

The Twilight of the Minimum Contacts Test

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INTRODUCTION

To students of Civil Procedure, and those like me who teach them, the “minimum contacts” test that *International Shoe Co. v. Washington*¹ announced is seen as the beginning of time for evaluating the

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¹ 326 U.S. 310, 316 (1945).

constitutionality of state court and (by application of the Federal Rules of Civil Procedure²) most federal court assertions of personal jurisdiction. Some meanies like me make students read *Pennoyer v. Neff*,³ which they generally find impenetrable. Particularly since *Pennoyer* was sort of overruled, at least in part,⁴ students (who then become lawyers and judges) are left with the notion that *Pennoyer* was the case that, by invoking the Due Process Clause of the Fourteenth Amendment,⁵ turned personal jurisdiction into a constitutional subject.⁶ I have argued at length that this is a debatable proposition.⁷

For quite awhile, we teachers didn't have anything new to cover when it came to the minimum contacts test. Until 2011, the last decision in which a majority of Supreme Court justices discussed the minimum contacts test was in the splintered opinions in *Asahi Metal Industry Co. v. Superior Court*,⁸ where the Court divided four to four on the question of whether a component manufacturer generally could be sued in a state in which the component was foreseeably resold as part of a finished product. Four Justices said the answer to that question is usually yes,⁹ four said usually no,¹⁰ and Justice Stevens wouldn't say one way or the other.¹¹ Remarkably, the Court ruled unanimously that the component manufacturer wasn't subject to jurisdiction because it would be unreasonable to do so even if there were minimum contacts.¹²

The lack of clarity left matters in a less-than-ideal position, but the Supreme Court said nothing on the topic for a quarter century. The closest the Court came was a 1990 decision reaffirming in-state service of process on an individual defendant as a basis for jurisdiction; four Justices in the concurrence purported to do a minimum contacts analysis, but it wasn't a majority opinion.¹³

² FED. R. CIV. P. 4(k).

³ 95 U.S. 714 (1877).

⁴ See *Shaffer v. Heitner*, 433 U.S. 186, 214 n.39 (1977).

⁵ U.S. Const. amend. XIV, § 1.

⁶ *Pennoyer*, 95 U.S. at 733.

⁷ 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, 38–43 (1990).

⁸ 480 U.S. 102 (1987).

⁹ *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

¹⁰ *Id.* at 112 (O'Connor, J., plurality opinion).

¹¹ *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment) (“An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional.”).

¹² *Id.* at 116 (O'Connor, J.).

¹³ *Burnham v. Superior Court*, 495 U.S. 604, 636–39 (1990) (Brennan, J., concurring in the judgment).

Then, in 2011, the Supreme Court showed interest in the subject again, deciding four cases from 2011 to 2014. In all four cases, the Court ruled that the minimum contacts test was not fulfilled.¹⁴ The result in three of the cases was utterly predictable, as the Court unanimously held that the minimum contacts test was not fulfilled.¹⁵ Justice Sotomayor, in the fourth case, authored a concurrence,¹⁶ thus breaking up the Court's otherwise blissful agreement on both rationale and result. All three of the unanimous cases represented wild over-reaches of long-arm jurisdiction by lower courts, and the Supreme Court appeared to take the cases mostly as hand-slapping exercises.

The most interesting case of the four produced the only non-unanimous decision. In *J. McIntyre Machinery, Ltd. v. Nicaastro*,¹⁷ it looked as though the Court might resolve the long-simmering debate as to the scope of the stream-of-commerce test for product liability cases that *Asahi* left undecided. As commentators have noted,¹⁸ the Court did no such thing. If anything, the Court achieved the remarkable feat of further confusing the issue by splitting four to two to three on the rationale.¹⁹ Strangely, this left Justice Breyer's two-vote concurrence in the judgment as the controlling opinion, but his opinion is so narrow it leaves little for lower courts to follow.²⁰

Although many find this surprising, in terms of the results reached, the jurisdictional landscape today is not much changed from the pre-*International Shoe* days when the "implied consent" rubric was the rationale for asserting jurisdiction. In fact, in some ways the minimum contacts test as now applied is less flexible than the old implied consent theory. To be sure, some things have changed. The collapsing of *in rem*

¹⁴ *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780 (2011).

¹⁵ *Walden*, 134 S. Ct. at 1115; *Daimler AG*, 134 S. Ct. at 746; *Goodyear Dunlop Tire Operations, S.A.*, 131 S. Ct. at 2846.

¹⁶ See *Daimler AG*, 134 S. Ct. at 763 (Sotomayor, J., concurring in the judgment).

¹⁷ 131 S. Ct. at 2780.

¹⁸ See e.g., Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245 (2011); see also Shane Yeagan, Note, *Purpose and Intent: Seeking a More Consistent Approach to Stream of Commerce Personal Jurisdiction*, 90 WASH. U. L. REV. 543, 555–56 (2012) ("The Court in *J. McIntyre* largely disappointed those who had hope for clarification of the law of stream of commerce jurisdiction."); Robert M. Pollack, Note, "Not of Any Particular State," *J. McIntyre Machinery, Ltd. v. Nicaastro and Nonspecific Purposeful Availment*, 89 N.Y.U. L. REV. 1088, 1103 (2014) (*J. McIntyre's* "splintered decision failed to settle [stream-of-commerce] doctrine.").

¹⁹ *J. McIntyre*, 131 S. Ct. 2780.

²⁰ Borchers, *supra* note 18, at 1265.

into *in personam* jurisdiction²¹ is a genuine change from the pre-*International Shoe* days, though one that has constricted state-court reach. But when it comes to the fundamentals of jurisdiction in tort and contract cases and assertions of jurisdiction over corporations, the picture today – at least from the standpoint of outcomes – looks remarkably unchanged from (perhaps is even more grudging than) the pre-*International Shoe* era.

Given the Supreme Court's adherence to the minimum contacts language for seventy years now, it seems unlikely that the vocabulary will soon change. The question rather is whether the vocabulary will continue to be a cloak to hide jurisdictional doctrine that is in truth no less rigid than that of the nineteenth and early twentieth century. The minimum contacts *test* is in its twilight because it has become almost completely separated from the fairness rationale that underlay the test as it was originally conceived. So while the minimum contacts *language* will almost certainly persist, the *test* as a meaningful exposition of the Due Process Clause may not live to see the next dawn, if indeed it is still alive at all.

Part I will briefly review the Supreme Court's four new cases. Part II will survey the jurisdictional landscape as it existed before *International Shoe* was decided in 1945. Finally, Part III offers a modest proposal to return the test to its basic fairness origins.

I. THE COURT'S RESURGENT INTEREST IN PERSONAL JURISDICTION

Because each new personal jurisdiction opinion begets a flood of commentary, I will endeavor to be as brief as possible in recounting the new decisions. In *J. McIntyre Machinery, Ltd. v. Nicaastro*,²² the Supreme Court faced a product liability action that an injured industrial worker brought against the English manufacturer of the allegedly defective machine that caused the accident.²³ Because the machine had not been sold directly to a buyer in the plaintiff's home state of New Jersey, but rather through an Ohio-based independent distributor, the case presented a question of stream-of-commerce jurisdiction.²⁴ Justice Kennedy authored a four-vote plurality opinion which held that there was no jurisdiction because of a lack of a direct effort to serve the forum state market.²⁵ The plurality noted the absence of any evidence in the record

²¹ *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

²² *J. McIntyre*, 131 S. Ct. 2780.

²³ *Id.* at 2786.

²⁴ *Id.* at 2788 (The stream of commerce “refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact.”).

²⁵ *Id.* at 2790–91.

that the English manufacturer was specifically targeting the forum state.²⁶ The plurality also attempted to revive the sovereignty strand of jurisdiction – that is, the notion that jurisdictional limits exist in part to check the breadth of state authority—which has appeared episodically in Supreme Court opinions.²⁷ The plurality reasoned that while one function of jurisdiction is to protect defendants from unfair assertions of jurisdiction, another was to constrain the sovereignty of states.²⁸

Justice Breyer’s controlling opinion,²⁹ concurring in the judgment—joined only by Justice Alito—refused to endorse the plurality’s broad rationale.³⁰ Justice Breyer emphasized that the record showed that only one such machine had been sold in New Jersey.³¹ Purporting to adhere closely to the Court’s minimum contacts precedents, the concurrence in the judgment reasoned that one drop could not fill the metaphorical streambed needed to keep afloat an assertion of jurisdiction.³² Justice Breyer saw the *J. McIntyre* facts as similar to those in *World-Wide Volkswagen v. Woodson*,³³ in which the Court ruled that the injury state did not have jurisdiction over an out-of-state seller of a car, because the car dealership (and its regional distributor) had made no effort to serve the forum state’s market.³⁴

Justice Ginsburg’s dissenting opinion vehemently rejected the plurality’s sovereignty rationale.³⁵ She emphasized that the English manufacturer saw the United States as a single market and that the sale of a machine in New Jersey was utterly foreseeable.³⁶ She also emphasized the unfairness of leaving the injured worker with no practical forum in which to pursue his case and, in her view, the absurdity of giving what

²⁶ *Id.*

²⁷ *Id.* at 2787–87; *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

²⁸ *J. McIntyre*, 131 S. Ct. at 2787.

²⁹ *See supra* note 18–20 and accompanying text.

³⁰ *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring in the judgment).

³¹ *Id.* at 2791–92.

³² *Id.* at 2792 (“a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place”).

³³ 444 U.S. 286 (1980).

³⁴ *J. McIntyre*, 131 S. Ct. at 2792 (citing *World-Wide Volkswagen*, 444 U.S. at 297–98).

³⁵ *Id.* at 2798 (Ginsburg, J., dissenting) (“the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty”).

³⁶ *Id.* at 2801.

amounted to jurisdictional immunity to the English manufacturer when the manufacturer's home European jurisdictional scheme would not do so.³⁷

In *Goodyear Dunlop Tire Operations, S.A. v. Brown*,³⁸ decided on the same day as *J. McIntyre*, the Court confronted a case in which two boys who were members of a soccer team were killed in France, allegedly as the result of a defect in a tire manufactured by one of several foreign subsidiaries of the U.S. tire giant Goodyear.³⁹ A court in North Carolina – the boys' home state – took jurisdiction over the foreign subsidiaries based on a very small percentage of their tires being sold in North Carolina.⁴⁰ This was an attempted exercise of “general” or “all-purpose” jurisdiction, because the forum-state sales were unrelated to the claims.⁴¹ *Goodyear* was only the third time in the minimum contacts era that the Court had decided a general jurisdiction case, and only the second since its six-decades-old opinion in *Perkins v. Benguet Consolidated Mining Co.*⁴²

Goodyear's brief and unanimous opinion held that the North Carolina courts had reached too far.⁴³ The Court relied heavily on its earlier decision holding that unrelated forum-state purchases by a corporate defendant could not sustain jurisdiction.⁴⁴ The real news from the *Goodyear* decision was that the Court formulated a test for deciding whether unrelated contacts met the constitutional threshold. The Court stated that a defendant must have contacts with the forum that make it “essentially at home” there.⁴⁵ That new test prompted a fair amount of speculation, with some reading it as limiting jurisdiction to a “headquarters” paradigm,⁴⁶ and others arguing that while the Court's

³⁷ *Id.*

³⁸ 131 S. Ct. 2846 (2011).

³⁹ *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

⁴⁰ *Id.* at 2851.

⁴¹ *Id.* at 2854 (“To justify the exercise of general jurisdiction over petitioners, North Carolina courts relied on the petitioners’ placement of their tires in the ‘stream of commerce.’”).

⁴² 342 U.S. 437 (1952). Although it is a debatable reading of the opinion, the Court treated *Perkins* as standing for the proposition that a corporation is subject to general personal jurisdiction in the state in which it has its headquarters. See *Goodyear*, 131 S. Ct. at 2856.

⁴³ *Goodyear*, 131 S. Ct. at 2851.

⁴⁴ *Id.* at 2856 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984)).

⁴⁵ *Id.* at 2851.

⁴⁶ Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT’L & COMP. LAW 1, 4 (2014) (“If what the Court means by ‘essentially at home’ is that the corporate defendant has its headquarters in the forum, U.S.

opinion required a meaningful and permanent connection with the forum, it did not limit general jurisdiction to the defendant's home base.⁴⁷

Three years later brought another pair of jurisdictional opinions, both reversing extremely aggressive attempted assertions of jurisdiction endorsed by the United States Court of Appeals for the Ninth Circuit.⁴⁸ In *Walden v. Fiore*, the defendant (who had been deputized to work for the federal Drug Enforcement Agency) seized about \$97,000 in cash from two professional gamblers as they passed through Atlanta, Georgia's airport on their way home to Nevada.⁴⁹ Apparently the defendant believed that the money might be tied to a drug transaction and some months later helped draft a "probable cause" affidavit in support of a forfeiture action.⁵⁰ However, no forfeiture action was ever filed, and a few months later the gamblers had the money returned to them.⁵¹

The gamblers brought a *Bivens* action⁵² in Nevada against the federal official. The District Court concluded that there was no jurisdiction over the Georgia-based defendant, but a divided panel of the Ninth Circuit reversed.⁵³ The Ninth Circuit's theory⁵⁴ was that the defendant's knowledge that the plaintiffs were Nevadans created minimum contacts with Nevada, particularly based on his later actions in helping to draft the affidavit.⁵⁵ The plaintiffs and the Ninth Circuit leaned heavily on the

plaintiffs could find themselves irrationally disadvantaged in pursuing cases against foreign corporate defendants."); Meir Feder, *Goodyear "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 677 (2012) ("[T]he *Goodyear* opinion did include several clues suggesting that the Court may have intended the at home standard as a narrow one, perhaps extending no further than a corporation's state of incorporation and principal place of business.").

⁴⁷ Danielle Tarin & Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction Over Foreign Corporations*, 11 J. INT'L BUS. & L. 49 (2012).

⁴⁸ Symposium, *Ninth Circuit Conference: U.S. Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006) (Over the past fifty years, the Ninth Circuit has been reversed by the U.S. Supreme Court an average of 10.78 times per term. In contrast, the Fifth Circuit was reversed an average of 7.42 times.).

⁴⁹ 134 S. Ct. 1115, 1119 (2014).

⁵⁰ *Id.*

⁵¹ *Id.* at 1120.

⁵² *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971) (recognizing a civil cause of action under the Constitution against federal officers who deprive citizens of constitutional rights). In *Walden v. Fiore*, the plaintiffs alleged a violation of their rights under the Fourth Amendment of the U.S. Constitution. 134 U.S. at 1120.

⁵³ *Walden*, 134 S. Ct. at 1120.

⁵⁴ *Id.* ("[P]etitioner 'expressly aimed' his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a 'significant connection' to Nevada.")

⁵⁵ *Id.*

Supreme Court's decision in *Calder v. Jones*,⁵⁶ where a famous entertainer successfully prosecuted an action in her home state of California against a writer and editor for the nationally circulated publication *The National Enquirer*, which the plaintiff alleged ran a libelous story about her.⁵⁷

The unanimous Court had little trouble dispatching the analogy to *Calder*.⁵⁸ The Court noted that the *Calder* opinion described California as the “focal point” of the story.⁵⁹ The wide circulation of the publication in California, and the fact that the plaintiff's reputation was centered there, rendered the forum state effects in *Calder* much more substantial than in *Walden*.⁶⁰ As the Court noted, the *Walden* case bore some similarities to *World-Wide Volkswagen v. Woodson*,⁶¹ in which the plaintiffs—not the defendants—created the relationship to the forum.⁶² The Court repeated several times that the contacts of the plaintiffs with the forum are by themselves irrelevant; it is essential that each defendant voluntarily create a relationship with the forum state.⁶³

Although *Walden* may prove to be the least consequential of the opinions, the opinion contains some stray language that might prove nettlesome. In a sentence that defendants are sure to quote frequently when attempting to dismiss actions, the Court stated: “[O]ur ‘minimum contacts’ analysis looks at the defendant’s contacts with the forum state itself, not the defendant’s contacts with persons who reside there.”⁶⁴ Taken out of context, this sentence might seem to announce a rule that dealings with forum-state plaintiffs could never suffice and that the minimum contacts test requires some additional connection to the forum state. Such a rule, however, could not be squared with cases such as *Burger King Corp. v. Rudzewicz*⁶⁵ and *McGee v. International Life Insurance Co.*⁶⁶ in which the defendant’s sole connection to the forum was a contractual relationship with a forum-based plaintiff.

⁵⁶ 465 U.S. 783 (1983).

⁵⁷ *Walden*, 134 S. Ct. at 1123 (citing *Calder*, 465 U.S. at 783).

⁵⁸ *Id.* at 1125.

⁵⁹ *Id.* at 1123 (quoting *Calder*, 465 U.S. at 789).

⁶⁰ *Id.* at 1125.

⁶¹ *Id.*, at 1123 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)).

⁶² *Id.* (“Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs or third parties.”).

⁶³ *Walden*, 134 S. Ct. at 1123 (“A forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.”).

⁶⁴ *Id.* at 1122.

⁶⁵ 471 U.S. 462 (1985).

⁶⁶ 355 U.S. 220 (1957).

More likely what the Court was emphasizing was that the relationship was formed and the vast majority of their interactions took place outside the forum, and the forum became of significance only once the plaintiffs returned to Nevada and demanded the money.⁶⁷ As the Court noted, if the plaintiffs' injury was deprivation of the use of the money, the injury could have arisen in any state to which the plaintiffs chose to travel and demanded the money.⁶⁸

If one squints to see anything else of doctrinal significance, it lies in the Court's footnote leaving to another day the question of the significance of virtual contacts.⁶⁹ The plaintiffs argued that denying them access to a Nevada forum could have the unintended consequence of denying a reasonable forum to plaintiffs injured over the Internet, perhaps by fraudulent schemes or "phishing."⁷⁰ As did Justice Breyer's opinion concurring in the judgment in *J. McIntyre*, the Court expressly left "questions about virtual contacts for another day."⁷¹

The most audacious effort at asserting jurisdiction was the Ninth Circuit's opinion that was reversed in *Daimler AG v. Bauman*.⁷² In *Daimler*, the plaintiffs were citizens of Argentina who alleged that they or close relatives were victims of Argentina's "Dirty War" that lasted from 1976 to 1983.⁷³ The corporate defendant was Daimler, the German auto-manufacturing giant that makes Mercedes-Benz vehicles.⁷⁴ The plaintiffs brought a complaint in a California federal court alleging a variety of tort theories claiming that Daimler's Argentinian subsidiary conspired with the government to "kidnap, detain, torture, and kill plaintiffs and their relatives"⁷⁵

The plaintiffs' theory of jurisdiction required several analytical leaps ranging from the debatable to the highly implausible. First, the plaintiffs

⁶⁷ *Walden*, 134 S. Ct. at 1125 ("Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner.").

⁶⁸ *Id.* ("Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.").

⁶⁹ *Id.* at 1125 n.9.

⁷⁰ *Id.*

⁷¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792-93 (2011) (Breyer, J., concurring in the judgment) (questioning the potential idea of granting jurisdiction against a company who instead of shipping product direct, cosigns through an intermediary such as Amazon.com).

⁷² 134 S. Ct. 746 (2014).

⁷³ *Id.* at 751.

⁷⁴ *Id.*

⁷⁵ *Id.*

alleged that Daimler was vicariously liable for the actions of its Argentinian subsidiary.⁷⁶ Second, the plaintiffs argued that Daimler's indirect U.S. subsidiary – Mercedes-Benz U.S.A. – had sufficient unrelated contacts in California that it would be subject to general jurisdiction in California.⁷⁷ Third, the plaintiffs argued that Daimler controlled its subsidiary to a sufficient degree that the subsidiary's contacts could be imputed to Daimler, rendering Daimler subject to jurisdiction in California.⁷⁸ Alternatively, the plaintiffs argued that Daimler's contacts on their own sufficed to subject it to jurisdiction in California.⁷⁹ Fourth, the plaintiffs argued that despite the lack of any connection between California and the events and the parties, the assertion of jurisdiction could survive the *Asahi* reasonableness test.⁸⁰

The District Court dismissed the action for lack of personal jurisdiction, and at first the Ninth Circuit affirmed over the dissent of one of the three members of the panel.⁸¹ In a remarkable turn of events, without additional briefing or argument, the Ninth Circuit panel granted plaintiffs' petition for rehearing and reversed itself with an expanded version of the dissent becoming the majority opinion.⁸² This time, the Ninth Circuit agreed with the plaintiffs' theory that the contacts of Daimler's U.S. subsidiary could be imputed to it under an "agency" theory.⁸³ Daimler's petition to have the case reheard *en banc* failed, but eight judges dissented from the denial of the rehearing petition and filed a

⁷⁶ *Id.* at 752.

⁷⁷ *Id.* (arguing "[a]lthough [Mercedes-Benz USA's] principal place of business is in New Jersey, [Mercedes-Benz USA] has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine [Mercedes-Benz USA] is the largest supplier of luxury vehicles to the California market Over 10% of all sales of new vehicles in the United States take place in California, and [Mercedes-Benz USA] California sales account for 2.4% of Daimler's worldwide sales.").

⁷⁸ *Daimler*, 134 S. Ct. at 746 ("plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of [Mercedes-Benz USA], a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes").

⁷⁹ *Id.* ("plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California").

⁸⁰ *Id.*

⁸¹ *Id.* at 752–53; *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009) (Reinhart, J., dissenting).

⁸² 134 S. Ct. at 753; *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011).

⁸³ *Bauman*, 644 F.3d at 924 (holding that because Mercedes-Benz USA's services were sufficiently important to DaimlerChrysler and DaimlerChrysler had the right to control Mercedes-Benz USA's activities, thus declaring Mercedes-Benz USA was DaimlerChrysler's agent for general jurisdictional purposes).

written opinion.⁸⁴ That dissent argued that the panel’s agency theory was so broad that it would render almost every multinational corporation subject to jurisdiction in every state.⁸⁵

There was little doubt that the plaintiffs would lose in the Supreme Court.⁸⁶ However, the opinion of Justice Ginsburg, joined by seven other Justices, adopted a theory that may roll the boundaries of general jurisdiction back past even what one might have expected after the announcement of the *Goodyear* “essentially at home” test.⁸⁷ The Court held Daimler to have conceded that its U.S. subsidiary was subject to general jurisdiction in California, though it was careful to make clear the U.S. subsidiary might not have been subject to jurisdiction had Daimler pressed the point.⁸⁸ The Court also accepted *arguendo* the Ninth Circuit panel’s contention that the U.S. subsidiary’s contacts could be imputed to Daimler.⁸⁹ But, said the majority, just because the subsidiary is “at home” in California doesn’t mean that Daimler the parent is.⁹⁰

The majority adopted what Justice Sotomayor—in her solo concurrence in the judgment—called a “proportionality” test.⁹¹ Despite the fairly substantial contacts between the U.S. subsidiary and California – multiple offices and extensive vehicle sales⁹² – when looked at from the perspective of Daimler, it could not be at home in California because Daimler had vastly more substantial contacts outside of California.⁹³ The majority’s rationale baffled Justice Sotomayor.⁹⁴ How is it, Justice Sotomayor wondered, that contacts sufficient to render the smaller subsidiary subject to jurisdiction in California become insufficient simply because a larger corporation has more contacts elsewhere?⁹⁵ Justice Sotomayor also argued that such a rationale was inconsistent with *Perkins*,

⁸⁴ *Daimler*, 134 S. Ct. at 753.

⁸⁵ *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 777 (9th Cir. 2011).

⁸⁶ Borchers, *supra* note 46, at 14.

⁸⁷ *See supra* note 45 and accompanying text.

⁸⁸ *Daimler*, 134 S. Ct. at 758 (noting that Daimler failed to object below to plaintiffs’ assertion that the California courts could exercise all-purpose jurisdiction over [Mercedes-Benz USA], and that the Court has not addressed whether a foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary).

⁸⁹ *Id.* at 760.

⁹⁰ *Id.*

⁹¹ *Id.* at 770 (Sotomayor, J., concurring in the judgment).

⁹² *Id.* at 752 (“[Mercedes-Benz USA] has multiple California-based facilities . . . Over 10% of all sales of new vehicles in the United States take place in California . . .”).

⁹³ *Id.* at 764 (Sotomayor, J., concurring in the judgment) (“The problem the Court says, is not that Daimler’s contacts with California are too few, but that its contacts with other forums are too many.”).

⁹⁴ *Daimler*, 134 S. Ct. at 770.

⁹⁵ *Id.* at 763–64.

which upheld jurisdiction while describing the corporation's contacts with the forum state as being "limited."⁹⁶ Rather, Justice Sotomayor would have decided the case in favor of Daimler based on the *Asahi* reasonableness test because of the foreign parties and events.⁹⁷

While *Daimler* was the most exorbitant attempt at exercising jurisdiction, its rationale could well be the most far reaching of the four decisions. While the majority insisted that it was not limiting general jurisdiction over corporations to the states of incorporation and principal places of business,⁹⁸ it's becoming increasingly difficult to believe that the Court has not retracted contacts-based general jurisdiction to that point, or something close to it. First, the Court emphasized that it was only *assuming* that the U.S. subsidiary was subject to general jurisdiction in California, despite the fact that most lower courts have held that the presence of substantial physical offices is enough to subject a corporation to general jurisdiction.⁹⁹ Second, the Court's proportionality test is clearly an effort to ensure that even the largest of corporate defendants are subject to jurisdiction in at most a few places. But, as Justice Sotomayor noted, it's difficult at best to glean from the Court's opinion when the non-forum contacts so overwhelm the forum-state contacts as to make the latter insufficient for constitutional purposes.

II. THE JURISDICTIONAL WORLD BEFORE *INTERNATIONAL SHOE*

The Court begins most jurisdictional opinions these days with a recitation of a truncated, mythical history in which the evil *Pennoyer* decision turned the landscape into a petrified forest of rules of very limited jurisdictional reach, but then the *International Shoe* Court heroically

⁹⁶ *Id.* at 767–68 (quoting *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952)). The majority and Justice Sotomayor each devoted several lengthy footnotes to arguing about whether *Perkins* could be fairly read as showing that the defendant corporation in that case had substantial activities outside the forum state of Ohio. *See, e.g., id.* at 768, n.9; *see also id.* at 756 n.8.

⁹⁷ *Id.* at 773 (“I would reverse the Ninth Circuit’s decision on the narrower ground that the exercise of jurisdiction over Daimler would be unreasonable in any event.”). The majority opinion also put some weight on Daimler’s foreign nationality and credited the Solicitor General’s assertion that adoption of the Ninth Circuit’s view would strain international relations and make it more difficult for the U.S. to negotiate judgment-recognition treaties; *see also id.* at 763.

⁹⁸ *Id.* at 760 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

⁹⁹ *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 411 (5th ed. 2010).

smashed through all of this by invention of the minimum contacts test.¹⁰⁰ Reading this recounting, one imagines a pre-*International Shoe* world of hapless plaintiffs left without any realistic judicial recourse unless they happened to catch defendants in the forum to serve them.¹⁰¹ The problem seemed particularly acute with regard to corporations, as the Court held that in-state service of a corporate officer was not by itself sufficient to confer jurisdiction.¹⁰²

The pre-*International Shoe* reality was vastly more complicated, however. For one thing, ambiguity persisted well past *Pennoyer* as to the role of the Due Process Clause. Some courts took what the “expansive view” and others the “limited view”¹⁰³ of the *Pennoyer* opinion. The expansive view is the familiar one to us today in which the Due Process and Full Faith and Credit Clauses work in tandem under a unified standard to limit assertions of jurisdiction (the role of the Due Process Clause) while requiring the recognition of judgments from other states with a constitutionally sufficient jurisdictional basis (the Full Faith and Credit Clause’s role).¹⁰⁴

However, doubt persisted until 1915 as to whether there was a unified standard, with some state courts believing that they could enforce a judgment against in-state assets even if the assertion of jurisdiction went beyond the boundaries set by the U.S. Supreme Court.¹⁰⁵ The lack of clarity on this point was fueled by Supreme Court opinions involving collateral attacks to state court judgments stating that they could be

¹⁰⁰ See, e.g., *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (referring to *International Shoe* as “pathmarking”); see also *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786-87 (2011) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998)).

¹⁰¹ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1878).

¹⁰² See, e.g., *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); *Goldey v. Morning News*, 156 U.S. 518 (1895); see *Martinez v. Caribbean*, No. 12-16043 2014 U.S. App. Lexis 16163 at *1 (9th Cir. Aug. 21, 2014) (reaching the result that in-state service of a corporate officer does not confer jurisdiction over the corporation, but remarkably never cited the Supreme Court’s controlling decisions in *Riverside* and *Goldey*).

¹⁰³ Borchers, *supra* note 7, at 38–41.

¹⁰⁴ Borchers, *supra* note 7, at 38–39 (“The expansive view of *Pennoyer* is that the court intended for the due process clause to provide both a mechanism for challenging either interstate or intrastate, state court assertions of personal jurisdiction, and the contents of the jurisdiction rules themselves.”).

¹⁰⁵ *Jester v. Steam Packet Co.*, 131 N.C. 54 (1902); *Pope v. Terre Haute Co.*, 87 N.Y. 137 (1881); see also *Riverside*, 237 U.S. 189 (sustaining a direct attack on a state court judgment based on service on corporate officer within the forum on personal business).

“questioned in a court of another government,”¹⁰⁶ implying that a different rule might apply in direct attack cases.¹⁰⁷

But even with that ambiguity resolved in favor of the expansive view in 1915 – thus unifying the standards for direct and collateral attacks on state-court judgments¹⁰⁸—jurisdictional doctrine of the time was not nearly as ossified as one might imagine. In fact, many of the current debates taking place within the context of the minimum contacts test bear a remarkable resemblance to those in the pre-*International Shoe* jurisdictional world.

As discussed below, one of the most important extensions of the common law bases of jurisdiction, was the notion that corporations “doing business” within a state were “present” there and thus could be served with process and made subject to the jurisdiction of the courts of a state other than their incorporation.¹⁰⁹ As we shall see, *International Shoe* itself was a fairly easy case for jurisdiction under the “doing business” test and – read in context – its minimum contacts language was an effort to clarify and systematize that test as applied to out-of-state corporations. In fact, it was not finally resolved until the Supreme Court’s 1977 decision in *Shaffer v. Heitner*¹¹⁰ that the minimum contacts test even applied to individual defendants.

Nor was the “doing business” test the only expansion of jurisdiction that took place between *Pennoyer* and *International Shoe*. Statutes creating jurisdiction over non-resident motorists involved in accidents within the forum state’s borders created what we could call today specific jurisdiction.¹¹¹ Additionally most of the “satellite” bases of jurisdiction survived *International Shoe* and carry over to today, with the notable

¹⁰⁶ See *Old Wayne Mutual Life Ass’n of Indianapolis v. McDonough*, 204 U.S. 8, 15 (1907).

¹⁰⁷ See also *Goldey v. Morning News*, 156 U.S. 518, 521 (1895) (noting that the New York state law rule allowed for jurisdiction over a corporation merely by service on any officer of the corporation even if not in the state on corporate business, the Court stated: “Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government.”).

¹⁰⁸ *Riverside*, 237 U.S. at 194–95 (“the courts of one state may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein . . .”).

¹⁰⁹ See *infra* notes 180–202 and accompanying text.

¹¹⁰ 433 U.S. 186, 204 n.19 (1977).

¹¹¹ The term adopted by the Supreme Court for cases in which the claim arises out of or relates to forum-state activities. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The Supreme Court now also calls specific jurisdiction “case-linked.” See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

exception of *quasi in rem* jurisdiction based on the attachment of property unrelated to the dispute.

To be sure, that is not to say that nothing has changed post-*International Shoe*. When the jurisdictional reach of courts hit its high-water mark with the Supreme Court's decision in *McGee v. International Life Insurance Co.*¹¹² – a decision that held that the sale of a single life insurance policy in the forum state created minimum contacts with the corporate insurer – it appeared that the Constitution might fade into the background as only a loose outer boundary on the power of states, much as it did with regard to choice of law.¹¹³ The Supreme Court, however, almost immediately post-*McGee* quashed that notion.¹¹⁴ Since then, the jurisdictional boundaries permitted under the Constitution have been in steady contraction.

The contraction has now reached the point where it's worth asking whether *International Shoe* still deserves the emphasis placed on it. It is unlikely that the Court will abandon the minimum contacts *language*, but the question worth asking is whether there really is anything left of the minimum contacts *test* – at least conceived of as a mechanism for promoting jurisdictional regime fundamentally guided by fairness.¹¹⁵ Assuming, as this article posits, that what now exists isn't very different in actual practice from the pre-*International Shoe* regime, and may be more protective of defendants, one might wonder whether this is truly progress.

¹¹² 355 U.S. 220 (1957).

¹¹³ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (affirming the Minnesota Supreme Court's decision to apply Minnesota substantive law to govern the effect of an automobile insurance policy even though the accident did not occur in Minnesota, the vehicle was not registered in Minnesota, and the plaintiff's decedent did not live in Minnesota).

¹¹⁴ See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”) (citations omitted).

¹¹⁵ *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 323–24 (1945) (“Due Process does permit State courts to ‘enforce the obligations which appellant has incurred’ if it be found ‘reasonable and just according to our traditional conception of fair play and substantial justice.’ And this in turn means that we will ‘permit’ the State to act if upon an ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business, we conclude that it is ‘reasonable’ to subject it to suit in a State where it is doing business.”) (emphasis added).

A. “Satellite” Bases of Jurisdiction

The United States law of personal jurisdiction has long allowed what are sometimes called “satellite” bases of jurisdiction, that is, assertions of jurisdiction that do not depend directly on what we now call contacts.¹¹⁶ There are several, and all but one survived into the post-*International Shoe* world.

1. In-State Service

In-state service of process – sometimes called “transient service” or “tag” jurisdiction¹¹⁷—on an individual defendant as a jurisdictional basis has a long history in the United States. State courts inherited the rule from the common law and applied it from nearly the birth of the United States.¹¹⁸ The *Pennoyer* decision recognized it as the paradigmatic way in which *in personam* jurisdiction could be obtained over individuals.¹¹⁹

It was heavily criticized in the post-*International Shoe* era as being unnecessary and potentially unfair to defendants making only a brief visit to the forum state.¹²⁰ The argument ran that while in-state service might have been a sensible basis when travel was more difficult, the rule was a

¹¹⁶ HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 392; *see also* Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (defining “satellite jurisdiction” as decisions approving jurisdiction on “‘single factor’ bases such as consent, waiver, domicile, state of incorporation, and personal service within the state.”).

¹¹⁷ Linda J. Silberman, *Shaffer v. Heitner: The End of An Era*, 53 N.Y.U. L. REV. 33, 75 (1978).

¹¹⁸ *See, e.g.*, *Barrell v. Benjamin*, 15 Mass. 354, 357–58 (1819) (defendant’s “arrest” in the forum state of Massachusetts sufficed to obtain jurisdiction over him in a civil partnership dispute, even though the defendant was not a resident of Massachusetts).

¹¹⁹ *Pennoyer v. Neff*, 95 U.S. 714, 724 (1878) (“Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its law, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam* . . .”) (quoting *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828)).

¹²⁰ *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (“Sitting in the lounge of his plane on a nonstop flight over New York, a citizen of California is handed a summons. For many years to come, to his great expense and greater annoyance, he will have to defend a law suit in a New York court three thousand miles away, from his home, even though the plaintiff may be a spiteful competitor alleging a fanciful claim dating back many years to a trip abroad.”); Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593.

holdover from the “power” theory of jurisdiction associated with *Pennoyer* and should give way to the “fairness” era ushered in by *International Shoe*.¹²¹ In a famously aggressive use of it, a lower court upheld jurisdiction based on service of a defendant on an airplane passing through the forum state’s airspace.¹²² Many commentators predicted the in-state service rule would not survive after the Supreme Court expanded the minimum contacts test to limit *quasi in rem* jurisdiction.¹²³

¹²¹ Ehrenzweig, *supra* note 120, at 311–12 (“there seems to be little left of the rule of *Pennoyer v. Neff* save the amorphous formula of fair play and substantial justice well known to use from the law of jurisdiction over corporations. It may well be the in the law of jurisdiction over individuals, as in that of jurisdiction over foreign corporations, a substantial “minimum contact” will ultimately be the touchstone of permissible jurisdiction. The question will then arise whether this formula, whose extreme flexibility is hardly preferable to the extreme rigidity of the classical rule of physical service, will not need to be supplemented by criteria within the civilian laws of competency, or, more likely, within the common law of forum non conveniens.”).

¹²² *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

¹²³ Daniel O. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979–80) (arguing tag jurisdiction cannot survive *Shaffer*); E. Merrick Dodd Jr., *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 438 (1929) (writing in 1929 Professor Dodd questioned the validity of tag jurisdiction: “Not only is there thus reason to doubt the appropriateness in all cases of conducting litigation in a state which has no relation to the controversy except the fact that the defendant is temporarily present therein, there is also strong ground for arguing that it is often highly desirable and altogether appropriate to try a case in a state in which the defendant may not be present at all.”); Donna Metcalfe Ducey, Note, *Lockert v. Breedlove; The North Carolina Supreme Court Rejects the Minimum Contacts Analysis Under the “Transient Rule” of Jurisdiction*, 66 N.C. L. REV. 1051, 1059–60 (1987) (criticizing North Carolina Supreme Court for upholding constitutionality of tag jurisdiction); Ehrenzweig, *supra* note 120 (criticizing fairness of in-state service rule); Donald W. Fyr, Shaffer v. Heitner: *The Supreme Court’s Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739, 770 (1977) (stating that “[t]he contacts formula could rarely be satisfied” in cases involving tag jurisdiction); Stewart Jay, “*Minimum Contacts*” as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429, 474 (1981) (stating that “[w]e may assume that the Court will restrict ‘tag’ jurisdiction whenever the occasion presents itself”); Lewis, *supra* note 116, at 61 (stating that “courts should discard the single factor jurisdictional basis of ‘tagging’”); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 329, 332 (stating that “*Shaffer* presumably renders unconstitutional the exercise of personal jurisdiction based solely on personal service in the forum”); Silberman, *supra* note 117, at 75 (stating that “if the power theory is rejected altogether [by *Shaffer*] . . . then the traditional basis of physical ‘tag’ for serving a defendant within a state . . . would be constitutionally suspect”); David H. Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997, 1021 (1978) (stating that availability of transient jurisdiction is “open to substantial doubt”); David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction—Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 303 (availability of transient jurisdiction “doubtful”); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time For Change*, 63 OR. L. REV. 485, 492 (1984) (“[t]he traditional basis for personal jurisdiction that is most vulnerable [after *Shaffer*] is service on the defendant while

In 1990 however, in *Burnham v. Superior Court*,¹²⁴ the Supreme Court upheld the constitutionality of the in-state service rule, though under a splintered rationale. The four-Justice plurality argued that the rule's acceptance at the time of the adoption of the Fourteenth Amendment sufficed to establish its constitutionality.¹²⁵ Four Justices concurring in the judgment argued that the rule's historical pedigree could not suffice to demonstrate its constitutionality, but argued that the rule was fair in operation even for brief visits, such as the *Burnham* defendant's three-day visit to the forum state of California.¹²⁶ Justice Stevens wrote a brief concurrence agreeing with both rationales.¹²⁷

2. Domicile

Before *International Shoe*, the domicile of an individual defendant was usually held to be a basis for *in personam* jurisdiction. State courts generally so held that as long as there was reasonable notice to the defendant, either by personally serving him outside the forum state or leaving the summons and complaint at his usual place of abode within the forum state.¹²⁸ The Supreme Court strongly hinted in *McDonald v. Mabee*¹²⁹ that domicile was a constitutionally sufficient basis for jurisdiction, but there sustained the attack on the judgment there because notice by publication in a newspaper was inadequate.¹³⁰ In *Blackmer v.*

he is transiently present in the forum"). *But see* Willis L.M. Reese, *Shaffer v. Heitner; Implications for the Doctrine of Seider v. Roth*, 63 IOWA L. REV. 1023, 1023 (1978) (stating that "it is by no means clear that *Shaffer v. Heitner* declares tag jurisdiction unconstitutional"); Eric P. Heichel, Note, *The Physical Presence Basis of Personal Jurisdiction Ten Years After Shaffer v. Heitner; A Rule in Search of a Rationale*, 62 NOTRE DAME L. REV. 713, 730 (1987) (arguing that tag jurisdiction serves goal of providing plaintiff with a forum).

¹²⁴ 495 U.S. 604 (1990).

¹²⁵ *Burnham*, 495 U.S. at 622 ("[A] doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [the traditional notions of fair play and substantial justice] standard.").

¹²⁶ *Id.* at 628 (Brennan, J., concurring in the judgment).

¹²⁷ *Id.* at 640 (Stevens, J., concurring).

¹²⁸ *Hurlburt v. Thomas*, 10 A. 556 (Conn. 1887) (abode service); *Henderson v. Staniford*, 105 Mass. 504 (1870) (collecting cases allowing domicile as a basis for jurisdiction); *In re Hendrickson*, 167 N.W. 172 (S.D. 1918) (personal service outside the forum); *Fernandez v. Casey*, 14 S.W. 149 (Tex. 1890). Not all courts took this view, however. The Iowa Supreme Court in *Raher v. Raher*, 129 N.W. 494 (Iowa 1911) took the view that service outside the forum state on a domiciliary did not confer *in personam* jurisdiction. The majority opinion purported to be unable to find any cases from other states on the question, though there clearly were, as pointed out by the dissent. The Iowa Supreme Court overruled *Raher* in *Edwards v. Smith*, 29 N.W.2d 404 (Iowa 1947).

¹²⁹ 243 U.S. 90 (1917).

¹³⁰ *Id.* at 92.

United States,¹³¹ the Court upheld under the Due Process Clause of the Fifth Amendment the power of the federal government to punish by contempt an American who refused to respond to a subpoena, even though he was not served in the United States. Reasoning by analogy, domicile is to a state what citizenship is to a nation. The Supreme Court finally closed the loop in *Milliken v. Meyer*,¹³² holding that Wyoming had jurisdiction over one of its domiciliaries even though he was served in Colorado.

Domicile continues on as an essentially unchallenged basis for *in personam* jurisdiction.¹³³ Interestingly, although referring to the need to give the domiciliary reasonable notice, the *Milliken* Court coined the phrase “traditional notions of fair play and substantial justice”¹³⁴ that the *International Shoe* Court would quote five years later in formulating the minimum contacts test.¹³⁵ The conversion of jurisdiction from a “power” or “sovereignty” theory to one of fairness was not instantaneous with the rendering of the *International Shoe* opinion, nor has it been complete—as the periodic reemergence of the sovereignty strand in modern opinions shows.¹³⁶ So when Justice Holmes in 1917 penned his famous line that “[t]he foundation of jurisdiction is physical power” he immediately qualified it by stating that even under the common law’s “conception of sovereignty” it “required a judgment not to be contrary to natural justice” and with jurisdictional fictions “great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.”¹³⁷

3. Voluntary Appearance and Express Consent

Courts at common law and continuing to today treat the right to object to personal jurisdiction as waivable. Voluntary appearance without a timely objection to jurisdiction has long been accepted as a form of

¹³¹ 284 U.S. 421 (1932).

¹³² 311 U.S. 457 (1940).

¹³³ HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 398. *But see* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 209 (5th ed. 2006) (basing jurisdiction purely on a technical domicile raises fairness questions).

¹³⁴ *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¹³⁵ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

¹³⁶ *See, e.g., J. McIntyre*, 131 S. Ct. at 2786–87 (“The [Due Process] Clause ‘protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land’. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.”).

¹³⁷ *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

express consent to jurisdiction.¹³⁸ In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,¹³⁹ the Supreme Court reaffirmed the principle that a party may, through conduct, forfeit its right to object to personal jurisdiction. Thus, with regard to voluntary appearance as a basis for jurisdiction, little has changed, except for an evolution from older pleading regimes that required a strict “special appearance” to the Federal Rules model that requires jurisdiction to be raised early in the case, but strictly as the sole issue that the defendant raises at the case’s outset.¹⁴⁰

4. Personal Status

Another satellite basis for jurisdiction is the domicile of any person whose “personal status” is being changed. This gives courts divorce jurisdiction to a state in which either party is domiciled¹⁴¹ or to give jurisdiction to a court in which other status matters such as custody and competence are being decided.¹⁴² The *Pennoyer* majority opinion explicitly left status determinations untouched.¹⁴³ The status basis survived the transition to the minimum contacts era unscathed.¹⁴⁴

5. *Quasi in Rem* Jurisdiction

The satellite basis of jurisdiction the minimum contacts regime undeniably alters is *quasi in rem* jurisdiction based on the attachment of property of the defendant unrelated to the litigation. This has been referred to as the “*quasi in rem* hold-up.”¹⁴⁵ *In rem* jurisdiction literally involves jurisdiction over property, and thus any judgment only can affect rights in the property.¹⁴⁶ In cases in which the dispute directly involves the property

¹³⁸ See, e.g., *Adam v. Saenger*, 303 U.S. 59 (1938) (filing of a counterclaim amounted to a submission to the court’s jurisdiction); *Sugg v. Thorton*, 132 U.S. 524 (1889) (finding that failure to raise a jurisdictional objection by special appearance amounted to a waiver of jurisdictional objections).

¹³⁹ 456 U.S. 694 (1982) (noting failure to cooperate in jurisdictional discovery); see also FED. R. CIV. P. 4(h) (personal jurisdiction objections waived if not timely raised).

¹⁴⁰ HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 401.

¹⁴¹ See, e.g., *Haddock v. Haddock*, 201 U.S. 562 (1906).

¹⁴² HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 353.

¹⁴³ *Pennoyer v. Neff*, 95 U.S. 714, 734 (1878) (“To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *Status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident.”).

¹⁴⁴ *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977); *Estin v. Estin*, 334 U.S. 541 (1948).

¹⁴⁵ Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 14 (1993).

¹⁴⁶ HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 350.

– a contest over a decedent’s estate, for instance – it makes perfect sense to vest jurisdiction in the courts of the state where the property is located.¹⁴⁷

Far more problematic were *quasi in rem* cases in which the property itself was not the subject of any dispute, but rather the presence of the property was simply an excuse to proceed with what was for practical purposes an *in personam* action in the state in which the defendant happened to own property. In fact, *Pennoyer* was just that sort of case, but jurisdiction was defeated because the plaintiff failed to attach the property at the outset of the case.¹⁴⁸ *Quasi in rem* jurisdiction created the possibility of default judgments taking the property of out-of-state landholders without any actual notice of the action and no realistic way to mount a defense. The lack of notice stemmed from the fiction that the property was “always in the possession of its owner” so that seizure of it would automatically convey notice.¹⁴⁹ Often, procedural statutes required only likely futile efforts at notice, such as by publication of a copy of the summons in a local newspaper.¹⁵⁰

The possibilities for abuse grew as the use of *quasi in rem* jurisdiction expanded from real to intangible property. The most notorious example was *Harris v. Balk*, in which a debt owed to a creditor was held to be property of the creditor and located wherever the debtor went, allowing the debt to be “attached” by seizing the body of the debtor.¹⁵¹ In *Shaffer v. Heitner*,¹⁵² the Supreme Court tore down the fiction by holding that these sorts of *quasi in rem* cases were nothing more than *in personam* actions against the owner of the property.¹⁵³ The Court therefore held that the true defendant, the property owner, could be subject to jurisdiction in

¹⁴⁷ *Id.*

¹⁴⁸ *Pennoyer*, 95 U.S. at 720.

¹⁴⁹ *Id.* at 727 (“The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.”).

¹⁵⁰ See, e.g., *id.* at 721 (“The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the ‘affidavit of the printer, or his foreman, or his principal clerk,’ is satisfied when the affidavit is made by the editor of the paper.”); *Webster v. Reid*, 1 Morris 467 (Iowa 1846) (affirming a lower court’s decision with regards to the validity of an Iowa statute allowing for notice in a local publication, in this case eight weeks notice of action against a land owner through publication in the “Iowa Teritorial [sic] Gazette”); *Brown v. Woods’ & Crump’s Heirs*, 29 Ky. 11, 15 (1831) (“the acts of Assembly tolerating proceedings against absent defendants and unknown heirs, upon constructive notice by publication, must be strictly observed.”).

¹⁵¹ 198 U.S. 215, 222–23 (1905).

¹⁵² 433 U.S. 186 (1977).

¹⁵³ *Id.* at 212.

the forum state only if he had minimum contacts with it.¹⁵⁴ The practical effect of *Shaffer* was to collapse *quasi in rem* jurisdiction into *in personam* jurisdiction, because if the property owner has minimum contacts with the forum, he is subject to *in personam* jurisdiction, which has the advantage that the judgment is not limited to the property.¹⁵⁵

International Shoe is often thought to have liberalized state-court jurisdiction.¹⁵⁶ But at least with satellite bases of jurisdiction, the minimum contacts era effected only one significant change, and that was to contract state-court jurisdiction by essentially eliminating *quasi in rem* jurisdiction.

B. Jurisdiction in Tort Actions

Jurisdiction in tort actions is a bit harder to gauge because substantive tort law has changed greatly since the pre-*International Shoe* era and technological innovations have made multistate torts easier to commit. Of the tort jurisdictional cases decided in the minimum contacts era, four have been product liability cases (all holding that there was no jurisdiction),¹⁵⁷ two were libel actions based on statements made in nationally circulated publications (both concluding that there was jurisdiction),¹⁵⁸ one was a negligence case in which the plaintiffs unsuccessfully attempted to assert jurisdiction based on unrelated contacts,¹⁵⁹ one pled a potpourri of tort theories but jurisdiction was unsuccessfully asserted based on unrelated contacts,¹⁶⁰ and one was a constitutional tort case—akin to conversion or trespass to chattels—in which the Court concluded that the plaintiffs’ home state did not have jurisdiction because the tortious conduct took place elsewhere.¹⁶¹

¹⁵⁴ *Id.* (“all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”).

¹⁵⁵ HAY, BORCHERS & SYMEONIDES, *supra* note 99, at 353.

¹⁵⁶ *See generally* *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

¹⁵⁷ *Goodyear*, 131 S. Ct. at 2857; *J. McIntyre*, 131 S. Ct. 2791; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980).

¹⁵⁸ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1983).

¹⁵⁹ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

¹⁶⁰ *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014).

¹⁶¹ *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014). The Supreme Court also decided *Rush v. Savchuk*, 444 U.S. 320 (1980). But there the attempted exercise of jurisdiction was based on a *quasi in rem* theory, which the Court rejected as being barred by *Shaffer*’s requirement that the true defendant have minimum contacts with the forum state.

In many of these cases, no pre-*International Shoe* analog exists. Product liability theory was in its infancy when *International Shoe* was decided. In *MacPherson v. Buick Motor Co.*,¹⁶² Judge Cardozo writing for New York's high court dispensed with the "privity" requirement and allowed a consumer to sue a manufacturer for a negligently designed or manufactured product.¹⁶³ However, modern product liability law was not born until the California Supreme Court's decision in *Greenman v. Yuba Power Products*¹⁶⁴—decided eighteen years after *International Shoe*—allowed plaintiffs to proceed on a strict liability theory. Multistate defamation was not unknown in the pre-*International Shoe* days, but the technological capacity to distribute publications nationally was not as readily available as it is today, to say nothing of the Internet's ability to spread a message worldwide with a few keystrokes on a computer.¹⁶⁵ As automobiles became the prevalent means of transportation, the likelihood of residents of different states being involved in negligence actions increased dramatically, but the pre-*International Shoe* Supreme Court handled this issue sensibly by upholding the constitutionality of nonresident motorist statutes.¹⁶⁶

In the well-known case of *Hess v. Pawloski*,¹⁶⁷ the defendant was a Pennsylvania motorist who, while driving in Massachusetts, collided with a Massachusetts motorist.¹⁶⁸ The Massachusetts motorist brought suit in his home state against the other driver and asserted jurisdiction under a Massachusetts statute providing that nonresident motorists driving on Massachusetts roads were deemed to have appointed the Massachusetts Secretary of State as their agent for service of process.¹⁶⁹ The statute required the plaintiff to serve the Secretary and pay a fee and the Secretary was then in turn required to send a copy of the summons to the nonresident defendant by registered mail.¹⁷⁰ The scheme paid homage to *Pennoyer*'s territorialism by requiring a physical act of service of process to take place within the forum state, but for practical purposes it was service by mail.¹⁷¹ Although modern long-arm statutes allow for service outside the state

¹⁶² 111 N.E. 1050 (N.Y. 1916).

¹⁶³ *Id.* at 1157.

¹⁶⁴ 377 P.2d 897 (Cal. 1963).

¹⁶⁵ *See, e.g.*, *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Griffs v. Luban*, 646 N.W.2d 527 (Minn. 2002).

¹⁶⁶ *See Hess v. Pawloski* 274 U.S. 352 (1927).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 353.

¹⁶⁹ *Id.* at 354.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 355 ("The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him.").

(often by registered mail) without the need to serve a constructive agent of the defendant,¹⁷² it is still common for states to require foreign corporations to appoint an in-state agent to accept process as a condition of doing in-state business, and if they fail to do so to be deemed to have appointed a state official as their agent.¹⁷³

The U.S. Supreme Court sensibly upheld the Massachusetts statute.¹⁷⁴ Foreshadowing *International Shoe's* fairness language, the Court pointed to the relative position of the parties; “The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights.”¹⁷⁵ Although the Court resorted to the dubious fiction of “implied consent” of the nonresident motorist to sustain the statute,¹⁷⁶ the rationale has a modern feel; in fact it is an improvement over the rationales offered up in the most recent cases.

Although this article does not quarrel with the result in the much more recent *Walden* decision, the Court’s strenuous efforts there to banish from the jurisdictional calculus any consideration of the plaintiff’s interest in obtaining a convenient forum were quite stunning.¹⁷⁷ As it has been noted,¹⁷⁸ the practical effect of the *J. McIntyre* decision was to deprive a U.S. plaintiff of any realistic forum in the name of giving a foreign manufacturer jurisdictional protection that it would not receive in its own nation’s courts.¹⁷⁹ The *Hess* Court’s recognition of the need of the plaintiff to have a reasonable forum is a veritable breath of fresh air contrasted with the exclusive defendant focus of those modern decisions.

Negligence involving railroads also presented the possibility of multistate tort actions. One example is *Simon v. Southern Railway Co.*¹⁸⁰

¹⁷² See, e.g. FLA. STAT. § 48.193(3) (2003); HAW. REV. STAT. § 634–35(b) (2002); 735 ILL. COMP. STAT. 5/2-209 (2003); WASH. REV. CODE § 26.510.130 (2011).

¹⁷³ See, e.g., CONN. GEN. STAT. § 52–59(B)(c) (1971); IOWA CODE § 617.3 (2003); N.J. STAT. ANN. § 4:4–4(A)(6) (West 2003).

¹⁷⁴ *Hess*, 274 U.S. 352, 356 (1927).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (“Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.”).

¹⁷⁸ Borchers, *supra* note 46, at 12; J. McIntyre Machinery, Goodyear, and the *Incoherence of the Minimum Contacts Test*, *supra* note 18, at 1246; Yeargan, *supra* note 18.

¹⁷⁹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (“The Court’s judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainant elsewhere in the world.”).

¹⁸⁰ 236 U.S. 115 (1915).

In that case, defendant's railroad in Alabama allegedly injured the plaintiff, the plaintiff attempted to assert jurisdiction in the Louisiana courts on the grounds that the defendant was doing business in the forum state.¹⁸¹ Turning away the plaintiff's efforts to enforce a judgment against the railroad, the Court presaged what today would be called the division between specific and general jurisdiction. The Court reasoned that the question of whether an employee of the railroad could be treated as an agent for service of process, the Court stated that this question depends on how the claim "relates to business and transactions within the jurisdiction of the state enacting the [service of process] law."¹⁸² Shortly thereafter, the Court reasoned: "the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."¹⁸³

In modern parlance, the lack of related forum contacts defeated any claim to specific jurisdiction, and the foreign corporation (and thus presumably not "at home" as the Court has recently defined that phrase) doomed any attempt to assert general jurisdiction.¹⁸⁴ Again to use modern terminology, the Court was worried that merely conducting unrelated business could subject the railroad to forum shopping. If doing unrelated business in the forum state sufficed, it would require the defendant to defend "claims on contracts wherever made and suits for torts wherever committed . . ."¹⁸⁵ The clear implication of the Court's rationale was that it would have allowed the plaintiff to proceed in the injury state of Alabama.¹⁸⁶

Defamation cases occasionally arose between citizens of different states. In *Goldey v. Morning News*,¹⁸⁷ a New York plaintiff brought in New York an action against corporation publishing *The Morning News of New Haven*, which was described in the Court's syllabus as "carrying on business in [Connecticut] only."¹⁸⁸ Tellingly, the plaintiff only attempted to justify jurisdiction under New York's "Pope"¹⁸⁹ rule which allowed for *in personam* jurisdiction over a corporate defendant based merely on service of process on a corporate officer while in the state, even if only

¹⁸¹ *Id.* at 128–29.

¹⁸² *Id.* at 130.

¹⁸³ *Id.*

¹⁸⁴ *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* See generally *St. Louis Sw. Ry. Co. of Tex. v. Alexander*, 227 U.S. 218 (1913) (suit for negligence with regard to allowing perishables to spoil allowed in state where shipment ended).

¹⁸⁷ 156 U.S. 518 (1895).

¹⁸⁸ *Id.*

¹⁸⁹ See *Pope v. Terre Haute Co.*, 87 N.Y. 137 (N.Y. 1881).

briefly and for reasons unrelated to corporate business. The Court ruled that the lower court did not have jurisdiction.¹⁹⁰

While tort cases did not make up a large portion of the pre-*International Shoe* Supreme Court opinions dealing with jurisdictional questions, the Court's handling of them was sensible. In fact, the Court appeared to have created a jurisdictional equivalent of the *lex loci delicti* – meaning the law of the place of injury¹⁹¹—rule in choice of law, which was to give jurisdiction to the plaintiff in the place of the injury. While it is impossible to know whether the Court would have stuck to this rule had it retained its pre-*International Shoe* jurisprudence, such a rule would have given the plaintiffs jurisdiction in their chosen forums in *World-Wide Volkswagen* and *J. McIntyre*, two of the most controversial, and deeply divided, opinions of the minimum contacts era. A place-of-the-injury rule would also accord with the European Union's rule, which – as the dissent noted – would have applied to the *J. McIntyre* defendant had the case been brought in an E.U. court.¹⁹²

C. “Doing Business” Jurisdiction

The most important, yet tangled, pre-*International Shoe* basis was jurisdiction over out-of-state corporations “doing business” in the state. Jurisdiction was rationalized in various ways. Sometimes the Court said that a corporation doing business in the forum state manifested a “presence” there (akin to an individual being present in the forum state and thus being capable of being served with process).¹⁹³ Other times, the Court reasoned that the corporation had implicitly consented to jurisdiction because a state could bar foreign corporations and thus extract from them an appointment of an in-state agent for service of process as a condition of doing business.¹⁹⁴

While the “doing business” decisions of the pre-*International Shoe* Court turned on fine distinctions, the opinions usually reached fair results. Indeed they are notable for their express invocation of the importance of

¹⁹⁰ *Goldey v. Morning News*, 156 U.S. 518, 525 (1895).

¹⁹¹ *See, e.g., Ala. Great S. R.R. v. Carroll*, 11 So. 803, 807 (Ala. 1892).

¹⁹² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (“within the European Union . . . the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction ‘in matters relating to tort . . . in the courts for the place where the harmful event occurred.’” (quoting Council Regulation 44/2001, art. 5, 2001 O.J. (L. 12))).

¹⁹³ *See, e.g., Consol. Textile Corp. v. Gregory*, 289 U.S. 85, 88 (1933).

¹⁹⁴ *See, e.g., Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 315 (1943); *St. Louis Sw. Ry. Co. of Tex. v. Alexander*, 227 U.S. 218, 226 (1913).

the plaintiff having at least one relatively convenient forum in which to sue the defendant. For example, in an opinion involving a policyholder suing an out-of-state insurer, the Court in sustaining jurisdiction in the policyholder's home state said that the forum state's "interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss."¹⁹⁵ Such reasoning is a marked contrast from the current Court's rigid insistence in *J. McIntyre* and *Walden* that the plaintiff is irrelevant to the jurisdictional calculus.

Within the "doing business" opinions there existed a clearly defined line between what today we call specific and general jurisdiction.¹⁹⁶ Corporations were held to be "doing business" only if the cause of action arose in the forum state.¹⁹⁷ In cases in which a corporate defendant only did unrelated business, the corporation was not subject to jurisdiction.¹⁹⁸ These pre-*International Shoe* decisions anticipated the current doctrine that a corporation's contacts must be so weighty as to make it "at home" in the forum to subject it to general jurisdiction.¹⁹⁹ Unchallenged was the right of a plaintiff to sue a corporation in its state of incorporation, but to sue it anywhere else required related contacts.²⁰⁰

The pre-*International Shoe* decisions were not perfect and presented some difficult issues of predictability. A thorny issue was the line between "mere solicitation" and solicitation plus other activities.²⁰¹ In cases in which a corporation engaged in more than mere solicitation, the Court held it subject to jurisdiction.²⁰² In cases in which there was no more than that, the corporation was not subject to jurisdiction.²⁰³ As the Court put it; "Each case depends on its own facts."²⁰⁴

¹⁹⁵ *Hoopston*, 318 U.S. at 316.

¹⁹⁶ *See, e.g.*, *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 140 (2d Cir. 1930).

¹⁹⁷ *See, e.g.*, *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 414 (1905).

¹⁹⁸ *See generally*, *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917).

¹⁹⁹ *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

²⁰⁰ *See, e.g.*, *Pennsylvania Lumbermen's*, 197 U.S. at 414.

²⁰¹ *See, e.g.*, *International Harvester Co. of Am. v. Ky.*, 234 U.S. 579, 587 (1914).

²⁰² *See, e.g.*, *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 317; *Int'l Harvester*, 234 U.S. 579; *Pa. Lumbermen's*, 197 U.S. at 414–15.

²⁰³ *See, e.g.*, *People's Tobacco Co., Ltd. v. Am. Tobacco Co.*, 246 U.S. 79, 86–88 (1918); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 142 (2d Cir. 1930).

²⁰⁴ *People's Tobacco*, 246 U.S. at 87.

Set in this context, *International Shoe* looks less like a radical break from its immediate past than an effort to make sense out of the “doing business” cases. Against this backdrop, the *International Shoe* result finding jurisdiction appears consistent with then-existing law. Although the defendant shoe corporation tried to bring itself within the “mere solicitation” rule and avoid jurisdiction, the Supreme Court unanimously held that its roughly one dozen salesmen working throughout the state of Washington was a sufficient connection with the forum state.²⁰⁵ The Washington Supreme Court had reached the same conclusion.²⁰⁶

The *International Shoe* Court seemed to have several goals. One was to bring the “presence” and “consent” fictions under one roof.²⁰⁷ Another was to put to rest the distinction between ‘mere solicitation and ‘more than mere solicitation,’²⁰⁸ a distinction that closely resembles the ongoing split between the “resale” and the “resale plus” tests in the Supreme Court’s stream-of-commerce jurisprudence.²⁰⁹ Next, the Court made explicit what had emerged in the earlier “doing business” cases, which was that plaintiffs whose claims arose out of the corporation’s forum-state activities stood in a much stronger position than those making claims based on unrelated activities.²¹⁰ Finally, by quoting *Milliken*’s “fair play and substantial justice” language, and adopting Judge Learned Hand’s test of an “estimate of the inconveniences,”²¹¹ the Court made basic fairness the guiding light of constitutional limitations on state-court jurisdiction.

It is far from clear that the *International Shoe* Court meant to offer a grand unifying theory of judicial jurisdiction. *International Shoe* tied

²⁰⁵ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 315 (1945) (“Appellant also insists that its activities within the state were not sufficient to manifest its ‘presence’ there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state.”).

²⁰⁶ *Int’l Shoe Co. v. State*, 154 P.2d 801 (Wash. 1945), *aff’d*, 326 U.S. 310 (1945).

²⁰⁷ *Int’l Shoe*, 326 U.S. at 317 (“‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.”).

²⁰⁸ *Id.* at 316.

²⁰⁹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (Ginsburg, J., dissenting) (referring to the “dueling” opinions in *Asahi* with regard to the stream-of-commerce test).

²¹⁰ *Int’l Shoe*, 154 P.2d at 820 (holding that the corporations operations within the state of Washington established enough contacts with the forum state to make it reasonable for the forum state to enforce the obligations that *International Shoe* had incurred there, and refusing to find that the contacts with the state were unrelated), *aff’d*, 326 U.S. 310.

²¹¹ *Int’l Shoe*, 326 U.S. at 316–17.

together the various strands of the “doing business” test as applied to corporate defendants. But whether the Court did much beyond that is uncertain. In the next Supreme Court case to present a jurisdictional issue, *Mullane v. Central Hanover Trust Co.*,²¹² the Court did not mention the minimum contacts test. It was not until twelve years after *International Shoe* that the Court expressly mentioned the minimum contacts test.

It did so in *McGee v. International Life Ins. Co.*,²¹³ but in a factual context that marked so many of the “doing business” cases—a policyholder suing an out-of-state insurance company to make good on a claim.²¹⁴ In retrospect, *McGee* is remarkable for its solicitude of the plaintiff-policyholder by noting that failing to give her a home-state forum would likely make litigation against the defendant impracticable,²¹⁵ but the need to give the plaintiff at least one realistic forum was one of the important threads that the Supreme Court had tied together in the *International Shoe* opinion.

From this high water mark for the fairness rationale, the water has receded. And the water has receded to a level that looks remarkably like the pre-*International Shoe* shoreline, or perhaps sits a bit below it.

III. A MODEST PROPOSAL

In his 1980 dissent from *World-Wide* and its companion case,²¹⁶ Justice Brennan wrote that the minimum contacts decisions “may already be obsolete as constitutional boundaries.”²¹⁷ Justice Brennan argued that the exclusive focus on defendant contacts, without any exploration of any actual inconvenience to the defendant and the need of plaintiff to have access to a forum, undercut the *International Shoe* rationale of fairness and

²¹² 339 U.S. 306 (1950).

²¹³ 355 U.S. 220 (1957).

²¹⁴ *Id.* (“Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948 [International Life Insurance Co.] agreed with Empire Mutual to assume its insurance obligations. [International Life Insurance Co.] then mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he held with Empire Mutual Petitioner, Franklin’s mother, was the beneficiary under the policy. She sent proofs of his death to the [International Life Insurance Co.] but it refused to pay claiming that he had committed suicide.”).

²¹⁵ *Id.* at 223 (“These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.”).

²¹⁶ *Rush v. Savchuk*, 444 U.S. 320 (1980).

²¹⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting).

reasonableness.²¹⁸ The point of determining whether there are contacts between the defendant and the forum is not a valuable exercise on its own, but rather a proxy for fairness to the defendant. But by any rational calculus courts must evaluate fairness to the plaintiff, in particular when the plaintiff chooses to sue at home or at the situs of the injury and thus is not engaging in any obvious forum shopping.²¹⁹ Recently, however, the Court has evaluated contacts as if they are important for their own sake, while denying the relevance of other considerations.²²⁰ While Brennan was a voice in the wilderness in 1980, his warning that a pure defendant focus would distort the basic fairness rationale of *International Shoe* proved prophetic.

It is unlikely that the Court will abandon the minimum contacts *language* in the foreseeable future. However, as we have seen, the minimum contacts *test* as currently applied is at best a trivial improvement over the regime of the fictions of “implied consent” and “presence” that pre-dated *International Shoe*, and in some ways less flexible.²²¹ As applied, the minimum contacts test defies predictability to the point that the Court often cannot generate a majority opinion.²²² Moreover, the Court has vacillated as to the theoretical underpinnings of the test, such as whether state sovereignty is an independent factor – all the while siding with defendants against plaintiffs who clearly were not forum shopping.²²³

The problem stems from the fact that jurisdictional due process is a constitutional orphan.²²⁴ The minimum contacts test is not an application of substantive due process or the Court presumably would apply some variant of the rationality test.²²⁵ Jurisdictional due process more resembles

²¹⁸ *Id.* at 300.

²¹⁹ *Id.*

²²⁰ *See* Walden v. Fiore, 134 S. Ct. 1115 (2014); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

²²¹ *See supra* notes 189–212 and accompanying text.

²²² *See, e.g.,* J. McIntyre, 131 S. Ct. 2780; Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

²²³ *See, e.g.,* J. McIntyre, 131 S. Ct. at 2787 (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); *World Wide*, 444 U.S. at 293 (“... we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.”).

²²⁴ Patrick J. Borchers, Jones v. Flowers: *An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343 (2007).

²²⁵ *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); Bowers v. Hardwick, 478 U.S. 186 (1986); Railroad Ret. Bd. v. Fritz, 449 U.S. 166 (1980);

procedural due process; however, that branch of due process jurisprudence divides into the requirements of “fair procedure”²²⁶ and “fair notice.”²²⁷

Jurisdictional due process could be wrapped in with those strands of due process jurisprudence if the minimum contacts test were replaced with – or at least subordinated to – the *Asahi* balancing test or something like it.²²⁸ However, in the four most recent minimum contacts opinions, the *Asahi* balancing test was mentioned only in Justice Sotomayor’s lonely concurrence in the judgment in *Daimler*,²²⁹ leaving in doubt whether the Court will continue to apply the *Asahi* test, and making it more unlikely still that it will supplant minimum contacts as the primary determinant.

The grudging reasoning and results in the specific jurisdiction cases would be less problematic but for the Court’s determination to rein in general jurisdiction to the point that defendants are subject to contacts-based general jurisdiction in only one – or at most a very few – forums. Nothing could have made this clearer than resting *Daimler* on the rationale that fulfillment of the test for general jurisdiction depends not only on the substantiality of the defendant’s contacts with the forum, but also their proportionality to contacts in other states.²³⁰ As a policy choice, this may well be a sensible one. Opening up large-scale enterprises to jurisdiction in all fifty states promotes forum shopping.²³¹ But contracting general jurisdiction while leaving plaintiffs who are injured in, and sue in, their home states’ courts with no access to a realistic forum is both bizarre and unfair.²³²

Dandridge v. Williams, 397 U.S. 471 (1970); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

²²⁶ *United States v. Timmreck*, 441 U.S. 780 (1979); *Matthews v. Elridge*, 424 U.S. 319 (1976); *Douglas v. California*, 372 U.S. 353 (1963).

²²⁷ *See, e.g., Jones v. Flowers*, 547 U.S. 220 (2006); *Mullane v. Central Hanover Trust Co.*, 399 U.S. 306 (1950).

²²⁸ *Jones v. Flowers: An Essay on a Unified Theory of Procedural Due Process, supra* note 219, at 349 (“One of the important developments in this line of cases has been the growth of an independent reasonableness test alongside the requirement of minimum contacts. This reasonableness test involves the weighing of five factors, which are “‘the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interest of the several States in furthering fundamental substantive social policies.’”)

²²⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 765 (2014) (Sotomayor, J., concurring).

²³⁰ *Id.* at 760.

²³¹ *See, e.g., Ferens v. John Deere* 494 U.S. 516 (1990) (employing the federal venue transfer statute to shop for a forum against a national manufacturer of farm equipment).

²³² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2801–02 (2011) (Ginsburg, J., dissenting) (“Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may

The difficulty is that the Court continues to attempt to make policy judgments better handled by legislation than episodic bursts of confusing jurisdictional opinions. Some commentators have praised the Court's campaign to limit assertions of contacts-based general jurisdiction.²³³ As a policy matter, plaintiffs ought not to have a virtually unlimited menu of forum choices. But the Court's efforts to decide, through constitutional litigation, what is on the menu is a failed project thus far. If the Court cannot produce majority opinions in common circumstances such as product suits in which the injury-causing product is sold in the forum, it is a tall order to ask lawyers and lower courts to predict results.

A plaintiff with a cause of action under state law has a property right subject to protection under the Due Process Clause.²³⁴ In the *J. McIntyre* case, the plaintiff's property right was summarily extinguished in the name of protecting a foreign defendant from the perceived unfairness of having to defend in New Jersey.²³⁵ In *World-Wide*, the plaintiffs were prohibited from pursuing all of the defendants in Oklahoma – the situs of the accident – even though the majority admitted that the forum state might well be the most convenient forum for all concerned.²³⁶ In *Shaffer v. Heitner*,²³⁷ the plaintiff was prohibited from pursuing a shareholders' derivative action in Delaware, even though the corporation was there incorporated.²³⁸ Yet in

evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury.”); *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, *supra* note 18, at 1246; Adam M. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 505–06 (2012); *see also* Borchers, *supra* note 18, at 1111–14 (noting fairness concerns raised by *J. McIntyre* decision and suggesting that the Court adopt a doctrine of “nonspecific purposeful availment” in which intentional efforts to serve the U.S. market would suffice without a need to show targeting of any particular state).

²³³ See *e.g.*, Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1081 (2012); Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tire Operations*, 60 KAN. L. REV. 549, 572–73 (2012).

²³⁴ See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (“[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.”).

²³⁵ *J. McIntyre*, 131 S. Ct. at 2800–01.

²³⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (“Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, 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.”).

²³⁷ 433 U.S. 186 (1977).

²³⁸ *Id.*

Keeton v. Hustler,²³⁹ the Court tolerated blatant forum shopping as the plaintiff was allowed to pursue a libel suit against a national publication in New Hampshire, a state with which she had no apparent connection because it was the only state in which the statute of limitations had not yet expired.²⁴⁰

These are symptoms that show that the minimum contacts test is very ill, perhaps terminally so. It produces helter-skelter results. The Court vacillates on the theoretical justification for limiting jurisdiction. The Court often decides cases without a majority opinion. As it is now functioning, the minimum contacts test is little or no improvement over the “patchwork of legal and factual fictions”²⁴¹ from which it supposedly liberated civil actions.

I have made sweeping proposals in the past. In 1990, I suggested that the Supreme Court get out of the business of attempting to regulate state-court jurisdiction.²⁴² I argued that the Constitution’s Due Process Clause was implicated only if the defendant’s opportunity to defend the case was meaningfully compromised.²⁴³ In the case that the subject of my attention then – *Burnham v. Superior Court*²⁴⁴ – I noted that the question at stake was whether the property aspect of the divorce case there would be litigated in the husband’s home state of New Jersey or the wife’s home state of California.²⁴⁵ Either way, one party was going to be inconvenienced, and I could see no constitutional justification for preferring one party to the other.²⁴⁶

²³⁹ 465 U.S. 770, 773 (1984).

²⁴⁰ *Id.*

²⁴¹ *Shaffer*, 433 U.S. at 219–20 (Brennan, J., concurring in part and dissenting in part) (“I join Parts I-III of the Court’s opinion. I fully agree that the minimum-contacts analysis developed in *International Shoe Co. v. Washington*, represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer v. Neff*. It is precisely because the inquiry into minimum contacts is now of such overriding importance . . .”) (citations omitted).

²⁴² Borchers, *supra* note 7, at 103.

²⁴³ Borchers, *supra* note 7, at 99 (“Perhaps there are some cases in which a defendant is put to the test of defending or defaulting, and it is economically rational for the defendant to make a motion to dismiss for lack of personal jurisdiction. This much, however, should be clear: if there are such cases, they are few and far between. Such a motion should require a defendant to show a practical inability to defend. Beyond that, a defendant must show the availability of some other forum in which the plaintiff can meaningfully pursue the claim. Unless the defendant can make that additional showing, dismissal is nothing more than trading one constitutional deprivation for another.”)

²⁴⁴ 495 U.S. 604 (1990).

²⁴⁵ Borchers, *supra* note 7, at 97–98.

²⁴⁶ *Id.* at 99.

I still believe this to be the best solution. By dramatically pulling back the boundaries of constitutional regulation of jurisdiction, states would be forced to draft meaningful long arm statutes.²⁴⁷ Statutes in general do a better job of promoting predictability. In the related area of choice of law, when Louisiana switched from judicially created “interest analysis” to statutory choice-of-law rules the affirmance rate of lower courts (a reasonably proxy for predictability) increased dramatically.²⁴⁸ The problem is that Supreme Court abandonment of the field is not likely to happen. The last Justice to call for rejection of the minimum contacts test was Justice Brennan in his 1980 dissent in *World-Wide*.²⁴⁹

A more modest suggestion was to unite jurisdictional due process with procedural due process by adopting the *Mathews v. Eldridge*²⁵⁰ balancing test for jurisdictional due process.²⁵¹ *Mathews* requires courts to evaluate the constitutional need for more elaborate procedures – such as live testimony – by balancing the cost of the additional procedure, the private party’s interest in the matter and the degree to which the additional procedure will contribute to an accurate result.²⁵² The *Asahi* reasonableness test is the *Mathews* test in different clothing.²⁵³ Either the

²⁴⁷ Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473 (2004).

²⁴⁸ Patrick J. Borchers, *Louisiana’s Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 LA. L. REV. 1061, 1062 (2000) (noting that in pre-codification cases the affirmance rate was 52.9%, but for post-codification decisions, the affirmance rate improved to 76.2%).

²⁴⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting) (“Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries, I dissent.”).

²⁵⁰ 424 U.S. 319 (1976)

²⁵¹ *Id.*

²⁵² *Id.* at 347–48 (“In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government’s interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.”).

²⁵³ Borchers, *supra* note 224, at 349 (“This reasonableness test involves the weighing of five factors, which are ‘the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiffs interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interest of the several States in furthering fundamental

reasonableness test could replace the minimum contacts test or it could become the primary test, with minimum contacts acting only as a safety valve, as opposed to vice versa.²⁵⁴

This proposal faces long odds now. Since the Court unveiled the *Asahi* reasonableness test in 1987, the only opinion applying it has been Justice Sotomayor's concurrence in the judgment in *Daimler*.²⁵⁵ Every other opinion in the four most recent cases ignored it. Thus, far from appearing poised to supplant the minimum contacts test, the *Asahi* test may well no longer exist.

This Article advances an even-more-modest proposal; In specific jurisdiction cases in which the liability-creating events take place in the United States, the plaintiff should be given at least one reasonable forum. To understand how modest this proposal is, it appeared to be the law both before the creation of the minimum contacts test and for a good while after. In *McGee*, the Court expressly invoked the consideration that if unable to sue the insurer at home, the policyholder might be left without any practical redress.²⁵⁶ In *Burger King Corp. v. Rudzewicz*,²⁵⁷ the Court stated that the plaintiff's need for a forum might allow for an assertion of jurisdiction on a lesser showing of purposeful contacts that ordinarily needed. In the pre-*International Shoe* days, the Court was not shy about

substantive social policies.' This test is the Mathews test recast for the issue of the choice of a state forum. The elements of the test that include the burden on the defendant and the plaintiff's interest are essentially the costs to those parties of various forum choices. If the parties differ as to the appropriate forum, then these factors should point toward the forum that is the least burdensome in the aggregate to all of the parties. This is essentially the Mathews test's required balancing of the cost of providing an additional procedure against the value of the claimant's interest.") (footnote omitted).

²⁵⁴ Borchers, *supra* note 224, at 352 ("The Court could thus substantially unify procedural due process either by abandoning the minimum contacts test in favor of the five-factor reasonableness test or, perhaps, subordinating the minimum contacts requirement to the reasonableness test. Under current doctrine, the minimum contacts test is the primary one with reasonableness acting as a secondary check. If the Court reversed the priority of the two, it would go a good distance toward completing the much-needed unification of procedural due process").

²⁵⁵ *Daimler AG v. Bauman*, 134 S. Ct. 746, 765 (2014) (Sotomayor, J., concurring in the judgment) (holding that she would decide *Daimler* under the reasonableness test because "[t]he same considerations resolve this case.").

²⁵⁶ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.").

²⁵⁷ 471 U.S. 462, 477 (1985).

invoking the need for insurance policyholders²⁵⁸ and resident motorists²⁵⁹ to have access to a home forum.

This “highly realistic” factor – as the Court has referred to it²⁶⁰—was present in *International Shoe*’s rationale.²⁶¹ But of late, the *J. McIntyre* plurality attempted to mutate the contacts test into an inquiry into a state’s sovereign authority.²⁶² More recently, in *Walden*, the Court found the plaintiffs’ interests to be inconsequential and – confusingly – wrote that defendants’ contacts with forum-resident persons are irrelevant.²⁶³

The silver lining is that the Court still has room to take into account the plaintiff’s need for at least one reasonable forum. The *J. McIntyre* plurality opinion is not controlling; the two-vote concurrence in the judgment is.²⁶⁴ Because the concurrence did not adopt the sovereignty dogma of the plurality, it is not binding on lower courts. In *Walden*, much of the troublesome language is dictum. The plaintiffs there surely could have sued in Georgia where the money was seized.²⁶⁵ There was no compelling need there to give the plaintiffs a jurisdictional bonus and allow them to sue at home in Nevada simply on the hypothesis that the defendant knew they lived there.²⁶⁶ Moreover, in jurisdictional opinions the Court has shown a remarkable facility for tiptoeing away from ill-considered language. The most obvious example was after having written in *World-Wide* that the needs of interstate federalism could defeat the plaintiff’s forum choice even if it proved to be the most convenient,²⁶⁷ two

²⁵⁸ *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943).

²⁵⁹ *Hess v. Pawloski*, 274 U.S. 352 (1927).

²⁶⁰ *Hoopeston*, 318 U.S. at 316.

²⁶¹ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (“An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”).

²⁶² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011).

²⁶³ *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

²⁶⁴ *Williams v. Romarm, S.A.*, No. 13-7022, 2014 U.S. App. LEXIS 12368, at *1–2 (D.C. Cir. July 1, 2014) (“Justice Breyer’s narrow concurrence addressed the precise issue we face today and concluded a foreign corporation’s sale to a distributor, without more, is insufficient to establish the minimum contacts necessary for a court to exert personal jurisdiction over the corporation, even if its product ultimately causes injury in the forum state.”).

²⁶⁵ *Walden*, 134 S. Ct. 1115. Among the likely bases for jurisdiction, it seems virtually certain that the defendant was domiciled in Georgia. See *Milliken*, 311 U.S. 457.

²⁶⁶ *Id.* at 1125 (“Petitioner’s actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff’s forum connections to the defendant and makes those connections ‘decisive’ in the jurisdictional analysis.”).

²⁶⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (“ . . . even if the forum State is the most convenient location for litigation, the Due Process Clause, acting

years later – in an opinion that same Justice wrote – the Court overruled itself and said that sovereignty concerns were not part of the jurisdictional calculus.²⁶⁸

This proposed rule giving the plaintiff at least one reasonable forum would call for re-examination of the results in only two Supreme Court cases. One is *J. McIntyre*. There is no rational justification for preventing a forum-resident plaintiff, injured in his home state by a machine that arrived in that state due to the marketing efforts of a foreign defendant, from suing at home.²⁶⁹ In the name of ensuring due process to the foreign defendant, the Court effectively extinguished the plaintiff’s cause of action with no process.²⁷⁰

The other is *World-Wide Volkswagen*. *World-Wide* is perhaps closer than *J. McIntyre*. New York – where the plaintiffs bought the car – might have sufficed as a forum, because the dealer and the distributor (whom the Supreme Court found not to have contacts with the injury state of Oklahoma) might have had jurisdiction over all four defendants, particularly given that the defendants at the top of the distribution chain (the manufacturer and importer) abandoned their efforts to be dismissed from the Oklahoma action, thus essentially conceding that they were subject to general jurisdiction there.²⁷¹ However, under *Goodyear* the defendants at the top of the distribution chain would be foolish to concede general jurisdiction under the “essentially at home” test.²⁷² Moreover, Oklahoma contained all of the physical evidence and New York was no longer the plaintiffs’ home.²⁷³ The defendants had no apparent desire to litigate the case in New York. The true purpose of dismissing the two defendants at the end of the distribution chain was to create full diversity

as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”).

²⁶⁸ *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (“The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”).

²⁶⁹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, (2011).

²⁷⁰ *Id.*

²⁷¹ *World-Wide*, 444 U.S. at 288 n.3 (“Volkswagen also entered a special appearance in the District Court, but unlike *World-Wide* and *Seaway* did not seek review in the Supreme Court of Oklahoma and is not a petitioner here. Both Volkswagen and Audi remain as defendants in the litigation pending before the District Court in Oklahoma.”).

²⁷² *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

²⁷³ *World-Wide*, 444 U.S. at 288 (noting that petitioners were en route to their new home in Arizona when the accident occurred).

of citizenship and remove the case to the more defendant-friendly Oklahoma federal court.²⁷⁴

This modest proposal would not call for a different result in either *Goodyear* or *Daimler*. The facts as pled in both cases are tragic. Nevertheless, acting outside of the United States carries some risk, and not having the availability of a U.S. forum is one of them, hence the limitation of the proposal to specific, not general, jurisdiction cases.

Although the following cases are not wrong as a matter of due process, some Supreme Court minimum contacts cases upholding jurisdiction could have been decided the other way without doing violence to this modest proposal. In *Burger King*, the plaintiff – a large national fast food chain – reasonably could have sued its franchisee where it was doing business, rather than at the plaintiff’s Florida headquarters.²⁷⁵ In the defamation cases, *Calder* and *Keeton*, the plaintiffs there had other available forums, notably the headquarters of the offending publications. However, the *Calder* plaintiff’s desire to sue at home where her reputation was besmirched was easy to understand. The *Keeton* plaintiff, however, had no connection to the forum state of New Hampshire; she was clearly forum shopping for a long statute of limitations.²⁷⁶

In the end, the modest proposal to give the plaintiff’s a reasonable domestic forum when the liability-creating events occur in the United States would do little violence to the results in the post-*International Shoe* cases. But it would restore *International Shoe*’s promise that jurisdiction rests on “traditional notions of fair play and substantial justice.”²⁷⁷

²⁷⁴ It worked. See Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122 (1993). It clearly would not work now, as diversity removal is prohibited in cases that have been pending in state court more than a year. See 28 U.S.C. § 1446(c). There also was case law at the time *World-Wide* was decided that prohibited removal if the dismissal was for a reason that was not voluntary on the plaintiffs’ part. See, e.g., *Debry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979).

²⁷⁵ *Burger King v. Rudzewicz*, 471 U.S. 462, 487 (1985). *Calder v. Jones*, 465 U.S. 783, 788–89 (1983) (“The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”).

²⁷⁶ See Russell J. Weintraub, *How Substantial is our Need for a Judgments-Recognition Convention and What Should we Bargain Away to Get It?*, 24 BROOKLYN J. INT’L L. 167, 198 (1998).

²⁷⁷ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

CONCLUSION

The daylight has been dimming for the minimum contacts test since the Court's 1980 decision in *World-Wide Volkswagen*. There the Court rejected the notion that forum convenience was necessarily central to the jurisdictional calculus and revived state sovereignty as a critical element, which was in tension with *International Shoe*'s emphasis on the fairness and reasonableness of the chosen forum. Though the Court attempted to back away from the sovereignty language in *World-Wide*, the damage was done because the Court didn't repudiate either *World-Wide*'s result or its exclusive focus on the defendant. With the Court's current campaign to roll back corporate general jurisdiction to one or a very few forums, some plaintiffs are certain to be left without a practical forum in which to pursue cases even when the liability-creating events took place in the United States; indeed this is precisely what happened to the *J. McIntyre* plaintiff.

As a result, we are left with a rigid jurisdictional structure that looks remarkably like the nineteenth and early twentieth century structure that the Court claimed to have torn down to erect the minimum contacts test. Perhaps even jurisdictional doctrine is now more rigid than ever. Some of those pre-minimum contacts decision seem now remarkable for their solicitude of the plaintiff's need to find a reasonable forum, the very consideration that the Court has sought to banish in its four recent jurisdictional opinions. While there is no reason to think that the Supreme Court will abandon the minimum contacts language, as a test it is now barely recognizable. If the law of personal jurisdiction is to be re-grounded in the promise of fair play and substantial justice that was the foundation of the minimum contacts test, the Court must end its exclusive focus on defendants and ensure that plaintiffs have at least one reasonable forum to pursue civil cases in which the liability-creating events occur in the United States.