRCUIT. REV. 339 (2007).

173. Harman v. Pauley, 522 F. Supp. 1130, 1135 (D. W.V. 1981); *see also* 11B M.J. *Jurisdiction* § 15 (2011).

174. *However, see* CHARLES DICKENS, A CHRISTMAS CAROL 30 (Serenity Publishers 2008) (1843) ("Business!" cried the Ghost, wringing its hands again. "Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were, all, my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!")

175. The courts of New York have also construed the "transacting business" component of the state's long-arm statute as not being restricted to commercial activities. Best Van Lines, Inc. v. Walker, 490 F.3d 239, 247 n.10 (2d Cir. 2007).

Similar interpretative questions arose in *Kopke v. A. Hartrodt S.R.L.*,[176] where the Wisconsin Supreme Court confronted the text of its long-arm statute in the context of a products liability suit. Kopke, a truck driver, was injured when he opened a cargo container in Neenah, Wisconsin. The injury occurred when a pallet loaded with paper fell out of the container and landed on him. L'Arciere, an employee-owned Italian cooperative, had loaded the pallet into the cargo container in Italy. Kopke brought a personal injury claim against L'Arciere and others in a Wisconsin state court. L'Arciere moved to dismiss for lack of personal jurisdiction. The County Circuit Court denied this motion and ruled that L'Arciere's acts of stabilizing the products being shipped by surrounding the product with air bags, and installing bracing beams and boards into the cargo container, brought the defendant within the scope of section 4(b) of state's the long-arm statute and that the exercise of jurisdiction was consistent with due process. L'Arciere's appeal was eventually certified to the state Supreme Court.[177]

The Wisconsin long-arm statute, § 801.05(4), authorized the exercise of personal jurisdiction over nonresidents whose act or omission committed outside of Wisconsin gives rise to an injury within the state under specified circumstances:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to § 801.11 under any of the following circumstances:
>
> . . .
>
> (4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:
>
> . . .
>
> (b) Products, materials or things *processed*, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.[178]

The critical issue was whether L'Arciere had "processed" products,

176. Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662 (2001), *cert. denied*, 534 U.S. 1079 (2002).

177. *Id.* at 667.

178. WIS. STAT. ANN. § 801.05(4) (West 2012) (emphasis added). It is worth noting that also the Wisconsin long-arm statute treats the stream-of-commerce as an expression of the effect-test.

materials, or things that were used or consumed within Wisconsin.[179] As the State Supreme Court phrased it, "The question presented is, therefore, whether the word 'process' means to bring about a physical transformation upon the products, materials, or things themselves, as urged by L'Arciere . . . or whether process is a broader term," i.e., one that would include the preparation of goods for transit.[180] In concluding that the latter, more inclusive definition was more consistent with the goals of the long-arm statute, the state high court relied on an earlier decision by the Seventh Circuit, *Nelson by Carson v. Park Industries, Inc.*,[181] construing § 801.05(4)(b):

> The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process. *See* Webster's Third New International Dictionary of the English Language (1963).[182]

With that broad interpretation as its guide, the Wisconsin Supreme Court concluded that the loading activities engaged in by L'Arciere fell within the scope of § 801.05(4)(b) as a form of processing.[183] In so ruling the court rejected the reasoning of the Fifth Circuit construing a virtually identical Florida statute as pertaining only to the process of manufacturing and thus excluded activities pertaining to the shipment of the goods.[184] The Wisconsin court explained the differing conclusions as being the product of different interpretive principles.[185] The court also found that the exercise of jurisdiction over L'Arciere was consistent with due process, applying Justice Brennan's pure stream of commerce model.[186]

Given the broad interpretation employed by the Wisconsin Supreme Court, the Wisconsin long-arm statute did not prevent the court from examining the fundamentals of due process (albeit through the misdirected lens of the stream of commerce test). The result in the Fifth

179. *Kopke*, 629 N.W.2d at 668.
180. *Id.* at 669.
181. *See generally* Nelson by Carson v. Park Indus. Inc., 717 F.2d 1120 (7th Cir. 1983).
182. *Id*. at 1124 n.5.
183. *Kopke*, 629 N.W.2d at 670.
184. *See generally* Mallard v. Aluminum Co. of Canada, 634 F.2d 236 (5th Cir. 1981).
185. *Kopke*, 629 N.W.2d at 671.
186. *Id.* at 674-75.

Circuit case was, however, quite different.[187] The Fifth Circuit's interpretation of the statute blocked any consideration of fundamental due process principles. On the one hand, the interpretation adopted by the Wisconsin Supreme Court seems to be a bit of a stretch. On the other hand, it seems unlikely that the Florida legislature intended to draw the manufacturer-shipper distinction that the language of the statute suggests. The simple point is this: Whether the "product, material, or things" were "processed," has virtually nothing to do with connecting factors, expectations, or fundamental principles of fairness and justice, which should have instead engaged the court.

III. PROPOSAL: A FUNDAMENTAL-PRINCIPLES DUE PROCESS STATUTE

With a broader perspective of the subject, this Article posits that a legislative intervention—at both the state and federal levels—would better address the topic and significantly reduce current inconsistencies and confusion, than continuing to rely upon an increasingly disjointed case-by-case approach. Indeed, immediately after *International Shoe*, state and federal legislative bodies might have stepped in and adopted statutes that articulated the basic ideas contained in that opinion, thus offering a stable, principled approach to answering many of the issues that the Court had to later confront on a case-by-case basis, not always successfully, as the Court itself recently admitted.[188]

As I noted in the introduction, all statutes are subject to judicial interpretation and judicial review. Hence, the Supreme Court will have the final say as to the constitutionally permissible scope of any proposed statute. It is possible that the Court will insist on enforcing its doctrinal approach to personal jurisdiction but it is also possible that the guidance from the statute will assist the Court in redirecting its analysis back to the fundamental principles of due process.

My statute takes a middle course between an open-ended due process type statute and the typical tailored long-arm statute. I reject the due process type because it provides too little guidance and it would generate the same problems that the Supreme Court has created in interpreting the Due Process Clause. I also reject the tailored long-arm statute for the reasons offered in Part III.B.4. This is because tailored

187. *See Mallard*, 634 F.2d at 241 (explaining that the statutory language could not be read to give the court jurisdiction in this case).

188. "This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity." J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

long-arm statutes incorporate the misguided case-by-case doctrine of due process and therefore are not premised on a durable standard capable of application to a wide range of cases. My statute is intended to articulate precisely such a durable standard without the baggage of the Court's mechanistic formulas or the acrobatics that state courts exercise in interpreting their long-arm statutes.

A. Proposed Statute

My proposed statute, which is addressed to Congress and state legislatures,[189] reads as follows:

> Section 1. The district courts may exercise personal jurisdiction over an individual or entity not a resident of the state in which the court is located when the individual or entity has engaged in activities in that state or outside that state that have caused effects therein, when those in-state activities or in-state effects are such as to give that individual or entity a reasonable expectation of being sued in that state. A "reasonable expectation of being sued in the forum" shall take account of both the quality and quantity of the contacts, including the relationship or lack thereof between those contacts and the plaintiff's claims.
>
> Section 2. The district courts may not decline the exercise of jurisdiction provided under Section 1 of this Title unless authorized to do so by Congress.

B. Commentary to the Proposed Statute

1. Section 1

This section is premised on the due process principles of connecting factors and reasonable expectations arising from those connections. This standard does not draw any distinction between the traditional and minimum contacts bases of jurisdiction. Nor does it draw a distinction between general and specific jurisdiction; nor among the various subcategories of doctrine developed over the past several decades, e.g., purposeful availment, effect test, stream of commerce, etc. Rather, this Section asks a simple and direct question and, at the same time, encompasses a wide range of jurisdictional possibilities, all traceable to the fundamental principles of due process.

189. The text of the statute is directed toward its application in the federal judicial system. The text, however, could be easily revised to make it applicable in state courts.

As discussed herein, most of the Supreme Court's major decisions on personal jurisdiction could be resolved and explained by reference to this elegant standard. For example, the activities of the International Shoe Company in the State of Washington were of such a nature to give that company reasonable expectation of a suit in the forum based on those contacts. Similarly, the contractual relationships in *McGee* and *Burger King* were sufficiently connected to the forum state to give the parties to the contracts a reasonable expectation of suit in the forum on claims arising from those contacts. Even the decision in *Calder* can be explained as premised on the nonresident defendants' connections with the forum state, such connections giving rise to a reasonable expectation of suit in the forum. The Section 1 standard also explains the denial of jurisdiction in *World Wide Volkswagen* and *Shaffer*, where the absence of meaningful factors connecting the nonresident defendants with the forum indicated the absence of a reasonable expectation of suit against them in that forum.[190] Section 1 would eliminate tag jurisdiction.[191] It would not overrule *Burnham*, but it would eliminate a district court's authority to exercise the jurisdiction otherwise permitted by *Burnham*.

Undoubtedly, there is some tension between this standard and some of the Court's decisions, at least if those decisions are examined under the Fourteenth Amendment perspective. This might occur in a federal forum under the standards of Federal Rule of Civil Procedure 4(k)(1)(A), or in a state forum that has adopted my proposed statute. Certainly, the results in *Hanson*, *Kulko*, and *McIntyre* can be seen as inconsistent with the standard described in Section 1. This is because in those cases the Court insinuated an artificial test between the fundamental principle and the facts. Thus, in these cases, the personal jurisdiction analysis was driven by irrelevant questions. Of course, it is possible that the current Court would insist on a continuation of this practice, thus rendering Section 1 ineffective and potentially unconstitutional. But it is also possible that the Court would accept an invitation from Congress to reconsider its personal jurisdiction jurisprudence from the more principled perspective provided in Section 1.

With respect to the exercise of personal jurisdiction by federal courts, the Fourteenth Amendment constitutional issue should disappear, since the exercise of jurisdiction by federal courts is constrained by the due process clause of the Fifth Amendment. In other words, the exercise

190. *See supra* text accompanying notes 40-41.

191. *See supra* text accompanying notes 42-46.

of personal jurisdiction here would not present a question of jurisdiction under Federal Rule of Civil Procedure 4(k)(1)(A), which incorporates the Fourteenth Amendment, but would under Federal Rule of Civil Procedure 4(k)(1)(C), which vests federal courts with personal jurisdiction pursuant to a congressionally enacted statute. Under these circumstances, the constitutionality of any application of Section 1 would look at the connecting factors between the nonresident defendant and the United States as a whole.

Given the foregoing, it is quite likely that under the proposed statute a federal court would be able to exercise personal jurisdiction in cases presenting fact-patterns similar to those in *Hanson*, *Kulko*, and *McIntyre*. In *McIntyre*, for example, the foreign manufacturer clearly had contacts with the United States as a whole, since it targeted the entire North American market, and those contacts were certainly sufficient to establish a reasonable expectation of suit in the United States premised on effects of that marketing felt there. Under Section 1, Justice Ginsburg's analysis in *McIntyre* would be unassailable, since the standard would be, in fact, national contacts as a matter of the Fifth Amendment due process clause.

Although Section 1 does not expressly reference the traditional grounds of jurisdiction, as I have explained, most of them are encompassed by its standard.[192] For example, an individual who is domiciled in the state in which the court is located will be subject to the jurisdiction in that state since domicile in a state creates a reasonable expectation of suit there, given both the quality and quantity of the defendant's contacts with the forum. In other words, domicile is a meaningful contact that gives the defendant a reasonable expectation of suit in the forum.[193] Similarly, consent to jurisdiction in a forum inherently creates a connection with the forum that leads to reasonable expectation of suit there.

2. Section 2

The purpose of Section 2 is to replace the "unreasonableness" exit of the personal jurisdiction analysis with a legislatively defined and carefully circumscribed *forum non conveniens* doctrine.[194] I have

192. *See supra* text accompanying notes 10-12. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29 & cmt. a (2012) (domicile); *id.* § 41 & cmts. a & b (place of incorporation); *id.* § 32 (consent); *id.* § 33 (waiver or appearance).

193. *See* Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623 (2012).

194. *See supra* text accompanying notes 31-39.

proposed the adoption of precisely such a *forum non conveniens* statute.[195] That statute is essentially a companion to my proposed personal jurisdiction statute. The combined goal of these proposed statutes is to define the scope of personal jurisdiction and to provide guidance as to the limited circumstances under which a court may decline the exercise of an otherwise legitimate exercise of jurisdiction.

*****

The above proposed personal jurisdiction statute fully incorporates the fundamental principles of due process recognized by the Court in *International Shoe*. It also embraces the traditional grounds of jurisdiction, but only to the extent that those traditional grounds are consistent with *International Shoe*'s individual-rights conception of the due process of law. Moreover, its application requires no mechanistic formulas, nor any doctrinal tests other than those that focus on the

195. *See* Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. ___ (2014). The proposed *forum non conveniens* statute reads as follows:

> 1. In any civil action of which a district court has original jurisdiction, the district court may stay or dismiss the action under the doctrine of *forum non conveniens* only if:
>
> a. The defendant files a timely motion to dismiss on grounds of *forum non conveniens*, such timeliness to be measured under the standards applicable to a motion under Federal Rule of Civil Procedure 12(b)(2), but for good cause shown, the court may extend the period set forth in this Section for the filing a (sic) *forum non conveniens* motions: and
>
> b. The moving party demonstrates and the district court finds that there is an available alternate forum with jurisdiction over the action and the defendants, that, as a practical matter, the plaintiff will have access to that forum, that such forum provides a suitable substantive remedy for the claim or claims asserted by the plaintiff, and that such forum adheres to the fundamental standards of due process; and
>
> c. The district court finds that the available alternate forum provides a substantially more suitable forum for the adjudication of the claim or action, and that the maintenance of the claim or action in the district court would impose substantial injustice on the moving party.
>
> 2. For good cause shown, the court may extend the period set forth in Section 1a for the filing a *forum non conveniens* motion.
>
> 3. If the district court finds that the standards in Section 1 have been satisfied, it may stay or dismiss the claim or action on any condition it deems just. Such conditions may include the defendant's waiver of any statute of limitation or lack of jurisdiction defense he might otherwise have in the alternate forum.
>
> 4. When granting a motion to dismiss an action on *forum non conveniens* grounds, the district court shall retain jurisdiction to enforce its dismissal order and any related stipulations or conditions attached thereto.
>
> 5. A court that grants or denies a motion to stay or dismiss an action pursuant to this statute shall set forth specific findings of fact and conclusions of law supporting the court's order.
>
> 6. An order granting or denying a motion to dismiss on *forum non conveniens* grounds is immediately appealable. The findings of fact shall be reviewed under a clearly erroneous standard. The conclusions of law shall be reviewed under *de novo* standard.

forum-relating connecting factors and the reasonable expectations that make the exercise of jurisdiction reasonable.

While courts will be required to apply this statute in specific factual contexts, those applications should not operate as an invitation to create new doctrine or rewrite the statute, as has occurred with so many state long-arm statutes. Rather, those applications should provide no more than exemplars of what a particular court did under a particular set of facts, consistent with the specific language of the statute. To be sure, the perceived wisdom of those particular applications may well influence the direction of statutory interpretation, but the critical question must always be whether the application respects the fundamental principles of due process.

IV. CONCLUSION

In 1966, von Mehren and Trautman had identified problems with the then emerging personal jurisdiction formula that became even more evident in the years that followed.[196] At that time, they predicted that significant changes were going to occur and that, among those changes, a less mechanistic and more effective methodology would emerge.[197] Instead, under the guidance of the Supreme Court, quite the opposite has occurred.

The importance of personal jurisdiction cannot be overstated. As noted earlier, personal jurisdiction is deeply intertwined with the litigants' due process rights. Also, the outcome of cases is significantly influenced, if not entirely determined, by decisions on jurisdiction and choice of law, with the latter often deeply influenced by the former.

Those who are skeptical of rules might raise questions as to whether a statute would really solve the issues that the Court's standards have thus far not been able to solve. Indeed, even after a statute is passed, judges would still be the ones who interpret and apply it. The proposed statute and its underlying ideas and principles, however, would not generate the same problems that the current personal jurisdiction judge-made formula is generating because it will carefully guide judges through a crisp analysis. Indeed, by endorsing the clear and straightforward formula of connecting factors and the reasonable expectations to which those factors can give rise, the proposed statute reminds courts that the jurisdictional inquiry is a fact-specific analysis

196. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

197. *Id.*

and that no more specific doctrinal test is needed to decide when meaningful connections with the forum state give rise to a reasonable expectation of being sued there. True, judges might view facts differently. However, the basic idea is that for the exercise of personal jurisdiction to be consistent with due process, it should be reasonably expected by the defendant based on his or her meaningful contacts with the forum. At least that is the right question to ask.

The proposed personal jurisdiction statute would not be the first jurisdictional statute to provide clear and effective guidance to federal courts. Indeed, 28 U.S.C. § 1367 governing supplemental jurisdiction can be considered illustrative in this respect. When § 1367 was adopted, in 1990, courts were confused as to when they could properly exercise supplemental jurisdiction, for the Court's earlier opinions[198] had left some questions unanswered.[199] Congress decided to intervene by passing § 1367. Subsections (a) and (c) of that statute adopt a fundamental principles approach to supplemental jurisdiction that, through general formula—"claims that are so related . . . that they form part of the same case or controversy under Article III"—and general criteria that a court might consider to "decline to exercise supplemental jurisdiction"—gives courts sufficient guidance as to the scope of the standards, avoiding the need for further doctrinal developments.[200] The guidance that the statute offered under subsections (a) and (c) was indeed effective, for the Court has not had to revisit the related issues again. On the other hand, the Court's intervention was necessary to clarify the scope of subsection (b) of the same statute,[201] which, unlike the other two provisions, had been framed in the tailored-long-arm-statute style. Learning from that experience, the proposed personal jurisdiction statute mirrors the format of subsections (a) and (c) of the supplemental jurisdiction statute and as a result provides a durable standard capable of application across a wide range of cases.

198. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978).

199. Aldinger v. Howard, 427 U.S. 1, 17-18 (1976).

200. 28 U.S.C. § 1367 (a) & (c) (1990).

201. *See* Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005).