

## Clarifying General Jurisdiction

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In the nearly sixty years since reformulating the jurisdictional calculus in *International Shoe Co. v. Washington*,<sup>1</sup> the Supreme Court has issued only two holdings on a defendant’s amenability to suit predicated solely on its forum activities unrelated to the plaintiff’s causes of action.<sup>2</sup> Unfortunately, neither decision provided much illumination regarding the due process strictures for general *in personam* jurisdiction, as the Court never developed either a theoretical foundation or a framework for resolving this query.<sup>3</sup>

Commentators have intermittently proposed various theories to

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<sup>1</sup> 326 U.S. 310 (1945).

<sup>2</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

<sup>3</sup> *See, e.g., LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000) (noting that the “Supreme Court has never outlined a test for determining whether a defendant’s activities within a state are sufficient for general 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, 567 (1998) (opining that Supreme Court’s holdings provide little guidance on the requisite criteria for general jurisdiction). “General jurisdiction” is the term used to describe the exercise of jurisdiction over a defendant for any cause of action based on activities unrelated to the plaintiff’s claims. *See* Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-37 (1966).

fill the vacuum.<sup>4</sup> Some of these theories espouse that a corporate defendant should only be subject to general jurisdiction in its principal place of business or place of incorporation,<sup>5</sup> while others contend that such jurisdiction might also be proper if the defendant either “adopts” the forum as its sovereign<sup>6</sup> or maintains a “branch” facility<sup>7</sup> or corporate office<sup>8</sup> in the forum. But this prevailing academic view that a defendant should only be subject to general jurisdiction in a comparatively limited number of forum states cannot be reconciled with even the narrowest jurisdictional holdings of federal and state courts.<sup>9</sup>

The academic commentary is thus of minimal assistance to the judiciary, which desperately needs a doctrinal formulation to illumine

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<sup>4</sup> See, e.g., Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (proposing that general jurisdiction is only appropriate in the states in which the corporate defendant has a place of incorporation, principal place of business, or “branch facility,” but not where the defendant conducts activities such as sales, purchases, or advertisements); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 87 [hereinafter Brilmayer, *How Contacts Count*] (proposing that the appropriate test is whether the defendant is enough of a “political insider” to invoke the political processes of the state); Sarah R. Cebik, “A Riddle Wrapped in a Mystery Inside an Enigma”: *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 33-36 (propounding a “realist” theory of sovereignty for general jurisdiction under which a defendant would be amenable to general jurisdiction if it is incorporated, shapes its corporate policy, or conducts its core activities in the forum); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129 (1990) (suggesting the requisite minimum contacts for general jurisdiction exist only if a corporate office is in the forum); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 758 (1987) [hereinafter Stein, *Interstate Federalism*] (urging that the appropriate standard is whether the “defendant has adopted the forum as its sovereign” by treating it as its home for most purposes); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 676 (1988) [hereinafter Twitchell, *Myth of General Jurisdiction*] (advocating that general jurisdiction should be restricted to the defendant’s place of incorporation and principal place of business).

<sup>5</sup> See, e.g., von Mehren & Trautman, *supra* note 3, at 1141-44. Compare Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 676 (advocating limitation of general jurisdiction to defendant’s principal place of business and place of incorporation), with Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 [hereinafter Twitchell, *Doing-Business Jurisdiction*] (discussing a “change of heart” since her earlier article on such a limited conception of general jurisdiction).

<sup>6</sup> See, e.g., Stein, *Interstate Federalism*, *supra* note 4, at 758.

<sup>7</sup> See Borchers, *supra* note 4, at 137. Dean Borchers acknowledged, however, that “the notion of what counts as a ‘branch’ is not self-evident.” *Id.* Accordingly, he recommended that the term “branch” be defined, “perhaps in terms of a fraction of the defendant’s total economic activity,” in order to “prevent twigs from being treated as branches.” *Id.* at 137-38.

<sup>8</sup> See George, *supra* note 4, at 1129.

<sup>9</sup> See *infra* Part IV.

the incoherent “morass” of conflicting decisions that Judge Learned Hand described over seventy years ago.<sup>10</sup> The decisions continue to “evinced a bewildering array of seemingly inconsistent results,” as the courts “appear to summon one line of decisions and then another to support the varying moods of their opinions.”<sup>11</sup> The resulting lack of predictability contravenes notions of both fairness and efficiency, as plaintiffs and defendants repeatedly litigate the propriety of subjecting a foreign defendant to the jurisdiction of the forum for any cause of action without guidance or notice as to the requisite forum activities allowing the sovereign to exercise such power.

Perhaps, though, an approach out of this quagmire may be found within it. As Professor Mary Twitchell suggested, a methodology to formulate a better theoretical understanding of general jurisdiction might be to scrutinize past judicial decisions.<sup>12</sup> Such decisions, she hypothesized, “may reveal a great deal about when states feel that a nonresident business entity should be treated like an ‘insider’ for any and all judicial purposes.”<sup>13</sup> Agreeing with her premise, the author and his research assistant reviewed approximately three thousand federal and state court decisions discussing this jurisdictional basis in an attempt to clarify the due process limitations on general jurisdiction.<sup>14</sup>

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<sup>10</sup> *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930) (describing the impossibility of divining “any rule from the decided cases; we must step from tuft to tuft across the morass”).

<sup>11</sup> *Severinsen v. Widener Univ.*, 768 A.2d 200, 203 (N.J. Super. Ct. App. Div. 2001).

<sup>12</sup> Twitchell, *Doing-Business Jurisdiction*, *supra* note 5, at 206.

<sup>13</sup> *Id.*

<sup>14</sup> We identified the cases through two broad Westlaw searches in individual state and federal databases: (1) “general jurisdiction” & continu!, and (2) general w/3 jurisdiction & contact!. Additionally, we also ran Key Cite reference searches for cases finding general jurisdiction and discussing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). We primarily concentrated on appellate court opinions after 1984 (when the Supreme Court first explicitly adopted the general and specific jurisdiction terminology), but we also conducted additional research to locate significant federal district decisions and pre-1984 state and federal appellate court opinions. Of course, by employing such broad searches, we unearthed a number of cases that mentioned—but did not apply—general jurisdiction, including cases involving procedural determinations such as the need for more discovery or the waiver of a jurisdictional challenge. *See, e.g., Szafarowicz v. Gotterup*, 68 F. Supp. 2d 38, 42 (D. Mass. 1999) (need for more discovery); *Jacobs v. Walt Disney World Co.*, 707 A.2d 477, 485 (N.J. Super. Ct. App. Div. 1998) (same).

Additionally, many of the opinions we located that reached general jurisdictional holdings were not within the scope of this Article. This Article focuses on the due process limitations on amenability for a non-consenting, nonresident defendant whose forum activities are not related to the litigation. As discussed in Part II, *infra*, numerous purported general jurisdiction decisions involved a

The Article first analyzes the Supreme Court decisions establishing the modern conception of general adjudicatory jurisdiction,<sup>15</sup> concluding that contemporary general jurisdiction doctrine emanates from the pre-*International Shoe* fictional premise of a corporation's constructive presence through doing business in the forum.<sup>16</sup> The Article then recounts the judiciary's continued difficulty in appropriately delimiting the parameters of general jurisdiction before identifying the approaches employed by the Supreme Court, lower federal courts, and state courts in resolving general jurisdictional queries.<sup>17</sup> Concluding that none of these approaches is satisfactory, the Article proposes a new principle to clarify the general jurisdiction analysis that comports not only with the holdings of the Supreme Court and most federal circuit courts, but also with a number of federal district courts and state courts as well.<sup>18</sup>

Under this principle, the requisite minimum contacts supporting general jurisdiction exist when the nonresident defendant is engaging in continuous activities in the forum similar in nature and volume to the in-state activities of an enterprise domiciled or based in the forum.<sup>19</sup> This minimum contacts analysis incorporates two components—first, a qualitative aspect that the nature of the defendant's forum activities are analogous to those activities that typically define a commercial domiciliary, and second, a quantitative aspect that such forum activities occur at a comparable frequency to at least some local businesses. If the necessary minimum contacts are extant, the third and final consideration is whether the exercise of jurisdiction in a given case comports with “traditional notions of fair

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defendant with forum activities that are actually related to the litigation. Still other decisions were not included because they primarily considered a state long-arm statute, statutory service of process requirements, or common-law alter ego theories. See, e.g., *White v. Pepsico, Inc.*, 568 So. 2d 886 (Fla. 1990) (long-arm statute); *Maunder v. DeHavilland Aircraft of Can., Ltd.*, 466 N.E.2d 217, 221-23 (Ill. 1984) (parent-subsidiary relationship). While personal jurisdiction over a non-consenting, nonresident defendant does require authorization for the service of summons on the defendant and adequate notice to the defendant, see *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987), this Article addresses only the due process aspect of the general jurisdiction calculus. No discussion of the interpretation of long-arm statutes, the adequacy of service of process, or the problems of related business entities has been included.

<sup>15</sup> See *infra* Part I.

<sup>16</sup> See *id.*; see also *infra* Parts III.E-IV.A.

<sup>17</sup> See *infra* Parts II-III.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *id.*

play and substantial justice.”<sup>20</sup>

After delineating the mechanics of this proposed three-pronged approach, the Article examines the theoretical foundation of general adjudicatory jurisdiction. It first proposes, relying in part on an analogy to traditional substantive due process doctrine, that the constitutional limitations on a state’s jurisdictional reach are premised on both fairness and state sovereign interests. The Article thereafter submits that the principal underpinning of the due process constraints on a state’s exercise of general *in personam* jurisdiction is the absence of sovereign authority over those nonresident defendants that do not engage in forum activities closely analogous to the activities of those owing allegiance to the state.<sup>21</sup>

### I. THE MODERN DEVELOPMENT OF GENERAL JURISDICTION

Pre-twentieth century jurisdictional theory predominantly focused on the state’s power over the defendant or the defendant’s property.<sup>22</sup> For instance, if the defendant was either actually or at least deemed present in the forum, the court could exercise jurisdiction over any cause of action against that defendant, despite the absence of any nexus between the forum and the cause of action.<sup>23</sup> Subsequently, the courts established additional theories allowing a state to exercise jurisdiction over certain claims related to the forum, but this jurisdictional basis was limited to the specific dispute at issue.<sup>24</sup>

In the mid-twentieth century, *International Shoe Co. v. Washington* reformulated the jurisdictional touchstone from a state’s power over those present within its territory to an analysis of the fairness or reasonableness of an exercise of jurisdiction premised on the

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<sup>20</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation omitted).

<sup>21</sup> See *infra* Part V.

<sup>22</sup> See Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 569-74 (1958); Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 614-15.

<sup>23</sup> See von Mehren & Trautman, *supra* note 3, at 1136 (noting “American practice for the most part [has been] to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected”); see also *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917) (holding that, because the defendant was engaged in business in the forum, “jurisdiction does not fail because the cause of action sued upon has no relation in origin to the business here transacted”).

<sup>24</sup> See Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 622-23.

defendant's forum contacts.<sup>25</sup> Yet *International Shoe's* new conception still incorporated elements of the preexisting American jurisdictional theories.<sup>26</sup> The Court first explained that due process was satisfied when the defendant's continuous forum activities actually gave rise to the claimed liabilities at issue.<sup>27</sup> The Court then noted that jurisdiction alternatively could be premised on a defendant's continuous activities with the forum "thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."<sup>28</sup>

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<sup>25</sup> 326 U.S. at 316. The Court explained:

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.* (citations omitted).

<sup>26</sup> *Id.* at 317-18.

<sup>27</sup> *Id.* at 317.

<sup>28</sup> *Id.* at 318 (citing *Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 255 U.S. 565 (1921); *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218 (1915); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917)). Seven years later, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 n.6 (1952), the Court explained that its citation to *Reynolds* did "not disclose the significance of this decision but light is thrown on it by the opinions of the state court below." *Id.* (citing *Reynolds v. Mo., Kan. & Tex. Ry. Co.*, 117 N.E. 913 (Mass. 1917); *Reynolds v. Mo., Kan. & Tex. Ry. Co.*, 113 N.E. 413 (Mass. 1916)). *Perkins* also cited three other pre-*International Shoe* holdings as additional support for the concept of jurisdiction based on forum contacts unrelated to the litigation. *Id.* (citing *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 268-69 (1917); *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898)).

The relevant pre-*International Shoe* cases cited by the Court as supporting the exercise of jurisdiction for causes of action unrelated to the defendant's forum contacts all involved defendants who had employees or at least an independent agent who conducted some business for the defendant from a physical location within the forum state. In *Reynolds*, the Court affirmed by a memorandum opinion the holdings of the Massachusetts state court. *Reynolds*, 255 U.S. at 261. The state court had held that a Kansas railroad was subject to jurisdiction in Massachusetts for a suit based upon promissory notes made, issued, and negotiated in another state merely because the railroad appointed a Boston independent passenger agent who also conducted business on his own account and for another company from the office he paid for himself. *Reynolds*, 117 N.E. at 914-15; see also *Reynolds*, 113 N.E. at 413. *Tauza* held that New York could exercise jurisdiction over a Pennsylvania coal company for a cause of action having no relationship to New York because the coal company had a branch sales office in New York staffed by a sales agent, eight salesmen, and clerical assistants from which it regularly solicited and obtained orders for continuous coal shipments from Pennsylvania to New York. *Tauza*, 115 N.E. at 916-18. *Barrow*

The Court subsequently relied on the defendant's unrelated forum activities to establish the required constitutional connection for jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*<sup>29</sup> Benguet Mining, a company created under the laws of the Philippine Islands, had ceased operating its gold and silver mines in the Philippines during the Japanese occupation of the Islands.<sup>30</sup> The company's president, general manager, and principal stockholder then returned to his home in Ohio where he established a company office staffed by two secretaries, maintained two bank accounts for the company, paid salaries and other expenses for the company, held directors' meetings, corresponded on the company's behalf, and supervised the rehabilitation of the company's properties in the Philippines.<sup>31</sup> Hence, as the Court noted, the company's president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."<sup>32</sup> Based on the company's conduct of such a "continuous and systematic, but limited part of its general business" in the state, the Court summarily concluded Ohio could exercise adjudicatory jurisdiction over the company, even though the plaintiff's claims "arose from activities entirely distinct" from the company's Ohio operations.<sup>33</sup>

The jurisdictional theory supporting *Perkins* became known as general jurisdiction, while the exercise of jurisdiction based on contacts connected to the cause of action was called specific jurisdiction.<sup>34</sup> The Supreme Court first explicitly recognized this

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concluded a British corporation was amenable to jurisdiction in New York for an altercation in Britain because the corporation was doing business in New York "through a mercantile firm, its regularly appointed agents." *Barrow*, 170 U.S. at 105. In contrast, in *McKibbin*, the Court held a Pennsylvania railroad could not be sued in New York for an injury occurring in New Jersey when the railroad merely sent loaded freight cars into New York over connecting carriers and a local carrier sold coupon tickets on its behalf. *McKibbin*, 243 U.S. at 267-69.

The relevance of the other two earlier decisions cited by the Court in *International Shoe* and *Perkins* is not as clear. The defendant's forum contacts in *Alexander* were related to the litigation as the plaintiff's claim arose in part from his dealings with the defendant's agents in the forum. *Alexander*, 227 U.S. at 223, 226. *Pennsylvania Fire* appeared primarily to consider amenability for an unrelated cause of action predicated on service of process on a designated agent, although the lower state court had held the defendant was doing business in the state. *Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co.*, 184 S.W. 999, 1020 (Mo. 1916), *aff'd*, 243 U.S. 93 (1917).

<sup>29</sup> 342 U.S. 437 (1952).

<sup>30</sup> *Id.* at 438, 447.

<sup>31</sup> *Id.* at 447-48.

<sup>32</sup> *Id.* at 448.

<sup>33</sup> *Id.* at 438, 447-48.

<sup>34</sup> *See* von Mehren & Trautman, *supra* note 3, at 1136.



dichotomy in terminology in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>35</sup> where it held that a foreign corporation was not amenable to general jurisdiction in Texas.<sup>36</sup>

Helicopteros Nacionales de Colombia, S.A. (“Helicol”), a Colombian corporation, provided helicopter transportation in South America for oil and construction companies.<sup>37</sup> One of its helicopters crashed in Peru as it was transporting employees of a Peruvian consortium that was the alter ego of a Texas joint venture.<sup>38</sup> The representatives and heirs of the four United States citizens who perished in the crash then sued Helicol in Texas.<sup>39</sup> Since the parties both supposedly conceded that the claims neither arose from nor were related to Helicol’s Texas contacts,<sup>40</sup> the Court examined whether such contacts were sufficient for jurisdiction when Helicol’s activities were unrelated to the asserted causes of action.<sup>41</sup>

The Court posited that the nature of Helicol’s contacts was not similar to the “continuous and systematic general business contacts” extant in *Perkins*.<sup>42</sup> The Court described three primary types of contacts Helicol had with Texas, discounting each in turn.<sup>43</sup> First, while the chief executive officer of Helicol traveled to Houston for a negotiating session with representatives of the Peruvian consortium and its Texas alter ego, the Court reasoned that this singular trip was neither continuous nor systematic as required for the exercise of general jurisdiction.<sup>44</sup> Second, the Court deemed insignificant the fact that Helicol received over \$5 million in payments drawn upon a Houston, Texas bank because it was a unilateral act of the drawer not

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<sup>35</sup> 466 U.S. 408, 414 nn.8-9 (1984). The Supreme Court had, the month before, used the term “general jurisdiction” in *Calder v. Jones*, 465 U.S. 783, 787 (1984), but the Court did not mention the term “specific jurisdiction.”

<sup>36</sup> *Helicopteros*, 466 U.S. at 416-18.

<sup>37</sup> *Id.* at 409.

<sup>38</sup> *Id.* at 410.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 415. However, this supposed concession is questionable. As Justice Brennan pointed out in his dissent, some portions of the briefs filed on behalf of Hall suggested that their claims were related to Helicol’s activities within Texas. *Id.* at 425 n.3 (Brennan, J., dissenting). Additionally, Hall’s oral argument, as some commentators have noted, “invited the Court to consider the nature and extent of the contacts and their relation to the cause of action.” GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 236 (8th ed. 1999) (citing Tr. of Oral Argument at 20-21, 27).

<sup>41</sup> *Helicopteros*, 466 U.S. at 409, 416.

<sup>42</sup> *Id.* at 416.

<sup>43</sup> *Id.* at 416-18.

<sup>44</sup> *Id.* at 410-11, 416.

imputable to Helicol.<sup>45</sup> Finally, the Court determined that Helicol's purchase of over \$4 million in equipment (including eighty percent of its helicopter fleet) along with training and technical consultation for pilots, management, and maintenance personnel from Bell Helicopter in Fort Worth, Texas, was "not enough to warrant . . . *in personam* jurisdiction."<sup>46</sup> While certainly these activities could be described as "continuous and systematic," the Court concluded, by relying on a pre-*International Shoe* case, *Rosenberg Bros. & Co. v. Curtis Brown Co.*,<sup>47</sup> that mere purchases and related trips were insufficient to support the exercise of general jurisdiction consonant with the constraints of due process.<sup>48</sup>

The Court's determination that Helicol's ongoing purchases and related trips did not establish its amenability to suit in Texas demonstrates that general jurisdiction requires more than merely "continuous and systematic" contacts with the forum. In other words, as the Court has remarked on other occasions, the test for jurisdiction is not merely quantitative.<sup>49</sup> Instead, there is a qualitative aspect to the analysis as well, requiring that the defendant's forum contacts must be "thought so substantial and of such a nature" to support the exercise of general jurisdiction.<sup>50</sup> But a question left unanswered by both *Perkins* and *Helicopteros* is the type of forum activities that satisfy the qualitative aspect of this analysis.

*Perkins* exhibits the unremarkable proposition that the situs of defendant's "principal, if temporary, place of business" is a contact of

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<sup>45</sup> *Id.* at 411, 416-17.

<sup>46</sup> *Id.* at 411.

<sup>47</sup> 260 U.S. 516 (1923). In *Rosenberg*, the plaintiff's cause of action was related to the defendant's forum activities. *Id.* at 518. Nevertheless, the Court held that "the fact that the alleged cause of action arose in New York is immaterial" as jurisdiction at that time required a finding that "defendant was doing business within the state . . . in such manner and to such extent to warrant the inference it was present there." *Id.* at 517-18. In other words, the Court was concerned only with what today would be characterized as general jurisdiction. See *Helicopteros*, 466 U.S. at 421 n.1 (Brennan, J., dissenting) ("If anything is clear from Justice Brandeis' opinion for the Court in *Rosenberg*, however, it is that the Court was concerned only with general jurisdiction over the corporate defendant.").

<sup>48</sup> *Helicopteros*, 466 U.S. at 417-18.

<sup>49</sup> See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (pronouncing that jurisdictional criteria "cannot be simply mechanical or quantitative" but instead must depend "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure").

<sup>50</sup> See *id.* at 318 (explaining that a defendant could be subject to jurisdiction based on continuous contacts with the forum "thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities").

a sufficiently substantial nature.<sup>51</sup> *Helicopteros* establishes that purchases and related trips, on the other hand, are not enough.<sup>52</sup> These decisions provide the extent of the Supreme Court's post-*International Shoe* interpretation of the qualitative aspect of the general jurisdictional calculus, other than cryptic references in two other opinions: one not disputing the proposition vital to the decision below that a major insurance company "doing business" in all fifty states could be amenable under general jurisdiction principles in each state,<sup>53</sup> and the other suggesting that defendant's sale of 10,000 to 15,000 magazines a month in the forum might not support general jurisdiction.<sup>54</sup> But the sum of these decisions lends de minimis assistance in resolving the substantiality of a host of other types of contacts.

The Supreme Court's decisions have also not articulated any type of theoretical approach underlying general jurisdiction, instead merely employing an ad hoc comparative analysis to prior precedent.<sup>55</sup> Intriguingly, though, such precedential comparisons include decisions predating, not just postdating, *International Shoe*. *International Shoe* itself cited several prior holdings that supported predicating jurisdiction on a defendant's continuous, substantial forum activities unrelated to the plaintiff's cause of action.<sup>56</sup> Likewise, *Perkins* referenced pre-*International Shoe* opinions as illustrative of the same doctrine.<sup>57</sup> And, most significantly, the *Helicopteros* Court primarily relied on a 1923 opinion authored by Justice Brandeis to reach its holding that purchases and related trips were insufficient for general jurisdiction.<sup>58</sup> The Court's continued

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<sup>51</sup> See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984).

<sup>52</sup> *Helicopteros*, 466 U.S. at 411-18.

<sup>53</sup> *Rush v. Savchuk*, 444 U.S. 320, 330 (1980).

<sup>54</sup> *Keeton*, 465 U.S. at 779-80 & n.11.

<sup>55</sup> See, e.g., *Helicopteros*, 466 U.S. at 416 (exploring the nature of the defendant's forum contacts "to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*"); *Keeton*, 465 U.S. at 779-80 & n.11 (opining Hustler Magazine's sale of 10,000 to 15,000 magazines a month in New Hampshire "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities" based on comparison to defendant's contacts in *Perkins*).

<sup>56</sup> *Int'l Shoe*, 326 U.S. at 318 (citing *Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 255 U.S. 565 (1921); *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218 (1915); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917)); see *supra* note 28.

<sup>57</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 n.6 (1952) (citing *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 268-69 (1917); *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898)); see *supra* note 28.

<sup>58</sup> *Helicopteros*, 466 U.S. at 417-18 (citing *Rosenberg Bros. & Co. v. Curtis Brown*

reliance on these antecedent opinions demonstrates that the contemporary doctrine of general jurisdiction emanates from pre-*International Shoe* jurisprudence. Nonetheless, this connection does not resolve the conundrum of the appropriate framework or theoretical basis for general jurisdiction because the constructs underlying these earlier opinions were explicitly disavowed as fictions in *International Shoe*.<sup>59</sup>

As a result, any further judicial guidance must be sought from the lower federal and state courts. But unfortunately, these courts often purport to find general jurisdiction by relying on the relationship of the defendant's forum contacts to the dispute.<sup>60</sup> Thus, the appropriate parameters of general jurisdiction must be demarcated before embarking on a doctrinal analysis.

## II. THE PARAMETERS OF DISPUTE-BLIND JURISDICTION

The distinction between specific and general jurisdiction appears rudimentary. *Helicopteros* articulated that specific jurisdiction is appropriate "in a suit arising out of or related to the defendant's contacts with the forum," whereas general jurisdiction exists for the assertion of jurisdictional power in suits "not arising out of or related to the defendant's contacts with the forum."<sup>61</sup> Yet alone these definitions are inadequate because they pretermitt the discrepancy in the state's jurisdictional power over the defendant in each circumstance.

As discussed previously, *International Shoe* incorporated two pre-existing jurisdictional concepts into its new model, one based solely on the relationship of the defendant to the forum providing jurisdiction for any cause of action and the other predicated on the nature of the specific dispute at issue.<sup>62</sup> To clarify the alterity between these two types of jurisdictional power, Professors von Mehren and Trautman, in an influential article, proposed employing the terminology "general jurisdiction" and "specific jurisdiction," which of course was later adopted by the Supreme Court.<sup>63</sup> Under their formulation, general jurisdiction referred to the exercise of jurisdiction over all claims against the defendant based solely on the

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Co., 260 U.S. 516 (1923)).

<sup>59</sup> *Int'l Shoe*, 326 U.S. at 316-17.

<sup>60</sup> See *infra* Part II.

<sup>61</sup> *Helicopteros*, 466 U.S. at 414 nn.8-9.

<sup>62</sup> See *supra* notes 22-28 and accompanying text.

<sup>63</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984) (citing von Mehren & Trautman, *supra* note 3, at 1136-64).

nature of the contacts between the defendant and the forum.<sup>64</sup> Specific jurisdiction, in contrast, granted adjudicatory power only “with respect to issues deriving from, or connected with, the very controversy that established jurisdiction to adjudicate.”<sup>65</sup>

Accordingly, a more precise distinction between general and specific jurisdiction is whether the relationship of the defendant’s contacts to the dispute impacts the court’s analysis of the requisite constitutional connection for jurisdiction. If the relationship of the defendant’s forum activities to the dispute influences the court’s jurisdictional holding, the court is exercising specific jurisdiction, which grants only limited adjudicative power over the defendant.<sup>66</sup> On the other hand, if the court does not rely upon any connection between the forum and the causes of action asserted, but instead bases its jurisdictional finding only on the defendant’s relationship with the forum, the court is exercising general adjudicative authority over any cause of action asserted against the defendant.<sup>67</sup>

Professor Twitchell proposed alternative nomenclature that would make this difference more pellucid in her seminal article, *The Myth of General Jurisdiction*.<sup>68</sup> She advocated that the exercise of general jurisdiction should be termed “dispute-blind” because the exercise of jurisdiction does not depend on the nature of or the facts involved in the dispute.<sup>69</sup> In contrast, she urged that jurisdiction predicated on the nature of the controversy should be referenced as “dispute-specific.”<sup>70</sup>

Professor Twitchell also proffered an insightful analytical device to ascertain whether a court is actually relying on true dispute-blind general jurisdiction.<sup>71</sup> Under this device, a court should construct a hypothetical claim without any forum connection to insure that any related forum activities of the defendant are not improperly infiltrating the dispute-blind query.<sup>72</sup> As an example: are the

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<sup>64</sup> von Mehren & Trautman, *supra* note 3, at 1136.

<sup>65</sup> *Id.*; see also *id.* at 1144-45 (noting specific jurisdiction “is limited to matters arising out of—or intimately related to—the affiliating circumstances on which the jurisdictional claim is based”).

<sup>66</sup> In fact, some courts refer to this basis of jurisdiction as “limited jurisdiction” or “transactional jurisdiction” rather than specific jurisdiction for this reason. See, e.g., *Hesse v. Best W. Int’l, Inc.*, 38 Cal. Rptr. 2d 74, 76-77 (Ct. App. 1995).

<sup>67</sup> Cf. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.5, at 72 (5th ed. 2001); *id.* § 2.8, at 87; von Mehren & Trautman, *supra* note 3, at 1136.

<sup>68</sup> Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 613, 680.

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.* at 642; Twitchell, *Doing-Business Jurisdiction*, *supra* note 5, at 205.

<sup>72</sup> See *supra* note 71.

corporate defendant's actual activities in California so pervasive and extensive that it should be amenable to the adjudicatory jurisdiction of California for a hypothetical employment discrimination claim filed by a New York citizen employed at corporate headquarters in New York? Or, with respect to a foreign corporation, do the corporation's actual California contacts support jurisdiction even for a hypothetical cause of action arising from its sale of a product in Germany that injured a German citizen? By constructing such a hypothetical, the court insures that the relationship between the defendant's forum activities and the dispute does not influence the jurisdictional query.

Unfortunately, however, many courts do not employ this simple analytical device, which would assist in restoring doctrinal purity to adjudicatory jurisdiction.<sup>73</sup> Instead, courts still often purport to employ general jurisdiction precepts while relying on the relationship of the litigation to the defendant's forum contacts.<sup>74</sup> This arises both in circumstances in which the defendant's related contacts are sufficient to satisfy current constitutional doctrine for specific jurisdiction and those in which the resolution of the specific jurisdiction query is not as certain.

A. *Decisions Purporting to Find General Jurisdiction by Relying on the Defendant's Contacts Clearly Giving Rise to the Litigation*

Amenability decisions frequently conflate dispute-specific and dispute-blind concepts even when the defendant's forum contacts actually give rise to the litigation.<sup>75</sup> The courts in these cases either ignore the dispute-blind nature of general jurisdiction or at least confuse its proper application.

In some of these instances, the court itself appears uncertain as to the proper basis for its holding.<sup>76</sup> These courts detail the defendant's contacts with the forum, some giving rise to the litigation while others do not, before concluding that the defendant's

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<sup>73</sup> *But see* Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331, 339 (5th Cir. 1999) (relying on "dispute-blind" nature of general jurisdiction query); *cf.* Sternberg v. O'Neil, 550 A.2d 1105, 1117 n.23 (Del. 1988) (noting Professor Twitchell's proposed "dispute-blind" terminology).

<sup>74</sup> *See* Twitchell, *Doing-Business Jurisdiction*, *supra* note 5, at 190.

<sup>75</sup> *See infra* notes 76-90.

<sup>76</sup> *See, e.g.*, Atlanta Auto Auction, Inc. v. G & G Auto Sales, Inc., 512 So. 2d 1334, 1335-36 (Ala. 1987) (holding Alabama court had "jurisdiction" over nonresident corporation without specifically articulating whether general or specific jurisdiction existed); *Waters v. Deutz Corp.*, 479 A.2d 273, 274-76 (Del. 1984) (holding foreign corporation was "doing business" within Delaware sufficient to satisfy the minimum contacts requirement for due process without iterating the basis).

“continuous and systematic” contacts establish the purposeful availment of the privilege of conducting business within the forum necessary to support jurisdiction.<sup>77</sup> Although these decisions cannot be properly considered dispute-blind because of the pervasive reliance on related contacts sufficient to support specific jurisdiction, subsequent courts, citing the “continuous and systematic” language, sometimes incorrectly interpret them as general jurisdiction decisions.<sup>78</sup> This misconception is unfortunate, especially for those courts that rely on precedential comparisons on the quantity and quality of contacts, because the defendant’s activities in the forum often are insufficient to establish true dispute-blind jurisdiction.<sup>79</sup>

Another even more common pitfall is to decree that general jurisdiction exists by relying, at least in part, on contacts giving rise to the litigation that are sufficient under current constitutional doctrine for specific jurisdiction.<sup>80</sup> Occasionally, the courts even iterate that

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<sup>77</sup> See, e.g., *Atlanta Auto Auction*, 512 So. 2d at 1334-36 (holding that nonresident corporation’s repeated wholesale auction sales of automobiles to dealers in Alabama, including the automobile at issue in the underlying lawsuit, was purposefully directed forum activity that constituted a “‘continuous and systematic’ course of conduct in Alabama” supporting jurisdiction); *Waters*, 479 A.2d at 274-76 (holding German corporation was “doing business” in Delaware by shipping its manufactured tractors, including the tractor injuring the Delaware plaintiff, through its wholly owned American subsidiary into Delaware).

<sup>78</sup> See, e.g., *Ex parte* Phase III Constr., 723 So. 2d 1263, 1264-65 (Ala. 1998) (interpreting *Atlanta Auto Auction*, 512 So. 2d 1334, as a general jurisdiction case); *Ex parte* United Bhd. of Carpenters, 688 So. 2d 246, 251-52 (Ala. 1997) (same).

<sup>79</sup> Compare *Atlanta Auto Auction*, 512 So. 2d at 1334-36 (holding that nonresident corporation’s repeated wholesale auction sales of automobiles to dealers in Alabama, including the automobile at issue in the underlying lawsuit, was purposefully directed, “‘continuous and systematic’ course of conduct in Alabama” supporting jurisdiction), with *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984) (noting in dictum that business contacts of 10,000 to 15,000 magazine sales in the forum a month might be insufficient for general jurisdiction).

<sup>80</sup> See, e.g., *Colonial Mortgage Serv. Co. v. Aerenson*, 603 F. Supp. 323, 326-27 (D. Del. 1985) (holding general jurisdiction appropriate in Delaware over Pennsylvania bank for cause of action arising from one of the bank’s Delaware mortgages); *Ex parte* Phase III Constr., 723 So. 2d at 1265 (finding general jurisdiction in Alabama over Virginia construction management corporation based solely on contacts related to underlying breach of contract action, the sole transaction the corporation ever conducted in Alabama); *Nichols v. Paulucci*, 652 So. 2d 389, 391-94 (Fla. Dist. Ct. App. 1995) (finding general jurisdiction in Florida over Kentucky corporation and individual in part because of contacts “regard[ing] the subject matter of this lawsuit,” such as their execution of guarantees on a mortgage on real property in Florida when they were being sued for breach of the loan agreement); *Zivalich v. Int’l Bhd. of Teamsters*, 662 So. 2d 62, 64-65 (La. Ct. App. 1995) (finding general jurisdiction over union in part because union job allegedly offered to plaintiff that was the basis of plaintiff’s breach of contract claim was to be partially performed in Louisiana); *Bruggeman v. Meditrust Acquisition Co.*, 532 S.E.2d 215, 219 (N.C. Ct. App. 2000) (holding Delaware corporation with a principal place of business in Florida subject

general jurisdiction is appropriate because either the suit arises from the defendant's contacts with the forum or the state has an interest in adjudicating disputes related to the forum.<sup>81</sup> Of course, by incorporating dispute-related contacts into the analysis, especially contacts alone sufficient to establish specific jurisdiction, these cases fall outside the ambit of true dispute-blind jurisdiction.<sup>82</sup>

More importantly, however, by relying on contacts giving rise to the litigation while purporting to find general jurisdiction, such decisions infuse a doctrinal impurity into the jurisdictional analysis. The harm is not limited to the particular decision, since a common methodology for resolving general jurisdiction queries is to compare the quantity and quality of contacts to those contacts found sufficient in prior cases.<sup>83</sup> Thus, subsequent cases contemplating a truly dispute-blind situation analogize to the contacts from a prior purported general jurisdiction case that, in fact, involved related contacts adequate to establish specific jurisdiction.<sup>84</sup> This inevitably dilutes the quantum and quality of activity necessary for dispute-blind general jurisdiction, culminating in "an impoverished body of general jurisdiction case law that fails to explore the question of the state's general adjudicatory power over nonresident defendants."<sup>85</sup>

Finally, still other courts rely on general jurisdiction as an

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to general jurisdiction in North Carolina in part because one of the real estate broker plaintiffs was a resident of North Carolina and the property for which the plaintiffs sought compensation was located in North Carolina); *Gen. Elec. Co. v. Brown & Ross Int'l Distribs., Inc.*, 804 S.W.2d 527, 531-32 (Tex. App. 1990) (finding New York corporation amenable to general jurisdiction in Texas based on the substantial sales of counterfeited GE parts in Texas when the basis for the lawsuit was the defendant's counterfeiting and theft of trade secrets).

<sup>81</sup> See, e.g., *Ex parte Phase III Constr.*, 723 So. 2d at 1264 (finding general jurisdiction in Alabama when plaintiff's "breach-of-contract action arises from [defendant's] contacts with Alabama"); *Nichols*, 652 So. 2d at 392 (relying on contacts "regard[ing] the subject matter of this lawsuit" in general jurisdiction analysis); *Bruggeman*, 532 S.E.2d at 219-20 (explaining "less extensive contacts" necessary for general jurisdiction because of forum's interest when plaintiff was a resident of forum state and case allegedly arose from contract to locate property in the state).

<sup>82</sup> See Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 613.

<sup>83</sup> See *infra* Part III.B.

<sup>84</sup> Compare *Temperature Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 676 (Tex. App. 1993) (citing *Design Information Systems v. Feith Systems & Software, Inc.*, 801 S.W.2d 569 (Tex. App. 1990), *aff'd in part and rev'd in part on other grounds*, 813 S.W.2d 481 (Tex. 1991), as support for general jurisdiction holding), and *Nikolai v. Strate*, 922 S.W.2d 229, 238-39 (Tex. App. 1996) (same), with *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 673 (Tex. App. 2001) (recognizing that the holding in *Design Info. Sys.* was based on the plaintiff being "a Texas resident whose cause of action arose out of and was directly related to the sale and shipment of the allegedly defective product to him in Texas by the nonresident defendant").

<sup>85</sup> Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 612.



alternative holding.<sup>86</sup> While judicial opinions commonly embrace alternative holdings, alternative findings on general jurisdiction are often dubious, apparently influenced by the relatedness of the contacts.<sup>87</sup> As an extreme example, the Oklahoma Supreme Court

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<sup>86</sup> See, e.g., *Replacements, Ltd. v. MidweSterling*, 515 S.E.2d 46, 51 (N.C. Ct. App. 1999) (holding in the alternative, if specific jurisdiction did not exist, general jurisdiction was appropriate because of Missouri defendant's business contacts with North Carolina plaintiff corporation, such as selling and shipping \$65,000 in merchandise, purchasing merchandise on ten occasions, placing telephone calls, and participating in joint programs); *Cherry Bekaert & Holland v. Brown*, 394 S.E.2d 651, 656-57 (N.C. Ct. App. 1990) (holding individual had sufficient "systematic and continuous" contacts with North Carolina" to establish general jurisdiction after finding jurisdiction based on execution of North Carolina partnership agreement that gave rise to the litigation); *Fraser v. Littlejohn*, 386 S.E.2d 230, 232-37 (N.C. Ct. App. 1989) (holding that judgment debtor was subject to general jurisdiction in North Carolina after concluding that prior Florida judgment against debtor was subject to full faith and credit in North Carolina, the only state in which the debtor had property); *Ferrell v. Prairie Int'l Trucks, Inc.*, 935 P.2d 286, 288 n.2 (Okla. 1997) (refusing to address distinction between specific jurisdiction and general jurisdiction in suit against truck dealer because sufficient contacts existed for the exercise of either based on dealer's advertisements and evidence of two forum sales); *Ahadi v. Ahadi*, 61 S.W.3d 714, 719-21 (Tex. App. 2001) (holding Michigan resident subject to general jurisdiction in Texas for guaranteeing twenty-three loans in Texas made to her husband's business after concluding that she was subject to specific jurisdiction because the plaintiff's claim arose out of her alleged promise made on the phone to him while he was in Texas); *Transportacion Especial Autorizada, S.A. de C.V. v. Seguros Comercial Am., S.A. de C.V.*, 978 S.W.2d 716, 719-21 (Tex. App. 1998) (holding Mexican transportation company amenable to both general and specific jurisdiction in Texas in suit arising from company's issuance of a bill of lading to transport equipment from Austin, Texas to Mexico City using itself and two Texas corporations when half of its business was derived from imports crossing the Texas border).

<sup>87</sup> See, e.g., *Cherry Bekaert & Holland*, 394 S.E.2d at 657 (holding in the alternative that there was general jurisdiction over an individual based on his participation in North Carolina accounting partnership); *Fraser*, 386 S.E.2d at 235-37 (holding in the alternative that individual was subject to general jurisdiction in North Carolina based primarily on his activities when he was residing in the forum two years before the suit was filed); *Ahadi*, 61 S.W.3d at 719-21 (finding general jurisdiction and specific jurisdiction over Michigan resident who personally guaranteed twenty-three loans in Texas made to her husband's business). These holdings are not dubious merely because they subject individuals to general jurisdiction based on continuous and systematic business activities, but also because their rationales collapse under *reductio ad absurdum*. Cf. *Burnham v. Superior Court*, 495 U.S. 604, 610 n.1 (1990) (Scalia, J., plurality) ("It may be that whatever special rule exists permitting 'continuous and systematic' contacts to support jurisdiction with respect to matters unrelated to activity in the forum applies only to corporations . . .") (citations omitted). The rationale of *Cherry Bekaert & Holland* would support general jurisdiction in North Carolina over a partner in a Washington branch office of a North Carolina-based law firm. 394 S.E.2d at 657. *Fraser* would allow general jurisdiction in North Carolina over an individual who resided and worked in North Carolina for several years who was still trying to sell his North Carolina home, although he moved to Alaska two years ago. 386 S.E.2d at 235-37. *Ahadi* apparently would support general jurisdiction over a father in Michigan guaranteeing loans and leases for his children attending

found general jurisdiction over a corporation based on advertisements in Oklahoma and evidence of two forum sales.<sup>88</sup> But this finding cannot properly be uncoupled from the court's judgment on the appropriateness of specific jurisdiction when one of the forum sales actually gave rise to the litigation—indeed, the court provided a unitary analysis for its dual holding.<sup>89</sup> And certainly, advertisements and evidence of two sales is not truly substantial enough, either qualitatively or quantitatively, for general jurisdiction.<sup>90</sup> Such insignificant activities should not render the nonresident corporation amenable to jurisdiction on any cause of action having absolutely no connection to Oklahoma, such as an employment discrimination claim filed by an employee hired and working in another state.

Hence, holdings finding general jurisdiction after finding specific jurisdiction are of practically no value in clarifying general jurisdiction. These decisions, along with those in which the basis of the holding is ambiguous or in which related contacts exist sufficient to establish specific jurisdiction, are not incorporated into this Article's doctrinal analysis of general adjudicatory jurisdiction decisions. Such judicial determinations cannot be adjudged dispute-blind when dispute-specific contacts justified their holdings.

*B. General Jurisdiction Cases Involving Contacts Tenuously Related to the Dispute*

The more difficult question is the appropriate categorization of those cases involving at least one dispute-related contact, although the relationship might be insufficient under current constitutional doctrine for specific jurisdiction. Rather than finding jurisdiction predicated on the problematic specific jurisdiction question, the court embarks on a general jurisdiction query.<sup>91</sup> The quandary such

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college in Texas. 61 S.W.3d at 719-21. Such tenuous business contacts by an individual with the forum are not sufficient to force them to defend a wholly unrelated matter in the forum.

<sup>88</sup> *Ferrell*, 935 P.2d at 288 & n.2.

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

<sup>90</sup> *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984) (noting in dictum that business contacts of 10,000 to 15,000 magazine sales in the forum a month might be insufficient for general jurisdiction); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 624 (4th Cir. 1997) (holding mail-order New Hampshire limited liability company not subject to general jurisdiction in South Carolina based on sales made to twenty-six South Carolina customers, although finding jurisdiction appropriate under RICO's nationwide service provision).

<sup>91</sup> *See, e.g., Thomason v. Chem. Bank*, 661 A.2d 595, 605 n.9 (Conn. 1995) (noting that disposition of case on general jurisdiction grounds obviated need to resolve specific jurisdiction issue).

cases pose for this Article is whether they should be incorporated into the dispute-blind doctrinal analysis when the dispute-related contacts perhaps, even subconsciously, influenced the court's decision. This Article reaches a compromise solution for these cases, depending on whether the court's *ratio decidendi* explicitly relies on the related contact.

In many of these cases, the courts' holdings rely on the relationship of the contacts to the dispute.<sup>92</sup> An example is *Glover v. Western Air Lines, Inc.*<sup>93</sup> The nonresident defendant, Avis U.S., was a franchisor licensing the Avis name and exercising "considerable control" over its franchisees, including several in Alaska, one of which paid Avis U.S. approximately \$11,000 during a single year.<sup>94</sup> Avis U.S. also placed advertising in national and international publications calculated to reach Alaskan consumers and maintained a toll-free number for Alaskans to make reservations for a rental car anywhere in the world.<sup>95</sup> The Alaska Supreme Court held that these contacts with Alaska were "of a continuing, systematic, routine and substantial nature," subjecting Avis U.S. to general jurisdiction in Alaska.<sup>96</sup> The court then continued that it was not unreasonable to subject Avis to the jurisdiction of Alaska's courts when the Alaskan plaintiffs alleged its advertising in Alaska *caused them* to rent the car in Mexico.<sup>97</sup> Of course, advertising in Alaska that caused the plaintiffs to rent the car was an activity at least related to the dispute, a contact that some (but

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<sup>92</sup> See, e.g., *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986) (holding that, although individual's business contact was not sufficient to support an exercise of specific jurisdiction, "the fact that some connection exists between [plaintiff], the forum, and the controversy involved in the instant case is nevertheless relevant to our determination [of general jurisdiction]"); *Johnson Worldwide Assocs., Inc. v. Brunton Co.*, 12 F. Supp. 2d 901, 910-13 (E.D. Wis. 1998) (finding general jurisdiction in Wisconsin over Wyoming corporation when its forum connections, although not giving rise to the litigation, "relate[d] to the sale of compasses—the heart of this very case"); *Hurlston v. Bouchard Transp., Co.*, 970 F. Supp. 581, 582-83 (S.D. Tex. 1997) (holding general jurisdiction appropriate over nonresident owner and manager of vessel for claim arising from a personal injury suffered by the ship's engineer off the coast of Florida in part because "the voyage at issue originated in Texas"); *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767, 773 (Tex. App. 1999) (relying in part on "contacts with Texas related to this suit," such as the plane that crashed in New Zealand killing six foreign nationals was originally sold to Texas residents and then allegedly defectively modified in Texas, in finding general jurisdiction over Kansas aircraft manufacturer), *disapproved on other grounds*, *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

<sup>93</sup> 745 P.2d 1365 (Alaska 1987).

<sup>94</sup> *Id.* at 1366-67.

<sup>95</sup> *Id.* at 1367.

<sup>96</sup> *Id.* at 1369.

<sup>97</sup> *Id.* at 1370.

not most) courts have held under analogous circumstances to be sufficient to support specific jurisdiction.<sup>98</sup>

The courts' reliance in such cases on a contact related to the dispute precludes their inclusion as paradigmatic dispute-blind decisions. Would the Alaska Supreme Court have found Avis U.S. amenable to jurisdiction if the dispute had not involved alleged misrepresentations, fraudulent omissions, and unfair trade practices directed at Alaskan residents, but instead involved plaintiffs residing in Florida receiving Avis's advertising in that state? But, on the other hand, categorizing the decisions as quintessential specific jurisdiction cases is difficult when the courts may have correctly disavowed any reliance on specific jurisdiction principles.<sup>99</sup>

Thus, these cases actually form a mutated, hybrid jurisdiction, neither truly specific nor truly general. Certainly, an argument can be made in favor of recognizing a hybrid jurisdictional basis.<sup>100</sup> A fundamental focus of the minimum contacts analysis is fairness, and a sliding scale, one could argue, is more fair and just than a rigid

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<sup>98</sup> See, e.g., *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 383-84 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Rutherford v. Sherburne Corp.*, 616 F. Supp. 1456, 1460-61 (D.N.J. 1985); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 554 (Mass. 1994). But see *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267-68 (E.D. Pa. 1991) (citing several cases rejecting *Shute* rationale); *Hesse v. Best W. Int'l, Inc.*, 38 Cal. Rptr. 2d 74, 76 (Ct. App. 1995) (rejecting advertisements to and solicitation of forum residents as a basis for specific jurisdiction when the injury occurred in another jurisdiction); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 676-77 (Minn. Ct. App. 2000) (same). Additional factors besides defendant's advertising may also have supported specific jurisdiction in the *Glover* case. The plaintiffs were injured by Mexican bandits as they were driving a vehicle rented from a Mexican Avis franchisee. *Glover*, 745 P.2d at 1366. The plaintiffs' suit alleged that Avis U.S. committed unfair trade practices, made misrepresentations and fraudulent statements, and failed to warn of the hazards of renting a car in Mexico. *Id.* If any of these alleged misrepresentations or fraudulent statements had been directed at the plaintiffs while in Alaska, specific jurisdiction might have been proper on this basis. See, e.g., *Calder v. Jones*, 465 U.S. 783, 789 (1984); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972).

<sup>99</sup> See, e.g., *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777-79 (5th Cir. 1986) (rejecting existence of specific jurisdiction in Texas as a result of contract executed with Texas resident but then determining "the fact that some connection exists between [plaintiff], the forum, and the controversy involved in the instant case is nevertheless relevant to our determination [of general jurisdiction]").

<sup>100</sup> See William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1345 (1984) (proposing a sliding scale approach to jurisdiction under which, "[a]s the quantity and quality of the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible; as the quantity and quality of the defendant's forum contacts decrease, a stronger connection between the plaintiff's claim and those contacts is required").

application of two categories.<sup>101</sup> Nevertheless, there are difficulties inherent in such an approach. First, and most importantly, the Supreme Court at least implicitly rejected the existence of hybrid jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.<sup>102</sup> *Helicopteros* did not consider the nature of the dispute in any fashion in denying Texas general adjudicatory jurisdiction, even though a number of the defendant's Texas activities were at least tangentially related to the lawsuit.<sup>103</sup> Second, as Professor Twitchell articulated, such a hybrid, or conditional, basis for jurisdiction inevitably dilutes the requirements for general jurisdiction and weakens the jurisprudential foundations of both specific and general jurisdiction.<sup>104</sup> Instead of discerning the outer limits of specific jurisdiction, courts invoke the hybrid analysis as a convenient fallback. Then subsequent cases contemplating a truly dispute-blind situation analogize to the contacts from prior hybrid cases, diluting the corporate activity necessary for dispute-blind jurisdiction and hindering the development of a cogent theoretical basis for either general or specific jurisdiction.<sup>105</sup> As a result of these difficulties, the better reasoned decisions reject the existence of a hybrid jurisdictional basis.<sup>106</sup>

In any event, such hybrid holdings are omitted from this Article's doctrinal analysis. At most, a hybrid holding only illustrates that the court deemed jurisdiction appropriate in that particular case predicated on a mixture of dispute-related and unrelated contacts.

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<sup>101</sup> See *id.*; cf. *Holt Oil & Gas*, 801 F.2d at 779 n.5 (noting that, although "the distinction between 'general' and 'specific' jurisdiction provides a useful analytic device, the use of these categories does not alter the fundamental [fairness] focus of the minimum contacts inquiry").

<sup>102</sup> 466 U.S. 408 (1984).

<sup>103</sup> *Id.* at 416-18. The related contacts included a trip to Texas by the defendant's chief executive officer for a negotiating session on the helicopter services contract by which the defendant was transporting plaintiffs' decedents, payments under this same contract from a Texas bank, purchases of almost all the helicopters in defendant's fleet (including the one involved in the crash) from the forum, and training for defendant's pilots (including the pilot of the crashed helicopter) in Fort Worth, Texas. *Id.* at 410-12; see also *id.* at 425-26 (Brennan, J., dissenting). But, despite the related nature of these contacts, the Court never allowed relatedness to enter its general jurisdiction calculus. See Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 651 (averring *Helicopteros* Court thus "implicitly reaffirmed the principle that it will not look to the nature of the dispute in considering the propriety of subjecting a defendant to general jurisdiction in the forum").

<sup>104</sup> See *id.* at 612-13, 650; see also Simard, *supra* note 3, at 580.

<sup>105</sup> See Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 612-13, 650.

<sup>106</sup> See, e.g., *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997) (rejecting the existence of "a hybrid between specific and general jurisdiction" based on Supreme Court precedent).

Due to this partial reliance on contacts related to the dispute to justify the assertion of jurisdiction, these decisions do not assist in demarcating a state's general adjudicative authority over causes of action with no relationship to the defendant's forum activities.

In other decisions with tenuously connected contacts, however, the courts disavow any reliance on the related contacts. Despite reciting an asserted, but debatable, basis for specific jurisdiction, the courts either reject or refuse to address the contention.<sup>107</sup> The courts then conduct an appropriate dispute-blind analysis, ignoring the arguable relatedness of the contacts to the litigation.<sup>108</sup> Because these courts properly omit any consideration of relatedness in the general jurisdiction query, the traditional criteria for dispute-blind jurisdiction are satisfied. The court's holding is apparently based solely on the defendant's relationship with the forum, justifying jurisdiction for any cause of action irrespective of any potential relationship of the litigation to the defendant's forum activities. Nevertheless, it is still possible that the tenuously related contacts may have had some underlying, unstated impact on the court.<sup>109</sup>

This Article hence adopts a compromise with respect to these decisions, incorporating them in the analysis of general jurisdiction decisions, but at least footnoting the existence of related contacts that might have influenced the court. In contrast, any decisions in which the court explicitly relied on the relatedness of the defendant's

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<sup>107</sup> See, e.g., *Hesse v. Best W. Int'l, Inc.*, 38 Cal. Rptr. 2d 74, 76-77 (Ct. App. 1995) (holding general jurisdiction, but not "transactional" or specific jurisdiction, existed over defendant with California sales office for California resident's claim that he received advertisement and made reservation in California for defendant's hotel in Mexico where he was injured); *Thomason v. Chem. Bank*, 661 A.2d 595, 605 & n.9 (Conn. 1995) (refusing to consider specific jurisdiction over New York trustee bank based on finding of general jurisdiction); *Verdin v. Morania Oil Tanker Corp.*, 655 So. 2d 542, 543-44 (La. Ct. App. 1995) (holding Louisiana recruitment efforts of Delaware shipping corporation with principal place of business in New York too attenuated to plaintiff's employment to support specific jurisdiction, but that general jurisdiction existed because of transportation services provided in Louisiana); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 676-77 (Minn. Ct. App. 2000) (holding general jurisdiction proper, rather than specific jurisdiction, over a Wisconsin resort that directed an advertisement at a Minnesota resident who was injured while vacationing at the resort); *Bachman v. Med. Eng'g Corp.*, 724 P.2d 858, 860-61 (Or. Ct. App. 1986) (holding Washington resident who suffered continued pain from alleged torts after moving to Oregon had to establish general jurisdiction in Oregon, not specific jurisdiction, over nonresident doctors, hospital, and medical equipment manufacturer who often served Oregon residents).

<sup>108</sup> See, e.g., *Hesse*, 38 Cal. Rptr. 2d at 76-77; *Thomason*, 661 A.2d at 605; *Verdin*, 655 So. 2d at 543-44; *Marshall*, 610 N.W.2d at 676-77; *Bachman*, 724 P.2d at 860-61.

<sup>109</sup> Cf. John T. McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1 (1985) (maintaining the Supreme Court's personal jurisdiction decisions are often influenced by hidden agendas).

forum contacts have been omitted from the subsequent doctrinal analysis.

### III. DOCTRINAL APPROACHES TO GENERAL JURISDICTION

The federal and state courts utilize several disparate approaches to resolving dispute-blind jurisdiction queries. While the parameters of these models are not well defined—indeed, it is not uncommon for a single decision to incorporate more than one approach<sup>110</sup>—six basic patterns may be divined from a review of the case law. Some courts use a conclusory, *ipse dixit* approach,<sup>111</sup> while others rely primarily on comparisons to precedent.<sup>112</sup> Additional methods include evaluating either a factor index or the defendant's principal business activities.<sup>113</sup> Still other jurisdictions employ foundational constructs such as presence or *quid pro quo*.<sup>114</sup> But, as discussed below, none of these approaches is satisfactory.

#### A. *The Ipse Dixit Approach*

A misguided, yet unfortunately common, state court approach to evaluate general jurisdiction is merely to list the defendant's forum contacts and hold that such contacts, without considering either their quality or nature, demonstrate the requisite "continuous and systematic" business activities.<sup>115</sup> The court's "rationale" is, in essence, the assertion that the contacts are sufficient for jurisdiction. For instance, the Louisiana court's *ratio decidendi* in *Verdin v. Morania Oil Tanker Corp.*<sup>116</sup> was solely the dictate that "defendant's overall contacts with this state [of having a ship repaired at a Louisiana shipyard and

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<sup>110</sup> See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124-25 (9th Cir. 2002) (relying on precedent and constructive presence theory); *Soma Med. Int'l, Inc. v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999) (employing a list of factors and comparisons to precedent); *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 650 (D. Utah 1998) (same); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 808-09 (Tex. 2002) (using a reciprocal benefits theory and precedential comparisons).

<sup>111</sup> See *infra* Part III.A.

<sup>112</sup> See *infra* Part III.B.

<sup>113</sup> See *infra* Parts III.C-D.

<sup>114</sup> See *infra* Parts III.E-F.

<sup>115</sup> Federal district courts on rare occasions are also guilty of employing this approach. See, e.g., *Resnick v. Manfredy*, 52 F. Supp. 2d 462, 469 (E.D. Pa. 1999) (holding summarily that a law firm with its sole office in Chicago was subject to general jurisdiction in Pennsylvania solely because its client list revealed that it had assisted fifty-four past and present Philadelphia clients on legal matters, although the court did not consider either the method of solicitation of the clients or the relative quantity or quality of the firm's Philadelphia business).

<sup>116</sup> 655 So. 2d 542 (La. Ct. App. 1995).

providing marine transportation to a Louisiana corporation three to five times a year] . . . are sufficient to provide general jurisdiction.”<sup>117</sup> Courts in Connecticut,<sup>118</sup> Florida,<sup>119</sup> Indiana,<sup>120</sup> and Texas,<sup>121</sup> to name a

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<sup>117</sup> *Id.* at 544 (holding Delaware corporation with principal place of business in New York subject to general jurisdiction in Louisiana for workplace injury in New Jersey of Louisiana domiciliary hired in New York).

<sup>118</sup> *See, e.g.,* Thomason v. Chem. Bank, 661 A.2d 595, 605 (Conn. 1995) (holding New York trustee bank with no offices in Connecticut performed “continuous and systematic” business in Connecticut through “substantial credit card business,” regular solicitation of “general banking business,” and mortgagee title to a “substantial” amount of real property in claim for mismanagement of a trust).

<sup>119</sup> *See, e.g.,* Woods v. Nova Cos. Belize, 739 So. 2d 617, 619, 620-21 (Fla. Dist. Ct. App. 1999) (holding Belizean shrimping corporation engaged in the continuous and systematic business activities with Florida necessary for general jurisdiction in lawsuit filed by Belizean citizen injured in Costa Rica through selling eighteen percent of its shrimp to Florida importers, moving almost all of its shipments through Florida either by air or boat, purchasing a variety of equipment and supplies from Florida sellers, using storage facilities in Florida when necessary, and utilizing a Florida broker for customs and FDA approval). *Achievers Unlimited, Inc. v. Nutri Herb, Inc.*, 710 So. 2d 716, 720 (Fla. Dist. Ct. App. 1998), employed a similar methodology in holding that a California resident’s three-year business involvement as a distributor for a Florida corporation and subsequent involvement as a distributor for a competing company established continuous and systematic business contacts with Florida. However, *Achievers* could have been decided as a specific jurisdiction case since the defendant allegedly engaged in an organized campaign to defame and disparage her former Florida distribution company and injure its business relationship with its distributors. *Id.* at 718; *cf.* *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding specific jurisdiction existed in California over Florida citizens intentionally directing defamatory statements at forum); *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 719 (5th Cir. 1999) (holding that allegation that Mexican telecommunications corporation violated United States antitrust law by intentionally canceling a telephone line to harm a Texas business was sufficient to grant Texas courts specific jurisdiction over the claim).

<sup>120</sup> *See, e.g.,* Anthem Ins. Cos. v. Tenet Healthcare Corp., 730 N.E.2d 1227, 1238-40 (Ind. 2000) (holding Nevada corporation with principal place of business in California subject to general jurisdiction in Indiana in suit alleging that one of its subsidiaries had submitted fraudulent claims to an Indiana insurance company through collective examination of parent corporation’s contacts, including twenty-eight corporate business trips to visit hospitals owned by subsidiaries in Indiana, \$385,000 in business transactions with Indiana entities in a five-year period, correspondence regarding Medicare and Medicaid audits to Indiana regulatory agencies, and prior defense and settlement of a lawsuit in Indiana).

<sup>121</sup> *See, e.g.,* Temperature Sys., Inc. v. Bill Pepper, Inc., 854 S.W.2d 669, 676 (Tex. App. 1993) (holding Wisconsin corporation distributing HVAC equipment in Wisconsin, Michigan, and northern Illinois amenable to general jurisdiction in Texas in suit arising out of alleged breach of employee recruitment contract because of corporation’s purchases in Texas of equipment and an inter-distributor relationship with all authorized United States distributors, including those in Texas); *Project Eng’g USA Corp. v. Gator Hawk, Inc.*, 833 S.W.2d 716, 722 (Tex. App. 1992) (finding general jurisdiction in suit alleging tortious conversion in California over a California corporation that had served as a sales representative or distributor in California for three Texas companies); *Lujan v. Sun Exploration & Prod. Co.*, 798 S.W.2d 828, 831-32 (Tex. App. 1990) (holding New Mexico corporation subject to general



few, have similarly exercised jurisdiction predicated on nothing more than a conclusion.

This general jurisdiction template is fraught with difficulties. First, many of the holdings are wrong, some even directly contravening Supreme Court precedent. For instance, the most significant forum contact in two Texas decisions appears to be the nonresident corporation's purchases from Texas businesses.<sup>122</sup> But the Supreme Court held in *Helicopteros* that such purchases were insufficient to establish general jurisdiction.<sup>123</sup> A similar deficiency is exhibited in those cases relying primarily on sporadic forum sales despite the Supreme Court's intimation that even more regular and continuous sales are not enough for dispute-blind adjudication.<sup>124</sup> Such grave judicial errors eviscerate the fundamental constitutional rights of the aggrieved litigants.

Yet even more importantly, a mere listing of contacts and conclusory determination of sufficiency provides no guidance for future cases as to the requisites for general jurisdiction. Indeed, some cases are devoid of any specificity regarding the nature of the

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jurisdiction in Texas for accident occurring in New Mexico to New Mexican employee by relying on corporation's occasional performance of work in Texas under one of its two contracts to perform oil field services on an "as needed basis," its insurance coverage for any accidents in Texas, its occasional trips to Texas to purchase supplies, and its advertisements in a trade publication distributed in Texas and New Mexico). The only "rationale" in these cases is merely the question-begging conclusion that the defendant should have "reasonably anticipated the call of a Texas court" based on its contacts, without appreciating the distinction in general jurisdiction cases that the contacts must be so substantial, both quantitatively and qualitatively, that the defendant would expect that it would be required to defend in Texas any cause of action arising anywhere in the world. See *Temperature Sys.*, 854 S.W.2d at 674; *Project Eng'g USA*, 833 S.W.2d at 721-22.

<sup>122</sup> See, e.g., *Temperature Sys.*, 854 S.W.2d at 676 (involving corporation's purchases in Texas); *Project Eng'g USA*, 833 S.W.2d at 722 (involving a California corporation acting as distributor for Texas companies, purchasing their products and selling in California).

<sup>123</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 417-18 (1984). The Texas courts' disregard of *Helicopteros* is quite remarkable considering the Supreme Court reversed the judgment of the Texas Supreme Court in that case. *Id.* at 419.

<sup>124</sup> Compare *Verdin v. Morania Oil Tanker Corp.*, 655 So. 2d 542, 544 (La. Ct. App. 1995) (holding Delaware corporation with principal place of business in New York subject to general jurisdiction in Louisiana for workplace injury in New Jersey of Louisiana domiciliary hired in New York because corporation provided marine transportation services and equipment to Louisiana corporation five or less times per year and had one of its ships repaired at a Louisiana shipyard), with *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984) (noting in dictum that business contacts of 10,000 to 15,000 magazine sales in the forum a month might be insufficient for general jurisdiction).

contacts at issue.<sup>125</sup> For example, in *Thomason v. Chemical Bank*,<sup>126</sup> the court held a New York bank subject to general jurisdiction in Connecticut, despite the lack of a Connecticut branch office, as a result of the bank's "substantial" forum credit card business and "substantial" forum real property holdings as a mortgagee.<sup>127</sup> But what did the court mean by the term "substantial"? Was this term used in the qualitative or quantitative sense? If employed as a quantitative yardstick, was it \$11,000 in business, as some courts have found to be "substantial" enough for jurisdiction?<sup>128</sup> Or was it hundreds of thousands, or even millions of dollars? The court's opinion offers no indication,<sup>129</sup> a quite "substantial" defect in its own right.

A defendant is not amenable under even specific jurisdiction principles unless it could reasonably anticipate being haled into the

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<sup>125</sup> See, e.g., *Project Eng'g USA*, 833 S.W.2d at 720-22 (finding general jurisdiction in Texas over California corporation that had served as a sales representative or distributor in California for three Texas companies without quantifying the business performed for these Texas companies on either an absolute, transactional, or percentage basis, other than to note that only one sale had been made for one of the companies and that the agreement with another company had been terminated); *Lujan*, 798 S.W.2d at 831-32 (holding New Mexico corporation subject to general jurisdiction in Texas in large part because of performing "work in west Texas for others" without specifying the amount of work performed).

<sup>126</sup> 661 A.2d 595 (Conn. 1995). The *Thomason* case involved some dispute-related contacts in that the settlor of the trust at issue was a resident of Connecticut, the beneficiaries were residents of Connecticut, and the trustee bank held informational meetings in Connecticut regarding the trust. *Id.* at 597-98. But the settlor both executed the trust in New York and directed that all communications related to the administration of the trust be sent to him at his office in New York. *Id.* at 597. Additionally, New York law governed the trust agreement and the trust assets were always held and administered in New York. *Id.* As a result, the existence of specific jurisdiction was at least a close question under *Hanson v. Denckla*, 352 U.S. 235, 252 (1958), which held that a foreign corporate trustee was not subject to specific jurisdiction in the state in which the settlor and beneficiaries resided. The court in *Thomason* explicitly refused to resolve the specific jurisdiction issue, instead relying solely on dispute-blind contacts to find general jurisdiction over the trustee bank in Connecticut. *Thomason*, 661 A.2d at 605 & n.9.

<sup>127</sup> *Id.* at 598, 605; see also *Verdin*, 655 So. 2d at 544 (holding Delaware corporation with principal place of business in New York subject to general jurisdiction in Louisiana for workplace injury in New Jersey to Louisiana domiciliary hired in New York because corporation provided marine transportation services and equipment to Louisiana corporation five or less times per year without indicating either the absolute or percentage of revenue generated from such services in Louisiana).

<sup>128</sup> See, e.g., *Glover v. W. Air Lines, Inc.*, 745 P.2d 1365, 1368 (Alaska 1987) (holding collection of \$10,985.12 from an Alaskan franchise contract was alone "more than sufficient to characterize Avis U.S.' business activities within Alaska as 'substantial'").

<sup>129</sup> *Thomason*, 661 A.2d at 597, 605.

state's courts.<sup>130</sup> Of course, this concept applies a fortiori to general jurisdiction.<sup>131</sup> If the defendant cannot reasonably anticipate that it has submitted to the sovereign authority of the forum for all causes of action, the defendant should not be amenable to general *in personam* jurisdiction. But a mere listing of contacts, using perfunctory adjectives such as "substantial" without providing any qualitative or quantitative analysis, provides no basis for a defendant to predict what activities will subject it to the sovereignty of the forum.

This offends the fundamental precept that corporations are entitled to structure their transactions to avoid the sovereign jurisdictional prerogative of a foreign state.<sup>132</sup> As the Supreme Court recognized, a corporation with notice that it is amenable to suits within the forum can either act to alleviate the risk by procuring insurance or passing its increased costs to consumers, or it can sever its connection with the forum if it determines that the risks are too substantial.<sup>133</sup> But if the corporation is without notice as to what activities are sufficient for general jurisdiction, not only can it not adequately factor the risk, it has no guidance on what is necessary to sever the relationship. Therefore, the *ipse dixit* approach violates one of the underlying premises of our current jurisdictional paradigm.

The final defect of this model is that a collective examination of the contacts often ignores the quality or substantiality of any one contact in contravention of the *Helicopteros* methodology, where the

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<sup>130</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (delineating that defendants must have "fair warning" that their activities subject them to the jurisdiction of the forum's courts).

<sup>131</sup> See, e.g., *Int'l Med. Group v. Am. Arbitration*, 312 F.3d 833, 847 (7th Cir. 2002) (holding exercise of general personal jurisdiction improper when nonresident defendant "could not reasonably anticipate being haled into court" on the basis of its forum activities); *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2001) (same).

<sup>132</sup> See, e.g., *World-Wide Volkswagen*, 444 U.S. at 297 (noting Due Process Clause "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit"); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (avowing that a defendant's "obvious intent to exercise its due process rights" by deliberately executing its contracts outside of the forum state "should not be disregarded lightly"); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 375-76 (5th Cir. 1987) (acknowledging nonresident defendant's "right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states"); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 808 (Tex. 2002) (explaining that a nonresident defendant that "purposefully structures transactions to avoid the benefits and protections of a forum's laws" is not amenable to general jurisdiction).

<sup>133</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

Court examined the nature of each contact separately.<sup>134</sup> As an example, in *Anthem Insurance Companies, Inc. v. Tenet Healthcare Corp.*,<sup>135</sup> the Indiana Supreme Court refused to consider the individual substantiality of any of the defendant's forum contacts, instead describing all the contacts collectively and summarily holding that they were sufficient to establish general personal jurisdiction.<sup>136</sup> But while the sum of the contacts should eventually be examined, this should not be accomplished without some consideration of the qualitative nature of the particular contacts.<sup>137</sup> The sum of nothing and nothing is still nothing; thus, the courts should scrutinize each type of forum activity to determine that it equates to something before collectively reviewing the defendant's contacts.

In sum, the *ipse dixit* approach is without any redeeming virtue. The decisions following this template are often specious. From a jurisprudential perspective, the approach is even worse, because it fails to provide any guidance for future decisions. It thus contravenes the due process maxim that defendants must reasonably expect to be amenable to the forum before the exercise of jurisdiction is appropriate.<sup>138</sup>

#### B. Precedential Comparisons

The most frequently adopted construct for resolving general jurisdiction queries is comparing the quality and quantity of the defendant's forum activities to the quantum of activities in other decisions.<sup>139</sup> As an example, the Fifth Circuit's rationale for rejecting

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<sup>134</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416-18 (1984).

<sup>135</sup> 730 N.E.2d 1227 (Ind. 2000).

<sup>136</sup> *Id.* at 1238-40.

<sup>137</sup> *See Helicopteros*, 466 U.S. at 416-18.

<sup>138</sup> *See World-Wide Volkswagen*, 444 U.S. at 297; *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (delineating that defendants must have "fair warning" that their activities subject them to the jurisdiction of the forum's courts).

<sup>139</sup> *See, e.g., United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 620 (1st Cir. 2001) (concluding foreign defendant bank's contacts of advertising and entering into various contracts, including a joint venture with a forum bank and correspondent banking relationships and accounts with four forum banks, were "less continuous and systematic than contacts found to be insufficient for general jurisdiction in previous cases"); *Noonan v. Winston Co.*, 135 F.3d 85, 93 (1st Cir. 1998) (being "guided by the types of contacts deemed sufficiently continuous and systematic in other cases" to hold British corporation regularly soliciting business and obtaining \$585,000 in orders from a Massachusetts corporation was not amenable to general jurisdiction in Massachusetts); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 624 (4th Cir. 1997) (holding mail-order New Hampshire limited liability company not subject to general jurisdiction in South Carolina based on sales made to twenty-six South Carolina customers because such contacts were much less extensive than the contacts found sufficient in prior general jurisdiction decisions); *Metro. Life Ins. Co.*

the existence of dispute-blind jurisdiction in *Submersible Systems, Inc. v.*

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v. Robertson-Ceco Corp., 84 F.3d 560, 571-73 (2d Cir. 1996) (finding adequate minimum contacts for general jurisdiction in Vermont over Delaware corporation with principal place of business in Pennsylvania for acts and omissions occurring in Texas and Florida based on comparing its contacts, such as sales, relationships with Vermont dealers, and deliberate targeted advertising in Vermont, to contacts held sufficient for general jurisdiction in other federal cases before concluding exercise of general jurisdiction would be unreasonable); Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 464-66 (6th Cir. 1989) (holding an Alabama corporation was subject to general jurisdiction in Michigan by equating its sales activities and solicitation efforts in the state to activities held to be sufficient in prior Michigan state court decisions); Robbins v. Yutopian Enters., Inc., 202 F. Supp. 2d 426, 439 (D. Md. 2002) (rejecting the propriety of dispute-blind jurisdiction because the nonresident defendant's advertisements and forty-six forum transactions "pale[d] in comparison even to those of defendants in other cases where the Fourth Circuit has found general jurisdiction lacking"); Haas v. A.M. King Indus., Inc., 28 F. Supp. 2d 644, 649-50 (D. Utah 1998) (opining nonresident's national and regional advertisements, direct mailings to the forum, a website accessible in the forum, one percent of its total sales to the forum, and presence of equipment in the forum were "substantially less significant" contacts with the forum than existed in *Helicopteros*); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 270 (E.D. Pa. 1991) (holding New Jersey motor inn's mailing of brochures to and solicitation of Pennsylvania citizens was insufficient to establish general jurisdiction in Pennsylvania because prior cases finding general jurisdiction "involved much more contact between the defendant and the forum state than that involved here"); Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt., Inc., 726 So. 2d 313, 314-16 (Fla. Dist. Ct. App. 1999) (holding Delaware corporation subject to general jurisdiction in Florida, after finding that the contract at issue did not have the required nexus to the forum for specific jurisdiction, by comparing its broadcasting of infomercials on forty-eight Florida cable channels to prior cases regarding television commercials and concerted mailings and by analogizing its \$1.75 million in annual sales to Florida residents via phone orders and mail to other sales cases); Dunham v. Hunt Midwest Entm't, Inc., 520 N.W.2d 216, 222 (Neb. Ct. App. 1994) (concluding requirements of general jurisdiction had not been satisfied against nonresident amusement park conducting forum advertising "based on *Helicopteros* [and] other cases"); Ash v. Burnham Corp., 343 S.E.2d 2, 5 (N.C. Ct. App.) (positing that Supreme Court precedent led to the conclusion that a nonresident defendant's \$520,000 of annual sales to forum residents through independent contractors was insufficient to establish jurisdiction when the plaintiff's cause of action did not arise out of such a sale), *aff'd*, 349 S.E.2d 579 (N.C. 1986) (per curiam); Deerinwater v. Circus Circus Enters., 21 P.3d 646, 651 (Okla. Civ. App. 2001) (determining nonresident casino owner's forum advertising contacts were comparable to the contacts held insufficient for general jurisdiction in *Ash* and were "less substantial than those of the non-resident corporation in *Helicopteros*"); Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 809 (Tex. 2002) (holding that dispute-blind jurisdiction was inappropriate in Texas because the facts were "more closely aligned with *Helicopteros* than with *Perkins*"); James v. Ill. Cent. R.R. Co., 965 S.W.2d 594, 598-99 (Tex. App. 1998) (finding requisite minimum contacts existed for general jurisdiction in Texas over Illinois railroad with office in Texas generating \$75 million in business annually through comparison to other cases involving offices and sales in the forum, but holding the exercise of general jurisdiction would violate conceptions of "fair play and substantial justice" as the accident did not involve activities similar to any activities conducted by the railroad in Texas and the injury occurred in Tennessee to a Tennessee resident).

*Peforadora Central, S.A. de C.V.*<sup>140</sup> was that the defendant's forum activities were "even less substantial than those of the Colombian company with Texas in *Helicopteros*."<sup>141</sup> Under this approach, then, the courts primarily rely on precedential analogies to determine whether the requisite substantial, continuous, and systematic contacts are extant.

A factor favoring this approach is the Supreme Court's iteration that the test for jurisdiction is not "simply mechanical or quantitative."<sup>142</sup> Hence, according to the Court, "talismanic jurisdiction formulas" and "clear-cut jurisdictional rules" are unavailing.<sup>143</sup> Instead, the quantity and quality of activities sufficient for jurisdiction must be determined in each case.<sup>144</sup> Such admonitions appear to counsel a case-by-case approach to jurisdiction, relying on prior precedent for guidance, but without applying mechanical rules. Indeed, the Supreme Court has itself utilized a comparative approach in some of its general *in personam* jurisdiction decisions.<sup>145</sup> Nevertheless, this model has its difficulties, including the lack of meaningful guiding precedent and the absence of a cogent rationale to aid the comparison.

The Supreme Court's two major general jurisdiction pronouncements, *Perkins v. Benguet Consolidated Mining Co.*<sup>146</sup> and *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>147</sup> provide little comparative guidance. The contacts in *Perkins* were extensive both quantitatively and qualitatively, as the defendant used the forum as its central office location for all the ongoing supervisory activities of the

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<sup>140</sup> 249 F.3d 413 (5th Cir. 2001).

<sup>141</sup> *Id.* at 420.

<sup>142</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *see also Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (noting that the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present").

<sup>143</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-86 & n.29 (1985).

<sup>144</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>145</sup> *See Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984) (exploring the nature of the defendant's forum contacts "to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*"); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772 & n.11 (1984) (asserting *Hustler Magazine's* sale of 10,000 to 15,000 magazines a month in New Hampshire "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities" based on comparison to defendant's contacts in *Perkins*).

<sup>146</sup> 342 U.S. 437 (1952).

<sup>147</sup> 466 U.S. 408 (1984).

corporation during the war.<sup>148</sup> Indeed, the Supreme Court subsequently described the forum as the defendant's "principal, if temporary, place of business."<sup>149</sup> In contrast, none of the contacts in *Helicopteros* involved either supervisory corporate activities or even the conduct of revenue-generating activities in the forum; instead, the defendant made purchases in the forum state, trained personnel in the forum, and sent a corporate officer on a single trip to the forum for contract negotiations.<sup>150</sup> Thus, a wide gulf exists between the contacts found sufficient in *Perkins* and those decreed insufficient in *Helicopteros*. And many cases fall somewhere between these extremes, precluding meaningful analogies to Supreme Court precedent.<sup>151</sup>

The absence of Supreme Court guidance thus requires comparisons to other lower court decisions that, at best, are still the conflicting "morass" depicted by Judge Learned Hand.<sup>152</sup> At worst, the authority relied upon may be clearly wrong or inapposite.<sup>153</sup> It is not uncommon for a general jurisdiction opinion to draw parallels on the substantiality of contacts from specific jurisdiction cases,<sup>154</sup>

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<sup>148</sup> *Perkins*, 342 U.S. at 445-48; *see supra* Part I.

<sup>149</sup> *Keeton*, 465 U.S. at 780 n.11.

<sup>150</sup> *Helicopteros*, 466 U.S. at 411-18; *see supra* Part I.

<sup>151</sup> *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 571 (2d Cir. 1996) (noting that "[m]any cases, including this one, fall between *Perkins* and *Helicopteros*").

<sup>152</sup> *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930) (Hand, J.); *see infra* Part IV; *cf. Metro. Life Ins.*, 84 F.3d at 572 (recognizing that two cases relied upon by the defendant in urging that the requisite minimum contacts for general jurisdiction did not exist were "arguably" analogous, but relying on two other decisions holding that similar contacts were sufficient); *Severinsen v. Widener Univ.*, 768 A.2d 200, 203 (N.J. Super. Ct. App. Div. 2001) (noting that, due to the fact-sensitive and somewhat subjective nature of the general jurisdiction query, "the courts appear to summon one line of decisions and then another to support the varying moods of their opinions").

<sup>153</sup> *See, e.g., James v. Ill. Cent. R.R. Co.*, 965 S.W.2d 594, 598 (Tex. App. 1998) (finding contacts at issue "were more systematic and continuous" than the contacts in *Project Engineering USA Corp. v. Gator Hawk, Inc.*, 833 S.W.2d 716, 721 (Tex. App. 1992), which held that a California company selling products in California was subject to general jurisdiction in Texas because it was a distributor for three Texas companies, despite Supreme Court's holding in *Helicopteros* that purchases are insufficient for general jurisdiction).

<sup>154</sup> *See, e.g., Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465-66 (6th Cir. 1989) (comparing quantity and quality of contacts in underlying case to prior Michigan case, *June v. Vibra Screw Feeders, Inc.*, 149 N.W.2d 480, 481 (Mich. Ct. App. 1967), in which the contacts were actually sufficiently related to the dispute to support specific jurisdiction as the Michigan plaintiff sued his former employer for breach of contract to recover commissions he was allegedly owed for selling the defendant's products in Michigan); *Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt., Inc.*, 726 So. 2d 313, 316 (Fla. Dist. Ct. App. 1998) (relying on eight cases that purportedly "control[ed] the result" of its amenability

despite the oft-recognized maxim that a more stringent test must be employed for general jurisdiction.<sup>155</sup> Without a coherent decisional foundation, precedential comparisons will only deepen the mire in the swamp.

More importantly, however, this approach does not provide any cogent underlying rationale for effecting a comparison. Businesses engage in numerous disparate activities to accomplish a wide variety of objectives.<sup>156</sup> As a result, discerning a reliable similitude from a

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determination that general jurisdiction existed even though each of the cited cases—*Electro Engineering Products Co. v. Lewis*, 352 So. 2d 862, 864 (Fla. 1977), *Atlanta Gas Light Co. v. Semaphore Advertising, Inc.*, 747 F. Supp. 715, 721-22 (S.D. Ga. 1990), *Casano v. WDSU-TV, Inc.*, 313 F. Supp. 1130, 1138 (S.D. Miss. 1970), *Cable Home Communication Corp. v. Network Products, Inc.*, 902 F.2d 829, 858 (11th Cir. 1990), *Logan Products, Inc. v. Optibase, Inc.*, 103 F.3d 49, 53 (7th Cir. 1996), *Clark v. City of St. Augustine*, 977 F. Supp. 541, 543-44 (D. Mass. 1997), and *Sollinger v. Nasco International, Inc.*, 655 F. Supp. 1385 (D. Vt. 1987)—involved specific rather than general jurisdiction); *Bachman v. Med. Eng'g Corp.*, 724 P.2d 858, 862 (Or. Ct. App. 1986) (citing two state court decisions, *Laufer v. Ostrow*, 434 N.E.2d 692 (N.Y. 1982), and *Labbe v. Nissen Corp.*, 404 A.2d 564 (Me. 1979), as holdings “on similar facts” even though cases involved specific jurisdiction rather than dispute-blind jurisdiction).

<sup>155</sup> See, e.g., *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (“[T]he constitutional requirement for general jurisdiction is ‘considerably more stringent’ than that required for specific jurisdiction.”) (quoting *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001)); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002) (recognizing that general jurisdiction entails a “more demanding standard than is necessary for establishing specific jurisdiction”); *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 747 (11th Cir. 2002) (reiterating that “[t]he due process requirements for general jurisdiction are more stringent than for specific personal jurisdiction”) (quoting *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000)); *Noonan v. Winston Co.*, 135 F.3d 85, 93 (1st Cir. 1998) (observing that “[t]he standard for evaluating whether [the defendant’s] contacts satisfy the constitutional general jurisdiction test ‘is considerably more stringent’ than that applied to specific jurisdiction questions”) (quoting *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984)); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997) (detailing that “the threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction”); *Metro. Life Ins.*, 84 F.3d at 568 (explaining that, “[b]ecause general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant’s ‘continuous and systematic general business contacts’”) (quoting *Helicopteros*, 466 U.S. at 416); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (expressing that “contacts of a more extensive quality and nature are required” for general jurisdiction); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002) (iterating that general jurisdiction entails a “more demanding minimum-contacts analysis than specific jurisdiction”).

<sup>156</sup> See, e.g., *Ex parte United Bhd. of Carpenters*, 688 So. 2d 246, 252 (Ala. 1997) (detailing activities of national labor union designed to discourage “contractors who do not provide union labor”); *Health Indus. Mfg. Ass’n v. Crabb*, No. 14-99-00402-CV, 1999 WL 1080662, at \*4 (Tex. App. Dec. 2, 1999) (discussing position advocacy mission of medical device manufacturers trade association).



prior decision is often difficult. So the courts resort to drawing comparisons from dissimilar precedents, which metaphorically resigns the courts, borrowing from Justice Scalia, to scrutinizing “whether a particular line is longer than a particular rock is heavy.”<sup>157</sup> And, even after the comparison, all the court can do is conclude that this is a little more, so general jurisdiction is present, or this is a little less, so no general jurisdiction exists. The general jurisdiction decisions thus take on the aura of obscenity decisions—the courts purport to know it when they see it. But this is no way to resolve a preliminary due process issue predicated in part on the defendant’s reasonable expectations regarding the situs of suit.<sup>158</sup>

Of course, there is nothing wrong in the abstract in relying on precedent—on the contrary, precedent is a pillar of American constitutional judicial decisionmaking.<sup>159</sup> But general jurisdiction precedent is often no assistance because the decisions are conflicting or inapposite.<sup>160</sup> This precludes defendants from structuring their transactions to avoid the sovereign jurisdictional prerogative of a foreign state. And, without an underlying rationale to serve as a compass, a comparative precedential template will keep the courts traipsing, as Judge Learned Hand remarked, “from tuft to tuft across the morass.”<sup>161</sup>

### C. Factor Analysis

Some jurisdictions have adopted jurisdictional factors or indicators for dispute-blind queries. Under one model, courts employ a five-factor analysis,<sup>162</sup> while the other approach inspects whether the defendant’s forum activities satisfy certain traditional general jurisdiction criteria.<sup>163</sup> But neither template bestows any doctrinal clarification.

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<sup>157</sup> *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

<sup>158</sup> *See supra* Part III.A.

<sup>159</sup> *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (O’Connor, Kennedy & Souter, JJ., plurality) (avowing “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable”).

<sup>160</sup> *See supra* notes 151-54 and accompanying text.

<sup>161</sup> *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930) (Hand, J.).

<sup>162</sup> *See infra* Part III.C.1.

<sup>163</sup> *See infra* Part III.C.2.

### 1. The Five-Factor “Whole-Hog” Approach

Some courts outline five factors for resolving all *in personam* jurisdiction queries, examining (1) the quantity of the contacts with the forum, (2) the nature and quality of the contacts, (3) the nexus between the cause of action and the contacts, (4) the forum state’s interest in the dispute, and (5) the parties’ convenience.<sup>164</sup> This Article names this factor analysis the “whole-hog” approach because the test collapses the general jurisdiction, specific jurisdiction, and fair play and substantial justice analysis into one sweeping inquiry.<sup>165</sup>

The origins of this approach predate significant modern refinements on amenability. The Eighth Circuit employed the approach as early as 1965, in *Aftanase v. Economy Baler Co.*<sup>166</sup> This sweeping test, then, is a precursor to the Supreme Court’s explicit adoption of separate reasonableness or fairness factors<sup>167</sup> and the widespread acceptance of Professors von Mehren and Trautman’s

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<sup>164</sup> See, e.g., *Sybaritic, Inc. v. Interport Int’l, Inc.*, 957 F.2d 522, 524 (8th Cir. 1992) (analyzing constitutionality of an assertion of jurisdiction by carefully considering “(1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties”); *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 778 (D. Minn. 1994) (detailing the above-referenced “five separate considerations . . . to be examined when determining whether the exercise of personal jurisdiction in any case comports with due process”); *Covia v. Robinson*, 507 N.W.2d 411, 415-16 (Iowa 1993) (applying test in case in which both general and specific jurisdiction were raised); *Vikse v. Flaby*, 316 N.W.2d 276, 282 (Minn. 1982) (adopting test in Minnesota); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674 (Minn. Ct. App. 2000) (applying test in general jurisdiction case); *Bruggeman v. Meditrust Acquisition Co.*, 532 S.E.2d 215, 219 (N.C. Ct. App. 2000) (applying test to hold nonresident defendant subject to general jurisdiction, even though case could have been resolved under specific jurisdiction principles since the contacts were related to the dispute).

<sup>165</sup> Cf. *Sybaritic*, 957 F.2d at 524 (noting these five considerations incorporate both the notions of minimum contacts and fair play and substantial justice); *Zumbro*, 861 F. Supp. at 778 (same).

<sup>166</sup> 343 F.2d 187, 197 (8th Cir. 1965) (Blackmun, J.).

<sup>167</sup> See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (holding California’s exercise of jurisdiction over a Japanese manufacturer was unreasonable because of the severe burden on the defendant, the minimal interest of the plaintiff and the forum in California’s assertion of jurisdiction, and the procedural and substantive policies of other nations); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (articulating factors, such as the defendant’s burden, the interests of the plaintiff and sovereign, efficient judicial resolution, and social policies, to consider in scrutinizing the reasonableness and fairness of an assertion of jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (listing factors to consider in determining reasonableness of jurisdiction, including the burden on the defendant and the interests of the plaintiff and the forum, as well as the interests in resolving cases efficiently and advancing fundamental substantive social policies).

dichotomy between specific and general jurisdiction.<sup>168</sup>

Not surprisingly, then, this sweeping approach often fails to adequately factor the quantitative and qualitative nature of contacts necessary for an assertion of general jurisdiction. Indeed, the nexus between the cause of action and the contacts, i.e., whether the case is a specific jurisdiction or general jurisdiction case, is only examined *after* analyzing the quantity of the contacts and nature and quality of the contacts.<sup>169</sup> For example, in *Marshall v. Inn on Madeline Island*,<sup>170</sup> the court first concluded that the defendant's forum activities supported "personal jurisdiction" by relying on both specific and general jurisdiction precedent, and thereafter contemplated the relationship of the defendant's forum activities to the suit.<sup>171</sup> Of course, such a mode of analysis places the proverbial cart before the horse. The court should first ascertain whether the defendant's forum contacts are related to the dispute to discern whether the substantiality of the contacts are to be adjudged by the less stringent specific jurisdiction standard or the more rigorous dispute-blind criterion. Otherwise, the analysis of the quantity and quality of the contacts will intermingle specific and general jurisdictional principles,<sup>172</sup> failing to provide an ascertainable standard for the more

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<sup>168</sup> See von Mehren & Trautman, *supra* note 3, at 1135-36, 1164-66.

<sup>169</sup> See, e.g., *Estate of Rick v. Stevens*, 145 F. Supp. 2d 1026, 1032-34 (N.D. Iowa 2001) (concluding the nature, quality, and quantity of one defendant's nine contracts with forum residents and the other defendant's dozens of forum trips satisfied "due process" before determining that the contacts had no relationship to the plaintiff's cause of action); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674-76 (Minn. Ct. App. 2000) (holding that the quantity of the contacts and the nature and quality of the contacts supported the exercise of "personal jurisdiction" before considering the relationship of the contacts to the cause of action). Some courts purport to follow the "whole-hog" factors, but actually fail to apply them, instead engaging in a more traditional analysis separately considering specific jurisdiction, general jurisdiction, and the reasonableness factors. See, e.g., *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 778 (D. Minn. 1994) (discussing the five sweeping considerations, but separately scrutinizing the propriety of general jurisdiction and specific jurisdiction).

<sup>170</sup> 610 N.W.2d 670 (Minn. Ct. App. 2000).

<sup>171</sup> *Id.* at 674-76. The *Marshall* case arguably could have been decided as a specific jurisdiction case because the Minnesota resident learned about the Wisconsin defendant Inn in a magazine directed at Minnesota readers, the Inn managed the property in Wisconsin at which he was injured via a contract with the Minnesota owners of the property, and the Inn contacted the resident in Minnesota after his injury. *Id.* at 676; see *supra* note 98. However, the Minnesota court held that specific jurisdiction did not exist. *Marshall*, 610 N.W.2d at 676-77.

<sup>172</sup> *Marshall*, 610 N.W.2d at 675-76 (holding the nature and quality of contacts by nonresident defendant of advertising in Minnesota publications and through direct mail to Minnesota residents, contracting for its services with Minnesota residents, and purchasing goods and services from Minnesota businesses supported "personal

substantial contacts required for an assertion of general jurisdiction.<sup>173</sup>

This approach accordingly suffers from similar deficiencies as the *ipse dixit* and precedential templates. While perhaps providing some superficial semblance of a jurisdictional “test,” the purported standard offers no insight on the substantiality of the contacts necessary for general jurisdiction. Instead, courts employing this approach often conflate dispute-specific and dispute-blind doctrine, thereby impoverishing both.<sup>174</sup> This prevents defendants from foreseeing the quality and quantity of forum activities establishing the requisite predicate for the foreign sovereign to exercise its jurisdictional prerogative over all causes of action.

## 2. Contact Factors

Other courts utilize a non-exhaustive listing of contact factors, sometimes referenced as the “traditional indicia” of general jurisdiction, in analyzing amenability based on unrelated forum contacts.<sup>175</sup> The various factors employed by the courts include, *inter alia*, whether the defendant has an office, bank account, phone listing, or property in the state; whether the defendant continuously employs individuals in the state to advance its interests; whether the defendant serves the market or engages in business in the state through sales or other activities; whether the defendant advertises or solicits business in the state; whether the defendant has designated a registered agent within the state or is licensed to do business there; whether agents of the defendant travel to the state to visit customers or solicit additional business; and whether the defendant recruits employees in the state.<sup>176</sup> These jurisdictional indicia are then

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jurisdiction” by relying on both specific and general jurisdiction precedent from Minnesota courts and the United States Supreme Court). *But see* Fraser v. Littlejohn, 386 S.E.2d 230, 235-37 (N.C. Ct. App. 1989) (analyzing nature and extent of contacts in light of prior United States and North Carolina precedent on general jurisdiction in alternative holding that judgment debtor was subject to general jurisdiction).

<sup>173</sup> See *supra* note 155 and accompanying text.

<sup>174</sup> Cf. Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 612.

<sup>175</sup> See, e.g., *Wiwa v. Dutch Royal Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000) (stating that court focuses “on a traditional set of indicia” in resolving general jurisdiction).

<sup>176</sup> See, e.g., *Doering v. Copper Mountain, Inc.*, 259 F.3d 1202, 1210 (10th Cir. 2001) (considering four factors, including whether the defendant solicited business in the forum through a local office or agent, sent agents to the forum on a regular basis to solicit business, conducted substantial business in the forum, or represented that it did business in the forum through advertisements, listings, or bank accounts, to hold that a Delaware corporation with its sole place of business in Colorado was not amenable to personal jurisdiction in New Jersey in suit filed by New Jersey

compared to the defendant's forum activities to appraise the defendant's amenability.<sup>177</sup>

Courts employing these criteria create a narrow palladium from the forum's dispute-blind adjudicatory power because the defendant is not amenable unless it conducts some of the delineated activities in the state.<sup>178</sup> But to be certain of procuring this safe haven, the

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residents for injury occurring in Colorado); *Wiwa*, 226 F.3d at 98 (opining that traditional indicia of general jurisdiction include "whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests," and holding that foreign oil corporation satisfied such indicia through the presence of a permanent office staffed by an employee); *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (iterating that a court should examine factors, such as "whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there," in resolving general jurisdiction query); *Trierweiler v. Croxton & Trench Holding Co.*, 90 F.3d 1523, 1533 (10th Cir. 1996) (holding Colorado law firm without a Michigan office that did not advertise or hold itself out as doing business in Michigan was not amenable to general jurisdiction, despite representing twenty-four Michigan residents on 104 matters, because the "factors which are normally considered in making 'continuous and systematic' determinations" were not implicated); *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 650 (D. Utah 1998) (concluding nonresident corporations were not amenable to jurisdiction based in part on the absence of any of the relevant jurisdictional factors); *Higgins v. Rausch Herefords*, 609 N.W.2d 712, 718 (Neb. Ct. App. 2000) (finding nonresident cattle selling operation not amenable to general jurisdiction when it did not designate an agent for service of process, hold a forum license, have employees in the state, or conduct any sales or solicitation in the state other than sporadic advertisements); *Buddensick v. Stateline Hotel, Inc.*, 972 P.2d 928, 930-31 (Utah Ct. App. 1998) (holding Nevada casino with parking lots on the Utah side of the Utah-Nevada border subject to general jurisdiction in Utah after distilling from a survey of case law that the factors for the exercise of general *in personam* jurisdiction include whether defendant is engaged in or registered to do business in the state; generates a substantial percentage of its sales from residents of the state; advertises or solicits business in the state; owns property in the state; has offices, employees, shareholders, bank accounts, or phone listings in the state; visits customers or potential customers in the state; recruits employees in the state; or pays taxes in the state), *cert. denied*, 982 P.2d 88 (Utah 1999).

<sup>177</sup> *Wiwa*, 226 F.3d at 98.

<sup>178</sup> *See, e.g., Doering*, 259 F.3d at 1210 (holding Delaware corporation with its sole place of business in Colorado that advertised in national magazines and sent an employee to two trade shows in New Jersey was not amenable to personal jurisdiction in New Jersey in suit filed by New Jersey residents for injury occurring in Colorado as it had no agents, employees, or offices in New Jersey); *Soma Med. Int'l, Inc. v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999) (finding British bank not subject to dispute-blind jurisdiction in Utah as it performed none of the twelve activities the court deemed to be relevant to the existence of general jurisdiction); *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 596 (5th Cir. 1999) (holding that a Mexican corporation not licensed to do business in Texas and that did not have an office, employees, or property in Texas did not have the requisite contacts for general jurisdiction in Texas); *Trierweiler*, 90 F.3d at 1533 (10th Cir.

defendant must perform none of the described activities, essentially requiring the defendant to sever all business relationships with the forum. Otherwise, the defendant cannot predict its amenability to the state's general adjudicatory jurisdiction.

This uncertainty arises because these traditional indicia provide no insight as to what general jurisdiction *is*. Most of the factors viewed singularly are, according to the better-reasoned decisions, of negligible jurisdictional import. For instance, owning property within the state is clearly not sufficient, standing alone, to subject the defendant to jurisdiction under the Supreme Court's decision in *Shaffer v. Heitner*.<sup>179</sup> Similarly, a defendant's forum bank account—which is, of course, a species of property—should not justify general jurisdiction.<sup>180</sup> Nor is the existence of a phone listing in the forum,<sup>181</sup>

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1996) (averring Colorado law firm without a Michigan office that did not advertise or hold itself out as doing business in Michigan was not amenable to general jurisdiction); *Ratliff v. Cooper Indus., Inc.*, 444 F.2d 745 (4th Cir. 1971) (concluding nonresident drug manufacturers without offices, property, or bank accounts in South Carolina not subject to the forum's dispute-blind adjudicatory jurisdiction); *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 269 (E.D. Pa. 1991) (holding New Jersey motor inn that had not paid taxes, made purchases, advertised in publications, maintained a telephone listing, owned property, or had agents in Pennsylvania was not amenable to the general jurisdiction of Pennsylvania courts); *Dean Mktg., Inc. v. AOC Int'l (U.S.A.), Ltd.*, 610 F. Supp. 149, 152-53 (E.D. Mich. 1985) (finding Taiwanese corporation not amenable to general jurisdiction in Michigan because it had no property, employees, agents, phone listings, or bank accounts in Michigan and because it did not solicit business nor was it registered or licensed to do business in Michigan); *Higgins*, 609 N.W.2d at 718 (concluding nonresident cattle operation without forum employees, agents, or sales not amenable to general jurisdiction); *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996) (holding Australian corporation did not have the continuous and systematic Texas contacts required for general jurisdiction as it did not have an office, employees, bank accounts, or property in Texas and it had not solicited business in Texas, paid taxes in Texas, or entered into contracts in Texas); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771-74 (Tex. 1995) (finding Maryland corporation not amenable to general jurisdiction in Texas when it had no office, employees, agents, assets, property, bank accounts, or place of business in Texas).

<sup>179</sup> 433 U.S. 186, 209 (1977) (holding mere presence of property in forum, standing alone, is an insufficient basis for jurisdiction).

<sup>180</sup> *See id.*; *see also* *Transportes Aeros de Coahuila, S.A. v. Falcon*, 5 S.W.3d 712, 719-20 (Tex. App. 1999) (finding Mexican corporation's maintenance of Texas bank account did not support general jurisdiction), *disapproved on other grounds*, *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 n.1 (Tex. 2002); *Primera Vista S.P.R. de R.L. v. Banca Serfin S.A.*, 974 S.W.2d 918, 926 (Tex. App. 1998) (holding Mexican corporation's annualized deposits of over one billion dollars and thousands of transactions a year at eleven Texas banks were insufficient to support the exercise of general jurisdiction). *But cf.* *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 438 (3d Cir. 1987) (finding California bank without Pennsylvania office or employees amenable to general jurisdiction in Pennsylvania in part because of zero-balance account with Pennsylvania bank that was central to the conduct of its business); *El Puerto de Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V.*,

or the presence of an agent for service of process,<sup>182</sup> significant to the general jurisdiction query. And even the more superficially consequential factors, such as a forum office, forum sales, or forum-targeted advertisements and solicitations, are not always enough to support dispute-blind jurisdiction.<sup>183</sup>

Because the mere existence of one (or perhaps more) of these traditional indicia is usually insufficient, either a methodology or baseline for balancing the requisite jurisdictional criteria is essential. But the cases finding general jurisdiction under this paradigm have not elaborated on such a technique, instead being content to hold that the defendant's forum business activities at issue, which were at least assisted by an office or business property within the forum, established the required minimum contacts.<sup>184</sup> Thus, while a traditional indicia analysis may reveal the defendant's non-amenability due to the complete absence of the relevant factors, it does not provide much assistance in demarcating the boundary between some quantum of forum activities and those continuous and systematic activities considered so substantial and of the requisite nature to support dispute-blind adjudication.

This deficiency could perhaps be mitigated if the traditional indicia were augmented by some justification for why these factors—especially the relatively insignificant contacts of a phone listing or registered agent for service of process in the state—are relevant to the forum's assertion of general jurisdiction over the defendant. But the courts have never proffered such a justification. And without it, this approach suffers from the same infirmity as the comparative

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82 S.W.3d 622, 633 (Tex. App. 2002) (concluding Mexican corporation conducted “substantial” activities in Texas” through its Texas bank account, but not addressing whether the bank account would alone provide an adequate basis for general jurisdiction because other contacts existed).

<sup>181</sup> See, e.g., *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 910 (4th Cir. 1984) (concluding listing in forum telephone directory not an activity supporting dispute-blind jurisdiction); *Johnson v. Summa Corp.*, 632 F. Supp. 122, 125 (E.D. Pa. 1985) (holding Nevada hotel not subject to general jurisdiction in Pennsylvania based on toll-free number in the forum); *Van Pelt v. Best Workover, Inc.*, 798 S.W.2d 14, 17 (Tex. App. 1990) (finding telephone listing did not support general jurisdiction).

<sup>182</sup> See *infra* Part IV.A.

<sup>183</sup> See *infra* Parts IV.B-C.

<sup>184</sup> See, e.g., *Wiwa v. Dutch Royal Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000) (holding foreign oil corporation satisfied “traditional indicia” of dispute-blind jurisdiction through the presence of a permanent office staffed by an employee); *Buddensick v. Stateline Hotel, Inc.*, 972 P.2d 928, 930-31 (Utah Ct. App. 1998) (holding Nevada casino with parking lots on the Utah side of the Utah-Nevada border subject to general jurisdiction in Utah), *cert. denied*, 982 P.2d 88 (Utah 1999).

precedential model—all the court can do is compare to singularly trivial criteria and conclude that this is enough, so general jurisdiction is present, or this is not quite enough, so no general jurisdiction exists.

*D. Central Business Activities*

Another general adjudicatory jurisdiction template is scrutinizing whether the defendant's forum activities are central to the conduct of its business.<sup>185</sup> Under this approach, a defendant conducts the requisite substantial business activities for general jurisdiction if its forum activities are the “bread and butter of its daily business.”<sup>186</sup> The Third Circuit adopted this model in *Provident National Bank v. California Federal Savings & Loan Association*,<sup>187</sup> where it held that a California bank without offices or employees in the forum was nevertheless amenable to dispute-blind jurisdiction primarily because its maintenance of a zero-balance, controlled disbursements bank account in the state was central to the conduct of its business.<sup>188</sup>

The efficacy of this approach depends, of course, on judicial guidance regarding the methodology for adjudging which activities are “central” to a corporation's business. Unfortunately, however, the courts following this construct have not provided consistent answers. One court opined that the contemplated activity was “the day to day operation of the defendant's business, *not the resultant sales.*”<sup>189</sup> On the other hand, different courts have concluded that forum sales and other revenue-generating activities are the requisite “bread and butter” of a company's business.<sup>190</sup> Further, the decisions conflate

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<sup>185</sup> See, e.g., *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 438 (3d Cir. 1987) (holding California bank subject to dispute-blind jurisdiction in Pennsylvania because it conducted forum activities central to the conduct of its business); *Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 572 (E.D. Pa. 1999) (decreeing the dispositive general jurisdiction criterion—the centrality of the nonresident's forum activities to the conduct of its business—was not satisfied when the principal business of the German corporation was selling steam in Germany rather than Pennsylvania).

<sup>186</sup> *Provident Nat'l Bank*, 819 F.2d at 438.

<sup>187</sup> 819 F.2d 434 (3d Cir. 1987).

<sup>188</sup> *Id.* at 438.

<sup>189</sup> *Orange Prods., Inc. v. Winters*, No. CIV. A. 94-CV-6004, 1995 WL 118461, at \*4 (E.D. Pa. Mar. 21, 1995) (emphasis added) (holding nonresident corporation not subject to dispute-blind jurisdiction because its forum sales were not “central to its business of producing precision plastic balls”).

<sup>190</sup> See, e.g., *Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 573 (E.D. Pa. 1999) (concluding defendant's principal business was selling steam in Germany, none of which occurred in the forum state of Pennsylvania);



whether the standard depends on the importance of the activities to the defendant's forum business or whether the comparison is to the defendant's overall business activities.<sup>191</sup> These uncertainties preclude defendants from obtaining needed guidance as to the quality and quantity of forum activities required for general jurisdiction.

The uncertainties emanate, in part, from the suspect rationale in the case adopting this approach, *Provident National Bank*.<sup>192</sup> The Third Circuit in that case distinguished *Helicopteros* on the basis that Helicol's purchase of helicopters and training from Bell Helicopter was not central to the conduct of its business, while the zero-balance, controlled disbursements account the California bank maintained with a Pennsylvania bank was.<sup>193</sup> But this distinction is dubious. Purchasing helicopters and training its pilots were just as central to Helicol's business of providing helicopter services as the maintenance of a disbursements account for clearing checks was to the California bank's business of borrowing and lending money. Although purchasing helicopters and training pilots did not directly generate revenue for Helicol, Helicol would not have been able to produce income from its helicopter services without helicopters and trained pilots. Similarly, the disbursements account itself did not generate revenue for the California bank, but such an account was necessary to support its activities that did. Thus, the Third Circuit's purported distinction between *Provident National Bank* and *Helicopteros* is doubtful, making it difficult for courts to apply in subsequent decisions.

The central business activities approach also suffers from the absence of an underlying rationale. The Third Circuit never explained why conducting activities in the forum central to the defendant's business supports the exercise of jurisdiction for causes

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Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1054 (E.D. Pa. 1994) (iterating that sale of goods and services was "principal purpose" of marketing and technology business, but finding that its forum sales were not daily or regular as required for dispute-blind jurisdiction); *Covenant Bank for Sav. v. Cohen*, 806 F. Supp. 52, 57-58 (D.N.J. 1992) (opining loans to and deposits from forum residents were "bread and butter" of bank's daily business, but holding that bank did not engage in required regular contact with forum state to service these loans as required for dispute-blind jurisdiction).

<sup>191</sup> See *Snyder v. Dolphin Encounters, Ltd.*, 235 F. Supp. 2d 433, 440-41 (E.D. Pa. 2002) (citing earlier case purportedly holding foreign defendant's websites were not "central" to the defendant's business in Pennsylvania, but nevertheless conducting its analysis based on the centrality of Pennsylvania to defendants' overall business activities) (emphasis added).

<sup>192</sup> 819 F.2d 434 (3d Cir. 1987).

<sup>193</sup> *Id.* at 438.

of action without any relationship to such activities.<sup>194</sup> While one could argue that conducting principal business activities in the forum enhances the defendant's reasonable expectation of being subject to the state's judicial power for all causes of action, a difficulty arises because of the previously discussed uncertainties regarding the defining characteristics of central business activities.<sup>195</sup>

Moreover, even if the courts marked the appropriate boundaries, the reasonable anticipation rationale may not justify the discrepant results expected under this model. As an example, if Wal-Mart maintained two of its thousands of nationwide stores in Alaska, its forum activities would not be central to the conduct of its overall world-wide business, presumably precluding the exercise of general jurisdiction by the Alaska courts.<sup>196</sup> In contrast, a closely-held Washington corporation with only two stores, one in Washington and another in Alaska, would be conducting activities central to its overall business in Alaska. Even though the closely-held corporation is conducting fewer activities in Alaska than Wal-Mart, its relatively paltry total business activities mandates that its smaller quantum of forum activities is more central to its overall business, subjecting it to general jurisdiction. But what persuasive rationale could support this incongruous result? It certainly is not fair or reasonable, as Wal-Mart has more substantial resources to defend itself in Alaska and conducts more of the same types of activities in the forum. Nor could it be said that Alaska has a greater sovereign interest over the closely-held corporation when the quantity and quality of Wal-Mart's activities is comparatively greater. Quite simply, this approach may offend "traditional notions of fair play and substantial justice," the very core of our modern jurisdictional model.<sup>197</sup>

Thus, equating central business activities with dispute-blind jurisdiction is problematic. Not only have the courts failed to adopt a consensus on the methodology for determining which activities are pivotal to the conduct of the defendant's business, the approach does not offer a cogent underlying rationale. Both of these defects

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

<sup>195</sup> See *supra* notes 189-93 and accompanying text.

<sup>196</sup> See, e.g., *Snyder v. Dolphin Encounters, Ltd.*, 235 F. Supp. 2d 433, 440-41 (E.D. Pa. 2002) (conducting its analysis based on the centrality of Pennsylvania to defendants' overall world-wide business activities); *Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 573 (E.D. Pa. 1999) (examining defendant's forum activities in light of its overarching principal business of selling steam in Germany).

<sup>197</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

preclude this approach from offering any meaningful insight regarding the parameters of dispute-blind jurisdiction.

*E. Constructive Presence*

A number of courts utilize a constructive presence rationale in scrutinizing a defendant's amenability to general jurisdiction.<sup>198</sup> Such decisions typically evaluate whether a defendant's forum contacts are so extensive that they either "approximate physical presence"<sup>199</sup> or "take the place of physical presence."<sup>200</sup> In other words, these courts analogize the defendant's forum activities to a jurisdictional baseline of a person's actual physical presence in the forum.

This approach is grounded in antecedent jurisdictional doctrine. Historically, the limits on personal jurisdiction were based on a court's power over the actual physical person of the defendant.<sup>201</sup> Of

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<sup>198</sup> See, e.g., *Purdue Research v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (finding no basis for exercising general jurisdiction when the defendant's forum contacts were not tantamount to it "being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in an Indiana court in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world") (emphasis in original); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir. 2002) (concluding general jurisdiction was not proper over defendant because its forum contacts were not "the kind of continuous and systematic general business contacts that 'approximate physical presence'" (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)); *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1092 (Cal. 1996) (stating that general jurisdiction requires wide-ranging contacts with the forum "that take the place of physical presence in the forum as a basis for jurisdiction"); *Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851, 853-54 (N.Y. 1967) (holding British hotel corporation conducted such continuous and systematic business activities through its agent in New York to justify its amenability to suit predicated on its "presence" in the forum); *Bachman v. Med. Eng'g Corp.*, 724 P.2d 858, 860-62 (Or. Ct. App. 1986) (holding nonresident hospital and doctors not "present" in Oregon as required for general jurisdiction, while nonresident medical equipment manufacturer was deemed present).

<sup>199</sup> See, e.g., *Glencore Grain*, 284 F.3d at 1124; *Bancroft & Masters*, 223 F.3d at 1086.

<sup>200</sup> *Vons Cos.*, 926 P.2d at 1092; see also *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997) (articulating dispositive issue is whether defendant's forum activities are "so substantial that they amount to a surrogate for presence and thus render the exercise of sovereignty just"); *Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 136-37 (4th Cir. 1996) (holding nonresident private investigation firm's telephone orders for investigation services from Maryland entities did not establish its "presence" in the forum as required for an assertion of adjudicatory jurisdiction); *Carretti v. Italpast*, 125 Cal. Rptr. 2d 126, 131 (Ct. App. 2002) (holding sporadic sales to California users were "not the kind of wide-ranging contacts that take the place of physical presence in the forum" as required to support general jurisdiction).

<sup>201</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877); see also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of the

course, corporations did not fit comfortably within such a regime, because a corporation has no tangible physical presence. Unlike an individual, a corporation's "presence" could "be manifested only by activities carried on in its behalf by those who are authorized to act for it."<sup>202</sup> Thus, the pre-*International Shoe* jurisdictional formula for corporations typically depended on the corporation's deemed presence through its business activities in the forum.<sup>203</sup>

*International Shoe* and its modern progeny relied on this earlier "presence" jurisprudence in illustrating a corporation's amenability to suit based on substantial, continuous forum business activities unrelated to the plaintiff's claim.<sup>204</sup> Indeed, *Helicopteros* predicated its holding that purchases and related trips, standing alone, were insufficient for dispute-blind jurisdiction on a pre-*International Shoe* decision, reasoning that "*Shoe* acknowledged and did not repudiate [this] holding."<sup>205</sup> Because the Court still examines these earlier decisions in evaluating general jurisdiction queries, contemporary dispute-blind jurisdiction appears to be a direct descendant of the pre-*Shoe* construct of presence.<sup>206</sup>

Nevertheless, a constructive presence rationale is of little assistance when perpending dispute-blind jurisdiction because a corporation's "presence" has always been a fiction merely begging the question of amenability.<sup>207</sup> Since a corporation has no actual corporeal existence, the only method to gauge "presence" is evaluating the corporation's ongoing forum activities to determine if jurisdiction is appropriate. In other words, as *International Shoe*

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court was a prerequisite to its rendition of a judgment personally binding him.").

<sup>202</sup> *Int'l Shoe*, 326 U.S. at 316.

<sup>203</sup> See, e.g., *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517 (1923) (noting sole issue presented was whether "defendant was doing business within the State of New York in such a manner and to such extent as to warrant the inference that it was present there"); *St. Louis Sw. Ry. Co. v. Alexander*, 227 U.S. 218, 226 (1913) (analyzing whether Texas railroad was "present" in New York).

<sup>204</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414-18 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 n.6 (1952); *Int'l Shoe*, 326 U.S. at 318; see *supra* notes 55-58 and accompanying text.

<sup>205</sup> *Helicopteros*, 466 U.S. at 417-18 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923)).

<sup>206</sup> Cf. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 151 (noting that "presence" implied general jurisdiction); Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 380 [hereinafter Stein, *Frontiers of Jurisdiction*] (iterating that "general jurisdiction is derived from the power premise of *Pennoy*, under which the exclusive test for state authority is the presence of the defendant or his property at the time of the litigation").

<sup>207</sup> *Int'l Shoe*, 326 U.S. at 316.

explained, the concept of “presence” is “used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.”<sup>208</sup> Because “presence” is just a symbol of corporate activities, courts must initially scrutinize the corporate defendant’s forum conduct to determine if the corporation is “present” and thereby amenable to jurisdiction, leading back to the original quandary of the quality and quantity of forum activities necessary to support dispute-blind jurisdiction.

While the Supreme Court accepted a fictional “presence” rationale as the polestar for jurisdiction before *International Shoe*, *Shoe* abandoned the construct in favor of directly examining the reasonableness of an assertion of jurisdiction based on the defendant’s forum activities.<sup>209</sup> As the Court realized, a quest for “presence” leads nowhere because its ultimate resolution *ipso facto* depends on the reasonableness of exercising jurisdiction based on the corporation’s underlying forum activities.<sup>210</sup>

A deemed or constructive presence rationale hence moves us no closer to clarifying general jurisdiction than simply reciting that such jurisdiction is permissible if the forum’s exercise of jurisdiction is reasonable in light of the corporation’s continuous, systematic, and substantial activities in the forum. No matter which metaphor is adopted, the underlying jurisdictional enigma has not been resolved.

#### F. *Quid Pro Quo*

Another doctrinal framework for general jurisdiction queries is a quid pro quo or reciprocal benefits rationale.<sup>211</sup> Under this exchange theory, a defendant’s business activities within the state provide a benefit that justifies imposing a corresponding burden of amenability for all causes of action in the forum.<sup>212</sup> In *Ex parte Newco*

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<sup>208</sup> *Id.* at 316-17.

<sup>209</sup> *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957) (recognizing Court’s “continuing process of evolution” accepting and then abandoning “‘consent,’ ‘doing business,’ and ‘presence’ as the standard for measuring the extent of state judicial power” over corporations).

<sup>210</sup> *Cf. Int’l Shoe*, 326 U.S. at 316-17.

<sup>211</sup> *See, e.g., Publ’ns Int’l, Ltd. v. Burke/Triolo, Inc.*, 121 F. Supp. 2d 1178, 1183 (N.D. Ill. 2000) (finding nonresident defendant amenable to general jurisdiction because it solicited and contracted with forum customers); *Wise v. Lindamood*, 89 F. Supp. 2d 1187, 1193 (D. Colo. 1999) (iterating that the dispositive inquiry for general jurisdiction is whether nonresident defendant enjoyed protections of forum’s laws such that it must submit to the burdens of litigation).

<sup>212</sup> *See, e.g., Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985).

*Manufacturing Co.*,<sup>213</sup> for example, the Alabama Supreme Court held that 2,000 sales made to Alabama residents in a five-year period in an amount of \$65,000 to \$85,000 per year was sufficient to subject a nonresident Missouri corporation to dispute-blind jurisdiction in Alabama even though the title to all goods was transferred outside the state.<sup>214</sup> The court reasoned that in exchange for the “privilege of making sales (and profits) in Alabama in a continuous and systematic course of merchandising,” the defendant “must bear the burden commensurate with the benefits received from its sales in Alabama.”<sup>215</sup>

However, this hardly appears a reasonable exchange. Newco Manufacturing undoubtedly received some benefits from its sales to Alabama residents, but were such benefits really a fair bargain for being subject to suit for any cause of action in Alabama, even for an injury suffered by a Tennessee resident in Tennessee? Most would probably think not. Indeed, in *Bearry v. Beech Aircraft Corp.*,<sup>216</sup> a case involving much more extensive sales to forum residents than *Ex parte Newco*, the Fifth Circuit utilized an exchange rationale to reject the existence of dispute-blind jurisdiction.<sup>217</sup> Reasoning that “general jurisdiction is based on a concept of ‘exchange’” requiring the defendant to invoke “the benefits and protections of the forum’s laws,” the Fifth Circuit postulated the dispositive issue was whether Beech Aircraft benefited from the forum’s law in conducting its activities.<sup>218</sup> Since Beech had meticulously negotiated, executed, and performed its contracts worth several hundred million dollars with forum residents outside the forum, the court determined that the defendant had “calculatedly avoided” the forum’s laws such that it was not amenable to general jurisdiction.<sup>219</sup>

The difficulty is that even *Bearry*’s more realistic analysis does not demonstrate what constitutes a fair exchange for a defendant’s submission to the forum’s general adjudicatory power for all causes of action. While *Bearry* correctly held that a defendant cannot be amenable to dispute-blind jurisdiction in the absence of receiving benefits and protections from the laws of the forum,<sup>220</sup> which indeed

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<sup>213</sup> 481 So. 2d 867 (Ala. 1985).

<sup>214</sup> *Id.* at 869. The suit was based on a fatal accident involving equipment manufactured in Missouri that was sold in Maryland and allegedly injured a Tennessee resident in Tennessee. *Id.* at 868.

<sup>215</sup> *Id.* at 869.

<sup>216</sup> 818 F.2d 370 (5th Cir. 1987).

<sup>217</sup> *Id.* at 375-76.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See id.*; *see also* Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801,

is a prerequisite for the lower threshold of activity necessary for specific jurisdiction,<sup>221</sup> the Fifth Circuit did not answer how much benefit and protection from the forum's law is required for general jurisdiction. Nor has any other court resolved this fundamental question.

Instead, exchange theory is typically used—and it originated—to justify specific jurisdiction, not general jurisdiction. *International Shoe* first expressed the reciprocal benefits rationale explicitly in terms of specific jurisdiction:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.<sup>222</sup>

*World-Wide Volkswagen Corp. v. Woodson*<sup>223</sup> articulated a similar conception, remarking that it was not unreasonable to subject a manufacturer or distributor serving the state's market to suit in that state when its “allegedly defective merchandise *has there been the source of injury* to its owner or to others.”<sup>224</sup>

Such a quid pro quo justification for specific jurisdiction appears appropriate. When a nonresident corporation conducts activities within the state obtaining the benefits and protections of that state's laws, it seems a reasonable exchange to subject the corporation to the risk of the state's assertion of jurisdiction if its activities cause a forum injury. In essence, as Professor Twichell noted, “The scope of the defendant's activity defines the scope of the risk.”<sup>225</sup>

However, obtaining the same benefits and protections from the state is hardly proportional to the burden of unlimited jurisdiction for any cause of action arising anywhere in the world.<sup>226</sup> A greater

808 (Tex. 2002) (holding dispute-blind jurisdiction inappropriate when “a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws”).

<sup>221</sup> See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1957) (noting that adjudicatory jurisdiction “requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”).

<sup>222</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (emphasis added).

<sup>223</sup> 444 U.S. 286 (1980).

<sup>224</sup> *Id.* at 297 (emphasis added).

<sup>225</sup> Twichell, *Doing-Business Jurisdiction*, *supra* note 5, at 175.

<sup>226</sup> See *id.*

quantum of forum benefits would be necessary. But the cases invoking this exchange rationale in the general jurisdiction context have never accounted for the more substantial forum activities required for dispute-blind jurisdiction, instead merely co-opting a specific jurisdiction justification to support the exercise of general jurisdiction.<sup>227</sup>

The judiciary's general jurisdiction exchange theory is therefore facile. While commentators have proposed insightful alternatives that acknowledge a distinction in the requisite forum activities necessary for dispute-specific and dispute-blind jurisdiction, their theories unfortunately depend on a more limited doctrinal conception of general jurisdiction's scope. For instance, Professor Allan Stein, reasoning that the "fairness of a state's jurisdiction over its citizens is based on a perceived equitable exchange of the privileges of citizenship for its burdens," contended general jurisdiction is therefore appropriate over those defendants structuring a "citizen-like relationship" by adopting the forum as home for most purposes.<sup>228</sup> But the general jurisdiction holdings of federal and state courts do not employ such a limited "adoptive home" theory.<sup>229</sup> Professor Lea Brilmayer avowed a defendant should be subject to general jurisdiction under the reciprocal benefits and burdens rationale when "the defendant's level of activity rises to the level of activity of an insider, so that relegating the defendant to the political process is fair."<sup>230</sup> Under her rationale, corporate efforts to influence the political process appear significant to the jurisdictional calculus.<sup>231</sup> But, because the courts do not typically consider such efforts as a relevant contact for general jurisdiction queries,<sup>232</sup> there is

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<sup>227</sup> See *supra* notes 211-24 and accompanying text.

<sup>228</sup> Stein, *Interstate Federalism*, *supra* note 4, at 758.

<sup>229</sup> See *infra* Part IV.

<sup>230</sup> Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 742 (1988) [hereinafter Brilmayer et al., *General Look*]; see also Brilmayer, *How Contacts Count*, *supra* note 4, at 87 (urging that a defendant's systematic activity within the forum, "such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an 'insider' that he may safely be relegated to the State's political processes").

<sup>231</sup> Brilmayer et al., *General Look*, *supra* note 230, at 742 (noting that a corporation's decision to exert political influence in a state depends "on whether the level of attachment in that state exceeds the threshold beyond which exerting political influence is profitable").

<sup>232</sup> See, e.g., *Hollar v. Philip Morris, Inc.*, 43 F. Supp. 2d 794, 801-02 n.6 (N.D. Ohio 1998). Indeed, the only general jurisdiction decisions scrutinizing lobbying efforts involved either businesses lobbying for governmental contracts or organizations engaged primarily in position advocacy. See, e.g., *Lehigh Coal & Navigation Co. v. Geko-Mayo, GmbH*, 56 F. Supp. 2d 559, 572 (E.D. Pa. 1999) (lobbying of



no jurisprudence supporting her innovative proposition.

The extant reciprocal benefits and burdens rationales are thus not the solution. While obtaining the benefits and protections of the forum's laws is a necessary predicate for jurisdiction, it is not sufficient by itself to establish dispute-blind jurisdiction. Something more is required, but the contours of what this is have not been adequately answered by any of the existing jurisdictional templates employed by the state and federal courts.<sup>233</sup> Another approach needs to be adopted.

#### IV. THE QUEST FOR A NEW DISPUTE-BLIND PARADIGM

Because the existing doctrinal approaches to general jurisdiction are deficient, a new guiding principle is essential. This theorem should incorporate the Supreme Court's directives that the requisite forum activities must be of a substantial nature as well as continuous and systematic.<sup>234</sup> Moreover, to the extent possible, a new principle should reflect the better-reasoned determinations of the lower federal and state courts. Accordingly, the Article first evaluates the forum activities that have been decreed substantial enough for dispute-blind jurisdiction before contemplating a new paradigm.

##### A. *Judicial Appraisals of the Substantiality of Typical Forum Activities*

An infinite variety of activities exist that a nonresident defendant could potentially undertake in the forum. Nevertheless, the judicial determinations on the requisite substantiality for dispute-blind jurisdiction commonly appraise four primary categories of activities, including the appointment of an agent for service of process, the existence of a forum office, revenue-generating activities in or attributable to the forum, and websites accessible to forum residents.

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Pennsylvania politicians for government contracts was a form of business solicitation, but not sufficient for dispute-blind jurisdiction); *Health Indus. Mfg. Ass'n v. Crabb*, No. 14-99-00402-CV, 1999 WL 1080662, at \*4 (Tex. App. Dec. 2, 1999) (holding non-profit medical device manufacturers' trade association registered in Delaware with headquarters in Washington, D.C. amenable to general jurisdiction in Texas as a result of lobbying efforts to Texas governmental bodies and submission of press releases to the Texas news media in support of its business mission of "advocat[ing] positions on issues that relate to medical device manufacturers").

<sup>233</sup> See *supra* Parts III.A-F.

<sup>234</sup> See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318-20 (1945). Of course, another potential approach would be for the Supreme Court to adopt a new jurisdictional paradigm. But an immediate foundational change in the Supreme Court's adjudicatory jurisprudence is unlikely. See, e.g., Borchers, *supra* note 4, at 133; Juenger, *supra* note 206, at 167.

### 1. Appointment of an Agent

The corporate laws of every state in the nation require foreign corporations to register and appoint an agent for service of process before transacting certain kinds of intrastate business.<sup>235</sup> Unfortunately, though, the jurisdictional effect of such a qualification and appointment is somewhat confused.<sup>236</sup> The confusion emanates from superficially conflicting holdings of the Supreme Court on whether a foreign corporation's qualification to do business in the forum and appointment of an agent establishes its amenability for causes of action unrelated to its forum activities.

Justice Holmes first addressed this question for the Court in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*<sup>237</sup> In *Pennsylvania Fire*, an Arizona corporation sued a Pennsylvania insurer in Missouri state court to recover for a loss suffered in Colorado.<sup>238</sup> The Pennsylvania insurer previously obtained a license to conduct business in Missouri and had filed with the insurance superintendent "a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state."<sup>239</sup> While the insurance superintendent was served in accordance with the statute, the insurer contended that such service violated due process.<sup>240</sup> But the Supreme Court disagreed, reasoning that the insurer performed a voluntary act consenting to such service by executing the power of attorney, thereby "hardly leav[ing] a constitutional question open."<sup>241</sup>

The *Pennsylvania Fire* decision is often cited for the proposition that the qualification to do business and appointment of an agent exercises as a consent to the forum's jurisdiction for all causes of action.<sup>242</sup> But the Court's holding may not be this broad. The

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<sup>235</sup> CT CORPORATION SYSTEM, WHAT CONSTITUTES DOING BUSINESS 1 (1992).

<sup>236</sup> See Sternberg v. O'Neil, 550 A.2d 1105, 1110 (Del. 1988) (noting that federal and state courts "are divided as to whether statutory registration can operate as an express consent to personal jurisdiction in the absence of 'minimum contacts'").

<sup>237</sup> 243 U.S. 93 (1917).

<sup>238</sup> *Id.* at 94.

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

<sup>240</sup> *Id.* at 94-95.

<sup>241</sup> *Id.* at 95-96.

<sup>242</sup> See, e.g., Sondergard v. Miles, 985 F.2d 1389, 1397 (8th Cir. 1993) (citing *Pennsylvania Fire* as support for holding that construing registration statute as a consent to jurisdiction for causes of action unrelated to the defendant's forum activities did not violate due process); Sternberg v. O'Neil, 550 A.2d 1105, 1109 (Del. 1988) (relying on *Pennsylvania Fire* for proposition that registration operates as a consent to the forum's exercise of general personal jurisdiction); Bianco v. Concepts

Missouri Supreme Court had held that the insurance company was actually “doing business” in the state of Missouri, leading to the inference that jurisdiction was not predicated solely on the mere presence of a designated agent.<sup>243</sup> Additionally, the Missouri registration statute arguably required a forum nexus in addition to registration, as service was considered valid only if the company “had any liabilities outstanding in the state.”<sup>244</sup> Thus, *Pennsylvania Fire*’s holding may have merely entailed the propriety of jurisdiction when the nonresident corporation appointed an agent and actually conducted some measure of forum business.

In any event, *Pennsylvania Fire* predated *International Shoe* and its reformulation of the jurisdictional query from fictional constructs to a minimum contacts analysis.<sup>245</sup> Indeed, *Perkins* subsequently minimized any impact the appointment of an agent may have had on the minimum contacts analysis.<sup>246</sup> The quantum and quality of activities requiring the appointment of a designated agent under state law, *Perkins* pronounced, was a “helpful but not a conclusive test” for ascertaining whether the nature of the defendant’s forum activities supported jurisdiction for an unrelated cause of action.<sup>247</sup>

The Court again considered the jurisdictional effect of the appointment of an agent in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,<sup>248</sup> which involved an Ohio statute tolling the statute of limitations against a foreign corporation that did not have a designated agent for service of process within the state.<sup>249</sup> Relying on this statute, Bendix, a corporation with its principal place of business

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“100”, Inc., 436 A.2d 206, 212 (Pa. Super. Ct. 1981) (same); *Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719, 720 (Tex. App. 1989) (same). *But see In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1277 (D. Md. 1981) (opining plaintiff’s reliance on *Pennsylvania Fire* for this proposition was misplaced), *aff’d*, 704 F.2d 125 (4th Cir. 1983); *Freeman v. Dist. Court*, 1 P.3d 963, 968 (Nev. 2000) (concluding Supreme Court “has abandoned the reasoning” of *Pennsylvania Fire*).

<sup>243</sup> *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 184 S.W. 999, 1020 (Mo. 1916), *aff’d*, 243 U.S. 93 (1917).

<sup>244</sup> *Pa. Fire*, 243 U.S. at 94; *cf. In re Mid-Atl. Toyota*, 525 F. Supp. at 1277 (reasoning *Pennsylvania Fire* therefore “did not hold that consent was a sufficient basis for jurisdiction in the absence of any contact between defendant and Missouri”).

<sup>245</sup> *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945) (articulating that the earlier standards of “presence” and “consent” were legal fictions); *see also Burnham v. Superior Court*, 495 U.S. 604, 617-18 (1990) (Scalia, J., plurality) (noting that the prior “purely fictional” doctrine of “consent” for jurisdiction over nonresident corporations appointing an in-state agent was “cast aside” by *International Shoe*).

<sup>246</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>247</sup> *Id.*

<sup>248</sup> 486 U.S. 888 (1988).

<sup>249</sup> OHIO REV. CODE ANN. § 2305.15 (Anderson 1987).

in Ohio, contended that its suit for breach of contract against Midwesco, an Illinois corporation, was not barred by limitations because Midwesco had not designated an agent in Ohio for service of process.<sup>250</sup> Midwesco responded that such a tolling provision violated the Commerce Clause, and the Supreme Court agreed.<sup>251</sup>

In its analysis, the Supreme Court accepted, without discussion, that, under the relevant Ohio long-arm statute, the appointment of an agent for service of process would operate as consent to the assertion of general jurisdiction by the Ohio courts.<sup>252</sup> By appointing an agent for service of process, the Court postulated Midwesco would thereby subject itself to the general jurisdiction of Ohio courts as to “any suit,” irrespective of whether the factual underpinning of the suit had any connection to Ohio.<sup>253</sup> The Court proclaimed that designating “an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio’s tenuous relation would not otherwise extend.”<sup>254</sup> Because requiring a foreign corporation to submit to general jurisdiction in the absence of minimum contacts was a “significant burden” exceeding any local interest of Ohio, the Court held the tolling provision violated the Commerce Clause by placing an undue burden on interstate commerce.<sup>255</sup>

*Bendix*, however, did not actually involve the issue of the substantiality of contacts necessary for the assertion of jurisdiction predicated on unrelated forum activities.<sup>256</sup> In fact, the Court explicitly distinguished consensual jurisdiction under the Ohio statute from “the minimum contacts necessary for supporting personal jurisdiction.”<sup>257</sup> The Court thus did not retreat from its prior pronouncement that, under the *International Shoe* minimum contacts test, the presence of an agent is not dispositive.<sup>258</sup>

Instead, the Court presumed the agent’s appointment, under Ohio law, operated as “consent to the general jurisdiction of the Ohio courts.”<sup>259</sup> Consent, of course, is another basis for personal jurisdiction, outside the parameters of the minimum contacts

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<sup>250</sup> *Bendix*, 486 U.S. at 890.

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

<sup>252</sup> *Id.* at 889, 892-93.

<sup>253</sup> *Id.* at 892.

<sup>254</sup> *Id.* at 892-93.

<sup>255</sup> *Id.* at 893-95.

<sup>256</sup> *See Bendix*, 486 U.S. at 889-95.

<sup>257</sup> *Id.* at 893.

<sup>258</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>259</sup> *Bendix*, 486 U.S. at 889 (emphasis added).

analysis.<sup>260</sup> Accordingly, *Bendix*, properly understood, did not involve the issue addressed by this Article, but instead proceeded on the assumption (perhaps even an erroneous assumption) that the Ohio registration statute purported to exact a defendant's consent to the forum's jurisdiction for all causes of action asserted against it.<sup>261</sup>

The preceding decisions reveal, then, that the Supreme Court has employed two distinct modes of analysis since *International Shoe* to evaluate whether the appointment of an agent establishes general jurisdiction. The first considers whether the appointment under the particular state statute operates as the defendant's consent to the jurisdiction of the courts of the state for any and all causes of action, and, if so, whether such exacted consent is constitutional.<sup>262</sup> This was the issue considered in *Bendix*, and it also has been addressed by numerous other federal and state courts.<sup>263</sup> But any contemplation of

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<sup>260</sup> See *Ins. Corp. of Ir. v. Compagnie des Bauxites*, 456 U.S. 694, 703 (1982) (noting a "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court" irrespective of the power of the forum to serve process under *International Shoe*); cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591-95 (1991) (holding adhesion contract between Florida cruise company and Washington passengers stipulating Florida as the forum for all disputes was enforceable); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (upholding contractual agreement between a New York equipment supplier and its Michigan customer requiring the customer to appoint an agent for service of process in New York and consent to the jurisdiction of New York's courts).

<sup>261</sup> *Bendix*, 486 U.S. at 889, 892-93. The provisions of the Ohio Code, however, do not clearly establish that the appointment of an agent constitutes a consent to the general jurisdiction of the Ohio courts. OHIO REV. CODE ANN. § 1703.04.1(A) (Anderson 1985) provides that "[e]very foreign corporation for profit that is licensed to transact business in this state . . . shall have and maintain an agent . . . upon whom process against the corporation may be served . . ." *Id.* Indeed, the Sixth Circuit held after *Bendix* that the Ohio Code provisions did not in fact operate as a consent to jurisdiction, reasoning that the Ohio Supreme Court itself "rejected the proposition that service of process may be equated with personal jurisdiction." *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993) (citing *Wainscott v. St. Louis-S.F. Ry. Co.*, 351 N.E.2d 466 (Ohio 1976)).

<sup>262</sup> *Bendix*, 486 U.S. at 892-93.

<sup>263</sup> See, e.g., *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181-83 (5th Cir. 1992) (holding statutory registration and appointment provisions of the Texas Business Corporation Act did not operate as a consent to jurisdiction); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 89 n.6 (1st Cir. 1990) (opining the appointment of an agent under Maine's registration statute was not a consensual submission to jurisdiction); *Pearrow v. Nat'l Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (concluding defendant did not consent to jurisdiction under Arkansas registration statute); *Smith v. Lloyd's of London*, 568 F.2d 1115, 1118 & n.7 (5th Cir. 1978) (interpreting Georgia registration statute as requiring more than the mere presence of an appointed agent for amenability and questioning the constitutionality of a broader interpretation); *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1278 (D. Md. 1981) (holding exacted consent under West Virginia registration statute was an insufficient basis for adjudicatory jurisdiction in the absence of

the appropriate resolution of this issue is outside this Article's focus on general jurisdiction predicated on *minimum contacts* rather than consent.<sup>264</sup>

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minimum contacts), *aff'd*, 704 F.2d 125 (4th Cir. 1983); *Freeman v. Dist. Court*, 1 P.3d 963, 968 (Nev. 2000) (holding the appointment of an agent does not operate as a consent to jurisdiction); *Juarez v. United Parcel Serv. de Mex. S.A. de C.V.*, 933 S.W.2d 281, 284-85 (Tex. App. 1996) (holding "the designation of an agent for service of process in Texas does not amount to a general consent to jurisdiction"). *But see* *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (holding nonresident corporation amenable because "Pennsylvania law explicitly states that the qualification of a foreign corporation to do business is sufficient contact to serve as the basis for the assertion of personal jurisdiction"); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (holding nonresident corporation's registration under Minnesota statute operated as jurisdictional consent for all causes of action even in the absence of minimum contacts with the forum); *Read v. Sonat Offshore Drilling, Inc.*, 515 So. 2d 1229, 1230-31 (Miss. 1987) (concluding nonresident corporation qualified to do, but not actually performing, business in the forum was amenable in Mississippi for accident occurring Louisiana because minimum contacts had "nothing to do" with jurisdiction predicated on service on a registered agent); *Mittelstadt v. Rouzer*, 328 N.W.2d 467, 469 (Neb. 1982) (holding Arkansas trucking company consented to Nebraska's jurisdiction by appointing an agent as required by the federal Motor Carrier Act, despite the fact the accident with the Nebraska plaintiffs occurred in Arizona); *Augsbury Corp. v. Petokey Corp.*, 470 N.Y.S.2d 787, 789 (App. Div. 1983) (reasoning registration to do business in New York is "a form of constructive consent to personal jurisdiction which has been found to satisfy due process"); *Sharkey v. Wash. Nat'l Ins. Co.*, 373 N.W.2d 421, 425-26 (S.D. 1985) (concluding insurer's registration to do business under South Dakota law was sufficient to establish jurisdiction even though the policy was executed and the insured died in Wyoming); *Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex. App. 1975) (holding Illinois corporation registered to do business under Texas Business Corporations Act "consented to amenability to jurisdiction for purposes of all lawsuits" within Texas, including underlying lawsuit arising out of a truck accident in Louisiana with the Texas plaintiffs). Some courts, perhaps to avoid any constitutional difficulty from exacted consent, have adopted a hybrid approach, limiting the efficacy of a corporation's consent to situations in which the corporation actually conducts some quantum of business activities in the forum. *See, e.g.*, *Harry S. Peterson Co. v. Nat'l Union Fire Ins. Co.*, 434 S.E.2d 778, 780-81 (Ga. Ct. App. 1993) (holding service of process on registered agent of corporation performing unspecified "substantial" business in Georgia sufficient for general jurisdiction); *Nelson v. World Wide Lease, Inc.*, 716 P.2d 513, 516-18 (Idaho Ct. App. 1986) (finding Washington corporation amenable in Idaho to dispute-blind jurisdiction based on its consent under the Idaho registration statute and its actual exercise of forum business activities under its registration).

<sup>264</sup> *See supra* note 14. Commentary addressing the propriety of appointment and registration as a consent to jurisdiction includes the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 & cmts. a, c (1971), which contends that a foreign corporation validly consents to its amenability in the state "as to all causes of action" specified under the particular state registration statute. *But see* D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990) (arguing persuasively that the exaction of consent to jurisdiction for unrelated causes of action in exchange for the privilege of conducting business in the forum violates the unconstitutional conditions doctrine, due process, and equal protection).

The second mode of analysis considers whether the mere appointment of the agent is in itself such a substantial and continuous activity in the forum to subject the defendant to jurisdiction under the minimum contacts analysis for general *in personam* jurisdiction. Here, *Perkins* established that the activities requiring such an appointment under state law do not provide the conclusive standard for general jurisdiction.<sup>265</sup> Accordingly, the mere fact that a corporation has appointed an agent for service of process, or should appoint an agent for service of process under state law, is not sufficient for dispute-blind jurisdiction. A distinction exists between applying for the privilege of doing business and actually conducting business within the forum, and only the actual conduct of business constitutes the requisite purposefully directed activities for general jurisdiction under *International Shoe's* progeny.<sup>266</sup> Some federal courts have even expressed that the mere designation of an agent is “of no special weight” in the jurisdictional calculus.<sup>267</sup> Yet irrespective of the appropriate “weight” to be afforded, courts routinely opine that the mere appointment of an agent does not establish the requisite minimum contacts for adjudicatory jurisdiction.<sup>268</sup>

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<sup>265</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>266</sup> See, e.g., *Siemer*, 966 F.2d at 181-83 (holding Delaware corporation with principal place of business in Kansas not subject to general jurisdiction in Texas in suit brought by foreign nationals for plane crash in Egypt because qualifying to do business and appointing a registered agent in Texas, “from any conceivable perspective, hardly amounts to ‘the general business presence’ of a corporation so as to sustain an assertion of general jurisdiction”); *Sandstrom*, 904 F.2d at 89-90 (holding nonresident corporation that secured a license to do business and appointed an agent for service of process in Maine without actually ever conducting any business in the forum was not subject to general jurisdiction because “preparations to do business at some indeterminate future date” was not the purposeful availment “of the privilege of conducting its affairs in the forum state”); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (determining nonresident drug company’s application to do business and appointment of an agent did not affect general jurisdictional calculus because “[a]pplying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another”); *Armstrong v. Aramco Servs. Co.*, 746 P.2d 917, 924 (Ariz. Ct. App. 1987) (positing that a license to conduct business “in no way obviates the requirement that a nonresident corporate defendant have *conducted* substantial or systematic and continuous business activities in the state”) (emphasis in original).

<sup>267</sup> *Ratliff*, 444 F.2d at 748; see also *Siemer*, 966 F.2d at 181 (quoting *Ratliff*).

<sup>268</sup> See, e.g., *Sofrar, S.A. v. Graham Eng’g Corp.*, 35 F. Supp. 2d 919, 921 (S.D. Fla. 1999) (holding nonresident defendant was not amenable to dispute-blind jurisdiction because “personal jurisdiction over a corporate defendant cannot be found on the basis of a defendant’s registration to do business in the state and designation of a corporate agent alone”); *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993) (averring that “[s]ervice on a designated agent alone does not establish minimum contact”); *DVI, Inc. v. Superior Court*, 128 Cal.

Thus, the appointment of a statutory agent alone is not of a sufficiently substantial nature to support the exercise of general jurisdiction under the *International Shoe* model. Instead, the actual course of conduct of business in the forum by the nonresident corporation must be examined, including the physical situs of the business transactions and the quantum and quality of such transactions.

## 2. In-State Office or Store

Conducting business operations through an office, store, or other tangible physical location in the forum state is traditionally sufficient for general jurisdiction.<sup>269</sup> As an example, the Second

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Rptr. 2d 683, 694 (Ct. App. 2002) (concluding that Delaware holding corporation with a principal place of business in Pennsylvania was not subject to general jurisdiction in California for its subsidiary's forum conduct merely because the holding company designated an agent for service of process in California and qualified to do business in the state); *Goodyear Tire & Rubber Co. v. Ruby*, 540 A.2d 482, 486-87 (Md. 1988) (holding that Goodyear's appointment of a resident agent "would not alone be sufficient to subject it to suit" in Maryland for cause of action "entirely unrelated to its contacts with [the] State"); *Travelers Indem. Co. v. Abreem Corp.*, 449 A.2d 1200, 1201 (N.H. 1982) (declining to exercise jurisdiction over defendant registered to do, but not doing, business in New Hampshire when forum was "not related to the parties or the litigation"); *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 417-18 (Tex. App. 1997) (plurality holding that nonresident corporation's certificate of authority to do business, presence of agent for service of process, and sporadic business contacts with Texas were insufficient to establish dispute-blind jurisdiction).

<sup>269</sup> See, e.g., *Rittenhouse v. Mabry*, 832 F.2d 1380, 1390 (5th Cir. 1987) (holding Tennessee professional corporation amenable to general jurisdiction in Mississippi when it conducted all its affairs every fifth business day in Mississippi clinic); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 793 (10th Cir. 1979) (finding nonresident corporation's manufacturing plant in Mississippi sufficient to support the forum's exercise of dispute-blind jurisdiction); *Hesse v. Best W. Int'l, Inc.*, 38 Cal. Rptr. 2d 74, 75-76 (Ct. App. 1995) (holding Best Western subject to general jurisdiction in California for injury occurring in Mexico to California resident because it had a business office in California soliciting guests for its affiliate members, it had designated agent for service of process, and it had licensed 295 members of its organization in California); *St. Louis-S.F. Ry. v. Gitchoff*, 369 N.E.2d 52 (Ill. 1977) (predicating jurisdiction on the presence of a forum sales office); *Reyes v. Marine Mgmt. & Consulting, Ltd.*, 586 So. 2d 103, 109-11 (La. 1991) (holding Hong Kong corporation's establishment of corporate office in Louisiana from which it conducted a substantial portion of its ship management business for five years subjected corporation to jurisdiction of Louisiana courts in claim by Honduran seaman injured in international waters off the coast of Oregon); *James v. Ill. Cent. R.R. Co.*, 965 S.W.2d 594, 598-99 (Tex. App. 1998) (finding requisite minimum contacts existed for jurisdiction in Texas over Illinois railroad with office in Texas generating \$75 million in business annually, but holding the exercise of general jurisdiction would violate conceptions of "fair play and substantial justice"); *Hein v. Taco Bell, Inc.*, 803 P.2d 329, 330-31 (Wash. Ct. App. 1991) (holding Taco Bell subject to general jurisdiction in Washington for injury occurring in California to



Circuit in *Wiwa v. Royal Dutch Petroleum Co.*<sup>270</sup> held that the two parent holding corporations of a vast, international conglomerate of affiliated oil and gas corporations were amenable to dispute-blind jurisdiction in New York because of their New York investor relations office through which the companies cultivated American capital markets.<sup>271</sup> Despite the fact that this New York office performed only minimal activities in comparison to the corporation's world-wide activities, the court explicated that the continuous operation of the New York office established the propriety of jurisdiction.<sup>272</sup>

*Wiwa* and other similar decisions are in accord with the antecedent opinions relied upon in *International Shoe* to illustrate general jurisdiction.<sup>273</sup> Each of these earlier decisions involved corporate agents conducting business from a forum locale.<sup>274</sup> In *Tauza v. Susquehanna Coal Co.*,<sup>275</sup> for instance, Judge Cardozo held that a Pennsylvania coal company's solitary New York sales office established its amenability to dispute-blind jurisdiction in New York.<sup>276</sup> Certainly, then, adjudicatory jurisdiction predicated on a forum

Washington resident as a result of at least sixteen restaurants in Seattle and hundreds of employees in Washington); see also 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 108.41[3] (3d ed. 1997) ("The general jurisdiction contact threshold of 'continuous and systematic' typically requires the defendant to have an office in the forum state . . ."); cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (noting that "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of a suit there").

<sup>270</sup> 226 F.3d 88 (2d Cir. 2000).

<sup>271</sup> *Id.* at 92-93. While the office was nominally a part of their American subsidiary Shell Oil Company, the parent corporations ultimately paid for all the expenses of the office and the office existed solely to service the needs of the parents. *Id.* at 93.

<sup>272</sup> *Id.* at 98-99. The investor relations office's budget was a mere \$500,000 per year while the companies had world-wide sales of approximately \$190 billion in 2000. *Id.* at 93.

<sup>273</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (citing cases).

<sup>274</sup> See, e.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 105 (1898) (holding British corporation amenable to jurisdiction in New York for altercation occurring in Britain because the corporation was doing business in New York "through a mercantile firm, its regularly appointed agents"); *Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 117 N.E. 913, 914-15 (Mass. 1917) (holding Kansas railroad subject to jurisdiction in Massachusetts for a suit based upon promissory notes made, issued, and negotiated in another state because the railroad appointed a Boston independent passenger agent conducting business from an office in the forum), *aff'd*, 255 U.S. 565 (1921); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916-18 (N.Y. 1917) (concluding New York could exercise jurisdiction over a Pennsylvania coal company for a cause of action having no relationship to New York because the coal company had a branch sales office in New York staffed by a sales agent, eight salesmen, and clerical assistants from which it regularly solicited and obtained orders for continuous coal shipments from Pennsylvania to New York).

<sup>275</sup> 115 N.E. 915 (N.Y. 1917).

<sup>276</sup> *Id.* at 916-18.

business location has a long pedigree.

Nevertheless, while the presence of a forum office is often critical, such an office, standing alone, is not always enough to confer general jurisdiction.<sup>277</sup> Even the Supreme Court's early decisions recognized that a forum office did not suffice if the defendant did not conduct business of the requisite nature and character.<sup>278</sup> Thus, there must also be evidence of continuous, substantial business activities undertaken from the physical location.<sup>279</sup> As a recent example, the Fifth Circuit held in *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*<sup>280</sup> that dispute-blind jurisdiction was not appropriate merely because of the presence of the defendant's office within the forum.<sup>281</sup> The defendant had contracted to purchase a marine drilling rig from a vendor in Mississippi, and maintained an office at the shipyard with three employees to oversee the construction.<sup>282</sup> The Fifth Circuit, analogizing to *Helicopteros*, pronounced that a forum office merely monitoring the construction of the purchase did not establish the requisite forum activities to support jurisdiction for a cause of action wholly unrelated to its in-state contacts.<sup>283</sup>

Thus, a forum office is not the sine qua non of dispute-blind jurisdiction. The presence of an office alone in the forum does not establish the propriety of jurisdiction.<sup>284</sup> And, conversely, while the absence of a forum office is certainly significant to the jurisdictional calculus,<sup>285</sup> this does not mandate that the exercise of general

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<sup>277</sup> See, e.g., *In re Rationis Enters., Inc.*, 261 F.3d 264, 269-70 (2d Cir. 2001) (instructing district court on remand to hold an evidentiary hearing on jurisdiction because mere fact that nonresident defendant had a local sales office and telephone listing in the forum was not dispositive); *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832, 834-35 (2d Cir. 1958) (holding presence of New York reservation office not sufficient for amenability over claim by New York citizen injured at Florida resort when situs of business transactions was Florida); *Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 571 (E.D. Va. 1999) ("In traditional terms, the placing of a store or salesman in a state is not sufficient to confer general jurisdiction over a defendant without some evidence that the store or salesman actually generated sufficient sales in the forum state for the contact to be considered continuous and systematic.").

<sup>278</sup> See, e.g., *Green v. Chi., Burlington & Quiney Ry. Co.*, 205 U.S. 530, 532-34 (1907) (concluding that forum office alone did not support jurisdiction).

<sup>279</sup> See, e.g., *Coastal Video*, 59 F. Supp. 2d at 571.

<sup>280</sup> 249 F.3d 413 (5th Cir. 2001).

<sup>281</sup> *Id.* at 419-20.

<sup>282</sup> *Id.*

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

<sup>284</sup> See *id.*; see also *In re Rationis Enters., Inc.*, 261 F.3d at 269-70; *Coastal Video*, 59 F. Supp. 2d at 571.

<sup>285</sup> See, e.g., *Omeluk v. Langsten Slip & Batbyggeri, A/S*, 52 F.3d 267, 270 (9th Cir.

jurisdiction over a defendant without a regular place of business in the forum is erroneous.<sup>286</sup>

As the Supreme Court cautioned in *Burger King Corp. v. Rudzewicz*,<sup>287</sup> jurisdiction “may not be avoided merely because the defendant did not physically enter the forum State.”<sup>288</sup> *Burger King’s* justification is that “it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.”<sup>289</sup> Of course, the indubitable proposition that business is often conducted without any type of physical presence within the forum does not inexorably establish that such presence is not necessary for general jurisdiction, rather than the specific jurisdiction at issue in *Burger King*.<sup>290</sup> As a matter of fact, the Supreme Court’s decisions finding general jurisdiction, as well as the precedent the Court has cited approvingly that upheld this jurisdictional basis, all involved a defendant with at least some type of forum locale from which business was conducted on its behalf.<sup>291</sup>

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1995) (holding dispute-blind jurisdiction inappropriate over Norwegian shipbuilder because the “lack of a regular place of business in Washington [was] significant, and [was] not overcome by a few visits”); *Robbins v. Yutopian Enters., Inc.*, 202 F. Supp. 2d 426, 429 (D. Md. 2002) (finding nonresident defendant advertising and executing forty-six transactions with forum residents in less than a year not amenable to dispute-blind jurisdiction because such contacts were “insufficient to conclude that [the defendant] is ‘essentially domiciled’ in Maryland”).

<sup>286</sup> See, e.g., *Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt.*, 726 So. 2d 313, 314-16 (Fla. Dist. Ct. App. 1999) (holding Delaware corporation subject to general jurisdiction in Florida because of its \$1.75 million in annual sales to Florida residents via phone orders and mail from its broadcasts of infomercials on forty-eight cable stations while finding that jurisdiction could not be asserted over a related defendant based on the mere fact that the parties’ contract involved a Florida corporation); *Alderson v. Southern Co.*, 747 N.E.2d 926, 940 (Ill. App. Ct. 2001) (finding Indiana power company amenable to dispute-blind jurisdiction in Illinois despite the absence of any physical locale in Illinois because it sold its electric output to an Illinois corporation for use by Illinois residents under a contract governed by Illinois law).

<sup>287</sup> 471 U.S. 462 (1985).

<sup>288</sup> *Id.* at 476; see also *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869-70 (Ala. 1985) (quoting *Burger King*, 471 U.S. at 476); *Travel Opportunities*, 726 So. 2d at 315 (same).

<sup>289</sup> *Burger King*, 471 U.S. at 476.

<sup>290</sup> *Id.* at 472-73 & n.15, 479-80.

<sup>291</sup> See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952) (holding Philippine mining company’s maintenance of corporate office in Ohio used to conduct a “continuous and systematic supervision of the necessarily limited wartime activities of the company” was sufficiently substantial to permit Ohio to adjudicate the dispute even though plaintiff’s cause of action had no relationship to company’s Ohio activities); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 105 (1898) (concluding British corporation amenable to jurisdiction in New York for altercation

Nevertheless, conditioning general jurisdiction on a place of business situated within the forum is problematic. Indeed, if the Court had intended such a superficial benchmark, it certainly could have decreed that the requisite minimum contacts for general jurisdiction demand at least a business locale in the forum. But instead, the Court explicitly rejected the use of any mechanical rules in resolving jurisdictional queries.<sup>292</sup> And its refusal to employ a physical locale requirement as a proxy for general jurisdiction was appropriate since such a construct would, in some cases, lead to absurd results.<sup>293</sup>

A quintessential example is *Alderson v. Southern Co.*<sup>294</sup> One of the defendants in that case, State Line Energy, an Indiana limited liability company, owned a power plant abutting the state line between Indiana and Illinois. The power plant exploded, injuring employees of an Indiana contractor.<sup>295</sup> Although the power plant was physically located just on the Indiana side of the state line,<sup>296</sup> the electric output of the power plant was almost exclusively provided to an Illinois corporation for distribution to Illinois residents, pursuant to a power purchase contract executed in Illinois and governed by Illinois law.<sup>297</sup>

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occurring in Britain because the corporation was doing business in New York “through a mercantile firm, its regularly appointed agents”); *Mo., Kan. & Tex. Ry. Co. v. Reynolds*, 117 N.E. 913, 914-15 (Mass. 1917) (holding Kansas railroad subject to jurisdiction in Massachusetts for a suit based upon promissory notes made, issued, and negotiated in another state because the railroad appointed a Boston independent passenger agent conducting business from an office in the forum), *aff’d*, 255 U.S. 565 (1921); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916-18 (N.Y. 1917) (concluding New York could exercise jurisdiction over a Pennsylvania coal company for a cause of action having no relationship to New York because the coal company had a branch sales office in New York staffed by a sales agent, eight salesmen, and clerical assistants from which it regularly solicited and obtained orders for continuous coal shipments from Pennsylvania to New York).

<sup>292</sup> *Int’l Shoe*, 326 U.S. at 319.

<sup>293</sup> *See, e.g., Wilkerson v. Fortuna Corp.*, 554 F.2d 745, 748 (5th Cir. 1977) (holding corporation owning horse track located in New Mexico, but as close to the Texas state line as possible because El Paso citizens provided the vast majority of its patrons, subject to jurisdiction in Texas for claims by Texas horse trainer regarding alleged violations of New Mexico Racing Commission rules).

<sup>294</sup> 747 N.E.2d 926 (Ill. App. Ct. 2001).

<sup>295</sup> *Id.* at 930-31.

<sup>296</sup> *Id.* As one witness testified, the main entrance of the plant was just barely on the Indiana side of the border; indeed, the road leading to this entrance was partially in Illinois. *Id.* at 935. The plant was actually connected to the Chicago sewer system, and Chicago emergency crews responded on the day of the explosion that was the basis of the suit. *Id.*

<sup>297</sup> *Id.* at 931. State Line Energy agreed to supply all of its normal operating capacity to the Illinois corporation, Commonwealth Edison. Commonwealth Edison also had a right of first refusal on any excess capacity. *Id.* However, on a couple of occasions, State Line Energy sold excess capacity to utilities in Ohio and Illinois. *Id.*

Under these circumstances, this Indiana company was certainly amenable to dispute-blind jurisdiction in Illinois, despite the lack of any type of physical locale in the forum. As the court expounded, holding that State Line Energy's lack of an office in Illinois was dispositive for purposes of jurisdiction would ignore "the economic reality of its business"—that it sold almost all its product to an Illinois corporation for use by Illinois residents under a contract governed by Illinois law and that its plant relied on governmental services, such as sewer and emergency protection, from Chicago, Illinois.<sup>298</sup> Its connections with Illinois were thus at least as substantial and meaningful to its business as its contacts with Indiana, mandating that general jurisdiction was appropriate in Illinois despite the absence of an in-state business locale.

Therefore, the absence of a forum office or store, just like the presence of such a location, is not determinative. Although whether the defendant maintains a forum business location is a significant jurisdictional factor, the quality and quantity of business activity conducted by the defendant in the forum must also be inspected, which can be an arduous task.

### 3. Revenue-Generating Activities

The judicial appraisals of a defendant's amenability to dispute-blind jurisdiction predicated on its revenues attributable to the forum, or its revenues as a result of solicitation efforts in the forum, appear hopelessly confused.<sup>299</sup> In this context, in particular, existing doctrine evinces "a bewildering array of seemingly inconsistent results."<sup>300</sup> Nevertheless, scrutinizing the lower court decisions consonant with the Supreme Court's intimations establishes some guiding precepts.

While the Supreme Court has issued only two holdings on

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at 933. Because the power from the plant was not provided at all to Indiana residents, State Line Energy requested an exemption from regulation by the Indiana Utility Regulatory Commission. *Id.* at 932-33.

<sup>298</sup> *Id.* at 940-41.

<sup>299</sup> Compare, e.g., *Ex parte* Newco Mfg. Co., 481 So. 2d 867, 869 (Ala. 1985) (holding that 2,000 sales in five years in an amount of \$65,000 to \$85,000 per year was sufficient for dispute-blind jurisdiction), with *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 375-76 (5th Cir. 1987) (holding hundreds of millions of dollars in forum sales did not suffice for dispute-blind jurisdiction under similar circumstances), and *Price & Sons v. Second Judicial Dist. Court*, 831 P.2d 600, 601 (Nev. 1992) (concluding that "[s]ales and marketing efforts in the forum by a foreign corporation, without more, are insufficient to establish general jurisdiction").

<sup>300</sup> *Severinson v. Widener Univ.*, 768 A.2d 200, 203 (N.J. Super. Ct. App. Div. 2001).

general jurisdiction since adopting the minimum contacts test,<sup>301</sup> two other decisions perhaps provide additional illumination. In *Rush v. Savchuk*,<sup>302</sup> the Supreme Court did not dispute the proposition, which was vital to the state court's holding under review, that State Farm Mutual Automobile Insurance Company had sufficient jurisdictional contacts for even unrelated causes of action in each of the fifty states.<sup>303</sup> The Court apparently concurred with the premise that, with respect to a vast nationwide enterprise like State Farm, dispute-blind jurisdiction might be appropriate in a number of states.<sup>304</sup>

On the other hand, *Keeton v. Hustler Magazine, Inc.*<sup>305</sup> indicates that not all revenue-generating forum activities satisfy the substantiality requirement for general jurisdiction. The defendant in *Keeton*, an Ohio corporation with its principal place of business in California, sold ten to fifteen thousand copies of its magazine in New Hampshire every month.<sup>306</sup> This aggregated to the sale of between 120,000 and 180,000 magazines annually, generating at least \$219,000 in revenue per year at the time suit was filed.<sup>307</sup> Nevertheless, the Court hinted these contacts might not justify general jurisdiction, stating such forum conduct "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities."<sup>308</sup>

Unfortunately, though, *Rush* and *Keeton* leave many questions unanswered. First, of course, because neither case announced a holding regarding whether the activities at issue were of the requisite substantial nature for general jurisdiction, the value of the Court's comments is debatable. Second, even accepting the Supreme Court's dicta, the decisions provide minimal detail. Assuming the Supreme Court agreed with the lower court in *Rush* that State Farm, a large national insurer with agents in every state, was amenable to

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<sup>301</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

<sup>302</sup> 444 U.S. 320 (1980).

<sup>303</sup> *Id.* at 330.

<sup>304</sup> *See id.* (noting that "State Farm is 'found,' in the sense of doing business, in all 50 States and the District of Colombia" and that the insurer's "forum contacts would support *in personam* jurisdiction even for an unrelated cause of action").

<sup>305</sup> 465 U.S. 770 (1984).

<sup>306</sup> *Id.* at 772.

<sup>307</sup> *See id.* *Keeton* filed her lawsuit in October 1980. *See Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1188 (N.H. 1988) (detailing procedural history of lawsuit). At that time, the subscription price for the magazine was \$22.00 per year, or \$1.833 an issue, with a cover price of \$2.95 per issue. *See HUSTLER*, Mar. 1980, at 2 (copy on file with Litigated Literature Section, Tarlton Law Library, University of Texas School of Law). The 2003 subscription price is \$41.95 a year, or \$3.496 an issue, with a cover price of \$7.99. *See* <http://www.subscription.larryflynt.com>.

<sup>308</sup> *Keeton*, 465 U.S. at 779-80.

jurisdiction anywhere in the United States, the Court did not denote the rationale, or even the defendant's activities, which justified the imposition of the state's judicial power.<sup>309</sup> And in *Keeton*, the Court did not imply that revenues alone in the forum could never be enough for general jurisdiction; rather, the implication was merely that the magazines sold in New Hampshire in that case may not have met the substantiality requirement.<sup>310</sup> Thus, *Keeton* only illustrates that 120,000 to 180,000 annual magazine sales in the forum may not suffice, providing no guidance as to either why such sales are insufficient or what, if any, level of sales are sufficient.<sup>311</sup>

Perhaps not surprisingly, then, lower courts rarely cite either *Rush* or *Keeton* in resolving general jurisdiction queries. While the *Keeton* dictum occasionally has been relied upon by courts as additional support for the defendant's non-amenability under dispute-blind principles,<sup>312</sup> the opinion has been ignored by decisions finding general jurisdiction. Instead, courts determining that the exercise of dispute-blind jurisdiction is appropriate often rely on a fiscal approach gauging the defendant's forum revenues.<sup>313</sup>

The Sixth Circuit, for example, held in *Michigan National Bank v. Quality Dinette, Inc.*<sup>314</sup> that two closely held Alabama corporations' combined four hundred sales totaling just over \$625,000 in Michigan

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<sup>309</sup> See *Rush v. Savchuk*, 444 U.S. 320, 330 (1980).

<sup>310</sup> *Keeton*, 465 U.S. at 779-80.

<sup>311</sup> *Id.*

<sup>312</sup> See, e.g., *Noonan v. Winston Co.*, 135 F.3d 85, 93 n.9 (1st Cir. 1998) (concluding forum solicitation efforts of foreign national defendant in Massachusetts were not as regular as *Hustler Magazine, Inc.*'s distribution efforts in New Hampshire that *Keeton* suggested were not substantial enough to support general jurisdiction); *Ash v. Burnham Corp.*, 343 S.E.2d 2, 4-5 (N.C. Ct. App.) (comparing the dollar volume of sales the nonresident defendant corporation made to forum customers to the level of sales *Keeton* hinted were insufficient for dispute-blind jurisdiction), *aff'd*, 349 S.E.2d 579 (N.C. 1986) (per curiam).

<sup>313</sup> See, e.g., *Travel Opportunities of Fort Lauderdale, Inc. v. Walter Karl List Mgmt., Inc.*, 726 So. 2d 313, 314-16 (Fla. Dist. Ct. App. 1999) (holding Delaware corporation subject to general jurisdiction in Florida because of its \$1.75 million in annual sales to Florida residents via phone orders and mail from its broadcasts of infomercials); *Colletti v. Crudele*, 523 N.E.2d 1222, 1229 (Ill. App. Ct. 1988) (finding Florida trucking company, realizing \$5,000 to \$10,000 in revenues from approximately a dozen annual trips for local industrial consignees to Illinois, subject to general jurisdiction for accident with Illinois residents occurring in Kentucky); *Gulentz v. Fosdick*, 466 A.2d 1049, 1055 (Pa. Super. Ct. 1983) (concluding general jurisdiction appropriate in Pennsylvania over a Minnesota trucking company for an accident occurring in Ohio because \$735,000 of the company's \$20 million nationwide gross receipts were attributable to its trucking activities in Pennsylvania, its trucks traveled 2.6 million miles on Pennsylvania roads, and it purchased over 500,000 gallons of fuel for its trucks in Pennsylvania).

<sup>314</sup> 888 F.2d 462 (6th Cir. 1989).

through an independent sales representative and mail order solicitations warranted dispute-blind jurisdiction in Michigan.<sup>315</sup> The court avowed that such sales, even though representing only three percent of the companies' total sales, indicated the requisite continuous and systematic portion of the defendants' general business necessary for general jurisdiction.<sup>316</sup> And other courts have predicated general jurisdiction on even more limited total revenues and sales made to forum residents.<sup>317</sup>

Other decisions have reached similar results by examining the percentage of total sales or revenues derived from the forum.<sup>318</sup> For instance, in *Woods v. Nova Cos. Belize Ltd.*,<sup>319</sup> the Belizean corporation's sale of approximately eighteen percent of its shrimp to Florida importers was the primary activity supporting dispute-blind jurisdiction.<sup>320</sup> Yet, while eighteen percent perhaps sounds substantial, what if the corporation's worldwide revenues had only been \$100,000?<sup>321</sup> Or, as a converse illustration, less than one-tenth of one percent of California Federal Savings & Loan Association's

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<sup>315</sup> *Id.* at 466.

<sup>316</sup> *Id.* As support, the Sixth Circuit cited two Michigan state cases, *Kircos v. Goodyear Tire & Rubber Co.*, 247 N.W.2d 316, 317 (Mich. Ct. App. 1976), and *June v. Vibra Screw Feeders, Inc.*, 149 N.W.2d 480, 481 (Mich. Ct. App. 1967). In *June*, however, the defendant's contacts were actually sufficiently related to the dispute to support specific jurisdiction, as the Michigan plaintiff sued his former employer for breach of contract to recover commissions he was allegedly owed for selling the defendant's products in Michigan. *See id.*

<sup>317</sup> *See, e.g., Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (holding that 2,000 sales through the telephone, the mail, and an independent manufacturer's representative in a five-year period in an amount of \$65,000 to \$85,000 per year was sufficient to subject a nonresident Missouri corporation to dispute-blind jurisdiction in Alabama for an injury occurring in Tennessee to a Tennessee resident); *Colletti*, 523 N.E.2d at 1229 (finding Florida trucking company with \$5,000 to \$10,000 in annual revenues from forum subject to general jurisdiction); *Kircos*, 247 N.W.2d at 317 (concluding revenues of \$32,117 in the last year from Michigan customers through a Michigan dealer, direct mail, and advertising supported general jurisdiction).

<sup>318</sup> *See, e.g., Woods v. Nova Cos. Belize*, 739 So. 2d 617, 620 (Fla. Dist. Ct. App. 1999) (using foreign defendant's sale of eighteen percent of its product in Florida as one of the contacts to support conclusion that defendant had engaged in continuous and systematic business activities in Florida in claim by Belizean citizen injured in Costa Rica); *Kircos*, 247 N.W.2d at 317 (relying on defendant's realization of an average of 2.78 percent of its total revenue from Michigan customers to support general jurisdiction finding).

<sup>319</sup> 739 So. 2d 617 (Fla. Dist. Ct. App. 1999).

<sup>320</sup> *Id.* at 620-21. While other forum contacts were listed as well, the percentage of sales to Florida was always discussed first by the court and appeared central to its holding. *See id.* at 619, 620-21.

<sup>321</sup> The *Woods* court did not specify the total worldwide shrimp sales made by the Belizean corporation. *See id.*



depositors, deposits, and loans were traceable to Pennsylvania in the mid-1980's, but this aggregated to over seven hundred Pennsylvanian depositors with \$10 million in deposits and an equal amount of loans.<sup>322</sup> Certainly, then, percentages alone are meaningless.

More importantly, though, regardless of whether revenues, sales, or the percentage of either derived from forum residents is the court's polestar, primarily relying on a quantitative fiscal analysis pretermits the qualitative aspect of general jurisdiction. As discussed previously, *Helicopteros* mandates that the general jurisdictional calculus incorporates a qualitative analysis; in other words, quantity is not enough.<sup>323</sup> Indeed, the New Hampshire magazine sales in *Keeton* were quantitatively extensive, more so in absolute numbers than in many of the cases finding general jurisdiction.<sup>324</sup> Nevertheless, the Court implied that such sales were not qualitatively "so substantial" as to support general jurisdiction.<sup>325</sup>

The evident question is how to distinguish forum revenue-generating activities that are substantial from those that are not. While the Court did not provide the answer in *Keeton*, some of its pre-*International Shoe* opinions that the Court continues to employ when deciding general jurisdiction queries may shed some insight.<sup>326</sup>

For instance, advertising and solicitation of sales alone did not satisfy the precursor to general jurisdiction.<sup>327</sup> It did not suffice that

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<sup>322</sup> *Provident Nat'l Bank v. Cal. Sav. & Loan Ass'n*, 819 F.2d 434, 436 (3d Cir. 1987).

<sup>323</sup> See *supra* Part I.

<sup>324</sup> Compare *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), with *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (holding that 2,000 forum sales in an amount of \$65,000 to \$85,000 per year was sufficient for dispute-blind jurisdiction), and *Colletti v. Crudele*, 523 N.E.2d 1222, 1229 (Ill. App. Ct. 1988) (holding a company with \$5,000 to \$10,000 in annual forum revenues subject to general jurisdiction), and *Kircos v. Goodyear Tire & Rubber Co.*, 247 N.W.2d 316, 317 (Mich. Ct. App. 1976) (finding forum revenues of \$32,117 in the prior year supported general jurisdiction).

<sup>325</sup> *Keeton*, 465 U.S. at 779-80.

<sup>326</sup> See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 417-18 (1984) (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923)); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 n.6 (1952) (citing, inter alia, *Philadelphia & Reading Railway Co. v. McKibbin*, 243 U.S. 264 (1917), and *Barrow Steamship Co. v. Kane*, 170 U.S. 100 (1898)); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945) (citing, inter alia, *Green v. Chicago, Burlington & Quincy Railway Co.*, 205 U.S. 530 (1907), and *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918)).

<sup>327</sup> See, e.g., *People's Tobacco Co.*, 246 U.S. at 87 (holding defendant's activities of advertising and sending soliciting agents to the forum were insufficient for jurisdiction); *Green*, 205 U.S. at 533-34 (decreeing solicitation in forum did not support amenability).

the defendant conducted activities in the forum if those activities were merely to solicit transactions occurring in another state.<sup>328</sup> Thus, in *Green v. Chicago, Burlington & Quincy Railway Co.*,<sup>329</sup> the Court held that an Iowa railroad was not amenable to jurisdiction in Pennsylvania for an injury occurring in California to a Pennsylvania citizen based on the solicitation efforts of its Philadelphia employees.<sup>330</sup> Such efforts, the Court highlighted, did not culminate in an in-state transaction when the tickets were sold, delivered, and used in Illinois.<sup>331</sup> In contrast, in those situations in which the defendant did undertake in-state transactions and business on a regular basis, the propriety of jurisdiction was upheld.<sup>332</sup>

Notably, these Supreme Court decisions never quantified the fiscal effects of the defendant's forum activities. Instead, the Court focused on the quality and nature of the corporation's business activities in the state. Soliciting did not suffice, but conducting in-state business transactions on a continuous and systematic basis did. Thus, the quantity of revenues generated from forum residents is not what is controlling to ascertain substantiality, but rather how those revenues are generated.

A number of modern decisions, especially from the federal appellate courts, apparently concur. These courts refuse to place primary emphasis on a quantitative analysis of revenues generated from forum residents.<sup>333</sup> Rather, these decisions emphasize

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<sup>328</sup> See *supra* note 327.

<sup>329</sup> 205 U.S. 530 (1907).

<sup>330</sup> *Id.* at 532-33.

<sup>331</sup> *Id.* at 534.

<sup>332</sup> See, e.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 112-13 (1898) (holding British steamship corporation amenable to jurisdiction in New York for injury occurring in Britain based on selling tickets in the forum).

<sup>333</sup> See, e.g., *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996) (finding that, while \$4 million in forum sales alone may not have sufficed, such sales combined with corporation's relationship with its independent dealers, its visits to those dealers, and its targeted marketing in the forum satisfied minimum contacts aspect of general jurisdiction in claim when all alleged acts and omissions occurred outside the forum, but subsequently holding that the exercise of jurisdiction was unreasonable); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993) (holding nonresident corporation's employment of representatives in Maryland from 1981-1987 soliciting \$9 million to \$13 million in annual sales did not support dispute-blind personal jurisdiction because "advertising and solicitation activities alone do not constitute the 'minimum contacts' required for general jurisdiction"); *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992) (holding nonresident corporation's annual forum sales of \$900,000 through one of its two Ohio distributors was insufficient to establish general jurisdiction); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (holding that hundreds of millions of dollars in sales to Texas dealers and companies did not

qualitative aspects of the transactions, including the situs of the transactions, the defendant's control of in-state distribution channels, and, in some unique cases, advertisements specifically targeted or tailored to forum residents.<sup>334</sup>

a. Situs of transactions

A predominant factor in an appropriate substantiality query is the situs of the negotiation, execution, and performance of the revenue-generating transaction. To illustrate, the Fifth Circuit in *Beary v. Beech Aircraft Corp.*<sup>335</sup> held that Beech, a Delaware corporation with its principal place of business in Kansas, was not amenable to dispute-blind jurisdiction in Texas, despite selling over \$300 million in manufactured products over a five-year period to eighteen Texas corporations, because all the sales contracts had been negotiated and executed, as well as performed through the transfer of title, outside Texas.<sup>336</sup> The court reasoned that, under such circumstances, Beech had not invoked the protection or benefits of Texas law.<sup>337</sup> Accordingly, even though the defendant's total revenues derived from Texas residents were quantitatively prodigious, the court held that the defendant's execution of out-of-state contracts with forum residents did not satisfy the required substantiality for general jurisdiction.

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suffice for dispute-blind adjudicative jurisdiction when such sales were negotiated, executed, and performed outside Texas); *Ash v. Burnham Corp.*, 343 S.E.2d 2, 3-5 (N.C. Ct. App.) (holding \$520,000 of annual sales to forum residents did not support general jurisdiction), *aff'd*, 349 S.E.2d 579 (N.C. 1986) (per curiam); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 809-10 (Tex. 2002) (determining that, although the quantity of the nonresident defendant's contacts, including revenues derived from \$350,000 in annual sales to Texas residents, perhaps suggested "a significant relationship with Texas," the quality of its contacts did not support jurisdiction when it performed its services and executed its contracts outside of Texas); *J&J Marine, Inc. v. Le*, 982 S.W.2d 918, 926-27 (Tex. App. 1998) (holding Alabama corporation's \$3.5 million of shrimp boat sales to Texas residents did not support general jurisdiction when such sales were negotiated, executed, and title transferred in Alabama).

<sup>334</sup> See *infra* Parts IV.A.3.a-c.

<sup>335</sup> 818 F.2d 370 (5th Cir. 1987).

<sup>336</sup> *Id.* at 373, 375-76. The action was a perfect example of dispute-blind jurisdiction, as the suit was brought in Texas by survivors of Louisiana residents who had purchased an aircraft from Beech in Louisiana and were killed in a crash in Mississippi during a flight from Mississippi to Louisiana. *Id.* at 372. The aircraft had not been designed, manufactured, serviced, or repaired in Texas, and had never been owned by a Texas resident. *Id.* at 373. Thus, no one even attempted to argue that the action "relate[d] in any way to Beech's contacts with Texas." *Id.*

<sup>337</sup> *Id.* at 376.

A number of decisions have employed a similar approach.<sup>338</sup> Nonetheless, other courts have dismissed the import of the situs of the transactions to the jurisdictional calculus,<sup>339</sup> while most courts simply ignore it completely.<sup>340</sup>

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<sup>338</sup> See, e.g., *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993) (holding nonresident corporation's \$9 million to \$13 million in annual sales to forum residents did not support dispute-blind personal jurisdiction when orders were placed directly with the company); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (finding nonresident's corporation's bareboat charters to its Louisiana subsidiaries did not support dispute-blind personal jurisdiction when charters were executed and payments under the charters were remitted outside the forum); *Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 542-43 (3d Cir. 1985) (concluding foreign medical school's admission of six percent of its students from Pennsylvania did not establish the school's amenability to dispute-blind jurisdiction on plaintiff's causes of action unrelated to its forum activities because the income derived from Pennsylvania residents was not the result of in-state activities, but of educational services provided in Grenada); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 810 (Tex. 2002) (holding Maryland corporation's \$350,000 annual revenues derived from Texas residents did not suffice for dispute-blind jurisdiction when company "perform[ed] all its business services outside Texas, and carefully construct[ed] its contracts to ensure it [did] not benefit from Texas laws"); *J&J Marine, Inc. v. Le*, 982 S.W.2d 918, 926-27 (Tex. App. 1998) (holding Alabama corporation's \$3.5 million of shrimp boat sales to Texas residents did not support general jurisdiction when such sales were negotiated, executed, and title transferred in Alabama); cf. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 571-72 (2d Cir. 1996) (distinguishing *Beary* on the basis that there was no suggestion that sales at issue were executed outside the state or were deliberately structured to avoid general jurisdiction); *Babcock & Wilcox Co. v. Babcock Mex., S.A. de C.V.*, 597 So. 2d 110, 112-13 (La. Ct. App. 1992) (recognizing importance of the locale of the transfer of title to general jurisdiction query).

<sup>339</sup> See, e.g., *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 710 (8th Cir. 2003) (concluding that \$10 million in loans made by a Georgia bank to Missouri residents was sufficient to establish dispute-blind jurisdiction over the bank in Missouri even though all the loans were executed in Georgia); *Ex parte Newco Mfg. Co.*, 481 So. 2d 867, 869 (Ala. 1985) (holding that approximately four hundred annual sales in an amount of \$65,000 to \$85,000 to forum residents through the telephone, the mail, and an independent manufacturer's representative when title was transferred outside the forum was sufficient to subject a nonresident Missouri corporation to dispute-blind jurisdiction in Alabama for an injury occurring in Tennessee to a Tennessee resident).

<sup>340</sup> See, e.g., *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989) (concluding two closely held Alabama corporations' combined four hundred sales totaling just over \$625,000 in two-year period in Michigan through an independent sales representative and mail order solicitations warranted dispute-blind personal jurisdiction in Michigan without discussing the locale of the transfer of title other than to note the defendant did not pay any Michigan sales tax); *Estate of Rick v. Stevens*, 145 F. Supp. 2d 1026, 1030-33 (N.D. Iowa 2001) (holding Minnesota tractor-trailer leasing corporation amenable to Iowa's general adjudicatory jurisdiction—in a claim arising from an accident with an Iowa resident occurring in Wisconsin—based on its nine unrelated lease contracts with Iowa residents without any discussion of the locale of the negotiation, execution, and performance of the lease contracts); *Travel Opportunities of Fort Lauderdale, Inc. v.*

But the situs of the transactions should not be ignored. A critical distinction exists between doing business *with* the residents of a state and conducting business transactions *in* the state.<sup>341</sup> Indeed, the Supreme Court in *Burger King* recognized this difference by decreeing that a defendant's contract *with* an out-of-state party does not necessarily subject the defendant to even specific jurisdiction in the foreign state.<sup>342</sup> On the contrary, "the real object of the business transaction" must be evaluated, by scrutinizing the parties' negotiations, the terms of the executed contract, and the parties' actual course of dealing, to ascertain whether the defendant is amenable to jurisdiction based on a contract.<sup>343</sup> Certainly this rationale applies a fortiori to general jurisdiction, which requires more extensive and substantial forum activities.

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Walter Karl List Mgmt., Inc., 726 So. 2d 313, 314-16 (Fla. Dist. Ct. App. 1999) (holding Delaware corporation subject to general jurisdiction in Florida because of its \$1.75 million in annual sales to Florida residents via phone orders and mail from its broadcasts of infomercials on forty-eight cable stations without any mention of the situs of the title transfer for such goods). A number of other decisions have also not considered the situs of the transactions in reaching the converse holding that dispute-blind jurisdiction was inappropriate because the sales to forum-based residents were de minimis. See, e.g., *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 650 (D. Utah 1998) (concluding "minimal" sales to forum residents did not establish necessary contacts for dispute-blind jurisdiction); *Regent Lighting Corp. v. Am. Lighting Concept, Inc.*, 25 F. Supp. 2d 705, 712 (M.D.N.C. 1997) (holding that the defendant's level of sales to forum residents was insufficient for dispute-blind jurisdiction); *Dominion Gas Ventures, Inc. v. N.L.S., Inc.*, 889 F. Supp. 265, 267-68 (N.D. Tex. 1995) (holding nonresident defendant "entering into transactions" with eight forum residents, constituting two to seven percent of its annual revenues, not amenable to dispute-blind jurisdiction).

<sup>341</sup> See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124-25 (9th Cir. 2002) (finding Indian corporation exporting substantial rice through forum ports was not subject to dispute-blind general jurisdiction as it was doing business *with* the forum rather than *in* the forum); cf. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (concluding that, while Georgia golf club was amenable under specific jurisdiction principles, it was not subject to general jurisdiction in California based on selling golf tournament tickets and merchandise to California residents and executing license agreements with two television networks and a few California vendors because such activities were "doing business with California, but [did] not constitute doing business in California"); *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 717 (5th Cir. 1999) (holding Mexican telephone carrier receiving millions of dollars each month in settlement revenues under correspondent agreements with carriers in the United States attributable to Texas residents was subject to specific, but not general, jurisdiction in Texas because, as such payments were for servicing the Mexican portion of a call from Texas to Mexico, the Mexican corporation was merely doing business *with* United States carriers rather than doing business *in* Texas).

<sup>342</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

<sup>343</sup> *Id.* at 478-79 (internal citation omitted) (quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316-17 (1943)).

Additionally, the Supreme Court's intimations in its jurisdictional decisions are in accord. The Court's pre-*International Shoe* opinions distinguished between the defendant's in-state solicitations of transactions that then occurred outside the state, which were insufficient for jurisdiction, and the defendant's actual in-state transactions, which did support amenability.<sup>344</sup> Plus, this same distinction could explain the discrepancy between the *Rush* and *Keeton* dicta. An insurance contract is generally governed by the laws of the state in which the insured or the insured's property is located;<sup>345</sup> thus, State Farm was perforce conducting business transactions *in* each state that it had insureds. In contrast, there is no indication that Hustler Magazine, Inc. was negotiating, executing, and performing contracts *in* New Hampshire by selling its magazines in the forum—rather, it used independent distributors to circulate its magazine there.<sup>346</sup> At most, Hustler may have been doing business *with* New Hampshire residents.

To be faithful to the Supreme Court's guidance, then, dispute-blind jurisdiction requires an appraisal of the true object of the defendant's forum business transactions by evaluating the situs of the negotiation, execution, and performance of the revenue-generating transactions. Courts must differentiate business transactions conducted *in* the forum from doing business *with* forum residents. Yet, while the situs of the transactions must at least always be considered, it is not always dispositive. In some situations, the in-state transactions alone may not be enough to support jurisdiction,<sup>347</sup> while

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<sup>344</sup> Compare *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918), and *Green v. Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533-34 (1907), with *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 105 (1898).

<sup>345</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 (1971). Additionally, a number of states have promulgated statutes mandating the application of that state's laws to insurance contracts with forum residents. See, e.g., ALA. CODE § 27-14-22 (1998); ALASKA STAT. § 21.51.300 (Michie 2002); ARIZ. REV. STAT. ANN. § 20-1115 (West 2002); COLO. REV. STAT. ANN. § 10-3-122 (West 1999); FLA. STAT. ch. 627.632 (1996 & Supp. 2004); LA. REV. STAT. ANN. § 22.629 (West 1995); MD. CODE ANN., INS. § 12-209 (1997 & Supp. 2002); MASS. GEN. LAWS ch. 175, § 22 (1998); MINN. STAT. § 60A.08 (1996 & Supp. 2004); MISS. CODE ANN. § 83-5-7 (2000); TEX. INS. CODE ANN. art. 21.42 (Vernon 1981); WASH. REV. CODE § 48.18.200 (1999).

<sup>346</sup> See *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 33-34 (1st Cir. 1982), *rev'd*, 465 U.S. 770 (1984).

<sup>347</sup> See, e.g., *Noonan v. Winston Co.*, 135 F.3d 85, 92-93 (1st Cir. 1998) (holding that a British corporation that conducted forum negotiations and extensive solicitations to obtain \$585,000 in orders in a two-year period from a Massachusetts corporation was not subject to dispute-blind jurisdiction); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996) (noting \$4 million in forum sales may not have alone sufficed for dispute-blind jurisdiction).

perhaps under certain unique circumstances, the actual negotiation, execution, or performance of transactions in the state may not be necessary.<sup>348</sup> Hence, other factors must also be considered.

b. In-state networks to distribute goods and services

Another important component to the substantiality query is whether the nonresident defendant employs or controls distributors, dealers, or agents in the forum to disperse its goods or perform its services. Sometimes the members of such a “network” are actually employees of the defendant, which frequently results in the defendant’s amenability to dispute-blind jurisdiction based on its employees regularly conducting business in the forum.<sup>349</sup> But, even when the defendant does not directly employ its distributors, dealers, or agents, their presence in the forum favors the exercise of jurisdiction if the defendant utilizes them to conduct business transactions within the state.<sup>350</sup>

In *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*,<sup>351</sup> for instance, the Second Circuit held that the requisite minimum contacts existed for dispute-blind jurisdiction over a nonresident defendant based on \$4 million in forum sales in a seven-year period, its relationship with its independent dealers in the forum, and its advertisements targeted to the forum.<sup>352</sup> The court initially articulated that the defendant’s sales were material to the jurisdictional calculus because there was no indication that the transactions were negotiated, executed, or performed outside the forum.<sup>353</sup> While acknowledging that such sales, standing alone, may not have established the required minimum contacts, the court

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<sup>348</sup> See *infra* Part IV.A.3.c.

<sup>349</sup> See, e.g., *LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000) (holding general jurisdiction appropriate in Ohio over Connecticut corporation with principal place of business in Virginia that employed multiple distributors in Ohio through which it made millions of dollars of sales even though none of the allegedly infringing items was sold in Ohio).

<sup>350</sup> See, e.g., *Pedelahore v. Astropark, Inc.*, 745 F.2d 346, 348-49 (5th Cir. 1984) (holding Delaware corporation operating Texas amusement park amenable to general jurisdiction in suit brought by Louisiana resident for injuries suffered at the park in part because corporation employed sales representative in Louisiana and authorized all Louisiana travel agencies to sell tickets to its facilities); *Frummer v. Hilton Hotels Int’l, Inc.*, 227 N.E.2d 851, 853-54 (N.Y. 1967) (concluding the required “presence” in New York for jurisdiction over a British hotel corporation for a claim by a New York citizen injured in Britain existed as a result of the defendant’s corporate agent’s conduct of business in the forum).

<sup>351</sup> 84 F.3d 560 (2d Cir. 1996).

<sup>352</sup> *Id.* at 573.

<sup>353</sup> *Id.* at 571-72.

exposed that the defendant's relationships with its dealers, including previously maintaining a forum office and making 150 visits to its forum dealers, "tip[ped] the balance" in favor of jurisdiction.<sup>354</sup>

*Metropolitan Life* is consistent with one of the Supreme Court's pre-*International Shoe* opinions, *Missouri, Kansas & Texas Railway Co. v. Reynolds*.<sup>355</sup> In *Reynolds*, the Court affirmed by memorandum opinion the jurisdictional holdings of the Massachusetts state court.<sup>356</sup> The state court found a Kansas railroad amenable to jurisdiction for a suit based upon promissory notes made, issued, and negotiated in another state because the railroad appointed a Boston independent passenger agent who, while also conducting business on his own account, engaged in business transactions for the railroad in Massachusetts.<sup>357</sup> Thus, the fact that the railroad appointed an independent agent to conduct its business affairs in the forum supported jurisdiction rather than insulating it from the state's judicial power.

Nevertheless, in order to be consistent with the Supreme Court's other early pronouncements that the solicitation of business by forum-based employees is insufficient,<sup>358</sup> the existence of a forum-based network or dealer should not suffice for dispute-blind jurisdiction unless the nonresident corporation is actually negotiating, executing, or performing transactions in the forum through such an agent, as in the *Reynolds* case. As the Court held in another pre-*International Shoe* case, *Green v. Chicago, Burlington & Quincy Ry. Co.*, the presence of even corporate employees in the forum does not support jurisdiction when their activities do not lead

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<sup>354</sup> *Id.* at 570-73. The court, however, subsequently determined that the exercise of jurisdiction would be unreasonable under the factors from *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987). See *Metro. Life Ins.*, 84 F.3d at 573-75.

<sup>355</sup> 255 U.S. 565 (1921).

<sup>356</sup> *Id.*; cf. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 n.6 (1952) (explaining that the significance of *Reynolds* is demonstrated "by the opinions of the state court below").

<sup>357</sup> *Reynolds v. Mo., Kan. & Tex. Ry. Co.*, 113 N.E. 413, 413-15 (Mass. 1916) and 117 N.E. 913, 914-15 (Mass. 1917), *aff'd*, 255 U.S. 565 (1921).

<sup>358</sup> See, e.g., *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918); *Green v. Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533-34 (1907); see also *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215-17 (1st Cir. 1984) (finding defendant's business contacts too fragmentary for general jurisdiction when it employed eight sales representatives in the forum); *Ratliff v. Cooper Indus., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (holding nonresident defendant's employment of five detail men in forum to promote its products insufficient to support dispute-blind general jurisdiction); *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 587 (1st Cir. 1970) (finding jurisdiction over a cause of action unrelated to the defendant's forum activities impermissible when the "defendant's only activities consist of advertising and employing salesmen to solicit orders").



to in-state transactions.<sup>359</sup> Accordingly, most courts recognize, as a general rule, that the actions of independent dealers and agents alone will not support dispute-blind jurisdiction.<sup>360</sup> Instead, an in-state network should only be a relevant factor to the extent it further bolsters the supposition that the defendant is conducting business transactions *in* the state rather than merely *with* forum residents.

c. Targeted advertisements or marketing

The Supreme Court's pre-*International Shoe* opinions consistently held that in-state solicitations and advertisements did not embody the type of forum contacts necessary to support jurisdiction.<sup>361</sup> Not surprisingly, then, modern decisions routinely adjudge the placement of advertisements in nationally-distributed publications as insufficient for general jurisdiction.<sup>362</sup> A number of courts have likewise found

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<sup>359</sup> *Green*, 205 U.S. at 532-34.

<sup>360</sup> *See, e.g.*, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124-25 (9th Cir. 2002) (holding that forum presence of an independent sales agent importing and distributing Indian corporation's rice was insufficient to establish dispute-blind general jurisdiction when the sales agent had no authority to contract on the corporation's behalf); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) (concluding "sales and sales promotion by independent nonexclusive sales representatives" were insufficient to establish jurisdiction over a West German corporation in California when the cause of action was unrelated to such forum activities) (internal citation omitted); *Adell Corp. v. Elco Textron, Inc.*, 51 F. Supp. 2d 752, 756 (N.D. Tex. 1999) (holding dispute-blind jurisdiction was inappropriate because "sales by an independent distributor are not enough by themselves to constitute continuous and systematic contact with Texas"); *Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052-53 (W.D. Wash. 1994) (concluding independent distributor's forum sales of unrelated products insufficient to establish dispute-blind jurisdiction); *Fisher Governor Co. v. Superior Court*, 347 P.2d 1, 3 (Cal. 1959) (concluding more contacts are necessary for assuming dispute-blind general jurisdiction "than sales and sales promotion within the state by independent nonexclusive sales representatives"); *Carretti v. Italtast*, 125 Cal. Rptr. 2d 126, 132 (Ct. App. 2002) (holding minimal resales by forum distributor purchasing products in Italy insufficient to establish dispute-blind jurisdiction in California over Italian seller).

<sup>361</sup> *See, e.g.*, *People's Tobacco Co.*, 246 U.S. at 87; *Green*, 205 U.S. at 533-34.

<sup>362</sup> *See, e.g.*, *Doering v. Copper Mountain, Inc.*, 259 F.3d 1202, 1210 (10th Cir. 2001) (concluding "the mere placement of advertisements in nationally-distributed publications cannot be regarded as 'continuous and systematic' in nature"); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 376 (5th Cir. 1987) (declaring the nonresident defendant's "nation-wide advertising program does not support a finding of general jurisdiction"); *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 650 (D. Utah 1998) (iterating that "mere placement of advertisements in journals of national distribution cannot be regarded as 'continuous and systematic' in nature in a given state"); *Armstrong v. Aramco Servs. Co.*, 746 P.2d 917, 922 (Ariz. Ct. App. 1987) (holding nonresident defendant not amenable to general jurisdiction predicated on advertisements in national publication circulated in the forum); *Mayo v. Tillman Aero, Inc.*, 640 So. 2d 314, 319-20 (La. Ct. App. 1994) (holding nonresident

that advertising and solicitation efforts alone, even when targeted or directed at the forum, do not constitute the requisite “minimum contacts” for general jurisdiction.<sup>363</sup> But there are unique circumstances in which perhaps targeted or directed forum marketing or advertising may suffice.

An example is *Wilkerson v. Fortuna Corp.*<sup>364</sup> In that case, a corporation operated a horse track that, while sited in New Mexico, was located as close to El Paso, Texas (where parimutuel horse racing was illegal) as allowed under New Mexico’s racing and gambling laws.<sup>365</sup> The track “saturated” El Paso with “substantial advertising” because it depended almost exclusively on the patronage of El Paso citizens for its revenues.<sup>366</sup> As the Fifth Circuit posited, the corporation therefore “was as much doing business in Texas as it was in New Mexico.”<sup>367</sup> While the court was not entirely perspicuous regarding the relationship of the corporation’s Texas contacts to the dispute,<sup>368</sup> the court apparently decreed that jurisdiction was proper under such circumstances “even though the suit [bore] no relation to the activities deemed necessary and sufficient to constitute minimum

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California corporation advertising its pilot training operations in international and national publications reaching forum residents was not subject to general or specific jurisdiction).

<sup>363</sup> See, e.g., *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993) (holding nonresident corporation’s employment of seventeen to twenty-one representatives in Maryland from 1981-1987 soliciting \$9 million to \$13 million in annual sales did not support dispute-blind personal jurisdiction because “advertising and solicitation activities alone do not constitute the ‘minimum contacts’ required for general jurisdiction”); *Pizarro v. Hoteles Concorde Int’l, C.A.*, 907 F.2d 1256, 1258-59 (1st Cir. 1990) (finding forum advertisements for Venezuelan corporation’s Aruba hotel did not establish general jurisdiction in claim by forum resident for injuries sustained at the hotel); *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 66 n.8 (3d Cir. 1984) (concluding that placing promotional advertisements in local magazine was insufficient for jurisdiction); *Ratliff v. Cooper Indus., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (holding forum advertising did not support dispute-blind jurisdiction); *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 587 (1st Cir. 1970) (finding jurisdiction over a cause of action unrelated to the defendant’s forum activities impermissible when the “defendant’s only activities consist of advertising and employing salesmen to solicit orders”).

<sup>364</sup> 554 F.2d 745 (5th Cir. 1977).

<sup>365</sup> *Id.* at 748. Indeed, the track was so close to El Paso that it was visible from the district judge’s El Paso apartment. *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*; see also *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1391-92 (E.D. Tex. 1989) (holding New Mexico ski lodge subject to general jurisdiction in Texas for injury to Texas resident at lodge because of its extensive forum solicitation activities culminating in forty-seven percent of its business from Texas residents, as well as its other contacts, such as its prior incorporation in Texas, its recruitment of employees in Texas, and its use of Texas travel agencies).

<sup>368</sup> *Wilkerson*, 554 F.2d at 749-50.

contacts [in the forum].”<sup>369</sup>

Nevertheless, a corporation’s solicitation of residents from a neighboring state should not, standing alone, be enough for jurisdiction.<sup>370</sup> In order to be consistent with the Supreme Court’s guidance on the substantiality of forum activities, dispute-blind jurisdiction requires at least the equivalent of in-state business. To illustrate, a California resort would not appear to be conducting the equivalent of business transactions in Texas by advertising its resort in both national and local media in an attempt to draw guests from Texas and other states. Yet the requisite correlation perhaps exists when the primary object of the business is to engage in transactions with residents of a particular adjoining state, such as in *Wilkerson* where the horse track was situated next to the state line and actively

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<sup>369</sup> *Id.* at 750.

<sup>370</sup> *See, e.g.,* *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 910-11 (4th Cir. 1984) (holding Georgia hospital not amenable to jurisdiction in neighboring South Carolina based on its forum solicitation efforts); *Giangola v. Walt Disney World Co.*, 753 F. Supp. 148, 156 (D.N.J. 1990) (holding Walt Disney World not amenable to jurisdiction in claim by New Jersey resident for injury in Florida as a result of its extensive forum advertising campaign); *Circus Circus Reno, Inc. v. Pope*, 854 P.2d 461, 462-63 (Or. 1993) (finding Nevada casino’s regular forum advertisements to attract Oregon residents to its casino insufficient to establish its amenability to either general or specific jurisdiction in Oregon for claim by Oregon resident injured at the casino); *Bachman v. Med. Eng’g Corp.*, 724 P.2d 858, 860 (Or. Ct. App. 1986) (concluding Washington hospital was not subject to general jurisdiction in Oregon despite advertisements in Oregon paper and telephone listing in Oregon to solicit Oregon patients across state line to Washington hospital); *Riviera Operating Corp. v. Dawson*, 29 S.W.3d 905, 910-11 (Tex. App. 2000) (holding Nevada casino’s solicitation efforts to attract Texas residents were insufficient to establish general jurisdiction over claim by Texas resident injured in Nevada). *But see* *Gorman v. Grand Casino of La., Inc.-Coushatta*, 1 F. Supp. 2d 656, 659 (E.D. Tex. 1998) (holding Louisiana casino subject to general jurisdiction in Texas for injury occurring in Louisiana to Texas resident predicated on casino’s extensive and pervasive forum advertising on billboards, television, radio, and other media); *Gavigan v. Walt Disney World, Inc.*, 646 F. Supp. 786, 790 (E.D. Pa. 1986) (holding Walt Disney World amenable to general jurisdiction in suit by Pennsylvania resident for injuries occurring in Florida because of Walt Disney’s extensive advertising campaign in Pennsylvania); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 675-76 (Minn. Ct. App. 2000) (finding general jurisdiction over Wisconsin inn that directly targeted Minnesota residents through direct mail and advertisements in Minnesota publications when Minnesota resident was injured at inn); *Maro v. Potash*, 531 A.2d 407, 409-11 (N.J. Super. Ct. Law Div. 1987) (holding Pennsylvania concessionaire at Veteran’s Stadium in Philadelphia subject to general jurisdiction in New Jersey for alleged injury to New Jersey resident at the stadium as result of stadium’s massive marketing and advertising efforts taken to attract New Jersey residents, resulting in millions of dollars of revenues for concessionaire over fifteen-year lease). Of course, all these case finding general jurisdiction based on solicitations from a neighboring state involved at least some contacts with a relationship to the dispute, although it is not clear under current doctrine whether specific jurisdiction could in fact be exercised in these cases. *See supra* note 98.

targeted, as its predominant source of revenue, the business of Texas residents.<sup>371</sup>

Moreover, targeted marketing may be relevant in another context as well. Continuous targeted advertising and solicitation efforts culminating in some quantum of in-state transactions are more substantial forum activities than engaging in the same quantum of in-state transactions without such directed marketing. By directing such efforts at the forum, the corporation is engaging in more qualitatively significant activities, with both corresponding additional forum benefits and expectations that its in-state transactions will subject it to the state's judicial prerogative for any and all causes of action. Thus, courts occasionally rely on such advertisements as an additional factor supporting dispute-blind jurisdiction over corporations negotiating, executing, or performing transactions in the state.<sup>372</sup>

In sum, those forum revenue-generating activities indicating that the corporation is conducting business transactions *in* the state, rather than merely with forum residents, are of a sufficiently substantial nature to support general jurisdiction. Typically, this occurs when the corporation negotiates, performs, or executes transactions in the state, especially if such transactions are aided by targeted forum advertisements or distributors, dealers, agents, or employees in the state. But other corporate activities may suffice as well, including perhaps targeted marketing under the right circumstances, consonant with the Supreme Court's directive that "talismanic jurisdiction formulas" are unavailing.<sup>373</sup>

#### 4. Websites

Modern technology has engendered new jurisdictional challenges. One of these challenges is the extent to which a nonresident defendant's Internet activity subjects it to personal jurisdiction in another forum. The best known case addressing this issue is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>374</sup>

*Zippo* involved a claim that an Internet domain site, with 3,000

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<sup>371</sup> *Wilkerson*, 554 F.2d at 749-50.

<sup>372</sup> *See, e.g., Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996) (finding that, while \$4 million of in-state sales alone may not have sufficed, such sales combined with corporation's targeted marketing in the forum and relationship with its independent dealers satisfied minimum contacts aspect of dispute-blind jurisdiction, but subsequently holding that the exercise of jurisdiction was unreasonable).

<sup>373</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-86 & n.29 (1985).

<sup>374</sup> 952 F. Supp. 1119 (W.D. Pa. 1997).

paying subscribers in the forum state of Pennsylvania, infringed upon another company's trademark.<sup>375</sup> The only question before the court was whether the defendant was subject to specific jurisdiction as a result of this conduct.<sup>376</sup> To resolve the jurisdictional query, the court, relying on "well developed personal jurisdiction principles," constructed a sliding scale categorizing a defendant's Internet usage into a spectrum with three zones.<sup>377</sup> At one end of the spectrum, the defendant uses the transmission of computer files over the Internet to enter into contracts with residents of other states, subjecting the defendant to jurisdiction.<sup>378</sup> At the other end of the spectrum, the defendant establishes a mere passive website that does nothing more than advertise, which is not sufficient for jurisdiction.<sup>379</sup> In between these two extremes are those websites allowing the exchange of information over the Internet, in which jurisdiction "is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website."<sup>380</sup> The *Zippo* court held that because the defendant was purposefully availing itself of the benefits and protections of the forum's laws by engaging in electronic commerce with Pennsylvania residents, the defendant was amenable under specific jurisdiction principles.<sup>381</sup>

*Zippo's* sliding scale framework was thus developed in the particular context of resolving the purposeful availment inquiry for specific jurisdiction.<sup>382</sup> Indeed, the court distinguished the defendant's proffered authority on the basis that the cited cases involved general jurisdiction rather than specific jurisdiction.<sup>383</sup> Nonetheless—and despite the frequent recognition that general jurisdiction requires more extensive forum activities than specific jurisdiction<sup>384</sup>—numerous courts have co-opted the *Zippo* framework for general jurisdictional queries.<sup>385</sup> Some of these courts have

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<sup>375</sup> *Id.* at 1121.

<sup>376</sup> *Id.* at 1122 (noting plaintiff conceded that only specific jurisdiction was at issue in the case).

<sup>377</sup> *Id.* at 1124.

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

<sup>379</sup> *Id.*

<sup>380</sup> *Zippo*, 952 F. Supp. at 1124.

<sup>381</sup> *Id.* at 1126-27.

<sup>382</sup> *Id.* at 1124-26.

<sup>383</sup> *Id.* at 1126 n.7.

<sup>384</sup> *See supra* note 155.

<sup>385</sup> *See, e.g.,* *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079-80 (9th Cir. 2003) (positing, as an alternative basis for general jurisdiction, that the nonresident defendant's website was "highly interactive and very extensive" under the "sliding scale" test); *Soma Med. Int'l, Inc. v. Standard Chartered Bank*, 196 F.3d 1292, 1296-

decreed that the presence of an interactive website accessible to forum residents supports the exercise of general *in personam* jurisdiction.<sup>386</sup> But such holdings ignore the appropriate parameters of general jurisdiction.

While technological change indubitably may increase the need for jurisdiction over nonresidents, such change, as the Supreme Court recognized in *Hanson v. Denckla*,<sup>387</sup> cannot herald “the eventual demise of all restrictions on the personal jurisdiction of state courts.”<sup>388</sup> Yet this is exactly what would occur if the sine qua non of general jurisdiction was merely an interactive or commercial website. Today, such interactive and commercial websites are common. As a result, contorting the *Zippo* framework to apply to general jurisdiction would render countless businesses around the globe subject to the

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97 (10th Cir. 1999) (employing sliding-scale categories in evaluating whether website supported general jurisdiction, but concluding that website was merely a passive informational site not establishing amenability); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) (adopting *Zippo* framework, but holding that the nonresident defendant’s website was passive and therefore did not support general jurisdiction); *Mieckowski v. Masco Corp.*, 997 F. Supp. 782, 787-88 (E.D. Tex. 1998) (holding nonresident manufacturer of bunk bed, which was purchased and sold by its original owner in another state and subsequently asphyxiated a child in Texas, subject to Texas’s general jurisdiction based on its somewhat interactive website and forum sales); *Efford v. Jockey Club*, 796 A.2d 370, 374-75 (Pa. Super. Ct. 2002) (employing sliding-scale categories to conclude that nonresident defendant’s website was insufficient to support general jurisdiction); *Townsend v. Univ. Hosp.*, 83 S.W.3d 913, 922 (Tex. App. 2002) (applying three category sliding scale to hold passive website containing only contact and product information insufficient to support general jurisdiction in Texas); *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 718, 724-25 (Tex. App. 2000) (concluding website allowing Texas residents to submit comments and questions to representatives of German corporation was interactive and therefore a factor to consider in determining whether general jurisdiction existed in Texas for accident occurring in Texas to Texas resident but involving an automobile originally sold in Germany and not intended for the United States market); *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767, 772-73 (Tex. App. 1999) (using three category sliding scale to find defendant’s website “somewhat interactive” because it allowed users to input data to locate the nearest sales representative and holding that, although website alone was not sufficient for jurisdiction, the combination of the defendant’s ability to solicit sales through its subsidiaries, its contacts related to the litigation, and its website were enough), *disapproved on other grounds*, *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 n.1 (Tex. 2002).

<sup>386</sup> See, e.g., *Mieckowski*, 997 F. Supp. at 787-88 (concluding general jurisdiction appropriate in part because of defendant’s somewhat interactive website); *Daimler-Benz*, 21 S.W.3d at 718, 724-25 (concluding interactive website was a factor to consider in determining whether general jurisdiction existed in Texas); *Jones*, 995 S.W.2d at 772-73 (finding defendant’s website “somewhat interactive” and therefore a factor supporting general jurisdiction).

<sup>387</sup> 357 U.S. 235 (1958).

<sup>388</sup> *Id.* at 251.

general jurisdiction of every state in the United States.<sup>389</sup> But merely because a website is interactive and *could be* accessed by forum residents does not mean that the nonresident has engaged in the requisite continuous and substantial forum activities necessary for general jurisdiction.<sup>390</sup>

Accordingly, the better reasoned opinions focus not on the characteristics of the website, but rather on the nature of the transactions between the nonresident defendant and the residents of the forum state.<sup>391</sup> The mere fact that a defendant maintains a website, even one that can be used for commercial activities with forum residents, should be insufficient for general, as opposed to specific, jurisdiction.<sup>392</sup> Instead, the general jurisdictional query

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<sup>389</sup> Cf. *GTE News Media Servs. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (recognizing that predicating jurisdiction on the accessibility of a website in the forum would allow any forum in the country to exercise personal jurisdiction in Internet-related cases).

<sup>390</sup> Cf. *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (concluding *Zippro* sliding scale is “not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction”).

<sup>391</sup> See, e.g., *Revell*, 317 F.3d at 471 (holding Columbia’s website providing the opportunity to subscribe to the *Columbia Journalism Review* and submit applications for admission to the University was not “substantial” activity in Texas as required under Supreme Court precedent for general jurisdiction when less than twenty Texas residents subscribed each year); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-13 (D.C. Cir. 2002) (concluding district court erred in dismissing action for lack of minimum contacts without providing plaintiff an opportunity to conduct discovery regarding whether dispute-blind jurisdiction existed based on the frequency and volume of the defendant’s transactions with forum residents through its website because the advent of the Internet did not eviscerate traditional jurisdiction principles); *GTE News Media Servs.*, 199 F.3d at 1350 (articulating that the Internet should not “vitiate long-held and inviolate principles of federal court jurisdiction”); *Robbins v. Yutopian Enters., Inc.*, 202 F. Supp. 2d 426, 430 (D. Md. 2002) (holding “active” website did not suffice to establish dispute-blind jurisdiction when the nonresident defendant had engaged in only forty-six transactions with forum residents because such activities were “not enough to establish general jurisdiction, no matter what medium was used to conduct the transactions”); *Dagesse v. Plant Hotel*, 113 F. Supp. 2d 211, 223 (D.N.H. 2000) (explaining that a “proper analysis of the jurisdictional effects of an internet web site must focus on whether the defendant has actually and deliberately used its web site to conduct commercial transactions or other activities with residents of the forum”).

<sup>392</sup> See, e.g., *Revell*, 317 F.3d at 471 (concluding *Zippro* scale was helpful in specific jurisdiction cases but not general jurisdiction cases); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002) (holding that, while specific jurisdiction was appropriate, general jurisdiction did not exist in Ohio over Washington defendants registering Internet domain names in part because “maintain[ing] a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction”); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713-15 (4th Cir. 2002) (adopting *Zippro* framework for specific jurisdiction, but concluding that even “numerous and

should revolve around the traditional criteria of the qualitative and quantitative nature of the actual forum activities conducted by the defendant. Even the *Zippo* court presumably would agree, as its sliding scale was intended to be “consistent with well developed personal jurisdiction principles,”<sup>393</sup> rather than eviscerating the axiom that the defendant’s amenability to general jurisdiction depends on “substantial” forum activities.<sup>394</sup>

The accessibility of an interactive website, then, should have approximately the same jurisdictional significance as the appointment of a statutory agent—neither is of the requisite substantial nature, standing alone, for the exercise of general jurisdiction under the *International Shoe* model. Instead, the actual course of conduct of business in the forum by the nonresident corporation is the jurisdictional linchpin. But the remaining dilemma is how to gauge whether such activities are substantial, continuous, and systematic enough to justify dispute-blind jurisdiction.

*B. A Suggested Three-Pronged Approach*

As discussed previously, *International Shoe* premised general jurisdiction on a defendant’s “continuous” forum activities adjudged “so substantial and of such a nature” that its amenability on causes of action unrelated to such activities was justified.<sup>395</sup> As worded, this conception appeared to imply two requirements to satisfy the requisite connection for due process—that the defendant’s forum activities must be both of a “substantial nature” and “continuous.”

*Helicopteros* thereafter confirmed this dual nature of the general jurisdiction minimum contacts query. Helicol’s purchases and related trips, while certainly continuous and ongoing, were nevertheless deemed an insufficient jurisdictional predicate, exhibiting that the nature of the defendant’s forum activities must be substantial as well.<sup>396</sup> Conversely, Helicol’s contract-negotiating session in Houston was arguably qualitatively substantial,<sup>397</sup> but the Court dismissed its import to the jurisdictional calculus because it

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repeated electronic connections with persons” in the forum through an Internet website “do not add up to the quality of contacts necessary for a State to have jurisdiction over the person for all purposes”).

<sup>393</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>394</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

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

<sup>396</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 417-18 (1984).

<sup>397</sup> *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985).



could not quantitatively “be described or regarded as a contact of a ‘continuous and systematic’ nature.”<sup>398</sup> Thus, both the qualitative and the quantitative sufficiency of the defendant’s forum activities must be scrutinized.

Unfortunately, however, as illustrated in the preceding doctrinal analysis, the lower courts often do not properly appraise both substantiality and continuity, instead basing jurisdiction on the existence of only one of the necessary constituents.<sup>399</sup> To ameliorate this omission, then, the minimum contacts analysis for general jurisdiction should consist of two interrelated components—first, a qualitative evaluation of the substantiality of the nature of defendant’s forum activities, and, second, a quantitative analysis of the continuity and regularity of such activities. Finally, if the necessary contacts exist, then additional factors must be considered to insure that the exercise of jurisdiction is both fair and reasonable.

#### 1. Substantiality and the Defining Activities of a Commercial Domiciliary

Although several courts have recognized the need for incorporating a substantiality component in the minimum contacts analysis for general jurisdiction, the challenge is discerning those activities of a nonresident defendant that satisfy the requirement.<sup>400</sup> The Supreme Court’s decrees establish that a temporary principal place of business is sufficient,<sup>401</sup> while purchases and related trips in the forum are not of the requisite substantial nature.<sup>402</sup> Earlier decisions of the Court add that a defendant’s advertising and solicitation efforts from an in-state office do not suffice,<sup>403</sup> yet jurisdiction may be predicated on the actual conduct of business in the forum from such a locale.<sup>404</sup> Similarly, according to some modern opinions, merely doing business *with* the state’s residents is not enough, but a defendant conducting business *in* the state through negotiating, performing, or executing transactions there may be

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<sup>398</sup> *Helicopteros*, 466 U.S. at 416.

<sup>399</sup> See *supra* Parts III & IV.A.

<sup>400</sup> See Twitchell, *Doing-Business Jurisdiction*, *supra* note 5, at 187 (iterating that the lower courts requiring “substantial” contacts for general jurisdiction “rarely attempt to develop the content of this ‘substantiality’ requirement”).

<sup>401</sup> See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952).

<sup>402</sup> See *Helicopteros*, 466 U.S. at 416.

<sup>403</sup> See, e.g., *People’s Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918); *Green v. Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 533-34 (1907).

<sup>404</sup> See, e.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 109 (1898).

subject to dispute-blind jurisdiction.<sup>405</sup> The enigma, of course, is the underlying framework justifying these disparate holdings.

The solution proposed by this Article is that the substantiality query compares the nonresident defendant's forum activities to the in-state activities of an entity domiciled or based in the forum. Under this comparison, the nature of the defendant's forum operations should indicate activities at least analogous to the types of in-state activities that define a commercial domiciliary.

This proposal therefore necessitates some consideration of the in-state activities that characterize a commercial entity as a domiciliary of the forum. While the term "domicile" typically is employed in reference to a natural individual's permanent "home," the law also recognizes that a business entity may have a "home base," or domicile, outside the state in which it is incorporated or chartered.<sup>406</sup> The Supreme Court initially acknowledged this concept in *Wheeling Steel Corp. v. Fox*,<sup>407</sup> holding a Delaware corporation established a commercial domicile in West Virginia by making that state "the actual seat of its corporate government."<sup>408</sup> Lower courts have similarly iterated that a company may obtain a commercial domicile in the state of its principal place of business, that is, where it conducts the majority of its activities or directs and manages its affairs.<sup>409</sup>

This common-law conception of commercial domicile thus appears to be the functional equivalent of the "principal place of business" standard adopted for corporate citizenship under the

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<sup>405</sup> See *supra* Part IV.A.3.

<sup>406</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 cmt. i (1971) (explaining term "commercial domicil" is used to indicate the state in which main office and principal place of business of corporation is located for taxation purposes); 36 AM. JUR. 2D *Foreign Corporations* § 32 (2001) (iterating that a corporation may obtain a "commercial domicile" in the state in which it actually functions and is managed). "Commercial domicile" also has a slightly different meaning employed in international law and the law of war that is irrelevant for present purposes. See *id.*

<sup>407</sup> 298 U.S. 193 (1936).

<sup>408</sup> *Id.* at 211-12.

<sup>409</sup> See, e.g., *S. Pac. Co. v. McColgan*, 156 P.2d 81 (Cal. Ct. App. 1945) (holding railroad's commercial domicile was in California when it conducted its day-to-day transportation operations in the state, thereby obtaining the greatest proportion of its corporate benefits there); *Bethlehem Steel Corp. v. Ind. Dep't of State Revenue*, 597 N.E.2d 1327, 1335 (Ind. Tax Ct. 1992) (defining commercial domicile as the location of the majority of the company's business or the nerve center of the business); *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172, 176 (Tex. 1967) (explaining commercial domicile of a corporation is its principal place of business or the locale from which corporate activities are managed and directed); see also *supra* note 406.

diversity statute<sup>410</sup> and the 1898 Bankruptcy Act.<sup>411</sup> In applying this statutory standard, courts typically focus on one or more of the following: (1) the locale of the company's "nerve center" or source of power, direction, control, or decision-making; (2) the situs of a substantial portion of its production, service, or other business activities; or (3) the totality of all the corporation's activities, including the location of its nerve center, production facilities, administrative offices, and business operations.<sup>412</sup> These criteria illustrate a company must at least be supervising the conduct of its business, producing its goods and services, or selling its goods or services in the state to have any possibility of being considered a locally based business—if it is not performing any of these activities in the state, its domicile will be in another state in which it does conduct such activities.

The proposed substantiality query compares these activities characterizing a business domiciled in the state to the nonresident defendant's forum activities. If the nonresident defendant is directing its business operations from the state, producing its goods or services in the state, or selling such goods or services through in-state business transactions, it is conducting activities analogous to those that may demarcate a local business. While a local business is ultimately considered "local" because it conducts relatively more of such activities in the forum than anywhere else, the substantiality prong of general *in personam* jurisdiction is not concerned with the quantity of the defendant's forum activities but rather their qualitative nature.

The quality of defendant's forum activities must be, in the words of *International Shoe*, "of such a nature as to justify suit" in the absence of any nexus between the litigation and the forum.<sup>413</sup> *Shoe's* "of such a nature" standard appears to contemplate activities of a particular type, which the Court subsequently confirmed by holding that this standard is satisfied when the defendant operates a "limited . . . part

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<sup>410</sup> 28 U.S.C. § 1332 (2002). Section 1332(c) provides that a "corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . ." *Id.*

<sup>411</sup> 11 U.S.C. § 11(a)(1) (1898). The diversity statute borrowed the term "principal place of business" from this provision of the Bankruptcy Act of 1898. *See* S. REP. NO. 85-1830, at 5-6, 31 (1958)), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3102-03, 3133.

<sup>412</sup> *See, e.g.,* *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 914-15 (10th Cir. 1993); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993); *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 407-10 (5th Cir. 1987).

<sup>413</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

of its general business” in the state.<sup>414</sup> Thus, the defendant’s forum activities must be of a special type—those types of activities that are part of its “general business” and therefore could define the defendant as a domiciliary. The nonresident accordingly does not actually have to have its principal place of business or commercial domicile in the forum; instead, the nonresident must merely conduct a portion of its general business operations in the state of a sufficiently substantial nature, which occurs when the nonresident conducts forum activities analogous to those defining or characterizing a local business.

This proposed standard corresponds with the Supreme Court’s prior jurisdictional holdings. In *Helicopteros*, for instance, Helicol’s continuous forum contacts included the purchase of helicopters and training for its pilots from a Texas corporation to support its business of providing helicopter transportation in South America.<sup>415</sup> Helicol’s forum activities were thus not analogous to the in-state direction of operations or provision of services that are the hallmark of a local company. This is evident as Helicol’s purchasing and training activities could not, irrespective of quantitative prodigiousness, establish a Texas domicile when Helicol performed those activities characterizing a local business—executing, performing, and supervising its helicopter service contracts—outside the forum, in South America.<sup>416</sup> A similar rationale explicates the Supreme Court’s pre-*International Shoe* holdings that forum solicitation and advertising without accompanying in-state transactions are insufficient for

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<sup>414</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952); *see also Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 415-16 (1984).

<sup>415</sup> *Helicopteros*, 466 U.S. at 409, 417-18.

<sup>416</sup> *See id.* While courts have on rare occasions opined in dicta that purchases might be a relevant consideration in determining the principal place of business of a corporation, *see J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 412 (5th Cir. 1987), even those cases discussing this possibility have either ignored or downplayed the importance of corporate purchases in their analyses. *See, e.g., id.* (omitting any discussion of purchases in its analysis); *Mosser v. Crucible Steel Co. of Am.*, 173 F. Supp. 953, 955-56 (E.D. Pa. 1959) (directing parties to provide evidence as to where corporation made its purchases, but deeming failure of corporation to provide an answer to this query immaterial when corporation conducted its primary production and supervisory activities in Pennsylvania). While perhaps purchases could arguably tip the balance in determining a corporation’s principal place of business if its production, supervisory, and sales activities were otherwise equivalent in two or more states, it is inconceivable that a corporation could ever establish a principal place of business in a state solely through its purchases there when it conducts all its other operations in another state. Purchases are thus not an activity that can be said to define or characterize a commercial domiciliary, unless perhaps the entity’s sole business operations are providing purchasing services to other companies.

general jurisdiction.<sup>417</sup> No matter how much advertising is done in a forum, the corporation is not acting comparably to a local business if its production, sales, and supervisory activities are occurring outside the state.

Conversely, the corporate office in *Perkins*, from which the defendant was conducting all of its business operations during the war, was temporarily the defendant's principal place of business.<sup>418</sup> Thus, the defendant's forum activities were closely analogous to the in-state activities of a commercial domiciliary as its "nerve center" was at least briefly located in the forum. But less substantial activities than a temporary principal place of business also support dispute-blind jurisdiction. For example, a nonresident defendant regularly performing business with forum residents from a physical location in the state is conducting the same types of activities that may characterize a local business, as one basis for commercial domicile is engaging in a high proportion of such business transactions in the state. The mere fact that the in-state activities may be somewhat trivial in comparison to the defendant's world-wide business is immaterial for purposes of the general jurisdiction substantiality query—what is significant is that the defendant engages in an in-state business activity (such as selling its goods or services to forum residents) that may define a purely local business. Hence, as the Supreme Court's pre-*International Shoe* decisions held, a nonresident with a sales office repeatedly conducting in-state transactions with forum residents is amenable to dispute-blind jurisdiction.<sup>419</sup>

The proposed comparison to the activities of a commercial domiciliary does not mandate that the maintenance of a forum business location is required for dispute-blind jurisdiction. A nonresident can perform the defining activities of a local business even without having any of its agents permanently ensconced in the forum. For example, *Alderson v. Southern Co.* appropriately held that an Indiana power company with its sole plant in Indiana was amenable to dispute-blind jurisdiction in Illinois because it sold all of its product to an Illinois corporation for use by Illinois residents under a contract governed by Illinois law.<sup>420</sup> The activities the defendant conducted in Illinois—negotiating, executing, and performing contracts selling product there on a continuous basis—

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<sup>417</sup> See *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918).

<sup>418</sup> *Perkins*, 342 U.S. at 445-48.

<sup>419</sup> *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 105 (1898); see also *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916-18 (N.Y. 1917).

<sup>420</sup> 747 N.E.2d 926, 940-42 (Ill. App. Ct. 2001).

are potential predicates for commercial domicile.

On the other hand, merely because a corporation's product is eventually purchased in the state does not establish that the corporation is engaging in activities similar to those of a commercial domiciliary. A local business typically conducts negotiations for its revenue-generating activities in the forum or at least makes strategic decisions regarding such negotiations from the forum. *Beary v. Beech Aircraft Corp.* accordingly reached the correct result in denying dispute-blind jurisdiction over a nonresident corporation selling millions of dollars of products to the forum when such sales were negotiated, executed, and performed outside the forum.<sup>421</sup> In such a case, the nonresident is not conducting the activities in the forum that a commercial domiciliary would conduct; instead, it is performing the typical activities of a local business *outside* the state.

This approach thus appears to provide the courts with an analytical model that comports with the holdings of the Supreme Court and numerous lower federal and state courts.<sup>422</sup> While the

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<sup>421</sup> 818 F.2d 370, 375-76 (5th Cir. 1987).

<sup>422</sup> See *supra* notes 415-21 and accompanying text. Other examples would lead to similar results. For instance, the proposal explains the insubstantiality, standing alone, of such potential forum contacts as registering to do business in the state or maintaining an interactive website. See *supra* Parts IV.A.1 & 4. Registering to do business in the forum is not an activity that would define a local business. Likewise, merely maintaining an interactive website that can be accessed in the state is not by itself an activity defining a forum domiciliary—only if the entity is conducting business transactions in the state through the website could it possibly be said that its activities are comparable to a local company.

The proposal would also explain the disparate holdings of the federal circuits on the propriety of dispute-blind jurisdiction predicated on an office within the forum. The Fifth Circuit held in *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 419-20 (5th Cir. 2001), that a three-person forum office to oversee the construction of a marine drilling rig the nonresident corporation was purchasing was insufficient to establish dispute-blind jurisdiction, whereas the Second Circuit concluded in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98-99 (2d Cir. 2000), that a similarly sized investor relations office was enough for general jurisdiction. Both these holdings appear correct under this Article's model. Activities related to the purchase of the rig were not the type of activities that could establish a corporate domicile for the nonresident defendant in *Submersible Systems*, although using an investor relations office to cultivate capital markets was at least the type of activity that could establish the domicile of the parent holding corporations in *Wiwa*. See also *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 793 (10th Cir. 1979) (holding that forum manufacturing plant supported the exercise of dispute-blind jurisdiction, a correct result under this Article's proposal because the operation of a manufacturing plant is the type of activity that may establish a corporation's domicile).

Finally, the proposal is also in accord with the decisions discussed earlier emphasizing the qualitative aspects of a nonresident defendant's revenue-generating activities in the forum. See *supra* Part IV.A.3. To illustrate, the Second Circuit appears to have reached the correct result in *Metropolitan Life Insurance Co. v.*

proposal would not furnish a clear solution to every query, this actually accords with the Supreme Court's admonition that jurisdictional determinations will in some instances be "grey" rather than "black and white."<sup>423</sup> Yet the proposed comparison does provide a suitable benchmark, consonant with the Supreme Court's holdings and intimations, for differentiating among these "shades of grey," as well as a cogent methodology to insure that the courts are asking the right questions.<sup>424</sup>

If employing this methodology reveals that the defendant did not conduct any activities of a qualitatively substantial nature in the forum, the assertion of dispute-blind jurisdiction is improper. On the other hand, if the defendant did engage in activities of the requisite substantial nature, such activities must also be quantitatively "continuous and systematic"<sup>425</sup> to insure that the nonresident defendant is truly acting comparably to a local business.

## 2. Continuous and Systematic Forum Activities

The terminology "continuous and systematic" indicates that the defendant's forum activities must be constant and occurring at regular intervals. But this apparently facile formulation masks two uncertainties. First, under what circumstances are a defendant's activities sufficiently regular and constant to justify the assertion of dispute-blind jurisdiction? And, second, over what period of time should the defendant's forum activities be evaluated?

In many cases, of course, resolving the first query will not be

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*Robertson-Ceco Corp.*, 84 F.3d 560, 570-73 (2d Cir. 1996), by holding that the minimum contacts necessary for general jurisdiction were established by the nonresident defendant's \$4 million in sales presumably executed in the forum, its relationships with its forum dealers, and its advertisements targeted to the forum. Extensive sales transactions executed within the state through forum advertisements and a forum distribution network are the types of activities that could establish a corporate domicile.

<sup>423</sup> *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

<sup>424</sup> Perhaps it could be argued that this proposal is merely a refinement of the pre-existing central business activities model for general jurisdiction. *See supra* Part III.D. Certainly there are similarities between the two approaches—both attempt to evaluate substantiality through a measure of the importance of the nonresident's in-state activity. Nevertheless, the proposed comparison to the defining in-state activities of a local business differs in two material respects that minimize the infirmities of the central business activities template. First, this proposal offers a more concrete standard for substantiality which is not as susceptible to the vagaries plaguing judicial interpretations of those activities that are "central" to a business. *See id.* Second, the comparison to a local business provides an underlying rationale for general jurisdiction that is absent from the central business model. *Compare supra* Part III.D, *with infra* Part V.B.

<sup>425</sup> *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952).

problematic. A nonresident defendant operating a forum place of business on a daily basis or making multiple daily sales in the forum is engaging in the requisite constant, regularly occurring forum activities.<sup>426</sup> Conversely, solitary or sporadic forum activities by the defendant are insufficient to support dispute-blind jurisdiction, which explains Helicol's non-amenability despite its arguably qualitatively substantial forum contract negotiation session. As the *Helicopteros* Court remarked, a single forum activity "cannot be described or regarded as a contact of a 'continuous and systematic' nature."<sup>427</sup> Other courts have likewise held that sporadic forum activity occurring on an infrequent basis—even if qualitatively substantial—is insufficient to allow the state to exercise its general adjudicative authority.<sup>428</sup>

The difficulty, however, involves those defendants conducting perhaps weekly, monthly, or quarterly activities in the forum. Are in-state activities occurring at such intervals sufficiently continuous and systematic? To resolve this dilemma requires some contemplation of the objective of the "continuous and systematic" requirement. In other words, why are "continuous and systematic" activities a prerequisite for the assertion of general jurisdiction?

My suggestion is that constant, regular forum conduct demonstrates a quantum of activities analogous to those of at least

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<sup>426</sup> See, e.g., *LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000).

<sup>427</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984).

<sup>428</sup> See, e.g., *Covenant Bank for Sav. v. Cohen*, 806 F. Supp. 52, 57-58 (D.N.J. 1992) (holding advertising in forum newspaper on two occasions in fourteen-month period and sporadic servicing of loans made to forum residents were not the "regular and substantial" forum activities required for general jurisdiction); *Curran v. Fisherman Marine Prods., Inc.*, 773 So. 2d 285, 288-89 (La. Ct. App. 2000) (holding nonresident corporation's \$150,000 in forum sales of shrimp in fourteen transactions over an eleven-year period was "ad hoc and sporadic" rather than "continuous and systematic" as required to support general jurisdiction); *Bosarge v. Master Mike, Inc.*, 669 So. 2d 510, 512 (La. Ct. App. 1996) (concluding similarly that nonresident defendant's six contacts over a four-year period were "ad hoc and sporadic"); *Arcon, Inc. v. Malone*, No. 12-01-00214-CV, 2002 WL 1428497 (Tex. App. June 28, 2002) (holding nonresident corporation's six forum construction projects performed irregularly over a three-year period were not continuous and systematic as required for general jurisdiction). This principle may also be the explanation supporting the apparently well-settled rule that a nonresident defendant's participation at a forum trade show is insufficient for general jurisdiction. See, e.g., *Doering v. Copper Mountain, Inc.*, 259 F.3d 1202, 1210 (10th Cir. 2001); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995); *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 673 (Tex. App. 2001). While the courts have not yet articulated the rationale for this maxim, one possibility is that such forum trade shows are usually only held once or perhaps twice a year rather than the much more frequent contact typically required for activities to be described as "continuous and systematic."



small local businesses. Thus, not only must the nonresident defendant perform forum activities qualitatively comparable to the activities defining a commercial domiciliary, it must also conduct these activities with a frequency that approximates at least some forum businesses as well. It is not necessary that the defendant conducts forum activities to such an extent that the state becomes its domicile or principal place of business; instead, the comparison is whether the defendant's in-state activities are quantitatively equivalent to at least some local businesses.

A forum-based enterprise typically would not only engage in one or two qualitatively substantial activities in the forum each year;<sup>429</sup> thus, such sporadic activities are insufficient to complete the analogy to the operation of a local company. On the other hand, a nonresident defendant operating a forum store on a daily basis or making multiple sales on a daily basis is acting similarly to a number of undisputedly local businesses with respect to both the type and quantum of activities conducted.

Because the linchpin to this Article's proposed minimum contacts analysis is whether the nonresident defendant's forum actions are both qualitatively and quantitatively similar to those of a forum-based enterprise, the requisite frequency of forum activity to satisfy the "continuous and systematic" prong depends on the type of activities the defendant is conducting in the forum and a comparison to local businesses performing similar activities. This technique may be illustrated by analyzing the Fifth Circuit's decision in *Ritenhouse v. Mabry*.<sup>430</sup> In *Ritenhouse*, the court held that a medical professional corporation conducting business every fifth business day from a forum clinic performed the necessary "systematic and continuous" activities for general jurisdiction.<sup>431</sup> The nonresident defendant's forum activities there consisted of operating an in-state medical clinic, which certainly is qualitatively comparable to the activities of many local medical centers. But is the weekly operation of a clinic sufficiently continuous and systematic? Under this Article's approach, the relevant comparison is whether a local clinic might be open only once a week. Although this is admittedly a close question because most clinics operate more frequently, it is not unheard of (at

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<sup>429</sup> There may be exceptions, however, for businesses negotiating contracts for large-scale projects that take months or even years to complete, such as commercial buildings. See *infra* note 433 and accompanying text.

<sup>430</sup> 832 F.2d 1380 (5th Cir. 1987).

<sup>431</sup> *Id.* at 1390. The court found that the cause of action did not arise out of the professional corporation's contacts with the forum because the patient was a referral at a time when the corporation did not conduct any business in the forum. *Id.*

least in rural parts of the country) for a doctor to have a facility in a small community open on a weekly basis.

Yet while *Rittenhouse* is thus arguably correct in the context of the operation and conduct of a medical clinic from a forum location on a weekly basis, the same result would not be appropriate for a nonresident defendant merely performing a single weekly forum sale of a standard household good.<sup>432</sup> Under such circumstances, the nonresident would not be acting comparably to a local business, which presumably would engage in more frequent in-state transactions. Of course, this will depend somewhat on the type of transactions the defendant is performing in the state. Some businesses might perform larger-scale projects in the forum that even a local company would only execute on a monthly or quarterly basis.<sup>433</sup>

Thus, the realities of the defendant's activities in the forum must be contemplated. Although the archetypical "continuous and systematic" activities would occur each business day, activities occurring less frequently, albeit still on a regular basis, may suffice if such activities are the types of activities that a forum-based enterprise might conduct on a comparable basis.

This comparison also provides guidance on resolving the second quandary, the relevant time period for assessing whether the defendant's forum contacts satisfy the "continuous and systematic" standard. *Perkins* appears to have adopted the Supreme Court's pre-*International Shoe* jurisprudence that the ultimate resolution of the defendant's amenability for unrelated causes of action hinges upon its forum activities at the time it is served with summons.<sup>434</sup>

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<sup>432</sup> Cf. *Modern Mailers, Inc. v. Johnson & Quin, Inc.*, 844 F. Supp. 1048, 1053-54 (E.D. Pa. 1994) (holding nonresident defendant's \$230,000 in forum sales over a three-year period was not a "continuous and substantial" activity when company did not have daily or regular contact with the forum).

<sup>433</sup> As an example, oil rig brokers might typically transact only a few sales a year. For a case law example employing this principle, see *Michigan National Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989), noting that the defendants' performance of "at least one sale in Michigan each and every month" when the average sale exceeded \$1,000.00 indicated the defendants "conducted a 'continuous and systematic part of their general business' in Michigan." While the Sixth Circuit's holding is perhaps dubious, the case does illustrate the necessity of considering the realities of the nonresident defendant's business.

<sup>434</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444-45, 448 (1952) (holding assertion of jurisdiction was not unfair when corporation was engaging in continuous and systematic business activities in Ohio at the time its president was served with process). Pre-*International Shoe* opinions frequently iterated that the nonresident must be doing business within the state at the time of service of summons to be amenable to jurisdiction. See, e.g., *Bank of Am. v. Whitney Cent.*

Nonetheless, a mere one-time snapshot of the defendant's in-state contacts, standing alone, would not necessarily provide a basis for a meaningful comparison to a local business. Thus, the nonresident's activities over a period of time preceding service must also be considered, as the Supreme Court implicitly recognized in *Helicopteros* by analyzing Helicol's Texas activities over a seven-year period.<sup>435</sup> Evaluating the defendant's activities over a period of time insures that its activities are truly quantitatively analogous to a business domiciled in the state and not merely an anomaly on a particular date.

The lower courts specifically addressing this issue generally concur, positing that a period "reasonable under the circumstances" should be employed.<sup>436</sup> Typically, under this standard the courts perpend the defendant's contacts over the two to seven years preceding the filing of suit.<sup>437</sup> While the evaluation of the defendant's

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Nat'l Bank, 261 U.S. 171, 172-73 (1923) (recognizing sole question for decision was whether, at the time of service of process, defendant was doing business in the state in such a manner as to warrant the inference it was present there); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517-18 (1923) (same); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 915, 918 (N.Y. 1917) (Cardozo, J.) (stating that an essential requirement for jurisdiction is that the corporation is served while it is present within the state). The Supreme Court's insistence that the defendant must have been engaging in the requisite forum activities before being served with process appears appropriate as service is the procedure by which the state asserts *in personam* jurisdiction over the nonresident. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946).

<sup>435</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 409-11 (1984).

<sup>436</sup> See, e.g., *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 717 (5th Cir. 1999) (concluding general jurisdiction should "be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed"); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-570 (2d Cir. 1996) (demonstrating through case law examples that contacts are commonly assessed over a reasonable period of time before the plaintiff's filing of the complaint); *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 648 (D. Utah 1998) (agreeing with *Metropolitan Life* that a period of time "reasonable under the circumstances" until the date of filing suit should be employed to assess compliance with the "continuous and systematic" standard).

<sup>437</sup> See, e.g., *Noonan v. Winston Co.*, 135 F.3d 85, 92-93 & n.8 (1st Cir. 1998) (considering all contacts established in the two years preceding the filing of the complaint); *Metro. Life Ins.*, 84 F.3d at 570 (employing a six-year period prior to the filing of the lawsuit); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198-1200 (4th Cir. 1993) (examining defendant's activities in the six years before suit was filed); *Mich. Nat'l Bank*, 888 F.2d at 466 (analyzing defendant's annual sales for the two years preceding the lawsuit); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 372-76 (5th Cir. 1987) (employing a five-year period); *Reyes v. Marine Mgmt. & Consulting, Ltd.*, 586 So. 2d 103, 109-11 (La. 1990) (analyzing contacts over a five-year period); *Bachman v. Med. Eng'g Corp.*, 724 P.2d 858, 862 (Or. Ct. App. 1986) (employing a three-year period before suit was filed). Some courts have reasoned that a longer relationship with the forum may be a factor favoring the exercise of jurisdiction. See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125

activities should also include the intervening period between filing of suit and service of process,<sup>438</sup> this distinction probably would seldom, if ever, be material.<sup>439</sup> Rather, the key is that a period of time predating the state's attempt to exercise its sovereign authority over the nonresident defendant must be scrutinized to insure that the nonresident is acting comparably to a forum domiciliary. In some instances, inspecting the defendant's post-service activities to assure that any in-state activities that commenced shortly before service continued thereafter may be permissible in order to demonstrate that the defendant is conducting ongoing business in the state comparable to local companies.<sup>440</sup>

To summarize, if the court determines the defendant's forum conduct includes those qualitatively substantial activities that may define a commercial domiciliary, the court should next discern whether such activities occurred in a comparable frequency to at least some local businesses over a reasonable period of time preceding the service of summons. If so, the requisite minimum contacts exist for general jurisdiction. But before dispute-blind adjudication is appropriate, the court must also cogitate whether exercising jurisdiction comports with traditional notions of "fair play and

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(9th Cir. 2002) (reasoning that defendant's sole forum activity of grain shipments over a one-year period was less continuous and systematic than the seven years of purchases in *Helicopteros*); *Noonan*, 135 F.3d at 93 (noting that defendant's two-year history of forum activities was "far less continuous than the ten years of activity" in an earlier precedent); *Hein v. Taco Bell, Inc.*, 803 P.2d 329, 330 (Wash. Ct. App. 1991) (relying on twenty-four years of forum contacts as factor supporting the exercise of general jurisdiction).

<sup>438</sup> See *supra* note 434 and accompanying text. None of the lower courts has proffered a rationale for preferring the date of filing over service. See, e.g., *Noonan*, 135 F.3d at 93 n.8; *Metro. Life Ins.*, 84 F.3d at 569-70; *Nichols*, 991 F.2d at 1198; *Haas*, 28 F. Supp. 2d at 648. Nor is such a rationale readily apparent. The date the lawsuit is filed, while important for purposes of subject matter jurisdiction and the statute of limitations, has little, if any, connection to the forum's assertion of personal jurisdiction over the nonresident defendant. Instead, as the Supreme Court has recognized, service of process is the mechanism the state uses to assert its sovereign prerogative over the nonresident defendant. See *Omni Capital*, 484 U.S. at 104; *Miss. Pub.*, 326 U.S. at 444-45.

<sup>439</sup> In most instances, service is accomplished shortly after the filing of the complaint. Indeed, in many state courts and in the federal courts, the plaintiff's action may be dismissed if service is not accomplished within sixty to 120 days after the filing of the complaint. See, e.g., FED. R. CIV. P. 4(m) (requiring service of summons and complaint to be made within 120 days after filing of the complaint).

<sup>440</sup> See, e.g., *Gavigan v. Walt Disney World, Inc.*, 646 F. Supp. 786, 787-88 (E.D. Pa. 1986) (considering evidence of nonresident defendant's extensive forum advertising campaign beginning six months before suit was filed but continuing for some time thereafter).

substantial justice.”<sup>441</sup>

### 3. “Fair Play and Substantial Justice” Considerations

The due process limitations on a state’s adjudicatory power depend in part on the “reasonableness” or “fairness” of maintaining the lawsuit in the forum.<sup>442</sup> The Supreme Court has therefore directed that other factors besides the defendant’s forum contacts should be considered “to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’”<sup>443</sup> The relevant factors include the burden on the defendant, the state’s interest in adjudging the dispute, the plaintiff’s interest in acquiring an effective remedy, the judicial system’s interest in efficiency, and the interests of the states in their substantive social policies.<sup>444</sup>

In *Asahi Metal Industry Co. v. Superior Court*,<sup>445</sup> the Supreme Court relied on these factors to hold that California’s assertion of jurisdiction over a Japanese corporation embroiled in an indemnification dispute with a Taiwanese corporation in California state court “would be unreasonable and unfair,” regardless of the defendant’s forum contacts.<sup>446</sup> But the Supreme Court did not specifically resolve whether these factors also apply to assertions of general jurisdiction rather than the specific jurisdiction that was at issue in *Asahi* and its prior decisions adopting these criteria.<sup>447</sup>

Yet there is no cogent rationale precluding the application of these five fairness or reasonableness factors to dispute-blind queries. Indeed, the factors were derived from *International Shoe*’s decree that due process demands that a defendant have “minimum contacts” with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>448</sup> Because the term “minimum contacts” subsumes both specific and

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<sup>441</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

<sup>442</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>443</sup> See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Int’l Shoe*, 326 U.S. at 320).

<sup>444</sup> *Id.* at 477.

<sup>445</sup> 480 U.S. 102 (1987).

<sup>446</sup> *Id.* at 116. The Court posited that the burden on the defendant was severe, while the interests of the plaintiff and the state in adjudicating the dispute in California were slight. *Id.* at 114-15. Additionally, the Court asserted that extreme caution and restraint were necessary before employing American conceptions of *in personam* jurisdiction in the international context. *Id.* at 115.

<sup>447</sup> See, e.g., *id.* at 116; *Burger King*, 471 U.S. at 476.

<sup>448</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

general jurisdiction, the factors gauging “fair play and substantial justice” should consequently apply to general jurisdiction as well.

Moreover, the need for the fairness factors is frequently more pronounced in general jurisdiction cases. As an example, asserting dispute-blind jurisdiction over foreign national corporations often implicates *Asahi*'s admonition that “great care and reserve” should be exercised before “extending our notions of personal jurisdiction into the international field.”<sup>449</sup> The international relations and comity concerns underlying *Asahi* are only heightened by applying the American conception of general jurisdiction, which is viewed with abhorance by many other nations,<sup>450</sup> to disputes without any relationship to the United States. Employing this jurisdictional basis to adjudicate controversies solely between two foreign nationals impacts the justified expectations of the parties as well as the “procedural and substantive policies of other nations.”<sup>451</sup> The only method under the current due process jurisdictional model to alleviate this concern and insure a careful weighing of the procedural and substantive international interests at stake is through the fairness or reasonableness factors.<sup>452</sup>

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<sup>449</sup> *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

<sup>450</sup> See Juenger, *supra* note 206, at 162.

<sup>451</sup> *Asahi*, 480 U.S. at 115.

<sup>452</sup> *Cf. id.* Certainly, additional potential techniques other than the Due Process Clause exist to limit the exercise of general jurisdiction against foreign nationals, such as a treaty or a jurisdictional statute. See Twitchell, *Doing-Business Jurisdiction*, *supra* note 5, at 212-13. But treaty prospects appear bleak, at least for the immediate future, since negotiations regarding the Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments reached an impasse. Additionally, in the absence of a treaty, it is highly unlikely that Congress will enact a jurisdictional statute. While yet another possibility is that a more stringent minimum contacts standard for the amenability of foreign national corporations might have been developed, this also has not occurred.

The Supreme Court has never intimated that a different contacts analysis applies to foreign nationals. Neither *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984), nor *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447-48 (1952), emphasized the foreign citizenship of the defendants. In fact, *Helicopteros* primarily relied for its substantiality holding on an earlier precedent involving a domestic corporation, indicating that the rigor of the minimum contacts analysis does not depend on the defendant's nationality. *Helicopteros*, 466 U.S. at 417-18 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923)). While the Solicitor General did file an amicus brief in *Helicopteros* urging that predicated jurisdiction on purchases would harm United States exports, any effect this may have had on the Court is not reflected in the written opinion, other than perhaps serving as an explanation for the Court's dubious conclusion that specific jurisdiction had been conceded. See *supra* note 40 and accompanying text.

The decisions of the lower federal and state courts have likewise not developed a different minimum contacts analysis for general jurisdiction over foreign nationals.

Thus, the *Asahi* factors should be incorporated into the general jurisdiction calculus. Their underlying concerns are often implicated in dispute-blind queries. Moreover, the factors' genesis, in the *International Shoe* tenet of "minimum contacts" consonant with notions of "fair play and substantial justice," implies that the considerations apply to any minimum contacts analysis, regardless of the relationship of the contacts to the dispute.<sup>453</sup> Finally, scrutinizing these factors in resolving general jurisdiction queries is consistent with the weight of judicial doctrine.<sup>454</sup> Indeed, several decisions have specifically held that the exercise of jurisdiction under the particular

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While one case, *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998), implied that "courts must exercise even greater care [in evaluating the defendant's contacts] before exercising personal jurisdiction over foreign nationals," the court did not actually provide any details on how to exercise the requisite "greater care," instead merely relying on a precedential comparison to general jurisdiction opinions involving domestic corporations. *Id.* at 93. Thus, there is no direct support in the case law for a more stringent minimum contacts analysis for foreign national corporations.

Moreover, in today's global, interconnected economy, predicating the minimum contacts analysis on the defendant's national citizenship is fallacious. Because of the deficiencies of specific jurisdiction, general jurisdiction is sometimes necessary to assure American plaintiffs an accessible forum against foreign businesses. *See* Borchers, *supra* note 4, at 132, 139; Juenger, *supra* note 206, at 159-60. Often this is not burdensome for the foreign corporation, which indeed may have been formed, owned, and controlled by United States citizens. *See, e.g., Perkins*, 342 U.S. at 447-48. Thus, rather than creating an arbitrary distinction in the minimum contacts analysis based on the citizenship of the defendant, the preferable course is to employ the reasonableness factors to preclude the exercise of jurisdiction in those cases falling under the *Asahi* paradigm—where the plaintiff's and forum's interests in adjudicating the dispute are slight while the burden on the defendant is severe.

<sup>453</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>454</sup> *See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002) (positing that, even assuming the requisite minimum contacts for general jurisdiction were present, the exercise of jurisdiction would still be unreasonable under the fairness factors); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573-74 (2d Cir. 1996) (holding exercise of general jurisdiction would be unreasonable under five-factor test from *Asahi*); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.2 (9th Cir. 1993) (noting that "*Asahi's* interpretation of *International Shoe* as entailing separate contacts and reasonableness inquiries is not limited to the specific jurisdiction context"); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990) (determining the exercise of general jurisdiction over the two nonresident defendants would violate the *Asahi* factors); *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990) (describing minimum contacts and five "fair play and substantial justice" criteria as the two stages to the judicial inquiry into general jurisdiction); *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389 (11th Cir. 1988) (same); *Reyes v. Marine Mgmt. & Consulting, Ltd.*, 586 So. 2d 103, 108-09 (La. 1991) (listing cases using fairness factors in general jurisdiction query). *But see Crane v. Carr*, 814 F.2d 758 (D.C. Cir. 1987); *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731 (10th Cir. 1984).

circumstances of that case would be unreasonable, although sufficient contacts existed for general jurisdiction.<sup>455</sup>

In sum, the proposed model for dispute-blind jurisdiction encompasses three queries. First, whether the nonresident defendant's activities occurring in the state are of a substantial nature, judged by comparing the in-state conduct of the defendant to the defining activities of a commercial domiciliary. Second, whether these substantial forum activities are also "continuous and systematic," that is, whether the activities occur in a comparable frequency to some local companies engaging in similar activities. Third, assuming the requisite minimum contacts exist, whether the exercise of jurisdiction comports with "fair play and substantial justice," appraised by cogitating the burden on the defendant, the plaintiff's interest in the forum, the forum's interest in adjudging the controversy, the judicial system's interest in efficiency, and the procedural and substantive policies of other states and nations.

Employing this paradigm would provide a measure of decisional coherence to dispute-blind jurisprudence while remaining faithful to the Supreme Court's pronouncements and intimations. The only remaining issue is what, if anything, does this model display regarding the foundational rationale for the constitutional limitations on the assertion of general jurisdiction.

#### V. THE QUIXOTIC PURSUIT OF A THEORETICAL FOUNDATION

Commentators have debated for decades now the underlying theoretical foundation for the constitutional limitations on a state's exercise of personal jurisdiction over nonresident defendants. Some have urged that the limitations emanate primarily from notions of state sovereignty,<sup>456</sup> while others posit that conceptions of fairness are

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<sup>455</sup> See, e.g., *Metro. Life Ins.*, 84 F.3d at 573-74 (holding exercise of general jurisdiction would be unreasonable under five-factor test from *Asahi* even though minimum contacts test for general jurisdiction satisfied); *James v. Ill. Cent. R.R. Co.*, 965 S.W.2d 594, 598-99 (Tex. App. 1998) (holding the exercise of general jurisdiction would violate conceptions of "fair play and substantial justice" under five-factor test after concluding sufficient contacts existed for general jurisdiction); cf. *Amoco Egypt Oil*, 1 F.3d at 851-52 (declining to resolve minimum contacts query because exercising jurisdiction would be unreasonable); *Dalton*, 897 F.2d at 1363 (averring that the exercise of general jurisdiction would violate the *Asahi* factors even if the requisite minimum contacts existed); *Juarez v. United Parcel Serv. de Mex. S.A. de C.V.*, 933 S.W.2d 281, 285-86 (Tex. App. 1996) (declining to decide minimum contacts issue for general jurisdiction because the assertion of jurisdiction would violate traditional notions of fair play and substantial justice).

<sup>456</sup> See, e.g., *Cebik*, *supra* note 4, at 23-25 (suggesting jurisdictional limitations dependent upon sovereign interests of the states); Stein, *Interstate Federalism*, *supra* note 4, at 706, 722 (avowing that sovereignty implications are incorporated in



the underlying value.<sup>457</sup> Yet critics protest that the very notion of any due process jurisdictional limitations is aberrant. Some objectors contend the source of constitutional limitations should be the Full Faith and Credit Clause,<sup>458</sup> while various others avow the premise of *any* constitutional limitations on a state's adjudicatory power is indefensible, unless perhaps the forum is so inconvenient that it impairs the defendant's ability to mount a defense.<sup>459</sup>

This Article does not attempt to resolve all these issues. Instead, the objective is exploring the inferences regarding the theoretical foundation for general jurisdiction that may be appropriate in light of the preceding doctrinal analysis and three-pronged proposed model. To accomplish this goal, the Article first analyzes the Supreme Court's guidance on the source of the due process constitutional limitations on adjudicatory jurisdiction before proffering its suppositions.

A. *A Precedential and Theoretical Evaluation of Sovereignty and Fairness*

The Supreme Court's early decisions described the limitations

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current due process calculus because otherwise state lines would be irrelevant to jurisdictional power).

<sup>457</sup> See, e.g., Harold S. Lewis, Jr., *The Three Deaths of 'State Sovereignty' and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 735-36 (1983) (criticizing the role of sovereignty and state interests in adjudicatory jurisdiction doctrine); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1133 (1981) (advocating a due process analysis predicated on "injustice or undue harm to the individual litigant" that would dismiss any role for state sovereignty or federalism in the jurisdictional calculus).

<sup>458</sup> See, e.g., Roger Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852-53 (1989) (proffering a jurisdictional framework under the Full Faith and Credit Clause because "[e]ven if the Fourteenth Amendment had never been adopted, states would be subject to significant constitutional restraints in exercising jurisdiction over noncitizens").

<sup>459</sup> See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 94-100 (1990) [hereinafter Borchers, *Death of Constitutional Personal Jurisdiction*] (averring that the Due Process Clause should not limit assertions of state court adjudicatory jurisdiction, unless perhaps the forum is so inconvenient that it impedes the defendant's ability to proffer a defense); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2184 (1997) (concurring with other commentators that personal jurisdiction should not be a constitutional issue); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 835-37, 846 (1981) (urging that the only constitutional limitation on personal jurisdiction consistent with the intent of the framers of the Fourteenth Amendment is the requirement that the defendant have an opportunity to be heard).

on adjudicatory jurisdiction as stemming from the mutually exclusive sovereignty of the co-equal states in our federal system of government.<sup>460</sup> In *Pennoyer v. Neff*,<sup>461</sup> for instance, the Court, in adopting a rule equating a court's jurisdictional reach with the physical presence of a person or properly attached property within the forum, relied on the supposedly well-established public law principles that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and the corollary proposition "that no State can exercise direct jurisdiction and authority over persons or property without its territory."<sup>462</sup> The Court explained that the extra-territorial assertion of jurisdiction over a person or property by a state "would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation."<sup>463</sup>

*International Shoe* later shifted the emphasis from the mutually exclusive sovereignty of the states to fundamental conceptions regarding fairness and the defendant's relationship to the sovereign power of the state. In the words of *International Shoe*, the state's exercise of jurisdiction, without the required minimum contacts, offends "traditional notions of fair play and substantial justice."<sup>464</sup> Minimum contacts exist if it is reasonable, "in the context of our federal system of government," to compel the defendant to adjudicate in the forum.<sup>465</sup> The Due Process Clause therefore precludes a state from exercising jurisdiction over a "defendant with which the state has no contacts, ties, or relations."<sup>466</sup> These passages illustrate that both fairness and sovereign power supported the *International Shoe* standard.

But since *International Shoe*, the Court has sometimes emphasized fairness and sometimes emphasized the sovereign power of the states as the basis for due process limits on jurisdiction. *Perkins*, for instance, concluded that the sine qua non of the jurisdictional query

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<sup>460</sup> *Shaffer v. Heitner*, 433 U.S. 186, 197-204 (1977) (recognizing that its early decisions, which defined the jurisdiction of the state courts in accordance with the "principles of public law" regulating "the relationships among independent nations," rested upon "the mutually exclusive sovereignty of the States").

<sup>461</sup> 95 U.S. 714 (1877).

<sup>462</sup> *Id.* at 722. *Pennoyer* might have erred in its interpretation of these supposed international norms, however. See Juenger, *supra* note 206, at 146-47.

<sup>463</sup> *Pennoyer*, 95 U.S. at 723.

<sup>464</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>465</sup> *Id.* at 317.

<sup>466</sup> *Id.* at 319.

is “general fairness to the corporation.”<sup>467</sup> The Court in *Shaffer v. Heitner*<sup>468</sup> similarly described the *International Shoe* standard as “fairness and substantial justice.”<sup>469</sup> Yet other cases emphasized a sovereignty rationale. *Hanson v. Denckla*<sup>470</sup> explained that personal jurisdiction limitations involve more than just the defendant’s litigation burdens but instead are “a consequence of territorial limitations on the power of the respective States.”<sup>471</sup>

In its most comprehensive analysis of the issue to date, the Court in *World-Wide Volkswagen* articulated that the minimum contacts analysis served two functions: (1) protecting the defendant from undue litigation burdens, and (2) preventing state courts from overstepping their authority vis-à-vis other “co-equal sovereigns in the federal system.”<sup>472</sup> While recognizing that the burdens of litigation in another state had substantially decreased as a result of advances in transportation and communication, the Court avowed that the geographical boundaries of the states continued to have jurisdictional significance due to “the principles of interstate federalism embodied in the Constitution.”<sup>473</sup> Thus, even if the exercise of jurisdiction by the forum was reasonable, “the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”<sup>474</sup>

The Court’s next decision, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*,<sup>475</sup> created some uncertainty. The Court there espoused that the personal jurisdiction requirement “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”<sup>476</sup> While recognizing its earlier pronouncements also discussed personal jurisdiction in terms of federalism and sovereignty, the Court reasoned that such sovereign

<sup>467</sup> *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

<sup>468</sup> 433 U.S. 186 (1977).

<sup>469</sup> *Id.* at 206; *id.* at 211 (referring to the “fairness standard of *International Shoe*”); *see also Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (espousing that the essence of the due process calculus is whether, based on the defendant’s activity in the forum, “it is ‘reasonable’ and ‘fair’ to require him to conduct his defense in that State”).

<sup>470</sup> 357 U.S. 235 (1958).

<sup>471</sup> *Id.* at 250-51 (noting that the “restrictions on the personal jurisdiction of state courts . . . are more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States”).

<sup>472</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

<sup>473</sup> *Id.* at 293.

<sup>474</sup> *Id.* at 294.

<sup>475</sup> 456 U.S. 694 (1982).

<sup>476</sup> *Id.* at 702.

power restrictions are not the result of a constitutional federalism principle but instead are “ultimately a function of the individual liberty interest preserved by the Due Process Clause,” which is the sole source of the limitations on a state’s exercise of personal jurisdiction.<sup>477</sup>

Nevertheless, the state’s sovereign interests in the due process jurisdictional calculus should not be disregarded as a result of *Bauxites*. The mere fact that the Due Process Clause is the source for the limitations on state judicial power does not support abolishing considerations of the forum state’s sovereign power and interests. Instead, an aspect of the liberty interest the Due Process Clause protects is the freedom from assertions of judicial power by a sovereign with whom the defendant has no “contacts, ties, or relations.”<sup>478</sup> Thus, as the Court explained two years after *Bauxites*, part of the “fairness” of compelling a defendant to appear is whether the defendant’s forum contacts give rise to a legitimate state sovereign interest.<sup>479</sup>

Some commentators nonetheless object that the Due Process Clause’s explicit guarantee of individual rights—rather than state interests—is incompatible with a jurisdictional doctrine predicated partially on sovereignty.<sup>480</sup> Admittedly, from a textual and original intent perspective, this argument has some initial appeal. The Due Process Clause provides that the states shall not deprive “any person of life, liberty, or property without due process of law.”<sup>481</sup> Textually, this phraseology appears to countenance a process-based individual right, especially considering the clause’s emphasis on precluding government deprivations of defined individual interests without the requisite “due process.” In addition, a historical lens reveals no evidence that the framers of the Fourteenth Amendment intended that an individual’s due process rights would encompass a right to be free from state jurisdictional assertions unless minimum forum

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<sup>477</sup> *Id.* at 702-03 n.10.

<sup>478</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>479</sup> *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775-76 (1984).

<sup>480</sup> See, e.g., Borchers, *Death of Constitutional Personal Jurisdiction*, *supra* note 459, at 92-93 (maintaining “the due process clause is a guarantor of personal rights,” which has absolutely no relationship to a conception of the clause “as an ‘arbitrator’ between jealous states” or “‘battling’ sovereigns”); Stephen E. Gottlieb, *In Search of a Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1299 (1983) (contending that “[s]overeignty does not have a place in the original design of the due process clause”); Redish, *supra* note 457, at 1120 (recognizing that the Due Process Clause references “the rights of ‘persons,’ not states”).

<sup>481</sup> U.S. CONST. amend. XIV.

contacts existed.<sup>482</sup>

On the other hand, however, the doctrinal conception of “due process of law” has long since been unhinged from potential narrow interpretations emanating from the literal text or intent of the provision. Shortly after the enactment of the Due Process Clause, the Court indicated that due process could be violated by state regulation unreasonably interfering with liberty or property rights.<sup>483</sup> Since that time, the Court has consistently emphasized that the linchpin of the due process guarantee “is protection of the individual against arbitrary action of government.”<sup>484</sup> In accord with this understanding, the Court has repeatedly employed the Due Process Clause over the last century to prevent all types of arbitrary state interferences with liberty and property rights, including proscribing state action that shocks the conscience,<sup>485</sup> imposes unfair retroactive legislative liability,<sup>486</sup> awards excessive civil punishments,<sup>487</sup> arbitrarily applies a state’s law to a controversy,<sup>488</sup> or interferes with recognized personal autonomy rights such as abortion,<sup>489</sup> private sexual conduct,<sup>490</sup> contraception,<sup>491</sup> marriage,<sup>492</sup> and child rearing.<sup>493</sup> While

<sup>482</sup> See, e.g., Borchers, *Death of Constitutional Personal Jurisdiction*, *supra* note 459, at 88-89 (noting that the framers and ratifiers of the Fourteenth Amendment never referenced personal jurisdiction); Redish, *supra* note 457, at 1124-25 (same); Whitten, *supra* note 459, at 805-07 (same).

<sup>483</sup> *Munn v. Illinois*, 94 U.S. 113, 125-26 (1877). Even before the Civil War, there are potential indications that the Court considered the phrase “due process of law” in the Fifth Amendment to include a substantive reasonableness component. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). At least two commentators have urged that a substantive aspect to due process was widely acknowledged even earlier. See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941.

<sup>484</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

<sup>485</sup> See, e.g., *Rochin v. California*, 342 U.S. 165, 172-73 (1952).

<sup>486</sup> See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 547-51 (1998) (Kennedy, J., concurring) (providing fifth vote to invalidate Coal Industry Retiree Health Benefit Act of 1992 relying on due process grounds rather than takings analysis employed by the plurality); *id.* at 554-58 (Breyer, J., dissenting) (agreeing with Justice Kennedy that the Due Process Clause was the “natural home” for an argument regarding unfair retroactive legislation, but concluding Act did not violate due process).

<sup>487</sup> See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003).

<sup>488</sup> See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

<sup>489</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 871 (1992); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

<sup>490</sup> *Lawrence v. Garner*, 123 S. Ct. 2472, 2476-82 (2003).

<sup>491</sup> See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

these disparate holdings cannot all be supported by the literal text or original intent of the Due Process Clause,<sup>494</sup> their common strand is their mooring in judicial conceptions of the reasonableness of the state's action in relation to the private interests at stake. Thus, irrespective of the ongoing (and perhaps intractable) debate regarding the propriety of these holdings,<sup>495</sup> employing the Due Process Clause to prohibit unreasonable state assertions of jurisdiction comports with the Court's use of the guarantee to prevent other arbitrary judicial, legislative, and executive actions.<sup>496</sup>

Of course, recognizing that the Due Process Clause protects persons from arbitrary governmental conduct provides little guidance in determining when the government's conduct is actually "arbitrary" and therefore unconstitutional. In resolving this query, the Court does not merely evaluate the nature of the individual right at issue alone, but instead analyzes the right in relation to the strength of the governmental interest and the necessity of the regulation at issue.<sup>497</sup> Thus, in considering whether an individual's due process rights have been violated, it is necessary to weigh the governmental interest supporting the state's actions. And this governmental interest necessarily includes state sovereignty and federalism concerns in certain contexts.

As an illustration, the Court has incorporated state sovereignty

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<sup>492</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>493</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>494</sup> See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-5, at 1318 (3d ed. 1999) (recognizing that substantive due process decisions are "both textually and historically suspect" under the Due Process Clause).

<sup>495</sup> See, e.g., ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* § 1.4, at 16-18 (2d ed. 2002) (discussing "heated scholarly and public debate" over the protection of unenumerated rights under the Due Process Clause).

<sup>496</sup> While it might be argued that the Supreme Court's minimum contacts test for due process limitations on adjudicatory jurisdiction is sui generis from the usual substantive due process analysis identifying the liberty interest at issue and evaluating the governmental interest in light of the appropriate level of scrutiny, the Supreme Court has also created distinct tests for several other liberty interests. For instance, regulations interfering with a woman's liberty interest in choosing an abortion are subject to an "undue burden" analysis under *Stenberg v. Carhart*, 530 U.S. 914, 921-22 (2000), and executive governmental actions in an emergency situation are evaluated under the "shocks the conscience" test discussed in *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). Additional examples include the due process tests for exemplary damages and choice of law, discussed *infra* in notes 498-503 and accompanying text.

<sup>497</sup> See generally CHERMERINSKY, *supra* note 495, § 10.1, at 765-67. Fundamental rights are subject to strict scrutiny requiring that the regulation is necessary to serve a compelling governmental interest, whereas non-fundamental rights must only pass the minimal rational basis test. See *id.*

considerations into the due process analysis for reviewing punitive damage awards and choice of law determinations. *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>498</sup> and *BMW of North America v. Gore*<sup>499</sup> both held that the exemplary damage awards at issue violated the substantive component of a litigant's due process rights, in part because the respective awards infringed upon the sovereign interest of other states in our federal system by exacting punishment for acts committed outside the forum.<sup>500</sup> Similarly, *Phillips Petroleum Co. v. Shutts*<sup>501</sup> relied in part on the Due Process Clause to invalidate the application of Kansas law to all members of a class when the vast majority had no connection to Kansas because "for a State substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests."<sup>502</sup> *Shutts* relied on earlier cases that likewise recognized the importance of "state interests" in determining whether a litigant's due process rights have been violated through the imposition of a forum's substantive law.<sup>503</sup> These cases demonstrate that state sovereign interests properly influence the reasonableness, under the Due Process Clause, of the exercise of certain state powers.

Sovereignty concerns likewise necessarily impact the reasonableness of the state's assertion of jurisdiction over a nonresident defendant. Only three potential governmental interests supporting a state's assertion of adjudicatory jurisdiction are readily apparent: state sovereign interests, providing a convenient forum to redress the injuries of its inhabitants, and insuring the efficient resolution of disputes. But the latter two interests are inappropriate in a number of cases. The plaintiff's residence is both overinclusive and underinclusive, as the plaintiff's status as a forum resident is not a sufficient jurisdictional basis,<sup>504</sup> nor does his or her status as a nonresident preclude jurisdiction.<sup>505</sup> The interest in insuring the efficient resolution of disputes is likewise problematic, as the Court

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<sup>498</sup> 123 S. Ct. 1513 (2003).

<sup>499</sup> 517 U.S. 559 (1996).

<sup>500</sup> *State Farm*, 123 S. Ct. at 1522-23; *BMW of N. Am.*, 517 U.S. at 572-74.

<sup>501</sup> 472 U.S. 797 (1985).

<sup>502</sup> *Id.* at 818 (internal citation omitted).

<sup>503</sup> *Id.*; see also *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930). *Dick* is especially instructive because the Court rested its analysis entirely on the Due Process Clause without any consideration of the Full Faith and Credit Clause. *Dick*, 281 U.S. at 408-10.

<sup>504</sup> See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978) (holding the state's interest in protecting its minor residents does not grant personal jurisdiction over a nonresident defendant).

<sup>505</sup> See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984).

has recognized that a need for efficiency, while a consideration in the due process calculus, is not dispositive.<sup>506</sup> Thus, the minimum contacts analysis necessarily incorporates state sovereign interests, which often is the only viable governmental interest to balance against the defendant's interest.

Moreover, current jurisdictional doctrine supports this conclusion, as state boundaries would become utterly meaningless in the due process calculus if sovereignty was not a consideration. Yet the Supreme Court has never retreated from its statement in *World-Wide Volkswagen* regarding the relevance of state lines for jurisdictional purposes.<sup>507</sup> In fact, numerous decisions appraising the due process jurisdictional limitations involve defendants located in contiguous states to the forum.<sup>508</sup> In many of these cases, defending the lawsuit there would hardly constitute an undue burden, yet the court nevertheless dismisses the action on jurisdictional grounds, due in part to the extra-territorial assertion of state sovereignty.<sup>509</sup>

*Bauxites* thus did not purport to—nor could it have—excised sovereignty concerns from the Due Process Clause under our current jurisprudential model; instead, it merely held that the underlying source of the constitutional limitations emanate not from Article III or some independent constitutional federalism principle (which could not be waived by the litigants), but from an individual's due process rights.<sup>510</sup> *Bauxites* in actuality confirmed the “restriction on state sovereign power described in *World-Wide Volkswagen Corp.*,” but clarified that this restriction “must be seen ultimately as a function of

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<sup>506</sup> Cf. *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”) (internal citation omitted).

<sup>507</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

<sup>508</sup> See, e.g., *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 910-11 (4th Cir. 1984) (Georgia/South Carolina border); *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 270 (E.D. Pa. 1991) (New Jersey/Pennsylvania border); *Bachman v. Med. Eng'g Corp.*, 724 P.2d 858, 860-62 (Or. Ct. App. 1986) (Oregon/Washington border).

<sup>509</sup> See *Wims*, 759 F. Supp. at 270 & n.2 (transferring case from Eastern District of Pennsylvania to District of New Jersey because *in personam* jurisdiction could not be exercised over New Jersey resident in Pennsylvania, but opining the controversy was “somewhat overblown, as the Federal Courthouse in Camden, New Jersey is less than two miles from this Courthouse”); see also *Wolf*, 745 F.2d at 910-11; *Bachman*, 724 P.2d at 860-62.

<sup>510</sup> *Ins. Corp. of Ir. v. Compagnie des Bauxites*, 456 U.S. 694, 702 & n.10 (1982).



the individual liberty interest preserved by the Due Process Clause.”<sup>511</sup> Accordingly, the Due Process Clause, in preventing the exercise of arbitrary assertions of governmental power, insures both that the exercise of jurisdiction is fair *and* that the state has a sufficient sovereign interest to exercise its authority to compel the defendant to appear. The question now is the extent to which these dual interests might justify this Article’s suggested model.

*B. The State Sovereignty Justification for the Analogy to a Local Business*

The linchpin of this Article’s proposed three-pronged approach is whether the defendant is engaging in continuous activities in the forum analogous to the activities characterizing a forum-based enterprise. On a broad level, of course, this approach is an attempt to ascertain the “reasonableness” of the assertion of general jurisdiction. But this level of abstraction is too generic to be a satisfactory underlying premise because any potential standard would necessarily depend on some notion of reasonableness. Thus, the more pertinent issue is the extent to which a theory incorporating fairness concerns and/or state sovereign interests may support predicating the defendant’s amenability on an analogy to the activities of a commercial domiciliary.

One difficulty with this inquest is that “fairness” is not a word with a singular meaning, not even in the jurisdictional context. It includes protecting the defendant against undue litigation burdens,<sup>512</sup> insuring the defendant has a reasonable expectation that the claim could be brought in the forum,<sup>513</sup> and mandating that the defendant obtained some forum benefits in exchange for its submission to the state’s jurisdictional power.<sup>514</sup> Yet none of these three “fairness”

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<sup>511</sup> *Id.* at 702 n.10.

<sup>512</sup> *See, e.g.,* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (explaining that the minimum contacts requirement “protects the defendant against the burdens of litigating in a distant or inconvenient forum”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (articulating that the jurisdictional query depends in part on the court’s “estimate of the inconveniences” which would result to the corporation from a trial away from its ‘home’ or principal place of business”).

<sup>513</sup> *See, e.g.,* *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) (holding exercise of personal jurisdiction unfair when defendant had no expectation that his purchase of insurance in Indiana could subject him to suit in Minnesota); *World-Wide Volkswagen*, 444 U.S. at 297 (requiring that “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there”).

<sup>514</sup> *See, e.g.,* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (concluding it is reasonable to require a defendant to submit to the state’s sovereign power if his alleged obligations arise from his enjoyment of the benefits and protections of the

rationales appears to support the proposed minimum contacts standard.

The undue burden rationale has minimal application in most dispute-blind cases. The defendants typically have the financial resources to defend themselves, especially considering that modern technological advances, such as electronic filings, facsimile transmissions, e-mail, video conferences, and even “older” developments like overnight mail and telephone conferences have made it far “less burdensome for a party sued to defend himself in a State where he engages in economic activity.”<sup>515</sup> Although as a result of these developments many defendants would not be burdened by litigating in the forum, courts still often decline to find general jurisdiction.<sup>516</sup> Even in those circumstances in which a defendant may be unduly burdened by litigating in the forum, the minimum contacts portion of the analysis does not typically evaluate this concern—instead the courts consider the defendant’s burden as one of the five *Asahi* factors.<sup>517</sup>

The second rationale, focusing on the defendant’s expectations, is too circular to provide a meaningful theoretical justification for general jurisdiction. A party’s “expectation” that it might be subject to suit depends primarily on the jurisdictional rules governing the assertion of sovereign power. Any prospectively-applied jurisdictional standard would presumably impact expectations, thus precluding the defendant from being “surprised” and thereby comporting with this rationale. Unless an expectation theory provides a specific explanation for predicating general jurisdiction on a comparison to a

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forum’s laws); *Int’l Shoe*, 326 U.S. at 319 (holding that requiring corporation to defend suit in forum in which it incurs obligations arising out of its activities there is reasonable and just because the corporation is enjoying the benefits and protections of the forum’s laws).

<sup>515</sup> *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *cf. Cody v. Ward*, 954 F. Supp. 43, 47 n.9 (D. Conn. 1997) (noting that “widespread use of facsimile equipment and overnight mail and the courts’ increasing use of telephone conferences in lieu of live conferences reduces the burden on nonresidents of litigation in a distant state”).

<sup>516</sup> *Cf. Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 270 (E.D. Pa. 1991) (transferring case from Eastern District of Pennsylvania to District of New Jersey because *in personam* jurisdiction could not be exercised over New Jersey resident in Pennsylvania, but opining the controversy was “somewhat overblown, as the Federal Courthouse in Camden, New Jersey is less than two miles from this Courthouse”).

<sup>517</sup> *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (discussing severe burdens on Japanese corporation being forced to defend lawsuit in California); *cf. World-Wide Volkswagen*, 444 U.S. at 292 (noting burden on defendant will always be a primary concern in fairness factors).

local business rather than using some other standard, it is not a meaningful theoretical foundation.

Perhaps one could argue that a legitimate expectation exists based on an innate concept of equivalent treatment—because the nonresident defendant is conducting operations in the forum similar to state-based entities, it should therefore expect similar jurisdictional consequences to attach. This argument's desideratum, however, is that the state-based entity's domicile in the state creates an additional connection with the forum, not possessed by the nonresident defendant, establishing at least a tenuous relationship between the cause of action and the forum. As an example, assume a major corporation with a principal place of business in Texas is sued for alleged employment discrimination suffered by a New York employee at the hands of New York supervisor. While such a cause of action may not arise in Texas for purposes of specific jurisdiction, there is presumably at least an indirect relationship to Texas headquarters through the chain of command. In contrast, such a relationship would not presumably exist if the major corporation was merely doing business in Texas rather than being headquartered in the state. The commercial domiciliary, then, will typically have an added relationship with the forum, increasing its expectation of being subject to the state's jurisdictional power. Thus, an expectations theory alone does not appear to justify the proposed model.

A reciprocal benefits or exchange theory offers the most promise. The premise supporting this theory is that the nonresident defendant is obtaining benefits from the state similar to those commercial domiciliaries enjoy by conducting forum activities quantitatively and qualitatively analogous to a local business. Because such a local business is undoubtedly subject to the state's general adjudicatory authority, a nonresident performing similar activities should be as well. This conception bears some resemblance to Professor Brilmayer's political insider approach, under which general jurisdiction is appropriate when the "defendant reaches the quantum of local activity in which a purely local company would engage" such that "relegating the defendant to the political processes is fair."<sup>518</sup> While Professor Brilmayer evaluates the defendant's quantity of forum activity in light of the exertion of political influence,<sup>519</sup> rather than the qualitative and quantitative comparison to the in-state activities characterizing a domiciliary proposed here, both approaches consider the nonresident's activities in light of those of a

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<sup>518</sup> Brilmayer et al., *General Look*, *supra* note 230, at 742.

<sup>519</sup> *See id.*

local business. And perhaps the nonresident's comparable benefits and protections from the state's laws could justify the assertion of general adjudicatory power.

Although this quid pro quo theory is intuitively appealing, it appears difficult to square with the Supreme Court's most recent personal jurisdiction pronouncement, *Burnham v. Superior Court*.<sup>520</sup> *Burnham* held that the Due Process Clause did not bar California's exercise of "transient" or "tag" jurisdiction over a nonresident defendant personally summoned while in the state to answer a lawsuit unrelated to his forum activities.<sup>521</sup> Although the Court was unanimous in its result, it splintered hopelessly on the supporting rationale. Justice Scalia's plurality opinion employed a historical approach, contending that transient jurisdiction is permissible "because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"<sup>522</sup> In contrast, Justice Brennan's concurrence attempted to justify the assertion of general jurisdiction on an exchange theory, maintaining Mr. Burnham received significant state-provided benefits, such as the rights to travel, to police, fire, and emergency medical services, and to enjoy the "fruits of the State's economy."<sup>523</sup> But Justice Brennan's theory appears facile.

California's exercise of jurisdiction over Mr. Burnham in a divorce action as an "exchange" for the forum benefits he received during a three-day visit would be neither a fair bargain nor consistent with prior precedent. As Justice Scalia retorted, the three days of protection Mr. Burnham received from California while visiting the state were "powerfully inadequate to establish, as an abstract matter, that it is 'fair' for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children."<sup>524</sup> Moreover, this "exchange" cannot be reconciled with *Kulko v. Superior Court*,<sup>525</sup> where the Court held that exercising jurisdiction in a child support action

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<sup>520</sup> 495 U.S. 604 (1990).

<sup>521</sup> *Id.* at 607 (Scalia, J., plurality). Because transient jurisdiction thus allows the exercise of jurisdiction over any cause of action irrespective of its relationship to the forum, it is a form of general jurisdiction. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 6.2 (3d ed. 2000) (concluding "transient" jurisdiction predicated on in-state service is a "truly" general basis of jurisdiction).

<sup>522</sup> *Burnham*, 495 U.S. at 619 (Scalia, J., plurality).

<sup>523</sup> *Id.* at 637-39 (Brennan, J., concurring).

<sup>524</sup> *Id.* at 623 (Scalia, J., plurality).

<sup>525</sup> 436 U.S. 84 (1978).

against Mr. Kulko predicated on the his three-day stop-over during which he was married in the state “would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment.”<sup>526</sup> While Mr. Kulko’s visit was years earlier, he actually obtained greater ongoing benefits than Mr. Burnham did from the laws of California based on his marriage there. The only additional contact Mr. Burnham possessed—that he was served with process while in the state—appears irrelevant to the reasonableness of the “exchange.” Despite Justice Brennan’s *Burnham* concurrence, then, an exchange theory is not a viable framework for analyzing a state’s general adjudicatory power over those served with process in the forum. The reciprocal benefits theory accordingly cannot provide a unified framework for dispute-blind jurisdiction.

Because the underlying theory does not seem to be fairness, the due process limitations on the exercise of general jurisdiction apparently stem from limits on state sovereign authority. This rationale is supported by the origins of the dispute-blind doctrine, prior precedent, and constitutional theory.

As discussed previously, general jurisdiction is the modern progeny of the pre-*International Shoe* construct of “presence,”<sup>527</sup> which relied on physical power as its foundation.<sup>528</sup> Dispute-blind adjudicatory jurisdiction accordingly derives “from the power premise of *Pennoyer*.”<sup>529</sup> Under this premise, the state’s status as an independent sovereign in our federal system grants it sovereign authority over its domiciliaries and those within its borders.<sup>530</sup> Although *International Shoe* shifted the analysis from power to reasonableness,<sup>531</sup> the state still undoubtedly retains jurisdictional authority over residents and individual domiciliaries<sup>532</sup> and corporations either incorporated or with their principal place of business or commercial domicile in the forum.<sup>533</sup> The state likewise

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<sup>526</sup> *Id.* at 92-93.

<sup>527</sup> See *supra* Parts II, III.E, IV.

<sup>528</sup> *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (stating that “[t]he foundation of jurisdiction is physical power”).

<sup>529</sup> Stein, *Frontiers of Jurisdiction*, *supra* note 206, at 380.

<sup>530</sup> See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

<sup>531</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>532</sup> See, e.g., *Milliken*, 311 U.S. at 463. While *Milliken* predated *International Shoe*, its “traditional notions of fair play and substantial justice . . . implicit in due process” standard was incorporated into the minimum contacts analysis. *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

<sup>533</sup> See, e.g., Twitchell, *Myth of General Jurisdiction*, *supra* note 4, at 633 & n.111 (noting that dispute-blind jurisdiction “over corporations where they are

may reasonably exercise jurisdiction over those acting—either by their in-state presence or forum business activities—like residents or domiciliaries at the time the state asserts its power through service of process.

This understanding provides a basis to reconcile the *Kulko* and *Burnham* holdings. While Mr. Kulko availed himself to a greater extent of the benefits and protections of California's laws by being married in the state, he bore no similarity to a California resident at the time he was served with process, as he resided in New York.<sup>534</sup> In contrast, Mr. Burnham was, in many respects, indistinguishable from the residents of California when the state asserted its sovereign prerogative via summons. Although he did not have the right to vote in a state or local election, he was subject to California's laws while he was present there using its roads, purchasing goods and services in the state, paying state and local taxes, and being protected by police, fire, and emergency services. His similarity to a resident at the time of service provided the necessary state "contacts, ties, or relations" for the exercise of the state's sovereign authority over him.<sup>535</sup>

The same analysis may explicate the minimum contacts standard proposed in this Article. The necessary contacts, ties, or relations exist for dispute-blind jurisdiction when the defendant is behaving in the forum, for most intents and purposes, as a commercial domiciliary by engaging in the same types of forum activities in a comparable quantity. The sovereign state has undoubted sovereign power to regulate the activities of its commercial domiciliaries. When a nonresident defendant performs similar forum activities in comparable quantities as a domiciliary, the same sovereign state interests are implicated—the only difference is that the nonresident defendant has a more substantial connection with another state, but that does not diminish the state's sovereign interests in regulating an entity that is virtually indistinguishable from other local businesses. If, on the other hand, the defendant is not behaving as a typical domiciliary, the state does not have any general sovereign authority

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incorporated or where they have their principal place of business" is "so well accepted that it is never challenged").

<sup>534</sup> *Kulko v. Superior Court*, 436 U.S. 84, 92-95 (1978).

<sup>535</sup> See *Burnham v. Superior Court*, 495 U.S. 604 (1990). Admittedly, none of the opinions in *Burnham* explicitly relied on a sovereignty rationale. But Justice Scalia's plurality opinion is not inconsistent with the theory urged here, as he relied primarily on the historical understanding that in-state service was sufficient for jurisdiction. *Id.* at 616-19. This historical understanding was predicated, of course, on the power premise of *Pennoy v. Neff*, 95 U.S. 714, 722 (1877), and its antecedents.

to regulate the nonresident's conduct, invalidating the state's assertion of jurisdiction over claims unrelated to the defendant's forum activities.

This sovereignty rationale also appears consistent with the Supreme Court's insistence that the ultimate resolution of the defendant's amenability to dispute-blind jurisdiction hinges upon its in-state activities when served with summons.<sup>536</sup> The service of summons, of course, is the vehicle for the state's assertion of sovereign power over the defendant.<sup>537</sup> Evaluating the defendant's contacts at the time the state asserts authority rather than when the cause of action arose makes sense only if state sovereign interests are the predominant underpinning for dispute-blind jurisdiction.

On the other hand, a potential objection to this sovereignty framework is that it does not adequately explain why the state should have sovereign authority to assert plenary judicial authority over the defendant. Is such an approach grounded in American federalism, constitutional dogma, international conceptions of sovereign power, or some other political science theory? But arguably, under our constitutional scheme, this is the wrong question. The relevant question under our Constitution is not "why" the state may assert its power, but rather why it is precluded from exercising its authority.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>538</sup> This provision, plus the structure of our federalism, allows the states to act unless the Constitution prohibits the activity. The states possess the whole of the police power, subject only to constraints by the Constitution, thereby granting the states flexibility to serve as laboratories for experimentation.<sup>539</sup>

Thus, the states may assert general adjudicatory jurisdiction over nonresident defendants unless barred by the Due Process Clause. This clause, as interpreted by *International Shoe*, precludes a state from exercising jurisdiction over a "defendant with which the state has no

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<sup>536</sup> See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444-45, 448 (1952); *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 173 (1923); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517 (1923).

<sup>537</sup> See, e.g., *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946).

<sup>538</sup> U.S. CONST. amend. X.

<sup>539</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

contacts, ties, or relations.”<sup>540</sup> The thesis of this Article is that such due process limitations on a state’s exercise of general *in personam* jurisdiction primarily stem from the absence of any sovereign connection to those nonresident defendants that do not engage in forum activities closely analogous to state domiciliaries.

Two provisos are necessary. First, while this interpretation of the Due Process Clause does not limit the state’s exercise of general jurisdiction to the extent often advocated by other commentators on policy grounds,<sup>541</sup> a state, of course, does not have to assert jurisdiction to the full extent allowed by due process.<sup>542</sup> The Due Process Clause operates only as a limitation on a state’s adjudicatory power, not a command that such power must be employed.<sup>543</sup> Thus, the policy choices regarding whether the state *should* adopt a broad “doing-business” basis for jurisdiction must be distinguished from the *constitutionality* of the assertion of dispute-blind jurisdiction. With respect to these constitutional limits on general *in personam* jurisdiction, the minimum contacts aspect of due process is transgressed only when the state attempts to subject a nonresident defendant not functioning as a domiciliary to its sovereign power.

Second, the state sovereignty emphasis for the proposed minimum contacts analysis does not preclude considering other factors as well in making the jurisdictional determination. Even if the defendant has the requisite minimum contacts with the forum, the fairness or reasonableness factors thereafter insure that the state’s jurisdictional ambit does not offend “traditional notions of fair play and substantial justice” under the particular circumstances. Thus, although the state may have a sovereign interest based on the defendant’s forum activities, exercising jurisdiction may in rare cases be unduly burdensome for the defendant, especially if the plaintiff’s interest in the forum is slight. The third prong of the proposed analysis, then, limits the assertion of jurisdiction in accordance with the principle of fairness.

Therefore, to some extent, both sovereignty and fairness concerns underlie the suggested analysis. The predominant consideration is the sovereign interest of the state to establish the required connections and relationships between the defendant and the forum to satisfy the minimum contacts standard. But even when such a sovereign interest exists, the “fair play and substantial justice”

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<sup>540</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>541</sup> *See supra* notes 4-8 and accompanying text.

<sup>542</sup> *See, e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440-41 (1952).

<sup>543</sup> *See id.*



concerns may preclude the state from employing its adjudicatory power.

## VI. CONCLUSION

The existing doctrinal approaches to dispute-blind jurisdiction are deficient. None of them provides a basis for the nonresident defendant to predict which activities will subject it to the sovereignty of the forum for all causes of action. Nor do any of these approaches proffer a non-fictional, cogent underlying rationale justifying the exercise of such power.

This Article suggests a three-pronged inquiry to ameliorate the shortcomings of the current models. The first two components of this query, which are somewhat interrelated, appraise the qualitative and quantitative sufficiency of the defendant's forum activities in comparison to a local business. Initially, the qualitative sufficiency is judged by analogizing the defendant's in-state operations to the activities that characterize a commercial domiciliary. This comparison is satisfied if the nonresident defendant is conducting those types of activities in the forum—such as directing its business operations from the state, producing its goods or services in the state, or selling such goods or services through in-state business transactions—that typically define a local business. Assuming this qualitative substantiality component is met, the second query examines the quantity and continuity of the defendant's activities by ascertaining whether such activities have occurred in a comparable frequency to at least some local businesses over a reasonable time preceding the service of process. Finally, assuming the necessary minimum contacts exist under the first two prongs, the last issue is whether jurisdiction comports with “fair play and substantial justice,” determined by considering the burden on the defendant, the plaintiff's interest in the forum, the forum's interest in adjudicating the dispute, the judicial system's interest in efficiency, and the procedural and substantive policies of other states and nations.

Under this proposed model, the due process limitations on the exercise of general jurisdiction stem primarily from the absence of sovereign state interests over those defendants not conducting activities in the forum similar to a domiciliary owing its allegiance to the state. This sovereignty emphasis, of course, corresponds with the derivation of dispute-blind jurisdiction from the power premise of *Pennoyer*. While certainly fairness is not irrelevant, as it is the motivating factor behind the fair play and substantial justice criteria, the predominant underpinning for the due process limitations is the

lack of the required sovereign connection between the forum and the defendant.

The Article's suggested approach and underlying theoretical foundation would provide a measure of decisional coherence to dispute-blind jurisdiction. It is consistent with the Supreme Court's holdings on general jurisdiction both before and after *International Shoe*, as well as comports with the recent decrees of a number of federal appellate courts. It could perhaps allow us to depart from the morass and clarify general jurisdiction.