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The Short Arm Of The Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants

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I. INTRODUCTION

In the six decades since the Supreme Court decided *International Shoe Co. v. Washington*[1], the seminal analysis of the scope of personal jurisdiction over a nonresident defendant, courts have struggled to apply

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1. 326 U.S. 310 (1945).

its meaning to varying fact patterns and causes of action. That struggle has only intensified as modern internet contacts replace the more familiar physical ties. It is hardly an exaggeration to say that—except in certain well-defined instances—the existence of specific personal jurisdiction over a nonresident defendant in state or federal court is impossible to predict. This means that in almost every case against a nonresident, a motion to dismiss for lack of personal jurisdiction is likely to be made. That motion will likely provoke a request for jurisdictional discovery and result in a small-scale litigation of its own before the merits of the case are ever addressed. It is an invitation to a waste of judicial and party resources.

It is time for the states to take to heart the Supreme Court's description of due process as a reflection not only of the limitations on states' power, but of state sovereignty, and of states' legitimate interests in hearing certain disputes. To that end, states should alter their long-arm practice to assert personal jurisdiction only in well-defined circumstances that reflect meaningful connections with the state, rather than reaching the limits of due process. The resulting harm to prospective plaintiffs who may not be able to sue in the forum of their choice is a reasonable price to pay for increased certainty, decreased costs, and a freeing-up of the courts' resources.

This article describes the current uncertainty surrounding personal-jurisdiction jurisprudence and how that uncertainty has been exacerbated by its extension to internet contacts. It advocates that states shorten their long-arm statutes to bring more certainty to the area of personal-jurisdiction jurisprudence as well as to strengthen the argument for the exercise of personal jurisdiction pursuant to those statutes as an expression of state sovereignty. And it proposes a model short-arm statute that exercises personal jurisdiction over nonresidents in the context of traditional state interests while defining the application of those activities within the internet context.

II. PREINTERNET PERSONAL-JURISDICTION LAW: A FOCUS ON STATES' LEGITIMATE INTERESTS

Since the straightforward analysis of *Pennoyer v. Neff*[2] gave way "inevitabl[y"][3] to increased assertions of personal jurisdiction by states over nonresident defendants, the line between constitutional and uncon-

2. 95 U.S. 714 (1877).

3. *See* Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting) ("[A]s the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on state jurisdiction announced in [*Pennoyer*].").

stitutional assertions of jurisdiction has been elusive. A close examination of Supreme Court precedent reveals an abiding concern for the sovereignty[4] of the states, as well as a view of personal jurisdiction over nonresidents as equivalent to a "quid pro quo" between the forum states and those defendants.[5] In addition, the Court has repeatedly invited the states to make policy decisions as to their jurisdictional reach—an invitation the states should now accept—particularly in the internet context.

A. *Pennoyer v. Neff: States' Sovereign Territory*

In the seminal case of *Pennoyer v. Neff*,[6] the Court considered the validity of an Oregon default judgment entered against a nonresident who was not personally served and did not appear, but who owned property in the state by the time the judgment was sought to be enforced.[7] The Court expressed the concept of personal jurisdiction in terms of physical territory:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.[8]

The Court stressed the exclusivity of this view of states' sovereign territory[9] but recognized that an individual state's exercise of jurisdiction over its own residents and property will inevitably affect nonresidents and property in other states.[10] Thus the Court first recognized the concept—to be greatly expanded later—that states have a legitimate right to exercise control over nonresidents and their property to the extent necessary to protect the states' own residents and property.[11] The Court also recognized that nonresidents will in some instances be deemed to have accepted the jurisdiction of the state in advance, by becoming a partner or other member of an association, or by virtue of entering into a contract.[12]

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4. In using the term "sovereignty," I refer generally to the states' rights to assert authority over persons and property within their territory as well as to the more modern concept of states' rights to assert authority over disputes having effects in the state or disputes arising from a nexus with the state.

5. *See infra* pp. 5–11.

6. 95 U.S. at 721–22.

7. *Id.*

8. *Id.* at 720.

9. *Id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

10. *Id.* at 723.

11. Jurisdiction over a nonresident found within the forum state's territory was never questioned. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

12. *Pennoyer*, 95 U.S. at 735.

The territorial view of states' jurisdiction was unable to withstand the practical implications of changes in society and technological advances that led to increased movement and communication of people among the many states.[13] Indeed, courts quickly began fashioning exceptions to *Pennoyer*'s rigid formulation.[14] Between 1877 and 1945, the year the Supreme Court next issued a significant personal-jurisdiction decision, the automobile replaced the horse and buggy, telephones replaced telegraphs, and the modern railroad—not to mention the advent of airplane travel—shortened distances across the country.[15] With the advent of mass communication and interstate commerce, personal-jurisdiction jurisprudence transitioned from an examination of territorial contacts to an analysis of other proxies for physical presence. As the jurisprudence evolved, the courts developed context-based applications of the traditional constitutional test for personal jurisdiction and expanded their analysis of the application of personal jurisdiction to corporations. However, underlying this jurisprudence is the idea of giving deference to states' expressions of their own interests in exacting jurisprudential obligations based on certain in-state activities.

B. *International Shoe: Jurisdiction as* Quid Pro Quo

In *International Shoe Co. v. Washington*,[16] the Court considered the validity of the state of Washington's exercise of jurisdiction over a Missouri-based corporation in an action to recover taxes arising out of the corporation's employment of shoe salesmen in Washington.[17] These employees solicited orders within Washington, resulting in a substantial volume of sales in the state.[18] In an oft-quoted passage, the Court both

13. *See* Shaffer v. Heitner, 433 U.S. 186, 202 (1977) ("The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power.").

14. *See id.* at 201–02 (discussing "presence" of foreign corporations by doing business in the forum); Frene v. Louisville Cement Co., 134 F.2d 511, 515–16 (D.C. Cir. 1943) (discussing the "tradition" of courts exercising jurisdiction over foreign corporations based on "doing business," including a "regular course of solicitation" in addition to other business activities); Christopher D. Cameron & Kevin R. Johnson, *Death of A Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 799–804 (1995) (discussing evolving "solicitation plus" rule).

15. *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 573 (1958) ("The rapid development of transportation and communication in this country demanded a revision of [the principles expressed in *Pennoyer*,] . . . which were appropriate for the age of the 'horse and buggy' or even for the age of the 'iron horse' [but] could not serve the era of the airplane, the radio, and the telephone.").

16. 326 U.S. 310, 311 (1945).

17. *Id.* at 311, 313.

18. *Id.* at 313–14.

noted the change that had taken place since *Pennoyer* and set forth a new formulation for determining personal jurisdiction:

> Now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain *minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".*[19]

In the context of a corporation, "presence" means "those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[20]

In describing those "contacts" necessary to subject a defendant to personal jurisdiction, the Court noted the importance of considering the reasonableness "in the context of our federal system of government" of requiring a defendant to defend itself in a particular forum[21] and the "fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[22] In addition to this consideration of the relationship among the states is the consideration of the relationship between the defendant and the forum state, expressed as a logical exchange:[23] "To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state"[24] and therefore must be called to answer for harms caused by those activities in the state.

In stressing the importance of "our federal system of government" and the "fair and orderly administration of the laws," the Court cited Judge Learned Hand's decision in *Hutchinson v. Chase & Gilbert, Inc.*[25] There, the Second Circuit Court of Appeals found that New York lacked personal jurisdiction over a Massachusetts corporation that had hired the plaintiffs to purchase stock for it in New York but had failed to pay for

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19. *Id.* at 316 (emphasis added).

20. *Id.* at 316–17.

21. *Id.* at 317.

22. *Id.* at 319.

23. Professor Stein states that under *International Shoe's* "exchange rationale," '[m]inimum contacts . . . are evidence of a deal." Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 700 (1987) [hereinafter *Styles of Argument*].

24. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Other factors for consideration in applying the minimum contacts test include an "estimate of the conveniences" entailed in defending itself away from its home base; the extent, volume, and pervasiveness of the defendant's contacts in the forum—"continuous and systematic" on one end of the spectrum, versus a "casual presence" on the other; and the "nature and quality" of some acts or the "circumstances of their commission,"—meaning that some contacts are, by themselves, significant enough to confer jurisdiction.

25. *Id.* at 17–19. (citing 45 F.2d 139 (2d Cir. 1930)).

those services. Hand's description of the relationship required between the defendant and the forum served as a model for later Supreme Court jurisprudence:

> The theory of personal jurisdiction in an action in personam is, ordinarily at any rate, derived from the power over the defendant, consequent upon his presence within the state of the forum. . . . As to jurisdiction, the express consent of a corporation to be sued elsewhere avoided its territorial limitations . . ., and . . . this has been extended to cases *where the corporate activities within the foreign state are such as empower that state to exact such a consent.*[26]

Here, too, can be found the seeds of the Court's description in *International Shoe* of the continuum of contacts delineating *general* from *specific* from *no* jurisdiction:

> It might indeed be argued that [a corporation] must stand suit upon any controversy arising out of a legal transaction entered into where the suit was brought, but that would impose upon it too severe a burden. On the other hand, it is not plain that it ought not, upon proper notice, to defend suits arising out of foreign transactions, if it conducts a continuous business in the state of the forum. . . . But a single transaction is certainly not enough, whether a substantial business subjects the corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.
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> This last appears to us to be really the controlling consideration, expressed shortly by the word "presence," but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts.[27]

In a statement that is remarkable for its prescience, the court concluded, "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[28]

Other decisions relied upon by the Court in *International Shoe* refer to the obligation of a corporation to submit to jurisdiction in a state

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26. *Hutchinson*, 45 F.2d at 140–41 (emphasis added) (internal citations omitted).

27. *Id.* at 141 (internal citations omitted). In addition, the Court of Appeals set forth specific actions that would or would not likely subject a corporation to personal jurisdiction in a foreign forum—actions that are relevant to this day both to personal jurisdiction generally and to the drafting of a state's long-arm statute: (1) "the maintenance of a regular agency for the solicitation of business" will give rise to jurisdiction, particularly where "the business [is] continuous and substantial;" (2) "[p]urchases, though carried on regularly, are not enough, nor are [(3)] the activities of subsidiary corporations, or [(4)] of connecting carriers." Finally, [(5)] "[t]he maintenance of an office" may be enough when accompanied by "continuous negotiation" and the ability to settle claims. *Id.* at 141–42. (internal citations omitted).

28. *Id.* at 142.

based on an exchange rationale, taking into consideration states' views of their own jurisprudential priorities. In *Lafayette Insurance Co. v. French*, the Court found that Ohio could validly exercise personal jurisdiction over an Indiana insurance company where an Ohio statute required the company to consent to such jurisdiction as a condition of doing business in the state, and where the company had an agent in the state and had entered into the policy at issue in the state of Ohio.[29] The Court found such jurisdiction to be reasonable:

> [W]hen this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contract."[30]

Similarly, in *St. Louis Southwestern Railway Co. v. Alexander*,[31] the Court upheld personal jurisdiction over a Texas railway company in New York where the defendant was allegedly negligent in shipping goods from Texas to New York and the joint freight agent present in New York negotiated and corresponded about the claim, attempting settlement:

> This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. *In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process.*[32]

And in *International Harvester Co. of America v. Kentucky*,[33] a company that had previously done business in Kentucky, but had since revoked the agency of its Kentucky agent and restricted the authority of its agents to taking orders from Kentucky to be approved outside the state was nonetheless found to be doing business in Kentucky: Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Har-

29. 59 U.S. 404, 406, 408 (1855).

30. *Id.* at 408. Prior to *International Shoe*, many courts justified jurisdiction over corporations based on a consent rather than a contacts model but, as the Court later acknowledges, the notion of consent was at best a fiction. 326 U.S. at 318. The important point is the fairness of extracting obligations in exchange for benefits.

31. 227 U.S. 218 (1913).

32. *Id.* at 227 (emphasis added) (internal citations omitted).

33. 234 U.S. 579, 582–85 (1914).

vester Company were delivered within the State of Kentucky."[34] "Such corporations [that engage in a continuous course of shipments into a state] are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the State."[35]

Individuals, too, are subject to the reciprocal duties imposed on them by virtue of receiving the benefits and protection of the state. The Court in *International Shoe* borrowed its reference to "traditional notions of fair play and substantial justice"[36] from *Milliken v. Meyer*,[37] where the Court upheld Wyoming's exercise of jurisdiction over one of its own domiciliaries who was served outside the state:

> The state which accords [a citizen] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates.[38]

International Shoe's citations to *Hess v. Pawloski*[39] and *Young v. Masci*[40] reflect the idea that nonresident individuals too are subject to such "reciprocal duties" when they conduct certain activities in the state.

Thus the cases upon which the Court relied in setting out the minimum contacts test in *International Shoe* reveal the importance of the relationship between the state and the defendant in determining the constitutionality of states' assertions of personal jurisdiction and highlight

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34. *Id.* at 585.

35. *Id.* at 588. *See also* Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 621 (1899) ("Statutes [exacting obligations from corporations in exchange for doing business in the state] reflect and execute the general policy of the State upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject."); St. Clair v. Cox, 106 U.S. 350, 355 (1882) ("[W]hen a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.").

36. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

37. 311 U.S. 457, 463 (1940).

38. *Id.* at 463–64 (internal citations omitted).

39. *Int'l Shoe*, 326 U.S. at 316 (citing Hess v. Pawloski, 274 U.S. 352, 356–57 (1927) (upholding a Massachusetts statute providing for service upon the secretary of state in an action against a nonresident who operates a motor vehicle in the state, in an action arising from that operation of the motor vehicle)).

40. *Int'l Shoe*, 326 U.S. at 316 (citing Young v. Masci, 289 U.S. 253, 258 (1933)). In *Young*, the Court upheld New York's application of a statute making a nonresident automobile owner liable for the negligence of the automobile's operator: "A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." *Young*, 289 U.S. at 258.

that the states themselves have the ability to define that relationship within the bounds of the Constitution.[41] Unfortunately, *International Shoe* has given the lower courts very little else in terms of a clear standard for application to questions of personal jurisdiction.[42]

C. *Post*-International Shoe*: The Application to Contexts*

The breadth of *International Shoe*'s rule is both its blessing and its curse. The rule encompasses any context in which litigation may arise and is flexible enough to withstand changes in technology, commerce and the law in general.[43] But the rule's breadth gives little guidance for particular cases. The Supreme Court has since clarified the application of the minimum contacts test in specific contexts—but uncertainty remains.[44]

1. CONTRACTS: STATES' SUBSTANTIAL INTERESTS AND CONFERRAL OF BENEFITS

The contracts context represents a comparatively straightforward application of the minimum contacts standard where courts analyze the

41. As scholars have recognized, the Court has vacillated over the prominence it has given to state sovereignty versus due process as the basis for jurisdictional doctrine. *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) ("The concept of minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.") *with* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); *see also* Stein, *Styles of Argument*, *supra* note 23, at 689; A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 637–41 (2006) [hereinafter *Jurisdiction to Adjudicate*]; Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 568–69 (2007).

42. *See* Kurland, *supra* note 15, at 591 ("If the *International Shoe* case was the beginning of a new formulation of doctrine for personal jurisdiction, it contains only a statement of policy when 'what are needed are rules of a fairly definite character . . . .'") (citation omitted); Spencer, *Jurisdiction to Adjudicate*, *supra* note 41, at 619 ("The complexity and lack of fundamental soundness characteristic of contemporary doctrine has resulted in a hopeless unpredictability that fosters regular jurisdictional challenges, turning what should be a 'simple threshold question' into one of the more vigorously litigated issues between parties.") (footnote omitted); Stein, *Styles of Argument*, *supra* note 23, at 699 ("If, therefore, *International Shoe*'s triumph was its recognition that the regulatory interest of the state sometimes justified assertions of extraterritorial jurisdiction, then its failure was the absence of any attempt to articulate those extraterritorial boundaries.").

43. *See* A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 104–08 (2006) (hereinafter, *Jurisdiction and the Internet*) (arguing that *International Shoe* should apply to internet cases and is capable of being applied to them).

44. Some would argue that multiple context-specific tests themselves create additional ambiguity. *See* C. Douglas Floyd and Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L. J. 601, 614 (2006).

relationship between the contract at issue and the forum state. At one end of the spectrum, a single contract may suffice for jurisdictional purposes where the nature of the contract is one that the state has a substantial interest in regulating, or the subject matter of the contract reflects substantial benefits from the connection with that state.[45]

In *McGee v. International Life Insurance Co.*,[46] the Court analyzed the *International Shoe* standard in the context of an insurance contract solicited by the defendant in the California forum.[47] The decedent, a resident of California, had paid premiums to the insurance company for six years until his death.[48] The Court upheld personal jurisdiction over the insurance company even though that contract was the single contact between the defendant and the forum, finding it "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."[49] The Court emphasized the importance to California of permitting jurisdiction in this context: "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."[50] A single contract between the defendant and a resident of the forum is therefore sufficient to confer personal jurisdiction where the defendant has solicited business in the forum and where the nature of the contract—insurance—is one in which the state has a recognized and substantial interest.[51]

In cases in which the subject matter of the contract is not one so traditionally regulated by the state, the Court's analysis in *Burger King Corp. v. Rudzewicz*[52] instructs courts to look at the purposefulness of the defendant's actions towards the forum state, including "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing."[53] Rejecting any "talismanic jurisdictional formulas," the Court advised that each case must be viewed on its own unique facts.[54] The contract at issue in *Burger King* between the plaintiff corporation and the defendant franchisor had

45. McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

46. *Id.* at 221–24.

47. *Id.* at 221.

48. *Id.* at 221–22, 223–24.

49. *Id.* at 223.

50. *Id.*

51. *See also* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647–48 (1950) (according "'great weight' to the 'consequences' of the contractual obligations in the state where the insured reside[s] and the 'degree of interest' that state [has] in seeing that those obligations [are] faithfully carried out") (quoting Hoopeston Canning Co. v. Cullen, 318 US. 313 (1943) [sic]).

52. 471 U.S. 462 (1985).

53. *Id.* at 479.

54. *Id.* at 485–86.

a substantial connection with the Florida forum. The defendant agreed to a twenty-year relationship with an enterprise based primarily in Florida and anticipated long-term benefits resulting from affiliation with a nationally recognized corporation.[55] Beyond that, the contract provided for the application of Florida law.[56] As in *McGee*, that single contract was found sufficient to confer personal jurisdiction.[57]

In contrast, the Court found insufficient as a basis for the exercise of personal jurisdiction the contractual relationship between a trustee and the state where the trust was probated in *Hanson v. Denckla*.[58] There, the Court considered whether Florida could constitutionally exercise personal jurisdiction over a Delaware trustee. The Court described the issue as "the absence of those 'affiliating circumstances' without which the courts of a State may not enter a judgment imposing obligations on persons . . . or affecting interests in property. . . ."[59]

As in its other decisions, the Court referred to states' authority vis-a-vis that of other states: "[T]he in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States."[60] Unlike in *McGee*, the defendant here did not transact or solicit business in Florida, and the cause of action did not "arise[ ] out of an act done or transaction consummated in the forum State."[61]

In addition, the Court focused on the failure of the trustee to have exercised a privilege in Florida that then gave rise to an obligation that it should defend against in Florida:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but *it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.*[62]

Purposeful availment is closely related to the role of foreseeability, the importance of which was stressed by the Court in *World-Wide Volkswagen Corp. v. Woodson*:

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55. *Id.* at 464, 467, 485.

56. *Id.* at 464, 467, 481.

57. *Id.* at 487.

58. 357 U.S. 235, 255 (1958).

59. *Id.* at 245–46.

60. *Id.* at 246; *see also id.* at 251 ("[R]estrictions [on the personal jurisdiction of the state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

61. *Id.* at 251.

62. *Id.* at 253 (emphasis added); *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (quoting *Hanson*).

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[63]

Importantly, the Court distinguished *McGee* on the basis that "there the State had enacted special legislation . . . to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."[64] In contrast, the trust agreement in *Hanson* was entered into in Delaware, its connection with the Florida forum was based on the "unilateral activity" of the settlor in moving to Florida, and Florida had not expressed a special interest in regulating the subject matter of the agreement.[65] Other than in insurance and "long-term relationship" contexts, or when the state otherwise expresses special interest in exercising jurisdiction in that circumstance, the determinants of a contract's "substantial connection" with the state remain uncertain.[66]

2. STREAM OF COMMERCE: FORESEEABILITY AND PURPOSEFUL AVAILMENT IN PRODUCT PLACEMENT

In the stream of commerce context, the Court appeared to set forth a specific rule to guide the lower courts: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by con-

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63. 444 U.S. at 297. (citations omitted). While a blanket allowance of all jurisdiction the Constitution allows does not provide any meaningful foreseeability for potential defendants in a forum state's courts, specific statements of the conduct that will result in such jurisdiction does. In his dissent in *World-Wide Volkswagen*, Justice Brennan opined that the Court placed too little emphasis on Oklahoma's interest in exercising jurisdiction over litigation involving plaintiffs injured and hospitalized there, noting that "[t]he State has a legitimate interest in enforcing its laws designed to keep its highway system safe." 444 U.S. at 305. As in *Shaffer*, *infra* text p. 22, it is likely that if Oklahoma's long-arm statute had expressed such an interest in asserting jurisdiction in this context, the outcome would have been different.

64. Hanson v. Denckla, 357 U.S. 235, 252 (1958).

65. *Id.* at 252–53.

66. *See* Cameron & Johnson, *supra* note 14, at 835 (noting that *Burger King*'s fact-specific holding "spawned the next generation of litigation in the lower courts concerning the exercise of jurisdiction over nonresident defendants in contract disputes"); Floyd & Baradaran-Robison, *supra* note 44, at 621 (2006) (noting that *Burger King*'s test "has proved less than self-defining" and has been articulated in a "plethora of differing formulations" by lower courts).

sumers in the forum State."[67] In *World-Wide Volkswagen*, this meant that jurisdiction was not appropriate over the New York dealer and distributor of an automobile that was purchased in New York and then driven to Oklahoma, where the accident occurred.[68] In denying personal jurisdiction based on this isolated sale, the Court noted the two related functions of the minimum contacts requirement:

> It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[69]

This "status as coequal sovereigns" means that "the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts" and a concomitant limitation on the sovereignty of other states.[70]

The Court then obfuscated the standard for the stream of commerce application of the minimum contacts test in *Asahi Metal Industry Co. v. Superior Court*.[71] The Court in *Asahi* examined the issue of exercising personal jurisdiction over "up-stream" component manufacturers who might well be held to have foreseen that their products—once made part of a motorcycle—would be "purchased by consumers in the forum State."[72] Here, all but one member of the Court found that *International Shoe*'s fairness prong, previously given little virility, would not allow jurisdiction over foreign manufacturers where the litigation itself had little connection to the forum.[73] The weighing of the "burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief,"[74] in addition to "'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'"[75] resulted in the finding that—apart from the existence of minimum contacts—the exercise of jurisdiction in this case would be "unreasonable and unfair."[76]

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67. World-WideVolkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980).

68. *Id.* at 287, 299.

69. *Id.* at 292.

70. *Id.* at 293.

71. 480 U.S. 102 (1987).

72. *Id.* at 105, 112; *see also World-Wide Volkswagen*, 444 U.S. at 298. Four members of the *Asahi* Court would require not only foreseeability but additional conduct "purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112. (emphasis omitted).

73. *Asahi*, 480 U.S. at 113–16. Justice Scalia did not join this section of the Court's opinion. *Id.* at 105.

74. *Id.* at 113.

75. *Id.* (citation omitted).

76. *Id.* at 116.

The Court split as to whether the minimum contacts standard itself was met. Four justices[77] found the "substantial connection" required by the Court's precedents to be lacking:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . . But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.[78]

Four other justices would have found purposeful availment on the facts of *Asahi*.[79]

Thus the application of the *International Shoe* standard in the stream of commerce context—particularly whether foreseeability alone is sufficient—remains unclear.[80] And contacts arising in between the far-upstream or intensely local downstream are uncertain.[81]

3. INTENTIONAL TORTS: TARGETED ACTION

Finally, the Court has noted factors to consider when applying the *International Shoe* test to the intentional tort context. In *Calder v. Jones*, a well-known actress sued the National Inquirer for libel arising from an article impugning her character and ability to fulfill her professional obligations.[82] The plaintiff lived in California, and her career was centered there.[83] The magazine was based in Florida, although the state with its largest circulation was California.[84] In contrast with the approach in previous personal jurisdiction settings, the Court in *Calder* focused on the intentional targeting of the defendant's conduct at the forum state and its foreseeable effects in that state:

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77. The plurality included Justices O'Connor, Rehnquist, Powell and Scalia. *Id.* at 105.

78. *Id.* at 112.

79. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan was joined by Justices White, Marshall and Blackmun. *Id.*

80. *See* Cameron & Johnson, *supra* note 14, at 833 ("[U]ncertainty in the most commonplace situations has increased, rather than decreased, as *International Shoe* has matured. Most notably, the inability of a majority of the Court in *Asahi* and *Burnham v. Superior Court* to agree on the proper analysis applicable to run-of-the-mill fact situations has contributed to this development.").

81. *See* 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, 77 (1990) (stating that *Asahi* "muddied the law of personal jurisdiction even further at a time when lower courts and parties were having an extremely difficult time trying to 'apply' the Court's maddeningly unstable constitutional 'test' for personal jurisdiction.").

82. Calder v. Jones, 465 U.S. 783, 788–89 (1984).

83. *Id.* at 785.

84. *Id.*

> [The plaintiff's] television career was centered in California. . . . [T]he brunt of the harm, in terms both of [plaintiff'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.[85]

The publishing of the article was not analogous to "mere untargeted negligence" implicated by the placement of a product in the stream of commerce but rather involved intentional and tortious actions "expressly aimed at California."[86]

Like the other context-specific formulations, *Calder* has engendered confusion and controversy. Courts disagree as to whether *Calder* requires that the targeted audience—in addition to or instead of the targeted plaintiff—be in the forum state.[87] In addition, some courts apply the effects test, uniquely suited to intentional acts, to other arguably inapplicable causes of action.[88]

4. IMPORTANCE IN ALL CONTEXTS OF THE STATE'S EXPRESSION OF ITS INTERESTS

As in its pre-*International Shoe* decisions,[89] the Court's post-*International Shoe* opinions reflect a deference to the states' expression of their own interests. In addition to showing deference in the insurance context,[90] the Court has emphasized that a state has a legitimate interest in providing means to close trusts established under state law,[91] and it

85. *Id.* at 788–89.

86. *Id.* at 789 (distinguishing *World-Wide Volkswagen* and other cases).

87. *Compare* Revell v. Lidov, 317 F.3d 467, 476 (5th Cir. 2002) *with* Young v. New Haven Advocate, 315 F.3d 256, 258–59 (4th Cir. 2002) (finding jurisdiction inappropriate because the intended audience for the newspaper's website was readers in the state where the newspaper is physically located, not readers in the state where the target of the alleged false statements resided); *and* Spencer, *Jurisdiction and the Internet*, *supra* note 43, at 101–03 (criticizing courts' application of *Calder* in internet context to focus on the audience for the publication rather than the plaintiff target).

88. *See* Floyd & Baradaran-Robison, *supra* note 44, at 612 ("Post-*Calder* decisions applying the effects test in cases involving intentional personal torts, business torts, and torts committed by means of the Internet have evidenced considerable confusion over the kind of intent that is relevant in applying the *Calder* test."); Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 629 (2003) ("[T]he utility of the effects test may be greater with certain causes of action than with others.").

89. *See supra* text pp. 2–4.

90. Travelers Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950) (holding that Virginia could subject a Nebraska insurance company to the jurisdiction of its courts pursuant to a Virginia statute); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221, 224 (1957) (deferring to California's expression of its interests via the enactment of a California statute subjecting foreign corporations to suits in California based on their drafting of insurance contracts with California residents).

91. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish

has a legitimate interest in redressing injuries that occur within its borders.[92] Importantly, in finding such a legitimate interest, the Court pays special attention to legislative pronouncements of the states themselves.

In *Keeton v. Hustler Magazine, Inc.*, the Court found proper the exercise of personal jurisdiction over a defendant based on false statements published outside the forum state but circulated therein, that harmed an out-of-state resident.[93] The Court relied in large part upon New Hampshire's criminal defamation statute that was not restricted to resident victims and on New Hampshire's long-arm statute that which had "specifically deleted . . . the requirement that a tort be committed 'against a resident of New Hampshire.'"[94]

In contrast, the Court is less likely to find the exercise of personal jurisdiction proper where the state has not expressed an interest in asserting jurisdiction over the specific subject matter. In *Kulko v. Superior Court of California*,[95] the Court rejected the argument that California's interest in protecting the welfare of its minor residents justified the court's assertion of personal jurisdiction over the nonresident father, noting that "California has not attempted to assert any particularized interest in trying such cases in its courts by, *e.g.*, enacting a special jurisdictional statute."[96]

Shaffer v. Heitner is another example of a case where the Court found that the lack of any expressed legislative interest by the state in exercising jurisdiction over a particular subject matter was a reason to deny personal jurisdiction.[97] Here, the plaintiffs argued that *International Shoe*'s requirement of minimum contacts between the defendant and the forum was met where the defendants were officers and directors of a corporation formed under the laws of the forum state.[98] The plaintiffs emphasized Delaware's interest in supervising the management of Delaware corporations.[99] But the Court found plaintiffs' argument to be

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beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.").

92. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("[I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State.").

93. *Id.* at 773–74.

94. *Id.* at 777.

95. 436 U.S. 84, 84 (1978).

96. *Id.* at 98.

97. 433 U.S. 186, 214–15 (1977) ("If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as [plaintiff] suggests, we would expect it to have enacted a statute more clearly designed to protect that interest."); *see also* Hanson, v. Denckla, 357 U.S. 235 (1958).

98. *Shaffer*, 433 U.S. at 213–14.

99. *Id.* at 214.

belied by the Delaware Legislature's failure to assert that interest.[100] The Court noted that Delaware had not enacted a statute treating acceptance of a directorship as consent to jurisdiction.[101] Such a statute would have shown that Delaware had a compelling interest in exercising jurisdiction in this context and given the defendants reason to expect to be haled before a Delaware court.[102]

One thing is clear from the Court's precedents: the states themselves have the ability to make policy judgments as to those actions that will constitute purposeful availment.[103] As set forth in Part IV, the states have not done so to any meaningful extent. Therefore, *International Shoe*'s dictates remain cloudy, and courts still must "step from tuft to tuft across the morass"[104] whenever the issue of specific[105] personal jurisdiction arises.[106]

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100. *Id.*

101. *Id.*

102. Of course, Delaware promptly passed such a statute. *See* DEL. CODE ANN. tit. 10, § 3114 (2009). Interestingly, a Delaware court recently upheld jurisdiction over a New York attorney who transacted business in Delaware by causing the filing of certificates with the secretary of state and providing services to Delaware corporate officers and board members, based on Delaware's interest in ensuring that Delaware corporations and their stockholders have access to its judicial system. *See* Sample v. Morgan, 935 A.2d 1046, 1047–48 (Del. Ch. 2007).

103. Professor Spencer argues for the centrality of state interest in assessing amenability to suit. Spencer, *Jurisdiction to Adjudicate*, *supra* note 41, at 645 ("[T]he minimum connection that must exist between a nonresident defendant and the forum is one where the alleged actions of the defendant have implicated the legitimate interests of the forum state, creating a link that makes it fair and nonarbitrary for that state to exercise adjudicatory authority over the case against that defendant. Where a nonresident defendant acts in such a way so as to adversely affect affairs within a state, disputes arising therefrom are something that a state has a clear interest in resolving; such an interest justifies jurisdiction unless there is a real injury to [the defendant's due process interests].").

104. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 142 (2d Cir. 1930).

105. This is not to suggest that the issue of general jurisdiction is a simple one. On the contrary, considerable confusion exists as to whether general jurisdiction jurisprudence retains viability. *Compare* Burnham v. Sup. Ct. of Cal., 495 U.S. 604, 610 n.1 (1990) (questioning whether general jurisdiction may be found outside the context of regular service of summons in the forum upon a corporation's president acting in that capacity) *with* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952) (upholding Ohio's exercise of jurisdiction over a foreign corporation that had been carrying on "a continuous and systematic, but limited, part of its general business" in a cause of action that "did not arise in Ohio and does not relate to the corporation's activities there"), *and* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 415–19 (1984) (analyzing the issue of general jurisdiction over the defendant, but finding its connection with the forum insufficient).

106. Even eighteen years ago, personal-jurisdiction jurisprudence was fodder for an alarming number of cases. *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1590, 1590 n. 5 (1992) (noting that "cases presenting the issue of amenability to personal jurisdiction under [the Supreme Court's] confusing standards now make up a large share of reported state and federal decisions," and noting a period of fourteen months in 1990 and 1991 in which 350 decisions were published dealing with the issue of personal jurisdiction). The issue has largely become more, rather than less, complicated.

III. THE INTERNET'S EFFECT ON PERSONAL-JURISDICTION LAW: VIRTUAL AVAILMENT

The advent of the Internet threw a wrench into this already complex and fact-specific system. Courts have struggled both to understand the underlying technology and to find a way to view internet contacts through the existing jurisprudential prism. The resulting landscape has not been pretty.

A. *Confusion About Application to the Internet*

While the law of personal jurisdiction was already in a sense unmoored from physical boundaries, the Internet's complete derogation of any geographic border poses unique challenges for the courts.[107] Before the advent of the Internet, personal-jurisdiction jurisprudence had already transitioned from focusing on physical presence[108] to considerations of activities in another state being directed to[109] or having effects in[110] the forum. The Internet both increases the likelihood of these out-of-state activities having effects within the state and poses the newer difficulty of ease of access to all states simultaneously,[111] as well as a lack of knowledge of the location of counter-parties to a transaction.[112]

The confusion caused by internet contacts in the personal-jurisdiction setting can be divided into two somewhat overlapping categories. First, courts have had trouble creating a coherent system for classifying the various internet contacts a defendant might have with a state. Whether a function of unfamiliarity with the subject matter or of simple expediency, courts have tended to lump all kinds of internet contacts into the same basket, even though there are significant distinctions among communicating via e-mail,[113] internet advertising,[114] e-com-

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107. *See* Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace Into* International Shoe, 8 SETON HALL CONST. L.J. 763, 774 (1998).

108. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

109. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

110. Calder v. Jones, 465 U.S. 783, 789 (1984).

111. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) ("In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states.").

112. *But see* Spencer, *Jurisdiction and the Internet*, *supra* note 43, at 88 (finding "presumption of aimlessness" to be a fiction); *id.* at 91–92 (noting available "jurisdiction avoidance mechanisms").

113. *See* Resuscitation Techs., Inc. v. Cont'l Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at *1,*5 (S.D. Ind. Mar. 24, 1997) (applying *Zippo* analysis to contacts arising from e-mails).

114. *See* ALS Scan, Inc. v. Wilkins, 142 F. Supp. 2d 703, 704, 708 (D. Md. 2001), *aff'd*, 293 F. Supp. 2d 707 (4th Cir. 2002) (analyzing contacts based on online advertisement under the spectrum of passivity introduced by *Zippo*); Digital Control Inc. v. Boretronics Inc., 161 F. Supp.

merce,[115] the posting of allegedly defamatory content on a website,[116] and the improper use of trademarked or copyrighted material on a website[117] or in a domain name.[118] But courts have treated all such internet contacts the same rather than differentiating the claims that arise out of that internet use from claims which are themselves unconnected to a defendant's website.[119]

Similarly, courts have attempted to apply a single derivative test to these contexts and have largely ignored existing Supreme Court precedent, rather than viewing the minimum contacts test through the traditional prism of a common law or statutory cause of action. Just as the use of the Internet to purchase goods differs from its use to post information, the "interactivity" of a site is more or less relevant in these contexts.[120]

Because the Internet transcends both personal and business spheres, the causes of action arising out of internet contacts can, and do, vary widely.[121] As discussed above, courts have developed standards for the application of *International Shoe* in these different contexts to determine if personal jurisdiction is proper. But early on, courts applying personal-jurisdiction jurisprudence to internet contacts treated the internet context as a species of its own.

B. *Inset Systems, Inc. v. Instruction Set, Inc.: Universal Jurisdiction*

Inset Systems[122] was one of the first cases to analyze personal jurisdiction in an internet context. Here, the plaintiff, a Connecticut corpora-

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2d 1183, 1186 (W.D. Wash. 2001) (using "web site plus" rule to analyze jurisdiction based on the placing of online advertisements).

115. *See* Sports Auth. Mich., Inc. v. Justballs, Inc., 97 F. Supp. 2d 806, 809, 812 (E.D. Mich. 2000) (considering "level of interactivity and commercial nature of the information" on defendant's web site in analyzing jurisdiction over a defendant accused of unfair trade practices).

116. *See* Revell v. Lidov, 317 F.3d 467, 468, 470 (5th Cir. 2002); Hy Cite Corp. v. Badbusinessbureau.com L.L.C., 297 F. Supp. 2d 1154, 1161–67 (W.D. Wisc. 2004); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 726 (E.D. Pa. 1999).

117. *See* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 448, 451–53 (3d Cir. 2003).

118. *See* Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002); Caterpillar Inc. v. Miskin Scraper Works, Inc., 256 F. Supp. 2d 849, 853 (C.D. Ill. 2003) (applying *Zippo*).

119. *See* Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1149 (2005).

120. *See* Spencer, *Jurisdiction and the Internet*, *supra* note 43, at 98 ("A passive Web site is as capable of originating a contractual relationship with forum residents as is an interactive Web site. . . . The level of interactivity exhibited by a Web site is of even less relevance when the claim sounds in tort or asserts an intellectual property violation.").

121. *See* Daniel Steuer, *The Shoe Fits and the Lighter Is Out of Gas: The Continuing Utility of* International Shoe *and the Misuse and Ineffectiveness of* Zippo, 74 U. COLO. L. REV. 319, 334 (2003) (finding an "explosion of Internet-related cases" in comparing the year 2001 to years prior to 1997).

122. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

tion that owned the trademark "Inset," sued the Massachusetts-based defendant that had registered the domain name "Inset.com" for use in advertising its own goods and services, for trademark infringement.[123] The court denied the defendant's motion to dismiss for lack of personal jurisdiction, finding first that the defendant's use of a website constituted repeated solicitation of business under Connecticut's long-arm statute.[124]

In addition, the court found that the exercise of personal jurisdiction satisfied due process because "the defendant has used the Internet, as well as its toll-free number to try to conduct business within the state of Connecticut."[125] The defendant should have reasonably anticipated being sued in the forum because it had "directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states."[126] The court did not find that the site had been accessed by Connecticut residents or had resulted in any purchases by Connecticut residents; the potential business was itself sufficient.

The implications of *Inset*'s reasoning were disastrous to online businesses that would be held to do business in every forum in which the website is accessible, whether or not the company actually did business in those fora.[127] For that reason, most courts and commentators have rejected *Inset*'s broad reach[128] but have not much improved upon its analysis.

C. *The* Zippo *Test: A Less Expansive, but Also Less Predictable, Position*

Partially in an attempt to curb the seemingly limitless boundaries of a court's jurisdictional power implied by *Inset*, courts struggled to find a

123. *Id.* at 162.

124. *Id.* at 164 (finding the existence of the website to be continuous advertisement directed toward the 10,000 internet users in Connecticut).

125. *Id.*

126. *Id.* at 165.

127. *See* Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3, ¶ 53 (1997), http://www.vjolt.net/vol1/issue/vol1_art3.pdf (noting that a large number of companies have websites).

128. *See* Digital Control Inc. v. Boretronics Inc., 161 F. Supp. 2d 1183, 1186 (W.D. Wash. 2001) ("[T]he legal analysis in *Inset* is far from compelling."); Bunmi Awoyemi, Zippo *is Dying, Should it be Dead?: The Exercise of Personal Jurisdiction by U.S. Federal Courts Over Non-Domiciliary Defendants in Trademark Infringement Lawsuits Arising Out of Cyberspace*, 9 MARQ. INTELL. PROP. L. REV. 37, 46 (2005) (observing that *Inset's* "over-expansion of the personal jurisdiction doctrine . . . makes it somewhat vulnerable to due process attacks"); *but see* Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 4–5 (D.D.C. 1996) (relying on *Inset* standard to find jurisdiction proper); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo.1996) (citing *Inset* with approval in finding jurisdiction over defendant based on allegedly infringing website).

new method of analyzing internet contacts. What has become the most widely accepted test[129] originated from a district court decision in the Western District of Pennsylvania.[130]

Like *Inset*, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, arose out of an internet domain name dispute. The plaintiff—a lighter manufacturer—brought suit against a California computer news service based on that service's use of the "Zippo" trademark in several domain names.[131] The defendant maintained no offices, employees, or agents in the forum state of Pennsylvania, but approximately two percent (or 3,000) of its website subscribers were residents of the state.[132] Those subscribers had visited the website and completed an online application for the service. In addition, the defendant had contracted with seven Pennsylvania Internet access providers so that Pennsylvania residents could access its service.[133]

Upon the defendant's motion to dismiss the claims for lack of personal jurisdiction, the district court devised a sliding scale test for purposeful availment in the internet context:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. . . . At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of

129. *See* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) (stating *Zippo* "has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site").

130. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo* was not actually the first court to consider a website's interactivity in determining whether personal jurisdiction was validly based on that site. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1266 (6th Cir. 1996) (finding indicia of "interactivity" later discussed in detail in *Zippo*); *Maritz*, 947 F. Supp. at 1333 (rejecting defendant's claim that it maintained a merely "passive website" in finding jurisdiction appropriate).

131. *Zippo*, 952 F. Supp. at 1120–21.

132. *Id.* at 1121.

133. *Id.*

information that occurs on the Web site.[134]

Zippo's test resembles the sliding scale set forth by the Supreme Court in *International Shoe*.[135] The finding of an interactive site through which a defendant is "clearly doing business over the internet" is similar to *International Shoe*'s finding of specific jurisdiction where a corporation's activities are "continuous and systematic" and "give rise to the liabilities sued on."[136] *Zippo*'s finding of a passive website is like *International Shoe*'s reference to "casual presence" or "single or isolated" activities.[137] And, as with *International Shoe*, the difficulty in applying *Zippo* is with the "vast middle area"[138] between these poles.

Applying its test to the facts before it, the *Zippo* court noted that the defendant's website did more than merely advertise but affirmatively conducted "electronic commerce" with Pennsylvania residents.[139] This constituted "doing business over the internet" on the high end of the court's proposed scale.[140] The defendant's activities were purposeful in that it "repeatedly and consciously chose to process Pennsylvania residents' applications" for its service.[141] Therefore, the defendant was on notice that it would be amenable to suit in Pennsylvania, and conferral of personal jurisdiction was proper.[142]

The *Zippo* test has been praised[143] and criticized[144] but never

134. *Id.* at 1124 (internal citations omitted).

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

136. *Id.* at 317.

137. *Id.*

138. Yokoyama, *supra* note 119, at 1166–67.

139. *Zippo*, 952 F. Supp. at 1125.

140. *Id.* at 1125–26. The court noted that the defendant's website was more than the passive advertising at issue in *Inset*, and more even than the active solicitation and promotional activities at issue in *Maritz*. 952 F. Supp. at 1125. The case was on par with the business conducted via the Internet in *CompuServe*, where a nonresident of the forum state contracted to distribute software via the defendant's Internet server. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1260 (6th Cir. 1996).

141. *Zippo*, 952 F. Supp. at 1126.

142. *Id.*

143. *See, e.g.*, Richard K. Greenstein, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of* Zippo Dot Com, 80 TEMP. L. REV. 21, 32–33 (2007) (characterizing *Zippo* as an "overwhelming triumph" due to the American propensity to assign legal duties based on active behavior); Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 103 (2003) ("The [*Zippo*] court produced a thoughtful opinion that remained true to the established principles of personal jurisdiction").

144. *See, e.g.*, Webzero, LLC v. Clicvu, Inc., No. CV-08-0504-MRP (PLAx), 2008 WL 1734702, at *7 (C.D. Cal. Apr. 4, 2008) ("[T]he criticism of the *Zippo* rule in cases like *Hy Cite* and *Shamsuddin* is somewhat compelling in this scenario. It is an undesirable result that a company is subject to personal jurisdiction based on its website, where the website and the very nature of its product do not differentiate in any way between different forums."); Awoyemi, *supra* note 128, at 62 ("What the *Zippo* court did not foresee was how many Web sites would fall into its negligibly useful middle classification and how often courts would misapply the test . . . . [I]t may be time for the courts to let it die."); Rachael T. Krueger, Comment, *Traditional Notions of Fair*

ignored.[145] Some courts follow the *Zippo* test either overtly[146] or by applying a similar "interactivity" test.[147] Some courts have modified the *Zippo* test to require something in addition to the interactivity of the website, variously referred to as "targeting" or "direction" of activity into the state.[148]

Courts have applied the *Zippo* test to causes of action based on

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Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements, 51 CATH. U. L. REV. 301, 326 (2001) ("The Internet jurisdiction rules of *Zippo* and its progeny enable courts to veer off the path of fairness and foreseeability in order to accommodate expanding litigation"); Robert M. Haskins, Jr., *The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button*, 25 PEPP. L. REV. 451, 475 (1998) ("While the court in *Zippo* takes pains to carefully reason its decision, its misanalysis of the specific jurisdiction question leads to the wrong result").

145. According to Westlaw, *Zippo* has been cited in over 600 court decisions and 648 law review articles in the twelve years since the decision.

146. The following circuits appear to follow *Zippo*: Fifth Circuit, *see* Mink v. AAAA Dev. LLC 190 F.3d 333, 336 (5th Cir. 1999) *and* Qassas v. Daylight Donut Flour Co., LLC, No. 4:09-CV-0208, 2009 WL 1795004, at *5 (S.D. Tex. June 24, 2009); Eighth Circuit, *see* Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711–12 (8th Cir. 2003) (applying *Zippo* test and then examining the quality of the contacts) *and* Romeo Entm't Group, Inc. v. Showing Animals Respect & Kindness, Inc., No. 8:08CV481, 2009 WL 764557, at *5 (D. Neb. Mar. 20, 2009) ("[T]he Eighth Circuit Court of Appeals has adopted the *Zippo* analytical framework."); Ninth Circuit, *see* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) (finding the "common thread" among precedent across courts is principally laid out in *Zippo*) *and* Am. Auto. Ass'n, Inc. v. Darba Enters. Inc., No. C 09-00510 SI, 2009 WL 1066506, at *4 (N.D. Cal. Apr. 21, 2009) (using *Zippo* spectrum analysis); and Tenth Circuit, *see* Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999) (applying *Zippo* "sliding scale" analysis) *and* Conlin Enter. Corp. v. Snews LLC, No. 2 07 cv 922, 2008 WL 803041, at *5–6 (D. Utah Mar. 24, 2008) (same).

147. The Seventh Circuit requires that, to premise jurisdiction on the maintenance of a website, there be "some level of 'interactivity' between the defendant and consumers in the forum state." Jennings v. AC Hydraulic A/S, 383 F.3d 546, 550 (7th Cir. 2004); *see* Morrison v. YTB Int'l, Inc., Nos. 08-565-GMP & 08-579-GMP, 2009 WL 2244471, at *8 (S.D. Ill. June 5, 2009) (rejecting plaintiff's claim that jurisdiction was proper where there was "simply no evidence" of an interactive website).

148. The Third Circuit, where the district court that decided *Zippo* is located, requires interactivity as well as "additional evidence that the defendant has 'purposefully availed' itself of the privilege of engaging in activity in that state." Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451–52 (3d Cir. 2003) (finding that while defendant's website was sufficiently "interactive" under *Zippo*, the interactivity of a website alone cannot lead to personal jurisdiction); *see* Chanel, Inc. v. Guetae, No. 07-3309 (JAG), 2009 WL 348501, at *4–5 (D.N.J. Feb. 11, 2009) (finding that the website was interactive but did not target New Jersey residents). The Fourth Circuit requires that the defendant "direct[ ] electronic activity into the State,[ ] with the manifested intent of engaging in business or other interactions within the State." ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002); *see also* Williams v. Adver. Sex LLC, No. 1:05CV51, 2009 WL 723168, at *2 (N.D. W. Va. Mar. 17, 2009) (applying *ALS Scan* standard).

negligence,[149] breach of contract,[150] torts,[151] patent infringement,[152] trademark infringement,[153] defamation,[154] and antitrust.[155] Some courts find that the *Calder* effects test should apply instead when the claim is based on an intentional tort,[156] where other courts apply *Zippo* to such a claim.[157] Still, other courts apply both *Zippo* and *Calder* to intentional torts.[158] Some courts apply *Zippo* to the specific jurisdiction context

149. *See, e.g.*, Edwards v. Erdey, 770 N.E.2d 672, 676, 678 (Ohio C.P. 2001) (applying *Zippo* to a medical malpractice case); Quality Design & Constr., Inc. v. Tuff Coat Mfg., Inc., 939 So. 2d 429, 431, 435 (La. Ct. App. 1st Cir. 2006) (applying *Zippo* to contractor's claim against coating manufacturer for damage to playground surface).

150. *See* Resuscitation Techs., Inc., v. Cont'l Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at *3, *5 (S.D. Ind. Mar. 24, 1997); Stewart v. Hennesey, 214 F. Supp. 2d 1198, 1200, 1202–04 (D. Utah 2002).

151. *Williams*, 2009 WL 723168, at *1, *2 (defamation); Doe v. Ciolli, 611 F. Supp. 2d 216, 218, 221–22 (D. Conn. 2009) (discussing *Zippo* in the context of various tort claims); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 728, 731 (E.D. Pa. 1999) (finding no personal jurisdiction over a defendant who, after posting a comment on a discussion board of a web site and entering into an e-mail conversation with the plaintiff, allegedly placed defamatory statements on her website and made ninety postings in other discussion groups, encouraging those viewers to visit her own website: "The Defendant did not participate in any on-line interactions such as the acceptance of information from forum residents, the entrance into a contractual agreement via the transmission of electronic mail, or the use of its Web sites to encourage contacts with forum residents.") (internal citations omitted).

152. *See, e.g.*, Neato, Inc. v. Great Gizmos, 3:99CV958 (AVC), 2000 WL 305949, at *1, *3 (D. Conn. Feb. 24, 2000).

153. *See* Am. Ass'n of Blood Banks v. Boston Paternity, LLC, No. DKC 2008-2046, 2009 WL 2366175, at *2, *8 (D. Md. July 28, 2009); 1-800-Contacts, Inc. v. Memorial Eye, No. 2:08-CV-983 TS, 2009 WL 1586654, at *1–2 (D. Utah June 4, 2009); Hershey Co. v. Pagosa Candy Co., No. 1:07-CV-1363, 2008 WL 1730538, at *4–5 (M.D. Pa. Apr. 10, 2008).

154. *See* Toytrackerz LLC v. Koehler, No. 08-2297-GLR, 2009 WL 1505705, at *1, *8 (D. Kan. May 28, 2009); Gorman v. Jacobs, 597 F. Supp. 2d 541, 543, 548 (E.D. Pa. 2009).

155. Universal Grading Serv. v. eBay, Inc., No. 08-CV-3557 (CPS), 2009 WL 2029796, at *1, *7 (E.D.N.Y. June 10, 2009).

156. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321–22 (9th Cir. 1998) (finding the defendant's activities in registering the plaintiff's trademark as a domain name, and offering to sell it to the plaintiff when asked to stop using it, were specifically directed at the plaintiff in California, where he knew the plaintiff would suffer harm); Licciardello v. Lovelady, 544 F.3d 1280, 1287–88 (11th Cir. 2008); *Toytrackerz*, 2009 WL 1505705, at *11; Andy's Music, Inc. v. Andy's Music, Inc., 607 F. Supp. 2d 1281, 1284 (S.D. Ala. 2009); *see also* Rice & Gladstone, *supra* note 88, at 629–42 (discussing intentional torts that are typically analyzed under the *Calder* test).

157. *See* Williams v. Adver. Sex LLC, No. 1:05CV51, 2009 WL 723168, at *5–6 (N.D. W. Va. Mar. 17, 2009) (declining plaintiff's argument that the court should apply the effects test in a defamation action and instead following the Fourth Circuit's version of the *Zippo* sliding scale test).

158. *See* Revell v. Lidov, 317 F.3d 467, 471–76 (5th Cir. 2002) (looking both at interactivity of website on which defendant posted allegedly defamatory statement, and evaluating "the extent of this interactivity . . . with respect to *Calder*," finding no jurisdiction because the forum state was not the focus of the harm); ALS Scan, Inc. v. Digital Serv. Consultants, Inc. 293 F.3d 707, 713–14 (4th Cir. 2002) (noting the standards are not inconsistent and applying both to find jurisdiction in a copyright infringement suit); Family Watchdog, LLC v. Schweiss, No. 1:08-CV-642-SEB-DML, 2009 WL 276856, at *5–6 (S.D. Ind. Feb. 5, 2009) ("[T]he *Zippo* framework is

only;[159] others apply it to questions of general jurisdiction as well.[160] Some courts find that *Zippo* only applies to websites at either extreme of its own spectrum.[161] Other courts refuse to apply *Zippo* at all, finding the interactivity of a website to be irrelevant.[162]

The primary criticism of *Zippo* is that the focus on interactivity of the website, no matter what the connection is between that site and the cause of action, ignores the critical relationship between the forum and the cause of action.[163] In addition, courts have been inconsistent with

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not the beginning and end of internet personal jurisdiction analysis."); Nationwide Contractor Audit Serv., Inc. v. Nat'l Compliance Mgmt. Servs., Inc., 622 F. Supp. 2d 276, 292–97 (W.D. Pa. 2008) (applying *Zippo* to the question of general jurisdiction and *Calder* to the question of specific jurisdiction).

159. *See* Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003); *Revell*, 317 F.3d at 471; *ALS Scan*, 293 F.3d at 714–15; Viko v. World Vision, Inc., No. 2:08-CV-221, 2009 WL 2230919, at *12 (D. Vt. July 24, 2009); Heidle v. Prospect Reef Resort, Ltd., 364 F. Supp. 2d 312, 318 n.18 (W.D.N.Y. 2005); Smith v. Basin Park Hotel, Inc., 178 F. Supp. 2d 1225, 1233 (N.D. Okla. 2001). *But see* Molnlycke Health Care v. Dumex Med. Surgical Prods. Ltd., 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999) (noting that "most of the cases applying [the *Zippo*] framework have looked to specific jurisdiction," but nonetheless applying *Zippo* to a question of general jurisdiction).

160. *See* Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296–97 (10th Cir. 1999); *Nationwide Contractor*, 622 F. Supp. 2d at 296; 1-800-Contacts, Inc. v. Memorial Eye, No. 2:08-CV-983 TS, 2009 WL 1586654, at *2 (D. Utah June 4, 2009) Mueller v. Sunshine Rest. Merger Sub LLC, No. 1:09-CV-0443, 2009 WL 1107263, at *3–4 (M.D. Pa. Apr. 23, 2009).

161. *See* Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 222 (D.N.H. 2000).

162. *See* Foley v. Yacht Mgmt. Group, Inc., No. 08 C 7254, 2009 WL 2020776, at *3, n.1 (N.D. Ill. July 9, 2009); Roblor Mktg. Group, Inc. v. GPS Indus., Inc., No. 08-21496-CIV, 2009 WL 2003156, at *8–9 (S.D. Fla. July 6, 2009); Howard v. Mo. Bone & Joint Ctr., Inc., 869 N.E.2d 207, 212 (Ill. App. Ct. 2007); Holland v. Hurley, No. 2 CA-CV 2008-0126, 2009 WL 1383809, at *5–6 (Ariz. Ct. App. May 19, 2009) (finding the *Zippo* analysis inappropriate where "the defendant does not own or control the website); *see also* Shamsuddin v. Vitamin Research Prods., 346 F. Supp. 2d 804, 813 (D. Md. 2004) ("Website interactivity is important only insofar as it reflects commercial activity, and then only insofar as that commercial activity demonstrates purposeful targeting of residents of the forum state or purposeful availment of the benefits or privileges of the forum state."); Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1160 (W.D. Wisc. 2004) (noting that a passive website may be sufficient for personal jurisdiction if it is used to intentionally harm the plaintiff in the forum state and an interactive website may be insufficient if it is not directed at the residents of the forum state, demonstrating how "a rigid adherence to the *Zippo* test is likely to lead to erroneous results.").

163. Rather than being its own subcategory, internet use is simply a middle layer or filter between a defendant's activities and their effects in the forum. So while a traditional libel case would analyze the effects of a publication on an in-state plaintiff as well as the circulation within the state, doing business there, so too should an intentional tort case arising out of internet use be analyzed: by looking at the effects of the actions on in-state persons, and how much business is done in the state. Similarly, a products liability case does not cease to be determined by stream-of-commerce principals simply because the product was purchased over the Internet. *See Hy Cite*, 297 F. Supp 2d at 1160 ("[R]egardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action or unless the contacts . . . are so substantial they may be considered 'systematic and continuous' for the purpose of general jurisdiction."); Spencer, *Jurisdiction and the Internet*, *supra* note 43, at 97–99.

their interpretation of what makes a website interactive.[164]

The *Zippo* test (or at least courts' embrace of it) is also criticized for functioning as an alternative to existing Supreme Court precedent.[165] Finally, a further concern involves the courts having latched on to a single test—*Zippo*—for application to Internet contacts without noting that *Zippo* itself was confined to specific jurisdiction in a commercial context.[166]

D. *Positive Trends: Application of Traditional Personal-Jurisdiction Concepts to Internet Cases and the Concept of Targeting*

There have been two positive trends away from the one-size-fits-all *Zippo* interactivity test. The first is toward a more traditional analysis of internet contacts that does less harm to the logic of the Supreme Court's precedents—a movement advocated by many scholars.[167] Courts are increasingly treating internet contacts more like ordinary contacts, and the *Zippo* test is finding less favor.[168]

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164. *Compare* Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 44 (D. Mass. 1997) (finding interactivity based on a website's encouragement and enabling of users to email the company) *with* Butler v. Beer Across Am., 83 F. Supp.2d 1261, 1266 (N.D. Ala. 2000) (finding insufficient interactivity in a website through which the plaintiff's son placed an order for the purchase of an alcoholic beverage).

165. *See Hy Cite*, 297 F. Supp. 2d at 1160 ("[T]he [Supreme] Court 'long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests. . . . [S]pecialized tests are often 'doomed to be shallow and to miss unifying principles.'") (internal citations omitted).

166. Yokoyama, *supra* note 119, at 1167 ("[E]ven though the *Zippo* test arose from a trademark dispute and the jurisdictional issue was squarely centered on specific jurisdiction, courts soon adopted and applied the *Zippo* test in substantively divergent cases, as well as applying the test to general jurisdiction issues. The result has been the inappropriate transformation of the *Zippo* test into an all-purpose test for Internet jurisdiction issues.") (internal citations omitted).

167. *See* Spencer, *Jurisdiction and the Internet*, *supra* note 43, at 104 (advocating traditional analysis); Steuer, *supra* note 121, at 355 (explaining that "[t]here is nothing problematic about continuing to use the traditional analysis to determine jurisdiction based on Internet contacts."); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW, 1167, 1173 (1998) ("[I]n spite of all its space-defying qualities, claims arising on the Internet are susceptible to a fairly coherent resolution under existing jurisdictional doctrine."); TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L. J. 519, 530 (2004) (arguing that "by modifying the *Zippo* sliding scale or utilizing the *Calder* effects test, [some] courts have unwittingly returned to the traditional personal jurisdiction test.").

168. *See* Boschetto v. Hansing, 539 F.3d 1011, 1016–18 (9th Cir. 2008) (applying traditional minimum contacts test to decline jurisdiction over eBay seller); Precision Craft Log Structures, Inc. v. Cabin Kit Co., Inc., No. CV05-199-S-EJL, 2006 WL 538819, at *6 (D. Id. Mar. 3, 2006) (applying traditional jurisdiction principles rather than interactivity to find specific jurisdiction in copyright infringement case); Dagesse v. Plant Hotel N.V., 113 F. Supp. 211, 223 (D.N.H. 2000) ("[A] proper analysis of the jurisdictional effects of an internet web site must focus on whether the defendant has actually and deliberately used its web site to conduct commercial transactions or other activities with residents of the forum."); Roblor Mktg. Group, Inc., v. GPS Indus., Inc., No. 08-21496-CIV, 2009 WL 2003156, at *8 (S.D. Fla. July 6, 2009) ("We share in the criticism of

Second, as pointed out above,[169] many courts have added a "targeting" element to their use of the *Zippo* test,[170] a move that has also been advocated by scholars.[171] The targeting concept has roots in the *Calder* "effects" test and in the *Asahi* plurality opinion[172] but primarily relates to the requirement of purposeful availment that is the touchstone of traditional minimum contacts analysis.[173] Targeting has been advocated as a means of focusing on a defendant's actions—those directed toward a particular jurisdiction, rather than actions directed at all jurisdictions simultaneously—as well as a means of focusing on actions that the

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over-reliance on the sliding scale of interactivity analysis."); Foley v. Yacht Mgmt. Group, Inc., No. 08 C 7254, 2009 WL 2020776, at *3 n.1 (N.D. Ill. July 9, 2009) ("This Court agrees that the *Zippo* test is not particularly helpful and thus should not be applied in the context of a public internet auction site. As such, the Court will apply a traditional analysis focusing on purposeful availment of a forum."); Pres-Kap, Inc. v. Sys. One, Direct Access, Inc., 636 So. 2d 1351–52 (Fla. 3d Dist. Ct. App. 1994) (applying traditional analysis to decline its exercise of personal jurisdiction); GTE New Media Servs., Inc. v. Bellsouth Corp., 199 F.3d 1343, 1349–50 (D.C. Cir. 2003) ("Access to a website reflects nothing more than a telephone call by a District resident to the defendants' computer servers, all of which apparently are operated outside of the District.").

169. *See supra* note 133 and accompanying text.

170. *See* Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (finding that the "express aiming" required by the Supreme Court "is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state"); Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 400 (4th Cir. 2003) (requiring "something more than merely plac[ing] information on the Internet" for jurisdiction based on Internet contacts); Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696, 700 (D. Md. 2001) (finding the exercise personal jurisdiction based on web site existence inappropriate where site "does not target Maryland in any way").

171. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380–1404 (2001) (advocating the use of three criteria to assess whether a website has targeted a particular jurisdiction: contracts, technology, and actual or implied knowledge); Scott T. Jansen, Comment, *Oh What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived From Internet-Based Contacts*, 71 Mo. L. REV. 177, 199–202 (2006) (discussing alternative tests); Brian D. Boone, Comment, *Bullseye!: Why a "Targeting" Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally*, 20 EMORY INT'L L. REV. 241, 288 (2006) ("For businesses engaged in E-commerce, widespread adoption of a targeting approach would alleviate much of the opportunity for unreasonable litigation because business owners could limit the geographic areas they target for business, regardless of whether they are technically 'successful' at keeping users from certain locales off their site. For the typical Internet plaintiff, such a targeting requirement would spell the end of lawsuits in the plaintiff's forum state when all that was accessed in the state was a website not *intending* to do business in that state. Such a result would be encouraging to E-commerce innovation and expansion.").

172. Asahi Metal Indus. Co. v. Sup. Ct., 480 U.S. 102, 112 (1987) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.") (citations omitted); *see* Boone, *supra* note 171, at 252 ("[I]t is Justice O'Connor's plurality opinion, though criticized by Justice Stevens in a separate concurrence, which adopted a targeting approach to stream-of-commerce cases.") (footnote omitted).

173. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("[A] forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents.") (citation omitted).

defendant should reasonably expect to result in his or her being haled into the forum state.[174]

Despite these positive trends, the state of the case law remains in hopeless confusion. If anything, courts are even more confused about the applicable standards. In a recent case in the Middle District of Pennsylvania,[175] a court applied three different tests to determine whether the plaintiffs had made a prima facie case for personal jurisdiction based on antitrust and consumer-protection claims:

> Three alternative theories allow a court to acquire specific jurisdiction over a defendant. First, under principles of purposeful availment, the court may exercise jurisdiction over a defendant that has directed its activities into a forum, thereby producing the alleged injury. Second, the stream-of-commerce theory provides jurisdiction over an out-of-forum defendant if plaintiff's in-forum injury arises from a product that defendant placed into channels of commerce. Third, the effects test announced in *Calder v. Jones* confers jurisdiction over a defendant whose tortious conduct performed outside the forum produced effects within the forum.[176]

The court separately addressed each such basis for specific jurisdiction, as well as the plaintiff's argument for general jurisdiction, finding none of them sufficient as applied to the foreign defendants. Finally, the court addressed whether those defendants could be subject to "alter ego jurisdiction" based in part on the existence of websites suggesting that the foreign and domestic companies operated as "integrated conglomerates with a single identity."[177] The suggestion of jurisdiction based tangentially on the existence of a website prompted the court to apply yet another test of personal jurisdiction: *Zippo* interactivity.[178] Despite the fact that the plaintiff's argument was apparently based on the websites only to the extent that those sites revealed evidence of alter ego status, the court analyzed the sites' interactivity and whether they were directed at the forum.[179]

Thus despite some positive trends, the application of the Supreme

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174. In addition, commentators have advocated the use of "targeting" in an international context as a step toward global minimum legal standards for the exercise of jurisdiction in the e-commerce context. Geist, *supra* note 171, at 1382; Boone, *supra* note 171, at 287–88.

175. *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 557 (M.D. Pa. 2009).

176. *Id.* (internal citations omitted).

177. *Id.* at 570.

178. *Id.* at 570–71 n. 35 ("A website may support exercise of jurisdiction if the defendant 'intentionally interacts with the forum . . . via the web site.") (quoting Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003), and Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126 (W.D. Pa. 1997)).

179. *Id.* (finding the sites "properly considered as a contact for purposes of general jurisdiction" but because they lack "a particularized intent to conduct business with American residents," they would receive little weight).

Court's personal-jurisdiction precedents—particularly to online activities—is as confused as ever.

IV. MODERN PERSONAL-JURISDICTION LAW IS A DRAIN ON FEDERAL AND STATE COURT SYSTEMS

The existence of personal jurisdiction over nonresident defendants—individual or corporation, large or small, foreign or domestic—remains a constant unknown.[180] And, the issue is litigated more than ever.[181] In a search of cases considering motions to dismiss for lack of personal jurisdiction, citations on Westlaw rose from 534 in 1988 to 740 in 1998, to 1767 in 2008.[182] *International Shoe* has been cited by courts over 14,000 times. The use of the Internet will only increase the number of cross-state contacts in the future, promising more such judicial labor.[183]

There is evidence that this jurisdictional uncertainty inhibits

180. *See* David S. Welkowitz, *Beyond* Burger King: *The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 1 (1987) (discussing the complaint of a federal district court judge that lawyers are unable to answer clients' questions about personal jurisdiction with certainty); Casad, *supra* note 106, at 1589–90 (calling Supreme Court decisions "far from satisfactory," "[lacking] a coherent philosophical foundation," and noting "[i]t is not surprising that cases presenting the issue of amenability to personal jurisdiction under these confusing standards now make up a large share of reported state and federal decisions"); *id.* at 1593 ("Because outcomes are often difficult to predict, parties are inclined to litigate the question of personal jurisdiction in every case where the issue is not crystal clear. Hence, we get more and more conflicting decisions."); Cameron & Johnson, *supra* note 14, at 833 ("Unfortunately, uncertainty in the most commonplace situations has increased, rather than decreased, as *International Shoe* has matured.").

181. *See* Casad, *supra* note 106, at 1591 ("We are bound to continue expending countless hours of attorney time litigating whether a defendant has contacts with the forum state sufficient to satisfy *International Shoe* and its progeny.").

182. Using the search terms "dismiss /s 'personal jurisdiction'" and the database "allcases," I found the following number of citations for the following years:

1988: 534	1995: 691	2002: 947	2009 (as of 8/7/09):
1989: 559	1996: 775	2003: 999	1058
1990: 663	1997: 739	2004: 989	
1991: 671	1998: 741	2005: 1336	
1992: 662	1999: 793	2006: 1676	
1993: 628	2000: 818	2007: 1758	
1994: 708	2001: 867	2008: 1767	

While some of this increase is attributable to the increase in availability of decisions on Westlaw, I believe it clearly reflects an increase in the number of such motions, particularly in the last five years. This list also includes appellate decisions, but an increase in appeals also reflects uncertainty in the law.

183. *See* ABA GLOBAL CYBERSPACE JURISDICTION PROJECT, ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A REPORT ON GLOBAL JURISDICTION ISSUES CREATED BY THE INTERNET 6 (London Meeting Draft 2000) ("The volume of cross-state contacts has increased and will

internet commerce.[184] Research has suggested a positive correlation between the outcome of personal-jurisdiction disputes and the outcome on the merits,[185] all the more reason to litigate the issue.[186] The jurisdiction question ties up the systems of both state and federal courts,[187] causing litigants to incur time and expense in the fight over an issue tangential to the merits.

V. SHORT-ARM STATUTES: A SOLUTION HIDDEN IN PLAIN SIGHT

States have always had the ability to exercise less personal jurisdiction than the Constitution would allow[188]—and indeed, many states have long-arm statutes that would seem to do just that, at least based on their precise language.[189] However, thirty-two states have long-arm statutes that either explicitly, or by virtue of courts' interpretation of their legis-

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continue to increase at a more rapid rate by virtue of the proliferation of electronic communications and the use of the Internet in commercial applications.").

184. MICHAEL GEIST, AMERICAN BAR ASSOCIATION, *Global Internet Jurisdiction: The ABA/ICC Survey* 1 (Apr. 2004), http://www.abanet.org/buslaw/newsletter/0023/materials/js.pdf (finding by 2003 survey of companies worldwide that U.S. companies believed the internet jurisdiction issue had become worse over the past two years and would continue to worsen, and also finding that "the risk of getting hauled into court is the biggest fear of companies operating online."); *id.* at 16 ("Thirty-seven percent of North American respondents said that online business had become harder since 2001 and only six percent replied that it had become easier.").

185. Cameron & Johnson, *supra* note 14, at 780 (finding "a clear correlation [in the Supreme Court's jurisdictional decisions following *Internationall* Shoe] between the party who prevailed on jurisdiction and the victor on the merits.").

186. *Id.* at 837 ("If the party prevailing in a personal jurisdiction dispute (and thus on forum choice) is more likely to prevail on the merits, defendants are more likely to contest jurisdiction and plaintiffs are more likely to resist the challenge."); *id.* at 838 ("[T]he current doctrinal uncertainty almost mandates competent attorneys to litigate the issue when a defendant is sued far from home").

187. *Id.* at 835 ("State, as well as federal, courts have been forced to deal with the fallout. Litigation over personal jurisdiction abounds in the bread-and-butter of state court dockets.").

188. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 450–51 (5th ed., West Publishing Co. 1994); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 440 (1952) ("The suggestion that federal due process *compels* the State to open its courts to [any] case has no substance.").

189. Thirty states have "specific acts" or "enumerated acts" long-arm statutes that specify the circumstances under which out-of-state defendants are subject to personal jurisdiction in the state. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525 (2004). However, twelve of those states have interpreted their statutes to extend to the limit of due process. *Id.* at 526–27. That leaves only eighteen states that exercise less than the full amount allowed by the Constitution. *Id.* at 525–26 (listing Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, West Virginia, and Wisconsin as the short-arm states). *But see* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 n.12 (3d ed. 1998) (stating that Oklahoma and Wyoming have been interpreted not to reach the limits of the Constitution, but that Georgia, Maryland, Michigan, Missouri and West Virginia have all interpreted their long-arm statutes to assert maximum jurisdiction). There is clearly some confusion in the area of state long-arm practice.

lature's intent, extend to the limits of due process.[190] So in many instances, rather than simplifying the process, the application of the long-arm statute is an utterly pointless exercise in fitting facts within statutory parameters before tossing that statute aside and getting to the constitutional analysis.[191]

Instead, states should reevaluate their long-arm statutes to provide for less conferral of personal jurisdiction than the Constitution allows and to assert jurisdiction in more specific circumstances in which those states have a legitimate interest.[192] While this will not eliminate the constitutional issue, which will arise in any event when a court decides that jurisdiction exists, it will result in more certainty.[193] And most importantly, it ties together the Supreme Court precedent expressing deference to state interests and states' articulation of those interests.[194] If the state expresses a legitimate interest in exercising jurisdiction in certain circumstances, the Court will in turn give deference to that expression.[195]

State long-arm statutes could be crafted in a way that manifests the

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190. *But see* McFarland, *supra* note 189, at 511–24 (suggesting that long-arm statutes have been improperly construed to extend to due process limits).

191. In one recent case that clearly pushed statutory construction to the side, the court agreed with the parties that the facts of the case did not fall within Kentucky's long-arm statute, but nonetheless analyzed the question of personal jurisdiction under constitutional standards. Doe v. Al Maktoum, No. 07-293-KSF, 2008 WL 4965169, at *2–3 (E.D. Ky. Nov. 18, 2008) ("[E]ven if a defendant's conduct does not fit within one of the clauses of Kentucky's long-arm statute, a court may still exercise personal jurisdiction over a nonresident if the defendant's contacts with Kentucky are sufficient under Constitutional due process standards."). *Id.* at *3. Even when the statute is clearly meant to extend to due process, problems arise. *See* WRIGHT & MILLER, § 1068, *supra* note 189 (3d ed. 1998) (Stating that a long-arm statute that explicitly goes to the extent of due process "suffers from vagueness, encourages litigation over jurisdiction questions, and tends to convert every jurisdictional issue into a dispute with constitutional dimensions.").

192. *See infra* APPENDIX.

193. *See* David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233, 269 (1990) (describing certainty and fewer appeals as benefits of adopting a categorical or enumerated acts long-arm statute).

194. This solution advances both the state sovereignty and due process bases for jurisdiction advanced by scholars. *See supra* note 41 and accompanying text. Shorter long-arm statutes further the sovereignty basis for personal jurisdiction by reflecting states' own indication of what their interests are. They further the due process concept because, by having such a statute with specific bases for personal jurisdiction, defendants should foresee being haled into court in that forum if they commit that activity and are purposefully availing themselves of the benefits of that state's laws if they do commit those acts. This solution also avoids the due process prohibition against states' arbitrary assertions of jurisdiction by advocating arms that are shorter than what due process will allow.

195. *See* Spencer, *Jurisdiction to Adjudicate*, *supra* note 41, at 645 ("[T]he concept of minimum contacts was originally intended to protect the notion that valid adjudicatory jurisdiction is limited to those cases in which the defendant's contacts have implicated legitimate interests of the state. That is, the minimum connection that must exist between a nonresident defendant and the forum is one where the alleged actions of the defendant have implicated the legitimate interests of the forum state, creating a link that makes it fair and nonarbitrary for that state to exercise adjudicatory authority over the case against that defendant.").

circumstances under which those states have a compelling interest in exercising jurisdiction over both internet and noninternet activity.[196] That activity then would constitute the contacts upon which personal jurisdiction is based because defendants would be holding up their end of the *quid pro quo* envisioned in Supreme Court precedent. Such defendants would also be on notice in a much more specific way that their activities may result in them being haled before a court of that state.

An analogy can be made to service of process. While there is an over-arching constitutional standard that tells us when notice is sufficient,[197] individual states and the federal courts have rules that are well within the Constitutional requirement and specify proper means of service of process.[198] The issue of whether someone has been properly served is thus a much more certain one. Venue is another example where the Constitution would allow greater leeway than statutory requirements, but the existence of specific rules results in greater certainty and less litigation.[199]

A. *Legitimate State Interests*

As set forth above, the Supreme Court has approved of states' expression of their interests in exercising personal jurisdiction in instances where citizens of the state have been harmed by intentional actions of the defendant directed toward the state,[200] where the claims involved the maintenance of trusts established under the law of the state[201] or the activities of officers and directors of corporations established under the law of the state,[202] or in circumstances where "defendants 'purposefully derived benefit[s]' from their interstate activities."[203] Similarly, many existing state long-arm statutes provide for jurisdiction

196. The model statute separately addresses when internet business is deemed to be conducted within the state. Other internet activity, like communication or tortious activity, would be analyzed like non-internet activity. *See infra* APPENDIX.

197. Milliken v. Meyer, 311 U.S. 457, 463 (1941) (stating that the form of service must be "reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312–13 (1950) (explaining that the Constitution requires defendants be "accord[ed] full opportunity to appear and be heard.").

198. *See* FED. R. CIV. P 4.

199. *See* Cameron & Johnson, *supra* note 14, at 841.

200. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985).

201. *See* Hanson v. Denckla, 357 U.S. 235, 254–55 (1958).

202. *See* Shaffer v. Heitner, 433 U.S. 186, 213–17 (1977).

203. *Burger King*, 471 U.S. at 473–74 (citing Kulko v. Super. Ct. of Cal., 436 U.S. 84, 96 (1978)).

in these circumstances.[204]

Other examples in which states assert personal jurisdiction in accordance with recognized interests include provisions for jurisdiction over defendants who insure in-state people or property;[205] claims involving divorce or for alimony, paternity, child support, or custody;[206] claims arising out of mortgages or foreclosure actions;[207] and actions for the collection of taxes.[208] North Carolina has even revised its long-arm statute to specifically cover claims for injury where at or about the time of the injury the defendant sent "unsolicited bulk commercial e-mail" into the state.[209]

Other traditional state interests reflected in long-arm statutes include jurisdiction over contracts to supply goods or services within the state and jurisdiction where the cause of action is connected to real property located within the state.[210]

States also express their lack of interest in hearing certain types of cases. For example, some states limit the reach of their long-arm statutes to cases brought by residents of the forum.[211] Many states choose not to assert long-arm jurisdiction over defamation cases.[212] In some states, the

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204. The model statute provides for jurisdiction over defendants who act intentionally and harm a person or property within the state where the defendant derives substantial revenue from interstate or international commerce. *See infra* APPENDIX.

205. *See* DEL. CODE ANN. tit. 10, § 3104(c)(6) (2009); FLA. STAT. ANN. § 48.193(1)(d) (West 2009); HAW. REV. STAT. ANN. § 634-35 (a)(4) (West 2009); IDAHO CODE ANN. § 5-514(d) (West 2009); MASS. GEN. LAWS ANN. ch. 223A; § 3(f) (West 2009); MICH. COMP. LAWS ANN. § 600.705(4) (West 2009); MO. ANN. STAT.. § 506.500.1(5) (West 2009); MONT. R.CIV.P. 4B(1)(d) (2009); N.M. STAT. ANN. § 38-1-16(A)(4) (West 2009); N.C. GEN. STAT. ANN. § 1-75.4(10) (West 2009); OHIO REV. CODE ANN. § 2307.382(A)(9) (West 2009); W. VA. CODE ANN. § 56-3-33(a)(7) (West 2009); WIS. STAT. ANN. § 801.05(10) (West 2009).

206. *See* FLA. STAT. ANN. § 48.193(1)(e), (h) (West 2009); GA. CODE ANN.§ 9-10-91(5) (West 2009); IDAHO CODE ANN. § 514(e), (f) (West 2009); MASS. GEN. LAWS ANN. ch. 223A, § 3(g), (h) (West 2009); MICH. COMP. LAWS ANN. § 600.705(7) (West 2009); MO. ANN. STAT. § 506.500.1(6), 2 (West 2009); N.M. STAT. ANN. § 38-1-16(A)(5) (West 2009); N.Y. C.P.L.R. 302(b) (McKinney 2009).

207. *See* N.C. GEN. STAT. ANN. § 1-75.4(6)(d) (West 2009); WIS. STAT. ANN. § 801.05(7) (West 2009).

208. *See* N.C. GEN. STAT. ANN. § 1-75.4(9) (West 2009); WIS. STAT. ANN. § 801.05(9) (West 2009).

209. N.C. GEN. STAT. ANN. § 1-75.4(4)(c) (West 2009).

210. *See* Spencer, *Jurisdiction to Adjudicate, supra* note 41, at 649–50.

211. *See* WRIGHT & MILLER, § 1068, *supra* note 189 (describing long-arm statutes in Mississippi, Utah, Wisconsin, and Massachusetts).

212. *See* CONN. GEN. STAT. ANN. § 52-59b(a)(2) (West 2009); N.Y. C.P.L.R. 302(a)(2) (McKinney 2009). *But see* Jeffrey A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine* International Shoe *After Its First Sixty Years*, 3 SETON HALL CIR. REV. 339, 377 (2007) (stating that Georgia's long-arm statute includes a defamation exclusion that "is out of date, based on a Fifth Circuit line of cases in the 1960s decided prior to the enactment of

long-arm statute only applies to corporate defendants[213] or to associations and partnerships.[214] In addition, states may decide to limit the reach of their jurisdictional arms in cases involving commercial claims as opposed to tortious injury.[215]

These existing expressions of state interests should be followed as written, rather than being construed to the extent of the Constitution and should be narrowed even further to increase certainty. For example, where the state wishes to exercise jurisdiction over defendants who intentionally harm citizens via activity directed toward the state, the statute could specify what is meant by "directed" activity.[216]

B. *Specification in Traditional Contexts*

In addition to these already-existing expressions of state interest, states should more clearly specify the circumstances under which individuals and corporations are subject to jurisdiction under their long-arm statutes in the broader contexts discussed under the Supreme Court precedents—contracts, stream of commerce, and intentional torts. For example, existing categorical long-arm statutes often provide for jurisdiction over a defendant who "transacts business" in the state.[217] The statutes could define the transaction of business to include more substantial contacts than the Constitution would require—perhaps by reference to a minimum dollar amount of business done in a specified period[218] or a minimum percentage of the defendant's business being done in the state.[219] While these figures and criteria may become dated, the legisla-

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the long-arm, which held that First Amendment concerns required greater showing of contacts to satisfy due process in defamation cases against nonresidents.").

213. *See* WRIGHT & MILLER, § 1068, *supra* note 189 (citing to TENN. CODE ANN. § 20-2-223 (West 2009) and VT. STAT. ANN. tit. 12 § 913(b) (2009)).

214. *See id.* (citing to TENN. CODE ANN. § 20-2-223 (West 2009)).

215. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (referring to states' "manifest interest" in providing a forum for redressing injuries inflicted on their residents); WRIGHT & MILLER, § 1068, *supra* note 189 (noting the original nonresident motorist statutes paved the way for statutes asserting personal jurisdiction based on a variety of hazardous activities).

216. The model statute attempts to do this in the context of internet activity. *See infra* APPENDIX.

217. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3104(c)(1) (2009) ("Transacts any business or performs any character of work or service in the State"); FLA. STAT. ANN. § 48.193(1)(a) (West 2009) ("Operating, conducting, engaging in, or carrying on a business or business venture in this state . . ."); GA. CODE ANN. § 9-10-91(1) (West 2009) ("Transacts any business within this state"); HAW. REV. STAT. ANN. § 634-35(a)(1) (West 2009) ("The transaction of any business within this State"); MD CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1) (LexisNexis 2009) ("Transacts any business or performs any character of work or service in the State").

218. *See* Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 455–57 (E.D.N.Y. 2004) (upholding jurisdiction over nonresident who contracted with New York corporation, generating more than $17,000 in income for the defendant).

219. *See* Bassili v. Chu, 242 F. Supp. 2d 223, 229–30 (W.D.N.Y. 2002) (upholding jurisdiction

tion can be changed.[220] The requirement of more substantial business to be done by the defendant in the forum state is itself an expression of the state's legitimate interest in exercising jurisdiction only over defendants who seek and receive substantial benefits from the forum's laws.[221]

C. *The Internet Context: A Definition of Virtual Availment*

The internet field is one particularly ripe for states to weigh in on. In addition to judicial efficiency, state legislatures should consider economic interests: if their state is considered hostile to web commerce, website operators may use technology to avoid doing business in that state.[222] Alternatively, states may encourage web commerce by limiting jurisdiction over defendants based on website operations alone to specific circumstances.[223]

As discussed above, internet activity is most often relied upon for a court's exercise of personal jurisdiction in cases based on (i) web commerce; (ii) intentional torts such as online defamation; and (iii) trademark and copyright infringement. States could revise their long-arm statutes to better define the circumstances under which internet activity gives rise to jurisdiction in those contexts.

(i) Web Commerce. Similar to the suggestion above in other business contexts, state long-arm statutes could limit the finding that a defendant is "doing business" via a website as the sole basis for jurisdiction to situations where the defendant performs a specified minimum amount of business in the state (either in dollar or percentage terms), and

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over nonresident defendant who did business in state of 3.5% and 2.5% of total sales in the last two years, amounting to $30,000).

220. The minimum amount in controversy necessary for diversity jurisdiction is an example of legislation changing with time and inflation. *See* 28 U.S.C. § 1332 cmt. (2005) (the statute was amended from requiring $3,000 to $10,000 in 1958; to $50,000 in 1988; to $75,000 in 1996)

221. It may also benefit the states themselves economically. *See* McFarland, *supra* note 189, at 533 (noting that one advantage of enumerated acts statutes is that they may promote the state's economy by encouraging economic activity by nonresident businesses who perceive themselves as having greater freedom there).

222. *See* Michael Geist, *Cyberlaw 2.0*, 44 B.C. L. REV. 323, 334 (2003) (discussing geographic identification on the internet); Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1961–62 (2005) (explaining how technological innovations allow website filtering to avoid purposeful availment).

223. *See* Burk, *supra* note 127, at ¶ 60–61. (Concluding that broad amenability based on internet contacts "may very well raise the price of participation beyond the average citizen's reach. . . . The average user simply cannot afford the cost of defending multiple suits in multiple jurisdictions, or of complying with the regulatory requirements of every jurisdiction she might electronically touch."); ELECTRONIC COMMERCE PROJECT'S AD HOC TASK FORCE, ICC, POLICY STATEMENT: JURISDICTION AND APPLICABLE LAW IN ELECTRONIC COMMERCE, *available at* http://www.iccwbo.org/id478/index.html (2001) (describing the negative result of jurisdictional ambiguity).

the cause of action arises out of that website business.[224] In addition, states could statutorily affirm sites' "jurisdictional avoidance" efforts.[225]

(ii) Intentional Torts. States could better define the type of targeting activity that they envision giving rise to liability. This could take the form of a *mens rea* requirement—that the defendant knew the target of the defamation was located in or would feel the effects in the forum state, for example—or a quantity calculation where a single such targeted statement would be insufficient, but numerous efforts to target forum residents would suffice.

(iii) Trademark and Copyright Infringement. As with the intentional torts discussed above, states could distinguish between mere negligent infringement that lacks intent to harm anyone in the forum and intentional infringement targeted at the forum.[226] States could also make the decision that they are more concerned with infringement of websites that are interactive, as in *Zippo* itself, and build that into the long-arm statute: a defendant would subject himself to personal jurisdiction in the forum state based on a claim for trademark infringement if the allegedly infringing website is both interactive and targeted at the forum.

D. *The Model Short-Arm Statute*

Attached as "APPENDIX" is a model statute, primarily drafted based on New York's long-arm statute, N.Y. C.P.L.R § 302, with additional restrictions borrowed from section 48.193 of the Florida Statutes, and additional suggested restrictions on internet-based contacts. Aside from the internet context, states should be encouraged to consider other substantive types of claims for which they wish to extend or contract their jurisdictional reach. For example, the model statute does not carve out

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224. States could choose to assert jurisdiction over cases in which the internet business done by the defendant is also the type of business which affects traditional local state interests, as in Illinois v. Hemi Group, LLC, No. 08-3050, 2008 WL 4545349, at *4 (C.D. Ill. Oct. 10, 2008) (upholding jurisdiction based on only six sales to in-state residents over a two-year period, but the sales implicated the state's health and welfare interest).

225. *See* Geist, *Is There a There?*, *supra* note 171, at 1393–98 (describing "technologies that provide businesses with the ability to reduce their legal risk by targeting their online presence to particular geographic constituencies."); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. REV. 411, 451–52 (2004) (discussing technological means by which website operators can avoid entering into business with certain jurisdictions); *see also* Model Short-Arm Statute, APPENDIX.

226. *Compare* Andy's Music, Inc. v. Andy's Music, Inc., 607 F. Supp. 2d 1281, 1284 (S.D. Ala. 2009) (refusing to apply *Calder* effects test to allegations of *negligent* trademark infringement) *with* Toytrackerz LLC v. Koehler, No. 08-2297-GLR, 2009 WL 1505705, at *11 (D. Kan. May 28, 2009) (applying *Calder* to allegations of continuing engagement in trademark infringement, "after receiving notice of Toytrackerz' claims to the trademarks," as well as defamation).

actions for defamation,[227] and it does not specifically provide for jurisdiction over actions based on loans made in the state.[228] It also does not specify a minimum dollar or percentage for "doing business," instead following the example of states that require "substantial revenue" from in-state activity where the defendant commits a tort outside the state.

Where the model statute is most innovative is in its treatment of business conducted via the Internet. The model statute provides:

> **Internet Business.** Business is deemed to be transacted within the state when that business is conducted via website activity that is targeted at the state or at a person within the state, and results in a purchase or sale being made or service being provided by or to an in-state resident.[229] "Targeting" means commercial activity specifically directed to the forum state, including, for example, designing the website for the market in the state, advertising in the state, or knowing and continuous sales made or services provided to in-state residents.
>
> **Jurisdictional Avoidance.** A website's use of procedures that are reasonably designed to guard against business in the forum is *prima facie* evidence that the website is not "targeted" at the forum.[230]

This allows jurisdiction where activity is directed toward a forum, and avoids the nebulous interactivity inquiry, increasing the foreseeability of being haled into court in that forum and fulfilling the *quid pro quo* envisioned by Supreme Court precedent. The model also allows website operators who use technological means to avoid doing business in a jurisdiction to get the benefit of that effort: there is a presumption that such a website is not targeted at the forum, although that presumption could be overcome by contrary evidence.

The statute would provide for jurisdiction in situations like that of *Zippo* itself, where Pennsylvania residents were subscribers to the defendant's website service (thus services were provided to instate residents

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227. New York's long-arm statute does make an exception for defamation cases. N.Y. C.P.L.R. 302(a)(2) (McKinney 2009). It was also recently amended to provide for jurisdiction over defendants in a declaratory judgment attacking liability based on foreign defamation proceedings; the "Libel Terrorism Protection Act" passed in the wake of Ehrenfeld v. Bin Mahfouz, 881 N.E. 2d 830, 833–36 (N.Y. 2007). *See* N.Y. C.P.L.R. § 302, Supplementary Practice Commentary by Vincent C. Alexander (McKinney 2008).

228. *See* N.C. GEN. STAT. ANN. § 1-75.4(6)(d) (West 2009).

229. *See infra* APPENDIX.

230. This language is based on the Securities and Exchange Act opinion as to when an offshore issue comes under its regulation. Among the factors the Commission stated it would consider in determining whether the United States was de-targeted on the internet were "whether the website offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering." Boone, *supra* note 171, at 272 (quoting the Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities Offshore, Securities Act Release No. 7516 (Mar. 23, 1998)).

in the language of the model statute), and the defendant entered into contracts with Internet service providers in Pennsylvania (thus constituting "targeting").

Internet domain-name suits could also fall within section (a)3 of the Model Statute for commission of tortious acts outside the state having effects within the state.[231] If the defendant's actions were intentional, the lesser showing of 3(ii) would apply—"derives substantial revenue from interstate or international commerce."[232] Otherwise, the defendant must derive substantial revenue from in-state activity.

An example where jurisdiction would not be found under the model statute is that presented by the recent case of *Sayeedi v. Walser*,[233] where the New York purchaser of an item on e-Bay sued the seller for breach of contract.[234] Because the seller, a casual user of the eBay system, did not target New York—instead he presented the item as open to any and all bidders, who themselves would dictate the shipping location[235]—he would not have done "business" in the forum under section (b) of the model statute.

Other internet activity, including electronic communication or tortious activity like defamation, would be treated like noninternet activity under this model. Of course, online defamation would likely fall within the intentional tort category of 3(ii) with its broader revenue requirement. Alternatively, the online defamer may be deemed to be doing business within the state under (a)(1) (and doing business is further defined in the internet context). The intentional defamation could be deemed "targeted at the state or a person within the state," and the defendant's internet activity must also have resulted in a purchase or sale or service provided by or to an in-state resident.

E. *Arguments Against the Short-Arm Solution*

Following are some potential arguments against the solution that states modify their long-arm statutes to provide for personal jurisdiction in well-defined circumstances that fall well within due process limits.

1. Inconvenience to plaintiffs. There will be some plaintiffs who are unable to sue in the forum of their choice. But states should be encouraged to make a judgment call as to the circumstances in which they believe convenience to plaintiffs is outweighed by the benefits of

231. *See infra* APPENDIX.

232. *Id.*

233. 835 N.Y.S.2d 840, 843–44 (N.Y. Civ. Ct. 2007) (finding no personal jurisdiction based on New York's long-arm statute).

234. *Id.* at 841.

235. *Id.* at 843.

certainty and predictability. These circumstances will not include those causes of action that the states feel have a strongly local flavor. And all long-arm statutes could include a provision for allowing the exercise of personal jurisdiction to the constitutional limit where no other jurisdiction would be available to the plaintiff (i.e., where the defendant is foreign).[236]

2. *Litigation will not really be reduced.* Some say there is no less litigation with specific act statutes because the court nonetheless must address the constitutional issue. This ignores three points: First, if there is more certainty as to what circumstances give rise to personal jurisdiction, fewer plaintiffs will bring suit against defendants in unlikely fora, and fewer defendants will challenge jurisdiction when the circumstances fall within the specified limits. Moreover, if jurisdiction is not within the state's long-arm, there is no need (and in fact no basis) to consider the constitutional issue.[237] Finally, if jurisdiction falls within a shorter state long-arm statute, the constitutional question should be a relatively easy one.[238]

3. *Technology changes will make statutes obsolete.* The broader Constitutional tests like that set forth in *International Shoe* have the virtue of being flexible and adaptable to changes in technology, while specific statutes may not. But this problem is not new and has not been intractable.[239] State long-arm statutes have been revised frequently, including revisions to include jurisdiction over senders of "[u]nsolicited bulk commercial" e-mail[240]and to cover claims involving the operation of computers and computer programs.[241]

4. *States will not voluntarily contract their jurisdiction, but instead are prone to expand their sovereignty and overreach.* This argument is belied by the fact that at least some states already exercise less than the full extent of personal jurisdiction they are allowed.[242] In addi-

236. FED. R. CIV. P. 4(k)(2) would already allow this in federal court based on a federal claim.

237. *See* WRIGHT & MILLER, *supra* note 189 ("[I]f there is no basis in state law for exercising personal jurisdiction over a nonresident defendant, a federal court sitting in diversity of citizenship jurisdiction need not—and, indeed, should not—consider the constitutional due process question.").

238. The cases are rare in which the exercise of jurisdiction is found to comply with a truly limited categorical long-arm statute but nonetheless is found to violate due process. *See* Ganiko v. Ganiko, 826 So.2d 391, 394–96 (Fla. Dist. Ct. App. 2002); Taurus Textiles, Inc. v. John M. Fulmer Co., 372 S.E.2d 735, 737–38 (N.C. Ct. App. 1988). Under the short-arm approach, the result would be rarer still.

239. Service of process rules have also been revised to keep up with technological advances. *See* W. VA. CODE ANN. § 56-3-33(c) (West 2009) (allowing service by electronic means).

240. N.C. GEN. STAT. ANN. § 1-75.4(4)(c) (West 2009).

241. CONN. GEN. STAT. ANN. § 52-59b(a)(5) (West 2009); MD CODE ANN., CTS. & JUD. PROC. § 6-103(c)(2) (LexisNexis 2009).

242. And the process in which other states decided to extend their jurisdiction reach is murky.

tion, if legislators performed a cost-benefit analysis that takes into account the price that is paid for jurisdictional uncertainty that only increases litigation and expense, they might find a limitation on the exercise of personal jurisdiction to be welcome.[243] Instead of valuing jurisdiction for its own sake, states should consider what types of cases truly matter to them and to their citizens.

VI. CONCLUSION

The increase in certainty provided by shorter long-arm statutes will benefit potential defendants who will not be sued in the fora for which jurisdiction would have been a stretch under the Constitution. It will benefit potential plaintiffs who will know where they can obtain personal jurisdiction over a defendant and who will be able to move forward with the substance of their claims rather than being distracted by the inevitable jurisdictional side-show. And it will benefit the courts whose resources will be better spent in this manner than in repeating verbatim the jurisdictional dictates of the Supreme Court and parsing their import in the application to yet another fact pattern.

See McFarland, *supra* note 189, at 541 ("Court extension of enumerated-acts long-arm statutes to the limits of due process did not occur by considered precedent or reasoned analysis. Instead, it happened via bald assertion, assumption, mistake, and inadvertence.").

243. *See* Borchers, *supra* note 81, at 103–04 ("There is every reason to be optimistic . . . that with the matter placed back in the legislative arena, states will draft sensible and clear long-arm statutes.").

APPENDIX

Model Short-Arm Statute[244]

Personal Jurisdiction By Acts of Non-Domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state; or
3. commits a tortious act without the state causing injury to person or property within the state, if he
   i. regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   ii. expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses, or possesses any real property situated within the state; or
5. contracts to insure or act as surety for, or on, any person, property, risk contract, obligation or agreement located or to be performed within the state at the time the contract is made, unless the parties otherwise provide in writing.

Internet Business. Business is deemed to be transacted within the state when that business is conducted via website activity that is targeted at the state or at a person within the state, and results in a purchase or sale being made or service being provided by or to an in-state resident. "Targeting" means commercial activity specifically directed to the forum state, including, for example, designing the website for the market in the state, advertising in the state, or knowing and continuous sales made or services provided to in-state residents.

Jurisdictional Avoidance. A website's use of procedures that are reasonably designed to guard against business in the forum is *prima facie* evidence that the website is not "targeted" at the forum.

(b) Personal jurisdiction over nonresident defendant in matrimonial

244. This statute is modeled on New York's long-arm statute, N.Y. C.P.L.R. § 302 (McKinney's 2008), with additional restrictions borrowed from section 48.193, Florida Statutes (1995), and suggested restrictions on internet-based contacts. It should not be construed as going to the extent of due process.

actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state.

(c) **Effect of appearance.** Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.