

Here Today Gone Tomorrow: The Timing of Contracts for Jurisdiction and Venue Under 28 U.S.C. 1391

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NOTE

HERE TODAY, GONE TOMORROW: THE TIMING OF CONTACTS FOR JURISDICTION AND VENUE UNDER 28 U.S.C. § 1391

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INTRODUCTION

In 1988 Congress amended the federal venue statute, 28 U.S.C. § 1391(c), redefining corporate residence for venue purposes as "any judicial district in which [the defendant] is subject to personal jurisdiction at the time the action is commenced."¹ In 1990 and 1992, Congress amended section 1391(a), the federal venue statute for diversity of citizenship cases, to make venue proper in "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought."²

At first glance, these provisions suggest that the only relevant contact with the forum district is one that the defendant has at the time the action is commenced, rather than at the time the claim accrued.³ By referring specifically to the time of commencement, section 1391 also seems to imply that the concept of personal jurisdiction does not carry inherent notions of the timing of contacts. This implication is erroneous. Contrary to the implication of section 1391, a number of cases hold that the relevant time to determine personal jurisdiction is the time of accrual.⁴ Personal jurisdiction can be based either on a defendant's contacts with the forum

¹ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4669 (1988) (codified as amended at 28 U.S.C. § 1391(c) (Supp. 1991)). Prior to this change, corporate residence for venue purposes was defined as "any judicial district in which [the corporation] is licensed to do business or is doing business. . . ." 28 U.S.C. § 1391(c) (1976) *amended by* 28 U.S.C. § 1391(c) (Supp. 1991).

² Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 110, 104 Stat. 5089, 5114 (1990) (codified as amended at 28 U.S.C. § 1391(a)(3) (Supp. 1991)). The 1992 amendment added the language, "if there is no district in which the action may otherwise be brought." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 504, 106 Stat. 4506, 4513 (1992). No analogous provision appears in the prior version of § 1391(a).

³ A cause of action is "commenced" when the plaintiff files a complaint. FED. R. CIV. P. 3. "A cause of action [or claim] 'accrues' when a suit may be maintained thereon." BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

⁴ See, e.g., *Snyder v. Eastern Auto Distribs., Inc.*, 357 F.2d 552, 556 (4th Cir.), *cert. denied*, 384 U.S. 987 (1966); *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 11 (8th Cir. 1965); *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 827 (10th Cir. 1963); *First Pullen Commodity Servs., Inc. v. A.G. Becker-Kipnis & Co.*, 507 F. Supp. 770, 774 (S.D. Fla. 1981); *L'Heureux v. Central Am. Airways Flying Serv., Inc.*, 209 F. Supp. 713, 715 (D. Md. 1962); *Nelson v. Victory Elec. Works, Inc.*, 210 F. Supp. 954, 956 (D. Md. 1962); Annotation, *Provision in 28 U.S.C. § 1391(c) for Laying Venue of an*

that are related to the claim and occurred at the time the claim accrued, or on a defendant's domicile-type contacts with the forum at the time the claim is commenced.⁵ There is no evidence that Congress considered the timing-of-contacts issue when it amended section 1391.⁶ This Note takes up that task.

The concept of personal jurisdiction, as developed by the courts, may be divided into specific and general jurisdiction.⁷ Each of these conceptual categories is imbued with notions of the timing of contacts. Specific jurisdiction depends on a defendant's contacts with the forum at the time the claim arose. General jurisdiction depends on the contacts that existed at the time the action is commenced. While the new venue statute could be read as modifying the timing requirements of personal jurisdiction, this Note argues that the new venue statute merely requires that personal jurisdiction, whether specific or general, must continue to exist over the defendant at the time that the specific action is commenced.

To make sense of the new statute, it is necessary to take a closer look at the concepts of venue and personal jurisdiction. Part I of this Note examines a variety of background issues and concepts, including the text of the venue statutes. Part II uses a series of hypothetical cases to analyze the nuances of the background concepts and how they shape the law of venue. Finally, Part III evaluates possible interpretations of section 1391 and urges an interpretation of the present scheme that best accommodates the text and purpose of section 1391 in light of the existing notions of personal jurisdiction.

1

BACKGROUND

Section A sets forth the text of the statute, both as it existed prior to 1988 and as amended. Section B addresses several background issues. Subsection 1 briefly discusses the conceptual differences between, and the overarching goals of, personal jurisdiction and venue. Subsection 2 traces the distinction between specific and

Action Against a Corporation in District in Which it is Doing Business as Referring to Date of Filing Suit or of Accrual of Cause of Action, 2 A.L.R. FED. 995 (1969) (Supp. 1992).

⁵ See discussion *infra* part I.B.2.

⁶ The same language is used in both § 1391(a)(3) and § 1391(c). In neither case does the legislative history indicate that the timing of contacts was considered. See H.R. REP. NO. 734, 101st Cong., 2nd Sess., reprinted in 1990 U.S.C.C.A.N. 6860, 6869 [hereinafter 1990 HOUSE REPORT]; H.R. REP. NO. 889, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.C.A.N. 5982, 6031 [hereinafter 1988 HOUSE REPORT]; 136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990).

⁷ See *infra* notes 22-25 and accompanying text.

general personal jurisdiction. Subsection 3 compares general jurisdiction with the "doing business"⁸ standard of corporate residence.

A. The Venue Statutes

1. *The Text of the Statutes*

The law of federal venue has changed significantly in the past three years. In terms of timing of contacts, the most significant changes are to 28 U.S.C. § 1391(a), the general venue statute for diversity cases, and 28 U.S.C. § 1391(c), which defines corporate residence.

Prior to 1990, 28 U.S.C. § 1391(a) provided for venue as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

In 1990 and 1992, Congress amended § 1391(a), so that it now reads:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district wherein any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Section 1391(c) defines corporate residence for venue purposes. Prior to 1988, section 1391(c) read:

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

In 1988, Congress amended section 1391(c) to read:

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to per-

⁸ "Doing business" refers to a definition of corporate residence contained in 28 U.S.C. § 1391(c) before the 1988 amendments. See *infra* notes 68-79 and accompanying text.

sonal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

This Note concerns only analyzing section 1391 as it appeared prior to 1988 and as it exists today. Consequently, this Note does not focus upon the 1988 and 1990 amendments.

2. *The Changes Wrought by Amendment*

a. Section 1391(a)

The 1990 and 1992 amendments brought four substantive changes to section 1391(a). With one exception, these changes expanded the plaintiff's choice of venue.

First, Congress eliminated "where all plaintiffs . . . reside" as a venue option. Congress intended to narrow section 1391(a) and to bring it into accord with section 1391(b), which covers venue in federal question cases and includes no such provision.⁹

Second, the option of laying venue in a "judicial district where . . . all defendants reside"¹⁰ has been broadened¹¹ to the state boundaries, by providing for venue in a judicial district where "any defendant resides, if all defendants reside in the same State."¹² Under the old wording, for venue to be proper in one district in a multi-district state, all defendants were required to reside in that district. Now, as long as all defendants reside in the same *state*, any district in that state in which a defendant resides is a proper venue.

Third, the amendments broadened "where the claim arose" to include places where only "a substantial part of the events or omissions giving rise to the claim occurred." This makes it possible for several districts, rather than just one, to be valid venue options under this choice. Congress made this change to "avoid[] the litigation breeding phrase 'in which the claim arose.'" ¹³

Finally, Congress added a new option for venue: "[A]ny judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." This addition consti-

⁹ 136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990).

¹⁰ 28 U.S.C. § 1391(a) (1988 & Supp. 1991).

¹¹ See 136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990). This amendment also brings § 1391 into alignment with § 1392(a), which provides: "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." 28 U.S.C. § 1392(a) (1988).

¹² See 28 U.S.C. § 1391(a).

¹³ 1990 HOUSE REPORT, *supra* note 6.

tutes a limited expansion of venue. Before Congress amended section 1391(a) in 1992,¹⁴ this provision seemed to make venue coextensive with the outer limits of personal jurisdiction. With the 1992 amendment, however, venue under section 1391(a)(3) is available only if there is no judicial district where venue is proper under sections 1391(a)(1) or (a)(2).

Additionally, section 1391(a)(3) does not contain the "most-significant-contacts" clause found in the new section 1391(c).¹⁵ Because personal jurisdiction is normally determined at state boundaries, rather than at the boundaries of judicial districts, venue under section 1391(a)(3) is apparently proper in *any* district of a multi-district state in which the defendant is subject to personal jurisdiction. Assume, for example, that there are two defendants in a case: *D1* and *D2*. *D1* resides in the Northern District of New York, and *D2*, a Montana resident, was served with process while physically present in the Western District of New York. They are being sued on a cause of action that arose in Swaziland. Both defendants are subject to personal jurisdiction in *all* of New York, making venue proper in *any* judicial district in New York, including the Southern District, where neither defendant has any contacts. However, New York is the only state in the U.S. where venue is proper under any provision of section 1391(a) on this claim.

b. Section 1391(c)

Before the 1988 amendments to section 1391(c), the statute contained three definitions of corporate residence for venue purposes: any place the defendant is incorporated, any place the defendant is licensed to do business, and any place the defendant is doing business. With the 1988 amendments, Congress replaced these three options with a single standard: "[Where] it is subject to personal jurisdiction at the time the action is commenced."¹⁶

In addition, the 1988 version adds a "most-significant-contacts" provision. This clause restricts a corporation's residence in a multiple-district state to the judicial district(s) in which the defendant would be subject to personal jurisdiction if the district itself were a

¹⁴ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 504, 106 Stat. 4506, 4513 (1992).

¹⁵ "In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts."

28 U.S.C. § 1391(c) (Supp. 1991).

¹⁶ *Id.*

separate state. If there are no such districts, then the defendant is deemed to reside in the district in which it has the highest level of contacts.¹⁷

B. Background Considerations

This Section examines three pairs of concepts, that are important to the meaning of section 1391. Subsection one examines the distinctions between personal jurisdiction and venue. Subsection two focuses on the two types of personal jurisdiction—specific and general. Subsection three compares general personal jurisdiction with “doing business,” a basis of corporate residence under the pre-1988 section 1391(c).

1. *Personal Jurisdiction and Venue*

The modern concept of personal jurisdiction is based on two factors: (1) whether the forum district has *power* over the defendant (commonly known as the “minimum contacts” line of inquiry); and (2) whether it is *reasonable* to subject the defendant to suit in this district (frequently referred to in terms of “traditional notions of fair play and substantial justice”).¹⁸ On the other hand, venue addresses the issue of where it would be most *convenient* for the parties to litigate a particular dispute.¹⁹ Professor Wright has offered the following distinction between jurisdiction and venue:

The distinction must be clearly understood between jurisdiction, which is the power to adjudicate, and venue, which relates to the place where judicial authority may be exercised, and which is intended for the convenience of the litigants. It is possible for jurisdiction to exist though venue in a particular district is improper, and it is possible for a suit to be brought in the appropriate venue though it must be dismissed for lack of jurisdiction.²⁰

Thus, while venue is a purely statutory creation, the outer limits of personal jurisdiction are delineated by the due process requirements of the Fifth and Fourteenth Amendments.²¹

¹⁷ *Id.*

¹⁸ Both concepts can be traced to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also *Vermeulen v. Renault, U.S.A., Inc.*, 965 F.2d 1014 (11th Cir. 1992) *petition for cert. filed* (Feb. 26, 1993) (summarizing the history of the power and reasonableness tests); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981).

¹⁹ See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 42 at 240 (4th ed. 1983).

²⁰ *Id.* at 239 (footnotes omitted).

²¹ See generally Clermont, *supra* note 18.

2. *Specific and General Jurisdiction*

Personal jurisdiction is classified as either general or specific.²² Where a defendant has a high level of contacts with a state over an extended period of time (as in the operation of corporate headquarters), the defendant is said to be subject to general personal jurisdiction.²³ Where a defendant has contacts that are closely "affiliat[ed]"²⁴ with the claim (such as when it commits a tort in the state), the defendant is said to be subject to specific personal jurisdiction.²⁵

The distinction between general and specific jurisdiction may be traced to *International Shoe Co. v. Washington*,²⁶ the cornerstone of the modern law of personal jurisdiction. In *International Shoe*, the Supreme Court analyzed a state's exercise of jurisdiction according to two factors: the level of in-state activity carried out by the defendant, and the degree of relatedness between the in-state activity and the claim filed.²⁷ The Court analyzed four combinations of these two factors.

The Court began by examining situations in which both factors pointed either for or against the existence of jurisdiction. The first scenario involved situations in which a defendant's contacts are both "continuous and systematic"²⁸ and "give rise to the liabilities sued on."²⁹ The Court found that jurisdiction in these cases, with high levels of in-state activities and a high degree of relatedness between the activities and the claim, "has never been doubted."³⁰ The second scenario, involving "single or isolated"³¹ in-state activities "unconnected"³² with the suit, argues against the existence of jurisdiction. To allow for jurisdiction in these cases, the Court held,

²² This terminology was first proposed by Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). See also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984) [hereinafter *Helicol*]; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Robert L. Theriot, Note, *Specific and General Jurisdiction—The Reshuffling of Minimum Contacts Analysis*, 59 TUL. L. REV. 826, 832 (1985).

²³ von Mehren & Trautman, *supra* note 22, at 1136.

²⁴ *Id.* at 1150.

²⁵ *Id.* at 1144.

²⁶ 326 U.S. 310 (1945).

²⁷ *Id.* at 317-18.

²⁸ *Id.* at 317.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

would impose “too great and unreasonable a burden”³³ on the defendant.

Conversely, scenarios three and four present cases where activity levels and relatedness point in opposite directions. In the third situation, the Court found that “continuous corporate operations”³⁴ alone may or may not support jurisdiction over claims unrelated to these activities. The Court noted that jurisdiction had been found to exist where the activities “were thought so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities.”³⁵ In the fourth scenario, the Court found that isolated in-state acts “because of their nature and quality and the circumstances of their commission . . . may be deemed sufficient to render the corporation liable to suit.”³⁶ That is, exercising the privilege of conducting activities within a state “may give rise to obligations, and, so far as those obligations *arise out of or are connected with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”³⁷

These last two *International Shoe* scenarios have come to be known as general and specific jurisdiction.³⁸ One question that has received little attention is whether general and specific jurisdiction are distinct categories,³⁹ or are merely endpoints on a continuum that runs from the combination of high relatedness with low contacts to that of low relatedness and high contacts.⁴⁰ The two subsections that follow address the arguments in favor of treating general and specific jurisdiction (1) as endpoints of a continuum, or (2) as distinct categories, or “pigeonholes.”

The answer to the continuum/pigeonhole question depends on whether the “arises out of” or the “connected with” test for relatedness between the cause of action and the forum is dominant. *International Shoe* set forth these two tests, without distinguishing

³³ *Id.*

³⁴ *Id.* at 318.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 319 (emphasis added).

³⁸ *Helicol*, 466 U.S. 408, 413-14; see also von Mehren & Trautman, *supra* note 22.

³⁹ This seems to be the original conception of von Mehren & Trautman. See von Mehren & Trautman, *supra* note 22, at 1141-46 (describing general and specific jurisdiction as substantially different concepts).

⁴⁰ The continuum view is most thoroughly analyzed in William M. Richman, *Part I—Casad’s Jurisdiction in Civil Actions; Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1336-46 (1984) (review essay). See also *Helicol*, 466 U.S. 408, 425 (Brennan, J., dissenting); KEVIN M. CLERMONT, CIVIL PROCEDURE 153 (2d ed. 1988); Lea Brilmayer et al., *supra* note 22, at 737 n.79.

between them, by stating that personal jurisdiction is more likely to exist in cases where the claim "arise[s] out of *or* [is] connected with"⁴¹ the defendant's in-state contacts. This phrase could mean (1) that the connected with test is dominant, and personal jurisdiction exists whenever the claim *either* arises out of a defendant's contacts or is in any other way connected with the defendant's contacts with the forum, or (2) that the arises out of test is dominant, and the claim must *usually* arise out of the defendant's contacts, although there may be compelling cases for specific jurisdiction where there are other types of connection between the claim and the defendant's contacts.

If the connected with test dominates, then specific and general jurisdiction are better characterized as endpoints of a continuum. At one end of the continuum is general jurisdiction, where a defendant has a high level of contacts with the forum that are unrelated to the claim. At the other end of the continuum is specific jurisdiction, in which the defendant has a single contact with the forum that related intimately to the claim. In the middle is a gray area of personal jurisdiction, in which the defendant has a moderate level of contacts that are moderately related to the claim. The connected with test allows personal jurisdiction to exist in this gray area because it allows personal jurisdiction based on contacts that are somewhat connected with the claim, but fall short of the type of causation necessary to support arises out of relatedness.

If the arises out of test for relatedness is dominant, then general and specific jurisdiction are better characterized as "pigeonholes," because there would be no gray area between a claim arising out of and a claim not arising out of a defendant's contacts with the forum. On this view, a claim that arises out of a defendant's contacts with the forum will generally support specific jurisdiction, while a claim not arising out of the defendant's contacts will not support specific jurisdiction, regardless of how continuous and systematic the defendant's contacts are.

This Note argues that a version of the arises out of test is preferable to the connected with test and adopts Professor Lea Brilmayer's method⁴² for distinguishing between those connections that can support personal jurisdiction and those that cannot. First, however, this Note considers the possibility that all types of "connection" can support personal jurisdiction.

⁴¹ 326 U.S. at 318 (emphasis added).

⁴² See *infra* notes 61-64 and accompanying text.

a. General and Specific Jurisdiction on a Continuum

If the connected with⁴³ standard controls or has significance independent of the arises out of language⁴⁴ then general and specific jurisdiction can be viewed as opposite ends of a continuum. At one end are cases involving a single contact, intimately connected with the claim.⁴⁵ At the other end are cases involving contacts which, although very continuous and systematic, are completely unrelated to the claim.⁴⁶ Along the continuum are cases with growing levels of contacts and falling degrees of relatedness.

As an example of this middle ground, consider the case of a motorist from New York who drives through Connecticut to Massachusetts, and injures a pedestrian in Massachusetts.⁴⁷ To give the motorist more contacts with Connecticut than a single trip through the state, assume that she frequently, but not “continuously and systematically,” drives through Connecticut on her way to Massachusetts. The motorist’s contacts with Connecticut are connected with the accident in Massachusetts, insofar as one of those contacts is part of the chain of events leading up to the accident. Connecticut should not be able to exercise personal jurisdiction over the New York motorist in a suit filed by the pedestrian. The defendant’s contacts with Connecticut are slight, in terms of both the number of trips and their connectedness to the claim. Furthermore, specific jurisdiction and general jurisdiction can be respectively had in Massachusetts, the site of the accident, and New York, the domicile of the defendant.⁴⁸

⁴³ This standard is also referred to as the related to standard. *See Helicol*, 466 U.S. 408, 420 (Brennan, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

⁴⁶ *See, e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

⁴⁷ *See Lea Brilmayer, Colloquy, Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1445 (1988).

⁴⁸ Professor Richman offers several hypotheticals to suggest instances where jurisdiction should exist, despite only moderate levels of contacts that are only slightly related to the claim. Richman, *supra* note 40, at 1343 n.61. First, he cites *Lee v. Walworth Valve Co.*, 482 F.2d 297 (4th Cir. 1973), in which the plaintiff’s husband was killed at sea by a valve manufactured by the defendant. Although the particular valve in question was not sold in South Carolina, the defendant did sell valves in South Carolina and had other contacts with the state, apparently related to its valve sales. The Fourth Circuit held that the defendant was subject to personal jurisdiction in South Carolina even though the claim did not arise out of the defendant’s contacts and the contacts were insufficient to support general jurisdiction.

Richman argues that this case illustrates the propriety of jurisdiction in the middle ground between specific and general jurisdiction. At least two alternative interpretations of the case are possible. Rather than using the arises out of test, the facts could fall within Professor Brilmayer’s “substantive relevance” test, therefore making this a case of specific jurisdiction. Alternatively, the case could be wrongly decided. If the plaintiff’s interests in having a convenient forum are ignored, it becomes clear that the defen-

In *Helicopteros Nacionales de Colombia v. Hall*⁴⁹ (*Helicol*), the most recent Supreme Court case to address general and specific jurisdiction, the Court declined to analyze the possible differences between the arises out of and related to standards.⁵⁰ The defendant, a Colombian corporation, had the following contacts with Texas: (1) it sent its chief executive officer to Texas to negotiate a contract to provide helicopter service to the plaintiff; (2) it accepted checks from the plaintiff drawn on a Texas bank account; (3) it purchased helicopters, equipment, and training services from a Texas manufacturer; and (4) it sent personnel to that manufacturer's facilities for training.⁵¹ Subsequent to these contacts, a helicopter owned by the defendant crashed in Peru.⁵² The Supreme Court held that because the helicopter crash did not "arise out of" the defendant's Texas contacts, Texas state courts had no specific jurisdiction over the case. Additionally, the Court found that because the defendant's contacts were less than continuous and systematic, they could not support general jurisdiction in Texas.⁵³

Justice Brennan argued in dissent that arises out of and related to should be regarded as distinct tests.⁵⁴ In this way, direct causal links between a defendant's in-state contacts and the claim would always give rise to specific jurisdiction under the arises out of test. More attenuated contacts, however, might still support specific jurisdiction via the related to test.⁵⁵ Justice Brennan concluded that:

dant's contacts really had nothing to do with the claim. The contacts may have been *similar* to the type of activities that gave rise to the claim, but they were not *related* to the claim.

Richman's second hypothetical involves an Illinois-based pharmaceutical company that sells an antacid product nationwide. A California resident regularly uses this brand of antacid in California. On a trip to New York, the California resident purchases a defective antacid tablet and is injured. Richman argues that California should have jurisdiction over the pharmaceutical company because the California resident would not have purchased the antacid in New York had it not been for his familiarity with the product in California. If a California court can exercise jurisdiction over the pharmaceutical company, it is only because the California resident's prior purchases of the antacid are substantively related to the claim. If the substantive relation test fails, it is not implausible to say that only Illinois and New York (exercising general and specific jurisdiction, respectively) can exercise jurisdiction over the pharmaceutical company on this claim and that California has no jurisdiction over the pharmaceutical company with respect to this claim.

⁴⁹ 466 U.S. 408 (1984).

⁵⁰ *Id.* at 415 n.10.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 466 U.S. at 419-428 (Brennan, J., dissenting) (because the parties conceded, perhaps erroneously, that neither test was met in this case, the majority did not rule on this issue).

⁵⁵ *Id.*

[A] court's specific jurisdiction should be applicable whenever the cause of action arises out of *or* relates to the contacts between the defendant and the forum. It is eminently fair and reasonable, in my view, to subject a defendant to suit in a forum with which it has significant contacts directly related to the underlying cause of action.⁵⁶

Thus, in Justice Brennan's view, the two tests should be read as separate: Personal jurisdiction may be proper in cases where the defendant lacks continuous and systematic contacts, provided that the claim either arises out of those contacts or is otherwise connected with them. This reading rests on the plausible assumption that arising out of refers to only one form of connection that may exist between the claim and the defendant's contacts.

It is important to note that the relatively specific arises out of language has not been merely absorbed into the more general and inclusive connected with standard.⁵⁷ Regardless of the independent jurisdictional significance of the defendant's contacts at the time a suit is commenced (such contacts can support personal jurisdiction only under a connected with standard and not under an arises out of standard), the defendant's contacts at the time of accrual must be regarded as relevant because these are the only contacts that can support personal jurisdiction under an arises out of standard. The only way a claim can "arise out of" the defendant's contacts is if those contacts exist prior to or simultaneously with the accrual of the claim. A claim cannot be said to arise out of contacts that did not exist until after the claim arose.

If the arises out of standard for specific jurisdiction is incorporated into the broader connected with standard, and if the connected with standard is regarded as indicating that specific and general jurisdiction exist on a continuum, it becomes necessary to inquire into the continuous and systematic nature of contacts at the time of accrual. This is because only contacts that exist at the time of accrual are relevant to the "arises out of" standard for specific jurisdiction, and specific jurisdiction is on a continuum with general jurisdiction.

It is unclear how continuous and systematic contacts at the time an action is commenced would fit onto such a continuum. Putting such contacts on the continuum would require courts to deal with a difficult temporal incongruity. It would also require courts to balance the relatedness of time-of-accrual contacts with the continuousness of time-of-commencement contacts. There seems to be

⁵⁶ 466 U.S. at 427-428 (Brennan, J., dissenting) (emphasis in original).

⁵⁷ In *Helicol*, the majority absorbed the relatively general "connected with" standard into the more specific "arises out of" standard. 466 U.S. at 415.

little question, however, that continuous and systematic contacts at the time of commencement are a valid basis for personal jurisdiction.⁵⁸ Thus, the pigeonhole model may provide a better explanation for the relationship between specific and general personal jurisdiction.

b. General and Specific Jurisdiction as "Pigeonholes"

If the arises out of test controls, then it is best to view general and specific jurisdiction as pigeonholes for determining personal jurisdiction.⁵⁹ The arises out of test is narrower than the connected with standard because it implies a tighter causal connection between the contacts and the claim. Thus, either the claim arises out of the in-state contacts, or it does not. If it does arise out of the defendant's contacts and those contacts are sufficiently numerous, specific jurisdiction exists. In *Helicol*,⁶⁰ for example, the defendant's contacts with Texas were connected with the claim: the defendant's equipment came from Texas and it trained its pilots in Texas. However, the cause of action did not arise out of those contacts.

The precise contours of the arises out of test, like those of the connected with test, are not entirely clear. Obviously, the arises out of relationship must be closer than merely being connected with the claim, but both standards remain vague. Professor Brilmayer has taken a different approach to the question, treating the "arises out of or is connected with" language as a simple requirement that there be an adequate nexus between the cause of action and the forum with which the defendant has contacts.⁶¹ If the nexus is too weak, there should be no specific jurisdiction. Professor Brilmayer argues that such a nexus exists when facts of "substantive relevance"⁶² occur in the forum district. She develops the concept of substantive relevance through an analogy to storytelling. If a certain fact is viewed as relevant to the story—that is, if it is not a digression—then it has weak substantive relevance.⁶³ If the same fact is relevant to the applicable law, rather than to the story, then it has

⁵⁸ See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (presence in the state at the time of commencement is sufficient to support personal jurisdiction).

⁵⁹ As illustrated by *International Shoe's* first scenario, these pigeonholes need not be mutually exclusive. A defendant may have such a high level of contacts with the state that any link between those contacts and the claim would be unnecessary to support jurisdiction. At the same time, however, the defendant's contacts might also be the source of the claim.

⁶⁰ 466 U.S. 408 (1984).

⁶¹ Brilmayer, *supra* note 47, at 1451-58.

⁶² *Id.* at 1451.

⁶³ *Id.* at 1452-55.

“strong” substantive relevance.⁶⁴ Each substantively relevant fact is associated with a geographic location, such as Massachusetts as the locale of the accident in the example of the New York motorist. These geographic locations, with which the defendant has some level of contact, are the ones that Professor Brilmayer claims have sufficient nexus with the cause of action to support specific jurisdiction.

Given the foregoing analytical framework, it becomes easier to see that specific jurisdiction is not proper in places where both the level of contacts and the level of relatedness are moderate, such as Connecticut in the example of the New York motorist. If personal jurisdiction is to be proper in such cases, it must consist of general, rather than specific, jurisdiction. But by the terms of the hypothetical, the contacts in such cases are less than “continuous and systematic,” thereby making general jurisdiction unavailable as well.

c. *Summary*

Specific and general jurisdiction should be regarded as pigeonholes, and not as the endpoints of a continuum.⁶⁵ They are analytically different concepts. Specific jurisdiction deals with a defendant’s contacts with a forum at the time the claim accrues. It turns on the nexus between that forum and the cause of action. Under Professor Brilmayer’s model, specific jurisdiction may be supported by contacts out of which the claim arises, as well as other contacts which are substantively relevant to the claim. General jurisdiction, on the other hand, deals with a defendant’s contacts at the time of the commencement of the action. The level of contacts is the crucial aspect for general jurisdiction.

One consequence of this conclusion is that contacts-nexus combinations in the middle of the continuum fail to support personal jurisdiction. This outcome should not be of much concern. The defendant is bound to have continuous and systematic contacts with some forum, thereby making it a proper forum to exercise general jurisdiction.⁶⁶ Likewise, there must be some place where substan-

⁶⁴ *Id.* at 1455-58. It is important to note that the relevance of particular facts could change, depending on what forum’s law is deemed applicable under state and federal choice of law doctrines.

⁶⁵ This conclusion does not exclude the existence of a self-contained continuum with respect to specific jurisdiction alone. Professor Richman’s instinct is sound insofar as it claims that an increased level of contacts can substitute for reduced relatedness, and vice versa, in determining specific jurisdiction. General jurisdiction, however, is analytically distinct from any such continuum. Relatedness is irrelevant to general jurisdiction. Furthermore, the timing of contacts relevant to general jurisdiction is different from the timing of contacts relevant to specific jurisdiction.

⁶⁶ If the defendant is domiciled or incorporated outside the United States, that venue might be in another country.

tively relevant facts occurred, thereby making specific jurisdiction a possibility in that forum.⁶⁷

3. "Doing Business" vs. "Continuous and Systematic Contacts"

Prior to 1988, the venue statute partly defined corporate residence in terms of whether the defendant was "doing business" in the forum.⁶⁸ The doing business standard developed in cases involving corporations as a rough analogue to the "physical presence" basis of jurisdiction over natural persons.⁶⁹ The next two subsections discuss the timing (accrual or commencement) and level (more than, less than, or equal to "continuous and systematic") of contacts necessary to support a finding that a corporation is doing business in a forum.

a. Timing of Contacts Under "Doing Business"

A corporation that is doing business in a state is regarded as physically present in that state during the period in which it is doing business. The Supreme Court recently reaffirmed the use of physical presence as a basis for personal jurisdiction in *Burnham v. Superior Court*.⁷⁰ Because the relevant time for presence-based jurisdiction is the period of the presence,⁷¹ a defendant is subject to personal jurisdiction only while actually present in the state. By analogy then, a corporation that is doing business in a state should only be subject to personal jurisdiction during the time it is actually doing business there.

b. Level of Contacts Under "Doing Business"

Like general personal jurisdiction, the doing business standard often permits a state to exercise jurisdiction over a defendant in claims unrelated to the defendant's business dealings in the state.⁷² Authorities are split as to precisely what level of contacts is necessary to qualify as doing business.⁷³ Both lines of authority, however,

⁶⁷ Again, the defendant's jurisdiction-conferring contacts may be outside the U.S.

⁶⁸ 28 U.S.C. § 1391(c) (1976), amended by 28 U.S.C. § 1391(c) (Supp. 1991).

⁶⁹ See generally FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE § 3.7 (1985).

⁷⁰ 495 U.S. 604.

⁷¹ Suppose a defendant was in California when he was supposed to be performing a contract in South Dakota. Then, by the time the plaintiff files suit for breach of contract, the defendant has wandered through 15 states and is now in South Carolina. No valid justification exists for subjecting the defendant to suit in California or any of the 15 intervening states.

⁷² See von Mehren & Trautman, *supra* note 22, at 1137-38.

⁷³ Ford Motor Co. v. Chroma Graphics, Inc., 678 F. Supp. 169 (E.D. Mich. 1987). There is split authority as to whether "doing business" for purposes of § 1391(c) should be construed as business activities sufficient to meet the "minimum contacts" tests for personal jurisdiction, or business activities

indicate that the level of contacts for doing business must be at least as high as that needed to support personal jurisdiction.⁷⁴ The two tests are somewhat different in scope. The broader of these, known as the “jurisdiction test,”⁷⁵ equates doing business with personal jurisdiction.⁷⁶ In other words, if a court can exercise personal jurisdiction over a defendant, that defendant is deemed to be doing business in the district. This test includes both general and specific personal jurisdiction. The other test, known as the “licensing test,”⁷⁷ “equates ‘doing business’ . . . with state corporate licensing requirements.”⁷⁸ This latter test seems to be more closely parallel to general jurisdiction alone.

E. Lawrence Vincent proposes the reconciliation of these two tests through an application of the distinction between general and specific jurisdiction. He concludes that doing business should be regarded as identical with general jurisdiction, and that contacts sufficient only for specific jurisdiction should not count as doing business.⁷⁹ Mr. Vincent’s proposal is sound. Because the doing business test is used to determine the places of corporate residence, it makes sense that corporations should be deemed to reside only where they have general jurisdiction-type contacts.

II ANALYSIS

Building on the concepts of general and specific jurisdiction developed in Part I, this Part discusses the possible situations in which venue should, and should not, be proper in a given court. Section A sets forth a series of hypothetical cases formulated to highlight the

that exhibit the sort of localized or intrastate character such that the state is permitted under the Commerce Clause to require the corporation to qualify to do business there.

678 F. Supp. at 170 (citations omitted). The *Ford* court held that the more stringent Commerce Clause standard is preferable. *Id.* at 171; *see also* Scott Paper Co. v. Nice-Pak Products, Inc., 678 F. Supp. 1086 (D. Del. 1988) (same).

⁷⁴ *See Ford Motor Co.*, 678 F. Supp. at 169; David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the new Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 406 (1989) (“[some courts have refused] to find a corporation to be ‘doing business’ in the state under the old [section 1391(c)] (so as to satisfy venue) merely because it was doing just enough to meet the demands of a state longarm statute (and thus satisfy jurisdiction)”).

⁷⁵ *See* E. Lawrence Vincent, Note, *Defining “Doing Business” to Determine Corporate Venue*, 65 TEX. L. REV. 153, 155 (1986).

⁷⁶ *See, e.g.* Smith v. Intex Recreation Corp., 755 F. Supp. 712 (M.D. La. 1991).

⁷⁷ Vincent, *supra* note 75, at 155.

⁷⁸ *Id.* For an example of the licensing test, *see* Scotch Whisky Ass’n v. Majestic Distilling Co., 681 F. Supp. 1297 (N.D. Ill. 1988).

⁷⁹ Vincent, *supra* note 75, at 173.

relationship between the type of a defendant's activities in a state⁸⁰ and the timing of those activities. Section B then defines and discusses the contours of a hypothetical venue statute that would codify the conclusions of Section A.

A. Four Hypothetical Cases

These four hypothetical cases represent the permutations that result from combining the time of relevant contacts (accrual or commencement) with the type of contacts (substantively relevant⁸¹ or continuous and systematic).⁸² The four time-type combinations of contacts will facilitate a clearer understanding of specific and general personal jurisdiction, which in turn will clarify the meaning of section 1391 and its references to personal jurisdiction. Notice that the contrast in the type of contacts is not a contrast between high and low levels of contacts, but instead parallels the concepts of specific and general jurisdiction. As such, it focuses on the relationship between the defendant's contacts with the forum and the claim, and the level of the contacts in the forum.

Most of the cases cited in this Section do not explicitly address the distinction between general and specific jurisdiction. The cases are surprisingly uniform, however, in suggesting that the judges may rely on common intuition. This Section seeks to formalize those intuitions and express them within the framework of the type and timing of a defendant's contacts.

1. *Continuous & Systematic Contacts at Time of Accrual*

The first hypothetical involves the case in which the defendant had continuous and systematic contacts with the forum state at the time the claim accrued, but subsequently withdrew from the state before the suit was filed. For example: Toxics Incorporated had continuous and systematic contacts with Wyoming at the time Timmy Treehugger was maimed in an accident with a Toxics Incorporated weather balloon in New Mexico. Toxics Incorporated's activities with weather balloons in New Mexico were completely unrelated to its operations in Wyoming. After the accident, but before Timmy filed suit in Wyoming federal court, Toxics Incorporated withdrew its contacts from Wyoming. At the time Timmy filed

⁸⁰ The use of the term "state" might be slightly inaccurate, because the relevant geographic area is sometimes a judicial district that covers only a portion of a state's territory. This issue of multidistrict states, for the purposes of this Note, is not significant. For simplicity, except where otherwise noted, this Note assumes the existence of one judicial district per state.

⁸¹ As would lead to specific jurisdiction.

⁸² As would lead to general jurisdiction.

suit, Toxics Incorporated had no contacts with Wyoming. Therefore, Wyoming should not have personal jurisdiction over Toxics Incorporated for Timmy's injury in New Mexico.

In *Proctor & Schwartz, Inc. v. C. F. Rollins*,⁸³ the Fourth Circuit held that personal jurisdiction does not exist over the defendant in such a case, reversing the district court.⁸⁴ The plaintiff, a Georgia resident, was injured in Georgia by machinery that had been manufactured by the defendant, a Pennsylvania corporation. The plaintiff brought suit in South Carolina to take advantage of that state's six-year statute of limitations, and based its claim of jurisdiction over the defendant on the defendant's contacts with South Carolina at the time the claim accrued. These contacts were completely unrelated to the accident in Georgia. The Fourth Circuit held that South Carolina's door-closing statute barred the bringing of this action in South Carolina. While the actual basis for the decision was the door-closing statute, the court's language indicates general disfavor with such attempted bases of jurisdiction: "South Carolina's relatively long six year statute of limitations, rather than any nexus with the facts giving rise to this claim, dictated Rollins' choice of forum."⁸⁵

2. *Related Contacts at Time of Accrual*

The second hypothetical also addresses cases in which the defendant had contacts with the forum when the claim arose. In this hypothetical, however, the claim arose out of or was connected with the defendant's contacts. The defendant had no contacts with the forum state at the time the suit was filed. For example: Toxics Incorporated was shipping a truckload of toxic waste through Oklahoma when the truck ran over Timmy Treehugger's sister, Tammy, who was standing on the highway to protest Toxics Incorporated's new program of trucking waste through Oklahoma. Due to the attendant bad publicity, that truckload was the only one Toxics Incorporated ever sent into or through Oklahoma. Tammy filed

⁸³ 634 F.2d 738 (4th Cir. 1980).

⁸⁴ *C. F. Rollins v. Proctor & Schwartz*, 478 F. Supp. 1137 (D.S.C. 1979), *rev'd*, 634 F.2d 738 (4th Cir. 1980).

⁸⁵ 634 F.2d at 739. Compare this statement with dictum from the district court's opinion:

It is interesting to note, at the outset, that Proctor & Schwartz closed a plant in Rock Hill, South Carolina, which it had operated for over ten (10) years, just five (5) months before this cause of action arose in May, 1972. Had this plant been operating at the time of the plaintiff's injury, the court could readily find that Proctor & Schwartz had so injected itself into the community and affairs of this state that notions of fundamental fairness would not be offended by holding it to be "doing business" here. 478 F. Supp at 1139 (citing *Snyder*, 357 F.2d 552, 556).

suit in Oklahoma federal court.⁸⁶ Therefore, Oklahoma should exercise personal jurisdiction over Toxics Incorporated.

Perhaps the best-known case of related contacts at accrual is *McGee v. International Life Insurance Co.*⁸⁷ In *McGee*, Franklin, a California resident, bought a life insurance policy from an Arizona insurer. Later, International Life Insurance Co. (Int'l Life), a Texas corporation, assumed the Arizona insurer's obligations and accepted premiums from Franklin. Although Franklin's policy was Int'l Life's only known contact with California, the Supreme Court held that the contact was sufficient to support jurisdiction in California, because the claim was based on "a contract which had [a] substantial connection"⁸⁸ with California.⁸⁹ The Court also listed several policy concerns that would be served by allowing the parties to litigate in California: a state interest in providing "means of redress for its residents when their insurers refuse to pay claims,"⁹⁰ the fact that individuals could not afford to litigate small or moderate claims in a distant forum,⁹¹ and the location of crucial witnesses.⁹²

Another variation on this fact pattern is found in *Snyder v. Eastern Auto Distributors, Inc.*⁹³ Eastern, an automobile distributor incorporated in Virginia, had a seven year franchise agreement with Snyder, a South Carolina auto dealer. Before the conclusion of the franchise term, Eastern canceled its agreement with Snyder, thus terminating all of its contacts in South Carolina. Snyder sued in South Carolina to recover damages for Eastern's allegedly unjustified cancellation of the agreement. The Fourth Circuit, finding venue to be proper, held that "[t]he focal time in determining whether Eastern is subject to the Court's jurisdiction and whether

⁸⁶ This case can be distinguished from *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), because there, the defendant was merely the seller of the car that ultimately went into Oklahoma.

⁸⁷ 355 U.S. 220 (1957); see also *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 827 (10th Cir. 1963) ("A foreign corporation which has ceased to do business in a state is still subject to service of process in suits on causes of action which arose out of business carried on by the defendant in the state.") (citation omitted).

⁸⁸ *McGee*, 355 U.S. at 223.

⁸⁹ Note that on Franklin's death, International Life's contact with California necessarily ended. To understand why the contact ended, imagine telling the story of this case, ending with the action by International Life that created the claim—its refusal to pay. Had International Life paid the claim, it would have had no further dealings in California. Therefore, because there could have been no contacts between International Life and California at the time the action was commenced, the relevant time in *McGee* was the time of accrual.

⁹⁰ *McGee*, 355 U.S. at 223.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 357 F.2d 552.

venue is proper is *when the cause of action arose*.⁹⁴ Eastern's seven year relationship with Snyder in South Carolina would seem to make this a case of continuous and systematic contacts sufficient to support general jurisdiction, however Eastern's contacts with South Carolina were intimately related to the claim, and should therefore be considered as grounds for specific jurisdiction.⁹⁵

Treating *Snyder* as a case of specific jurisdiction, rather than one of general jurisdiction, also highlights that specific and general jurisdiction are analytically distinct concepts. Specific jurisdiction depends on the *relation* of the contacts to the claim, with the *level* of contacts playing only a minor threshold role. General jurisdiction, on the other hand, depends entirely on the existence of a sufficiently high *level* of contacts, with no regard to the *relation* of the contacts. Thus, if the level of contacts at the time of commencement is continuous and systematic, and if the contacts at accrual are substantively related to the claim, then the defendant is subject to both specific and general jurisdiction.

3. *Continuous & Systematic Contacts at Time of Commencement*

This hypothetical presents the type of case in which the defendant had no contacts with the forum state at the time the claim accrued, but it subsequently established continuous and systematic contacts with the forum state. Assume for example, that a Toxics Incorporated product fatally injured Timmy Treehugger but before the Treehugger estate filed suit,⁹⁶ Toxics Incorporated relocated its principal headquarters to Vermont, a state with which it had no prior contact. After Toxics Incorporated opened its new corporate headquarters in Bennington, the Treehugger estate filed suit against Toxics Incorporated in Vermont federal court.⁹⁷ In this scenario, Vermont should exercise personal jurisdiction over Toxics Incorporated in any action filed by the Treehugger estate.

A recent case from the Fourth Circuit provides a good illustration of this scenario.⁹⁸ In *Tenefrancia v. Robinson Export & Import Corp.*,⁹⁹ Tenefrancia, a Florida resident, was injured in Virginia in an accident allegedly caused by Robinson Export, a Virginia corpora-

⁹⁴ 357 F.2d at 556 (emphasis in original).

⁹⁵ This view is supported by the court's language: "Having conducted its affairs in South Carolina for a period of seven years, Eastern remained answerable there *for its contract responsibilities* for a reasonable time after cessation of its business in the state." 357 F.2d. at 556 (emphasis added, citations omitted).

⁹⁶ See *supra* parts II.A.1.

⁹⁷ Instead of Wyoming, the place of the tort, or Oklahoma, the previous location of Toxic Incorporated's headquarters, assume that the estate filed suit in Vermont.

⁹⁸ See also *R.E. Linder Steel Erection Co. v. Alumisteel Sys., Inc.*, 88 F.R.D. 629 (D. Md. 1980).

⁹⁹ 921 F.2d 556 (4th Cir. 1990).

tion. Tenefrancia filed suit in Maryland,¹⁰⁰ where Robinson Export became licensed to do business approximately one year after the accident and two years before Tenefrancia filed suit. Robinson Export apparently had no contacts with Maryland at the time the claim arose. The court noted that the statute is worded in the present tense ("is doing business"),¹⁰¹ therefore the relevant contacts for venue purposes are those that exist at the time the action is commenced. The court distinguished *Snyder* on the ground that the rationale of *Snyder* was to prevent a defendant from escaping liability by fleeing a state,¹⁰² a concern completely irrelevant to this case, because the plaintiff was attempting to base jurisdiction on Robinson Export's entry into the forum state after the claim had accrued. The court further argued that the 1966 amendments to section 1391(a)¹⁰³ adequately covered the venue question in cases like *Snyder* by providing that venue is proper in the judicial district where the claim arose.¹⁰⁴

4. *Related Contacts at Time of Commencement*

The fourth permutation presents the case in which the defendant had no contacts with the forum state at the time the claim accrued, but subsequently established a low level of contacts with the forum state. These contacts, which are less than continuous and systematic, are, however, related to the cause of action. Assume, for example, that when Toxics Incorporated ran over Tammy Treehugger, it was shipping the first of what it had hoped to be many truckloads of toxic waste from Arkansas to Nevada. However, Tammy Treehugger's tragic plight rallied the local residents, who formed a powerful political action group that succeeded in stopping the flow of toxic waste through Oklahoma. Consequently, Toxics Incorporated was forced to route the waste through Kansas. After Toxics Incorporated's first shipment through Kansas, Tammy Treehugger filed suit in Kansas federal court for her injuries from the Oklahoma accident.¹⁰⁵ Toxics' presence in Kansas is causally related to the Treehugger incident in Oklahoma because *but for* the accident with Tammy Treehugger, Toxics Incorporated would not have com-

¹⁰⁰ Apparently to avoid Virginia's expired statute of limitations. See 921 F.2d at 557.

¹⁰¹ 28 U.S.C. § 1391(c) (1976), amended by 28 U.S.C. § 1391(c) (Supp. 1991) ("A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business.").

¹⁰² 921 F.2d at 558-59.

¹⁰³ 28 U.S.C. § 1391(a) (1966) provided, for the first time, that venue in diversity suits is proper in the judicial district where the claim arose.

¹⁰⁴ 921 F.2d at 559-61.

¹⁰⁵ Rather than in Oklahoma, the place of the tort, or in Vermont, the location of the new corporate headquarters.

menced shipping toxic waste through Kansas. In such a case, in which there is an indirect causal connection and the contacts are not contiguous and systematic, Kansas should not exercise personal jurisdiction over Toxics Incorporated.

No cases of this type have been reported.¹⁰⁶ Under Professor Brilmayer's "substantive relevance" for related contacts, it would be impossible for such in-state contacts to possess the requisite nexus with a claim to support specific jurisdiction.¹⁰⁷ To apply Professor Brilmayer's storytelling analogy to substantive relevance, one would ask whether there is any way to tell the story of Tammy Treehugger's injury—particularly if only legally relevant facts are included—where Toxics Incorporated's subsequent move to Kansas would not be viewed as a digression. Toxics Incorporated's new shipping route could not possibly be important to the question of whether Toxics Incorporated is at fault for Tammy Treehugger's injury.¹⁰⁸

This hypothetical illustrates that the "subject to personal jurisdiction at the time the action is commenced"¹⁰⁹ language, if read literally, is nonsensical insofar as it applies to specific personal jurisdiction if the phrase "at the time the action is commenced" is interpreted to indicate the relevant time for examining a defendant's contacts with a forum. In other words, if we start with the statutory text, "subject to personal jurisdiction at the time the action is commenced," then substitute a description of specific jurisdiction for the term "personal jurisdiction" in the statutory language, the result is a text stating that venue is proper where the defendant "had substantially relevant contacts with the forum at the time the cause of action accrued[,] at the time the action is commenced." Under such interpretation, the two timing limitations seem to contradict one another. One of three explanations must be true: (1) the premise that specific jurisdiction depends on contacts at the time of accrual is incorrect, (2) the phrase "at the time the action is commenced" indicates something other than when the contacts should occur,¹¹⁰ or

¹⁰⁶ *But see* CLERMONT, *supra* note 40, at 152-53. Professor Clermont argues that consent or waiver of objections to personal jurisdiction is the type of in-state act that is sufficiently related to the claim to give rise to specific jurisdiction. This does not seem correct. Consent is an act done in the process of litigating the action, not an act done in the process of creating the cause of action. Professor Brilmayer's substantive relevance test helps clarify this point. *See supra* notes 61-64 and accompanying text. Someone telling the story of the claim would almost certainly not include "and then the defendant consented to suit in the Western District of Washington."

¹⁰⁷ *See Helicol*, 466 U.S. 408 at 428 (Brennan, J., dissenting).

¹⁰⁸ To say that the new shipping route is important to the story would be tantamount to saying that it is important to know what happened to Scarlett O'Hara after Rhett Butler walked out of her life. *See* MARGARET MITCHELL, *GONE WITH THE WIND* (1936); ALEXANDRA RIPLEY, *SCARLETT* (1991).

¹⁰⁹ 28 U.S.C. § 1391 (Supp. 1991).

¹¹⁰ *See infra* part III.

(3) Congress intended to limit venue under this clause to general jurisdiction-type contacts.¹¹¹ There is no evidence that Congress intended to so limit venue. Furthermore, specific jurisdiction does depend on contacts at the time of accrual.¹¹² Therefore, the phrase "at the time the action is commenced" must indicate something other than when the contacts should occur. This Note argues that this language merely requires that personal jurisdiction, whether specific or general, continue to exist over the defendant—in the particular claim—at the time the action is commenced. In cases of specific jurisdiction, for example, venue is proper where the defendant had substantively relevant contacts with the forum at the time the claim accrued, but venue is not proper over that defendant in claims unrelated to the defendant's contacts with the forum. In cases of general jurisdiction, venue is proper as long as the defendant has continuous and systematic contacts with the forum. When those contacts cease, general jurisdiction, and thus venue, becomes improper.

B. A Hypothetical Venue Statute

As Section A demonstrates, venue is closely related to the concepts inherent to personal jurisdiction. Some commentators, however, have asserted that the purpose of venue is "to insure that litigation is lodged in a convenient forum and to protect defendant against the possibility that plaintiff will select an arbitrary place in which to bring suit."¹¹³ More specifically, venue statutes serve "the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial court that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred."¹¹⁴

This purpose of venue—convenience—is not necessarily incompatible with a close interrelation between personal jurisdiction and venue. The rise to prominence of the reasonableness branch of *International Shoe's* two-part test for personal jurisdiction¹¹⁵ indicates

¹¹¹ See 1990 HOUSE REPORT, *supra* note 6.

¹¹² See *supra* notes 22-67 and accompanying text.

¹¹³ Clermont, *supra* note 18, at 431 (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1063 at 203 (1969)).

¹¹⁴ VDI Technologies v. Price, 781 F. Supp. 85, 92 (D.N.H. 1991) (citing VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1576 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991)).

¹¹⁵ See Clermont, *supra* note 18, at 416-18, 451. See also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). All three cases apparently give the reasonableness branch of minimum contacts significance independently of the power branch. For a commentary on *Asahi* and reasonableness, see Earl M. Maltz, Comment, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A*

that the law of personal jurisdiction increasingly serves the goal of convenience.¹¹⁶ With personal jurisdiction fulfilling the purpose of venue, there is a diminished need for a distinct or independent law of venue.¹¹⁷ This suggests that a venue statute should be phrased in terms of, or at least indexed to, personal jurisdiction concepts. Furthermore, the ready availability of transfer of venue between courts where venue is proper in both the transferor court and the transferee court¹¹⁸ provides a further argument in favor of eliminating the distinctions between jurisdiction and venue. It is no longer necessary to ask whether the present forum is the *most* convenient place to litigate the dispute; so long as it meets a minimal threshold of convenience, the forum should be deemed a proper venue. If a more convenient forum exists,¹¹⁹ then the case can easily be transferred to that forum. A combined law of personal jurisdiction and venue would simply seek to answer the question: Of those fora that have power over a defendant, where will it be reasonable, fair, and convenient to require that defendant to litigate? The following subsections address the permutations of a venue statute that is based on the type and timing of a defendant's contacts.

1. *Venue in the Place of Accrual*

First, the most logical district in which to allow a plaintiff to sue is the one in which the defendant had contacts out of which the claim arose; for example, venue is logical in the district in which a defendant allegedly committed a tort. In such a case, factors weighing in favor of venue include the location of evidence and wit-

Comment on Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669 (1987).

¹¹⁶ Compare the purpose of venue, *supra* notes 18-21 and accompanying text (part I.B.1), with the factors to be considered in determining the reasonableness of personal jurisdiction: "When determining the reasonableness of the exercise of personal jurisdiction by a forum state, the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief may be considered." *Fogle v. Ramsey Winch Co.*, 774 F. Supp. 19, 22 (D. D.C. 1991).

¹¹⁷ See Clermont, *supra* note 18, at 430-41, 450-55; CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3801 at 4 n.4 (1986) (Supp. 1992).

¹¹⁸ 28 U.S.C. § 1404(a) (1988).

¹¹⁹ Cases abound that list the relevant factors in the transfer of venue. Such factors include: (1) plaintiff's choice of forum, (2) the convenience of the parties, (3) the convenience of the witnesses, (4) the relative ease of access to sources of proof, (5) the availability of process to compel attendance of unwilling witnesses, (6) consideration of trial efficiency, and (7) the furtherance of the interest of justice. See, e.g., *Davidson v. Exxon Corp.*, 778 F. Supp. 909 (E. D. La. 1991); *Lethbridge v. British Aerospace PLC*, 1991 WL 233206 at *3 (S.D.N.Y. 1991); *Employers Ins. v. Triton Lines, Inc.*, 708 F. Supp. 54, 56 (S.D.N.Y. 1989); *Car-Freshener Corp. v. Auto Aid Mfg. Corp.*, 438 F. Supp. 82, 85 (N.D.N.Y. 1977); *Saminsky v. Occidental Petroleum Corp.*, 373 F. Supp. 257, 259 (S.D.N.Y. 1974).

nesses,¹²⁰ as well as the strong state interest in ensuring the enforcement of its laws.¹²¹ The most direct wording of a statute to provide for venue in such cases would be: "Venue is proper where the claim arose."¹²² While nonproblematic in most cases, this could invite litigation over the issue of precisely where the claim arose.¹²³ If, for example, the claim stems from business conducted through the mails or electronic media, it might be impossible to identify a single location where the claim arose. Assume, for example, that *D*, a business in State *X*, advertises its widgets in State *Y*. *P*, a resident of State *Z* on vacation in State *Y*, sees the advertisement and orders a widget, requesting that it be mailed to his home in State *Z*. When it turns out to be defective, thereby injuring *P* in State *Z*, where, of State *X*, State *Y*, or State *Z*, did the claim arise?¹²⁴ All three states have a significant relationship with the claim.

Since the phrase "where the claim arose" presents such problems, the statute could be revised to read: "Venue is proper in any state in which a substantial part of the events or omissions giving rise to the claim occurred."¹²⁵ In the example involving the sale of widgets, this would arguably allow venue to be proper in State *X*,¹²⁶ State *Y*,¹²⁷ and State *Z*.¹²⁸

2. *Venue Where Related Contacts Exist at Accrual*

Second, there are, at least theoretically, cases in which the defendant had closely related contacts with the forum state at the time of accrual that are neither (1) sufficient to support general jurisdic-

¹²⁰ See, e.g. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); see also cases cited *supra* note 119.

¹²¹ See, e.g., cases cited *supra* note 119.

¹²² Compare with pre-1990 28 U.S.C. § 1391(a) ("A civil action . . . may . . . be brought . . . in the judicial district . . . in which the claim arose.").

¹²³ In fact, this was Congress' primary motivation for amending 28 U.S.C. § 1391(a)(2) to allow venue in districts where only "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2) (Supp. 1991); see 136 CONG. REC. S17581.

¹²⁴ Such fact patterns are not at all far-fetched. See, e.g. *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (plaintiff injured in Illinois by the explosion of a hot water heater, whose safety valve was manufactured in Ohio, sold to a Pennsylvania water heater manufacturer, and then sold to an Illinois purchaser.).

¹²⁵ Compare this version with the 1990 version of 28 U.S.C. § 1391(a) ("A civil action . . . may . . . be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.").

¹²⁶ As the location from which *D* ordered the advertisements and shipped the widget. (In practice, a more sound basis for personal jurisdiction and venue in State *X* would perhaps be that *D* is presently domiciled there.)

¹²⁷ As the location of the advertisements, and as the place from which *P* placed the order.

¹²⁸ As the place where *D* mailed the widget, and as the place where the widget injured *P*.

tion nor (2) the source of the claim. For example, consider a train accident on Michigan's upper peninsula in which the train derailed and spilled its cargo. The train had to pass through Wisconsin to reach the upper peninsula. The railroad's contacts with Wisconsin are clearly related to the accident, however, it is doubtful in the absence of other facts that a credible argument can be formulated that the accident somehow arose out of those contacts. It is also doubtful that a credible argument can be formulated that Wisconsin, rather than Michigan, would be a proper forum for this case.

The statutory formulation suggested in subsection one would preclude venue where the defendant's actions are related to, but not the source of, the claim. This follows because such events, although related, do not *give rise to* the claim. Venue may not be proper in Wisconsin in the Michigan train accident case, or in Connecticut in the New York motorist case, but there may be cases in which a defendant's contacts have substantive relevance, as defined by Professor Brilmayer,¹²⁹ while still falling short of being "events or omissions out of which the claim arose." If so, then a statutory provision to cover these cases might read as follows:

Venue is proper in any judicial district in which a substantively relevant event or omission occurred. A substantively relevant event or omission shall be defined as any event or omission whose occurrence or nonoccurrence would affect the outcome of the case, when considering any substantive law applicable to the claim.

3. *Venue Where Continuous Contacts Exist at Commencement*

A third statutory provision should address the propriety of venue where the defendant has continuous and systematic contacts at the time the action is commenced. Venue should be proper in such cases because of the strong state interests both in regulating businesses located there and in providing a convenient forum for the state's residents.¹³⁰ Presumably, the state interest in convenience extends equally to residents who are defendants or plaintiffs. A statute addressing these concerns could read as follows:

Venue is proper in any state in which the defendant has continuous and systematic contacts at the time the action is commenced. Continuous and systematic contacts are those contacts that would be sufficient to subject the defendant to general personal jurisdic-

¹²⁹ *Supra* notes 60-66 and accompanying text.

¹³⁰ *See* *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

tion, assuming that the relevant time for determining general personal jurisdiction is the time the action is commenced.¹³¹

4. *Venue Where Continuous Contacts Exist at Accrual*

Fourth, some might argue that a thorough venue provision should address the preservation of plaintiffs' rights of action against defendants who, prior to commencement, lessen or withdraw from continuous and systematic contacts that existed at the time of accrual. It might read as follows:

Venue is proper in any state in which the defendant has such continuous and systematic contacts at the time the action accrues that those contacts would be sufficient to subject the defendant to general personal jurisdiction, assuming the relevant time for determining general personal jurisdiction is the time of accrual of the claim.¹³²

At first glance, it might not make much sense to force a party to defend lawsuits in the forum of its former corporate headquarters or other residence if the claim is unrelated to the former activities at that residence. For example, assume a corporation that maintained corporate headquarters in New York injured a New Jersey resident in Idaho. Further, assume that the corporation relocated its headquarters to Texas shortly after the time of accrual but before the plaintiff commenced the action.

At least two policies, fairness and convenience, could plausibly be served by compelling the defendant to litigate in New York. First, a number of cases have favored the time of accrual as a proper basis of venue, because of notions of fairness.¹³³ This rationale would urge that during the period that a corporation avails itself of the protections of a state's laws, courts of that state should be allowed to subject that corporation to the obligations of that state's laws for claims that arose against the corporation during the period of such availment. Further, New York might be more convenient to the plaintiff than the place of the tort or the place of the defendant's residence at the time of commencement.¹³⁴ Such convenience to

¹³¹ Some readers might object to the use of judicially created concepts, such as general personal jurisdiction, in a statute. However, Congress drafted both versions of 28 U.S.C. § 1391(c) incorporating judicially created concepts. In the pre-1988 version, Congress made the standard for proper venue whether the defendant was "doing business" in the state. The drafters did not independently define the term "doing business." Similarly, Congress relied on the judicial definition of "personal jurisdiction" in the 1988 version. 28 U.S.C. § 1391(c) (Supp. 1991).

¹³² See *supra* notes 81-83 and accompanying text (part 11.A.1).

¹³³ See cases cited in Annotation, 2 A.L.R. FED., *supra* note 4, at 995.

¹³⁴ Under the 1990 version of 28 U.S.C. § 1391(a), Congress deleted the provision that made venue proper in the plaintiff's place of residence.

the plaintiff, however, is highly dependent upon the specific facts of the case. If the plaintiff was a New Mexico resident, for example, New York would probably not be a very desirable forum.

Other conditions might favor a different venue. For instance, at the time of commencement, New York may contain no evidence relevant to the suit;¹³⁵ the state may be an inconvenient place for the defendant to litigate;¹³⁶ and New York may have no desire to protect the interests of either non-resident party. Also, many states have no desire expend their judicial resources on disputes that have no direct nexus with the state. In *Proctor & Schwartz, Inc. v. C. F. Rollins*,¹³⁷ for example, a federal court held that South Carolina's door-closing statute precluded the laying of venue there because, at the time of accrual, the defendant's continuous and systematic contacts were unrelated to the claim.

Finally, when the inquiry is broadened to include all possible claims against a defendant, rather than a single dispute, it becomes apparent that requiring a defendant to litigate where it formerly had continuous and systematic contacts serves neither fairness nor convenience. For example, imagine a corporation that maintained its headquarters in Minnesota for ten years. During that period, twenty unrelated claims arose against that corporation. No substantively relevant facts occurred in Minnesota on any of those claims. After the ten years, the corporation relocated to Florida, extinguishing all ties with Minnesota. Two years after the company's relocation to Florida, all twenty plaintiffs independently filed suit in Minnesota against the corporation.¹³⁸ These unlikely but theoretically possible circumstances illustrate the extreme inconvenience to which a defendant could be placed if it was forced to defend suits where it *used to* have continuous and systematic contacts.

5. *Venue Where Related Contacts Exist at Commencement*

Finally, a statutory provision allowing venue in cases in which the defendant has contacts at the time of commencement that are related to the cause of action would waste both judicial and private resources.¹³⁹ If Congress or the courts defined "relatedness" as the existence of a logical link, then a statute providing proper venue in places where related contacts exist at commencement would waste judicial resources. It would invite burdensome discovery and litiga-

¹³⁵ See, e.g., *McGee*, 355 U.S. at 220, 223 (indicating that the location of witnesses may be an important factor in venue determinations).

¹³⁶ *Id.* at 224.

¹³⁷ 634 F.2d 738 (4th Cir. 1980).

¹³⁸ Assume no statute of limitations problems exist in the hypothetical.

¹³⁹ See discussion *supra* part II.A.4.

tion as to the precise relationship of the claim to whatever corporate contacts are arguably sufficient to give rise to specific jurisdiction. For example, a plaintiff might have some incentive to try to show how a defendant's opening of a new McDonald's franchise in Maine is related to a claim arising from the plaintiff's food poisoning at a McDonald's owned by the defendant in Washington. Perhaps the courts will never find this sort of relatedness sufficient to support time-of-commencement specific jurisdiction, but the courts should not rely on this possibility when construing the statute. If either Congress or the courts applied Professor Brilmayer's substantive relevance test for relatedness, then no contacts at the time of commencement would ever be sufficiently related to support specific jurisdiction.¹⁴⁰

6. *Summary*

The hypothetical venue statute should definitely provide for venue in cases in which: the claim arose out of contacts that existed at the time of accrual;¹⁴¹ the claim is substantively related to the contacts that existed at the time of accrual;¹⁴² and the defendant has continuous and systematic contacts with the forum at the time of commencement.¹⁴³ It should exclude the possibility of venue in cases in which the defendant has continuous but unrelated contacts at the time of accrual¹⁴⁴ and cases in which the defendant has less-than-continuous, but related, contacts at the time of commencement.¹⁴⁵ Such a statute could be phrased as follows:

Venue is proper (a) in any state in which a substantial portion of the events or omissions giving rise to the claim occurred; (b) in any judicial district in which a substantively relevant event or omission occurred (a substantively relevant event or omission shall be defined as any event or omission whose occurrence or nonoccurrence would affect the outcome of the case, when considering any law applicable to the claim); or (c) in any state in which the defendant has continuous and systematic contacts at the time the action is commenced (continuous and systematic contacts are those contacts that would be sufficient to subject the defendant to general personal jurisdiction, assuming that the relevant time for determining general personal jurisdiction is the time the action is commenced).

¹⁴⁰ See discussion *supra* part II.B.4.

¹⁴¹ See discussion *supra* part II.B.1.

¹⁴² See discussion *supra* part II.B.2.

¹⁴³ See discussion *supra* part II.B.3.

¹⁴⁴ See discussion *supra* part II.B.4.

¹⁴⁵ See discussion *supra* part II.B.5.

In this formulation, section (a) describes the type of contacts that would give a court specific personal jurisdiction under the arises out of test. Section (b) provides for the kind of contacts that would give rise to specific personal jurisdiction under Professor Brilmayer's substantive relevance test. Finally, section (c) of the hypothetical statute corresponds to the type of contacts that would allow for general personal jurisdiction. When considered together, the drafters could ostensibly reduce these provisions to the concepts embodied in personal jurisdiction by stating that: "Venue is proper in any state where the defendant is subject to personal jurisdiction." This abbreviated formulation may have too much densely-packed information to be easily comprehensible, but its simplicity follows the pattern of the 1988 version of section 1391(c).¹⁴⁶ Specifically, section (c) of the hypothetical statute and its simplified version resemble the operative language of section 1391(c): "subject to personal jurisdiction at the time the action is commenced."

The hypothetical venue statute achieves the goal of extending venue to the limits of personal jurisdiction.¹⁴⁷ In doing so, however, it does not distinguish among the possible choices for venue to encourage a plaintiff to choose the *most* convenient forum for the litigants. That is, under the hypothetical venue statute, a plaintiff intent on causing inconvenience for the defendants could force them to litigate in the most remote place in which they are subject to personal jurisdiction, rather than where they reside or where the claim arose. Section 1391(a), as amended in 1992, serves just such a channeling function and forces plaintiffs to look to more convenient fora before choosing an inconvenient one. Part III of this Note discusses the method by which section 1391 accomplishes this channeling.

III

SYNTHESIS: INTERPRETATION OF 28 U.S.C. §§ 1391(a) AND (c)

This Part discusses how courts should interpret sections 1391(a) and (c). In facilitating arguments for the interpretation of those sections, Part I illuminated the background of the statute, as well as the concepts of personal jurisdiction and venue. Part II discussed the circumstances under which venue should be proper in a given forum, and hypothesized a codification of these circumstances. Part III now argues that courts should interpret the federal venue statute broadly.

¹⁴⁶ See 28 U.S.C. § 1391(c) (Supp. 1991).

¹⁴⁷ See discussion *supra* part I.B.1.

A. Section 1391(a)(3)

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district wherein any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.¹⁴⁸

When Congress amended section 1391(a) in 1990, it omitted a key phrase in section 1391(a)(3) that would have limited that subsection's application to cases in which there was no judicial district where the action could be brought under sections 1391(a)(1) or (a)(2). This led courts and commentators to confusion and disagreement over section 1391(a)(3)'s meaning. Many courts uncritically¹⁴⁹ treated the statute as providing that the plaintiff has filed suit in the proper venue simply upon finding personal jurisdiction over the defendant.¹⁵⁰ Thus, these courts held that because they had personal jurisdiction over the defendant, the plaintiff commenced suit in the proper venue, without further analysis. At least one court¹⁵¹ and several prominent commentators¹⁵² argued that because section 1391(a)(3) provides for venue where "the *defendants*

¹⁴⁸ 28 U.S.C. § 1391(a) (Supp. 1991), amended by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 504, 106 Stat. 4506, 4513 (1992).

¹⁴⁹ While the courts' assumptions are not necessarily wrong, none of these decisions, *infra* note 150, provide any analysis of the statute or possible alternate interpretations.

¹⁵⁰ See, e.g. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1385 (8th Cir. 1991); *Dave Guardala Mouthpieces, Inc., v. Sugal Mouthpieces, Inc.*, 779 F. Supp. 335 (S.D.N.Y. 1991); *Generale Bank v. Wassel*, 779 F. Supp. 310 (S.D.N.Y. 1991); *Viacom Int'l, Inc. v. Melvin Simon Prods., Inc.*, 774 F. Supp. 858, 868 (S.D.N.Y. 1991); *Peregrine Corp. v. Peregrine Indus., Inc.*, 769 F. Supp. 169, 172 (C.D. Pa. 1991); *Apple Vacations, Inc. v. Dvornik, Civ. A. No. 91-4500*, 1991 WL 243561, at *3 (E.D. Pa. Nov. 15, 1991); *Manufacturas Int'l Ltda. v. Manufacturers Hanover Trust Co.*, No. 91 Civ. 4892 (TPG), 1991 WL 230620, at *2 (S.D.N.Y. Oct. 30, 1991); *John Burgee Architects v. Patrick*, No. 91 Civ. 3023 (MJL), 1991 WL 222147, at *3 (S.D.N.Y. Oct. 16, 1991); *Universal Pipe & Supply, Inc. v. Merchants Int'l, Inc.*, No. 91 C 3566, 1991 WL 214070, at *2 (N.D. Ill. Oct. 16, 1991); see also William F. Harvey, *Federal Statutory Procedural Amendments—1990*, 34 RES GESTAE 546 (June 1991) (concluding that the new statute equates venue with personal jurisdiction).

¹⁵¹ *Harrison Conference Servs., Inc. v. Dolce Conference Servs., Inc.*, 768 F. Supp. 405, 407-08 (E.D.N.Y. 1991).

¹⁵² WRIGHT ET AL., *supra* note 117, § 3802.1 (Supp. 1991); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 769-82 (1991); David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 72-73 (1990).

are subject to personal jurisdiction,"¹⁵³ courts should limit it to cases involving multiple defendants. Nobody could plausibly interpret this language in a manner consistent with the purpose stated in the legislative history. Section 1391(a)(3) "[was] meant to cover the cases in which no substantial part of the events happened in the United States and in which all the defendants do not reside in the same state."¹⁵⁴ Apparently, Congress had omitted a portion of the language it had intended to enact. Fortunately, Congress corrected its error in 1992, thus relieving courts and commentators from having to interpret section 1391(a)(3) in a manner that would have abolished any separate venue requirement in diversity cases, an interpretation that hinged on a single letter "s."

Section 1391(a), as amended in 1992, plays an important, rational, and effective role in ensuring that cases will be litigated in a venue that is convenient. Section 1391(a)(1) renders venue proper in a judicial district where "any defendant resides, if all defendants reside in the same state."¹⁵⁵ Thus, for single defendants or multiple defendants that reside in the same state, venue is literally laid at their doorstep. Section 1391(a)(2) renders venue proper where "a substantial portion of the events or omissions giving rise to the claim occurred."¹⁵⁶ This language lays venue where specific jurisdiction-type events occurred. The term "substantial portion" is somewhat ambiguous, and this Note submits that it should be interpreted in consonance with Professor Brilmayer's test for substantive relevance.¹⁵⁷ Section 1391(a)(3) is available only if there is no place in which venue would be proper under sections 1391(a)(1) or (a)(2), and essentially waives venue in such circumstances.

A plaintiff may seek to establish venue under section 1391(a)(3) only if (1) there are multiple defendants that do not reside in the same state¹⁵⁸ and (2) either the claim arose outside the U.S. or not all of the defendants are subject to personal jurisdiction where any substantial portion of the events giving rise to the claim arose.¹⁵⁹ In other words, section 1391(a)(3) removes any constraints imposed by venue requirements that are different from those imposed by personal jurisdiction when the combination makes it impossible to sue anywhere in the U.S. on a claim in which at least one judicial district can exercise personal jurisdiction over all defendants. This can apparently occur only in two circumstances: (1) where multiple de-

¹⁵³ 28 U.S.C. § 1391(c) (Supp. 1991) (emphasis added).

¹⁵⁴ 1990 HOUSE REPORT, *supra* note 6.

¹⁵⁵ 28 U.S.C. § 1391(a)(1) (Supp. 1991).

¹⁵⁶ 28 U.S.C. § 1391(a)(2) (Supp. 1991).

¹⁵⁷ See *supra* notes 61-64 and accompanying text.

¹⁵⁸ Thus making venue under 28 U.S.C. § 1391(a)(1) impossible.

¹⁵⁹ Thus making venue under 28 U.S.C. § 1391(a)(2) impossible.

fendants reside in different states and the claim arose outside the United States, or (2) where multiple defendants reside in different states and at least one defendant is not subject to personal jurisdiction in any judicial district where a substantial portion of the events or omissions giving rise to the claim occurred.

An example of the first circumstance would be a situation in which a plaintiff wished to sue two defendants for injuries suffered as a result of a plane crash in Iceland. The first defendant, Ponco, is an airplane manufacturer residing in California, and the second, Precise, is an airplane guidance system manufacturer based in South Dakota. Venue under section 1391(a)(1) is impossible, because the defendants do not reside in the same state. Venue under section 1391(a)(2) is also impossible, because the claim arose in Iceland.

An example of the second circumstance would include a scenario in which a plaintiff bought a car from Pluto, an auto manufacturer residing only in West Virginia. Subsequently, the plaintiff had the car tuned-up by Bob, an auto mechanic residing in Florida. Later, Sam, an auto mechanic in Michigan, performed another tune-up. After the tune-ups, the plaintiff drove the car to Texas, where the transmission fell out, causing injuries to the plaintiff. The accident investigation is not yet sufficiently advanced to enable the plaintiff to eliminate either Bob or Sam as a defendant. The plaintiff wishes to sue Pluto, Bob and Sam. Venue under section 1391(a)(1) is improper because the defendants reside in different states. Venue under section 1391(a)(2) is improper because both Bob's and Sam's contacts with Texas are too tenuous to subject them to personal jurisdiction there, and Bob and Sam are not subject to personal jurisdiction in Michigan and Florida, respectively. Thus, a maximum of two defendants are subject to personal jurisdiction in any given state. Therefore, if the plaintiff can find any court in the U.S. that can exercise personal jurisdiction over all three defendants, section 1391(a)(3) waives any independent venue requirements.

In all cases that do not match the circumstances of these hypotheticals, venue must be laid either where the defendants reside or where substantively relevant events occurred.¹⁶⁰ If the defendants are corporations, their residence is defined by section 1391(c), which is discussed in the next subsection.

This subsection's examination of section 1391(a)(3) has thus far treated the section as simply providing venue "where the defendants are subject to personal jurisdiction," and has ignored the "at the time the action is commenced" language. The omission has been deliberate. "At the time the action is commenced" adds noth-

¹⁶⁰ Under 28 U.S.C. §§ 1391(a)(1) or (a)(2).

ing to the analysis.¹⁶¹ It simply requires the defendants to continue to be subject to personal jurisdiction in the forum at the time the action is commenced, regardless of when they first became subject to personal jurisdiction there. For example, if the court exercises specific personal jurisdiction—based on contacts related to the claim that occurred at the time of accrual—then the court properly exercises personal jurisdiction over defendants *on that claim* beginning at the time the claim accrued and continuing indefinitely into the future. If, however, the court relies on general personal jurisdiction—based on presence or domicile—then it may subject the defendants to personal jurisdiction only during the duration of their presence or domicile in the forum.¹⁶²

B. Section 1391(c)

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district in which it has the most significant contacts.¹⁶³

The legislative history indicates that Congress intended the 1988 amendment to section 1391(c) to limit corporate venue to the judicial districts in multiple-district states in which the defendant

¹⁶¹ This interpretation comports with Siegel's interpretation of the "at the time the action is commenced" language in § 1391(c):

Under the first sentence of subdivision (c), the measure of whether the defendant is subject to personal jurisdiction is based on "the time the action is commenced." That may not be very important when longarm jurisdiction is being used, because longarm jurisdiction ordinarily depends on some act or acts the defendant performed in the past (and, of course, that the claim arises out of those acts). But it may be quite important when the claim itself did not arise in the state and when jurisdiction is based only on the corporation's current physical presence in the state. That's the "doing business" test, and it ordinarily requires a showing that the defendant was doing business in the state when the action was commenced. (The 'doing business' test explicitly listed as a venue basis under the old subdivision (c) remains a venue basis under the new one for the obvious reason that doing business in a state also makes the corporation amenable to jurisdiction there.)

David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 407 (1988).

¹⁶² See discussion *supra* part I.B.2.

¹⁶³ 28 U.S.C. § 1391(c) (Supp. 1991).

does business or has a significant level of activity.¹⁶⁴ This conclusion about Congress' intent is supported by the fact that the pre-1988 formulation seemingly allowed venue in *any* district in a multiple-district state, even those districts with which the defendant had no contacts.¹⁶⁵ The second sentence of the 1988 amendment to section 1391(c), while appearing to rectify this problem, ultimately has no net effect toward implementing Congress' goals.

To understand how the 1988 amendment had no effect on the definition of corporate residence, consider two hypothetical corporations. The first, *X*, does business only in the Northern District of New York, at a sufficient level to subject it to general personal jurisdiction in New York. The second, *Y*, is incorporated in New York. Under the pre-1988 version of section 1391(c), *X* would reside only in the Northern District, because that is a "judicial district in which it is . . . doing business."¹⁶⁶ *Y*, on the other hand, resides in every district in New York under the old statute, because a charter of incorporation applies throughout the state, not just in one particular district.¹⁶⁷ Under the new version of section 1391(c), *X* again would be deemed to reside only in the Northern District. However, the court would reach this result by a rather convoluted process: Doing business in New York subjects *X* to personal jurisdiction throughout New York, but the "most-significant-contacts" clause limits *X*'s residence to the district where those contacts are located.¹⁶⁸ According to the revised section 1391(c), the court may subject *Y* to personal jurisdiction in New York. Because *Y* has no more or fewer contacts with any particular district due to its mere incorporation, it resides for venue purposes in all judicial districts in New York. Thus, the amendment does not fulfill its stated purpose of limiting corporate venue to districts in which a defendant engages in a significant level of activity.

Because resolving the multiple-district problem is the only stated goal of the amendment, Congress' shift in language from "doing business" to "subject to personal jurisdiction" should not be regarded as altering the *type* of contacts—specific or general—necessary to qualify for residence. Therefore, courts should deem

¹⁶⁴ 1988 HOUSE REPORT, *supra* note 6.

¹⁶⁵ *Id.*

¹⁶⁶ 28 U.S.C. § 1391(c) (1976).

¹⁶⁷ This fact depends on the operation of state laws of incorporation, rather than on the language of the statute, which provides that a corporation resides in "any judicial district in which it is incorporated." 28 U.S.C. § 1391(c) (1976) (amended 1988). A corporation incorporates in a *state*, not a judicial district. Therefore, if it is incorporated in the state, the corporation is incorporated in every judicial district throughout the state.

¹⁶⁸ *See* 28 U.S.C. § 1391(c) (Supp. 1991).

that a corporation resides wherever a court may exercise general or specific jurisdiction over it.¹⁶⁹ Cases and commentators support this broad interpretation as the proper interpretation of section 1391(c).¹⁷⁰

Courts should interpret section 1391(c)'s inclusion of the "at the time the action is commenced" language in harmony with section 1391(a)(3), as because there is no reason to treat this phrase differently between the two statutes. This phrase simply requires that the defendant continue to be subject to personal jurisdiction in the forum at the time the action is commenced, regardless of when the defendant first became subject to personal jurisdiction there. For proper venue, a court must exercise either specific personal jurisdiction, based on contacts that occurred at the time the claim arose, or general personal jurisdiction, based on presence in the district at the time of commencement of the suit.

C. Summary

As ultimately enacted with the 1992 amendments, sections 1391(a) and (c) present a logical and coherent treatment of venue. Section 1391(a) simultaneously extends venue to the outer limits of personal jurisdiction and establishes a priority system among possible venues to assure that the statute adequately serves the goal of maximizing convenience. Section 1391(c) defines corporate residence broadly, to assure that corporations are amenable to suit in the widest reasonable range of places.

Courts should interpret the language in sections 1391(a)(3) and (c) similarly in two respects. First, both should apply equally to cases of general and specific personal jurisdiction. Second, the phrase, "at the time the action is commenced" should not be interpreted to modify the concept of personal jurisdiction. Rather, this phrase requires that any *personal jurisdiction* a forum possesses over the defendants must continue to exist at the time the action is commenced—*independent of the existence of the contacts that gave rise to the personal jurisdiction, which may have occurred at the time of accrual or at the time of commencement.*

¹⁶⁹ See *supra* notes 68-79 and accompanying text.

¹⁷⁰ See *International Honeycomb Corp. v. Transtech Serv. Network, Inc.*, 742 F. Supp. 1011 (N.D. Ill. 1990); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526 (N.D. Ga. 1989); Siegel, *supra* note 163, at 407; see also Oakley, *supra* note 152, at 772 (arguing that section 1391(c) "looks awkwardly to the law of personal jurisdiction to determine when venue is proper"). But see WRIGHT ET AL., *supra* note 117, § 3811 at 21 (apparently regarding "personal jurisdiction" as used in § 1391(c) solely as general jurisdiction).

CONCLUSION

When Congress amended sections 1391(a) and (c) in 1988, 1990, and 1992, it remedied many of the statute's deficiencies.¹⁷¹ In that process, however, it also created new problems of interpretation. In particular, by explicitly relating venue to personal jurisdiction,¹⁷² Congress increased the importance of precisely understanding the concept and contours of personal jurisdiction.¹⁷³ Congress further muddied the statutory waters by providing for venue in any judicial district in which the defendant is subject to personal jurisdiction at the time the action is commenced.¹⁷⁴

Personal jurisdiction, a concept based on the defendant's relationship with the forum state, carries inherent notions of when the defendant's contacts must occur in order to give a court personal jurisdiction over a defendant.¹⁷⁵ In appending "at the time the action is commenced" to the requirement of personal jurisdiction, Congress did not clarify whether the language should modify personal jurisdiction to require that the defendant's contacts exist at commencement, or whether the phrase merely requires that the defendant continue to be subject to personal jurisdiction on the claim in the forum at the time the action is commenced. The latter of these two views is preferable.

Personal jurisdiction consists of two distinct categories: specific jurisdiction and general jurisdiction. For specific jurisdiction, the court must consider only the defendant's contacts at the accrual of the claim. For general jurisdiction, however, the court must inquire only about the defendant's contacts at the time of the commencement of the action. The "personal jurisdiction" language in sections 1391(a)(3)¹⁷⁶ and (c)¹⁷⁷ includes both categories of personal jurisdiction. Therefore, the only logical reading of the phrase "at the time the action is commenced" requires the existence or continuation of the court's personal jurisdiction over the defendant until the commencement of the action.

¹⁷¹ See discussion *supra* part III.

¹⁷² See 28 U.S.C. § 1391(a)(3), (c) (Supp. 1991).

¹⁷³ Congress increased the importance of personal jurisdiction insofar as it restructured the law so that both personal jurisdiction and venue depend on the concepts implicit in personal jurisdiction. Previously, an erroneous finding of personal jurisdiction, which would have resulted in the case being heard in the wrong court, could be remedied by reference to an independent venue statute that would have required dismissal on *forum non conveniens* grounds (or transfer to a proper venue). With the merging of personal jurisdiction and venue, this safety net no longer exists.

¹⁷⁴ 28 U.S.C. §§ 1391(a)(3), (c) (Supp. 1991).

¹⁷⁵ See discussion *supra* parts I.B.2, II.A, and II.B.

¹⁷⁶ See discussion *supra* part III.A.

¹⁷⁷ See discussion *supra* part III.B.

Congress inserted the phrase “personal jurisdiction” as a convenient shorthand, without fully considering the implications of this usage. This Note, by contrast, *has* considered the implications of personal jurisdiction and its use in the federal venue statute. In light of these implications, this Note has considered several possible interpretations of sections 1391(a) and (c) and has offered suggestions for the best interpretation of the statute. The task now passes to the courts to implement section 1391. They should do so in a manner consistent with this Note’s recommendations.

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