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Justice Black Was Right About International Shoe, But for the Wrong Reason

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Justice Black Was Right About *International Shoe*, But for the Wrong Reason

Richard D. Freer*

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I. INTRODUCTION

In his important book, *Animating Civil Procedure*, Professor Michael Vitiello demonstrates the power of procedure.¹ His theme, put simply, is that substantive rights are worthless unless there is some effective avenue for enforcing them. The traditional avenue of enforcement is civil litigation. A gatekeeper of that avenue is personal jurisdiction. Without personal jurisdiction, a plaintiff simply cannot get into court; she cannot vindicate her claims and the community cannot benefit from private enforcement of the law.

The principal case guiding the state-court exercise of personal jurisdiction is

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1. MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* (2018) [hereinafter VITIELLO].

the iconic 1945 decision *International Shoe Company v. Washington*.² The Supreme Court's efforts to interpret and apply the *International Shoe* test during the second half of the twentieth century were notoriously inconsistent and frustrating. That century ended with a flurry of cases in the 1980s and one in 1990 that featured an inability to muster majority opinions on fundamental questions and a tendency toward restrictive views of state-court power.

When the Court returned to personal jurisdiction in 2011, after a 21-year hiatus, observers were hopeful that it would remedy the doctrinal shortcomings with which it had left us. From 2011 through 2017, the Court decided six personal jurisdiction cases, which constitute what we can call the "new era."³ With no personal jurisdiction cases on the Supreme Court's immediate horizon, it is a good time to take stock. Doing so reveals that the law of personal jurisdiction today, while in some ways clearer, is more sclerotic than it was at the turn of the century. In his concurrence in *International Shoe*, Justice Black warned that the doctrine announced in that decision might be used limit plaintiff's access to courts. Though his warning now seems prescient, the limited scope of personal jurisdiction in the new era results not from the importation of flexible standards, as Black feared, but from an obsession with the defendants' intent to form a tie with the forum state.

II. WRITING ON A BLANK SLATE: JUSTICE BLACK'S MELANGE APPROACH

The most famous phrase in the law of personal jurisdiction, memorized by countless law students, is from *International Shoe*. After discussing the historic grounding of personal jurisdiction in a court's *de facto* power over the person of the defendant, which required that the defendant be served with process in the forum, the Court explained that in the modern view:

due process requires only that . . . to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.⁴

At least three things were clear from the outset of the modern approach. First, there must be some contact between the defendant and the forum. The Court expressly recognized that there can be no personal jurisdiction in a state in which the defendant has no "contacts, ties, or relations."⁵

2. 326 U.S. 310 (1945).

3. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

4. *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted).

5. *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878)).

Second, “fair play and substantial justice”—what came to be called “reasonableness”—is part of the personal jurisdiction calculus. This was something new and potentially liberating from the power-based regime of *Pennoyer v. Neff*.⁶

Third, though the Court did not use the terms, it recognized (albeit not in the language quoted above) the concepts of what came to be called “general” and “specific” personal jurisdiction.⁷ With specific jurisdiction, the plaintiff asserts a claim that arises from or relates to the defendant’s contacts with the forum. With general (or “all purpose”)⁸ jurisdiction, the plaintiff’s claim does not relate to the defendant’s contacts with the forum.

The Court did not give much guidance on these three matters in *International Shoe* itself. On contact, for instance, it did not discuss how volitional, direct, or foreseeable the defendant’s affiliation with the forum must be. Regarding fairness, the Court did not prescribe relevant factors for the assessment, nor did it explain how reasonableness of jurisdiction interacts with the requirement that the defendant have a contact with the forum. Regarding general jurisdiction, the Court recognized that sometimes a defendant’s contacts with the forum would be so “continuous and systematic” as to justify jurisdiction for a claim unrelated to those contacts. But it did not define continuous or systematic.⁹ On all three fronts, then, *International Shoe* left a blank slate.

Justice Black was the first Justice to write on that slate. In his concurrence in *International Shoe*—which reads much more like a dissent—he saw no need for the Court’s broad restatement of relevant principles.¹⁰ Under the “solicitation plus” rule fashioned by the state and lower federal courts, the defendant shoe company was unquestionably subject to *in personam* jurisdiction in Washington.¹¹ Black was especially bothered by the injection of “elastic standards” and “vague . . . criteria”—phrases like “fair play” and “substantial justice,” “estimate of the inconveniences,” “reasonableness,” and the “quality and nature” of defendant’s activities.¹² He explained:

6. *Pennoyer*, 95 U.S. 714.

7. *See, e.g., Int’l Shoe*, 326 U.S. at 318 (“[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”).

8. *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“all-purpose jurisdiction” as another rubric for general jurisdiction).

9. For example, is the level of activity to be measured by objective criteria, such as the generation of a certain number of dollars in revenue in a given year? Or is it assessed on a relative scale, such as a certain percentage of the defendant’s overall business? The Court has not wrestled with such questions, though in *Daimler* it concluded that activities-based general jurisdiction over a corporation must be based upon that company’s overall level of business, and not by comparing it to other businesses in the forum state. *See infra* note 74.

10. *Int’l Shoe*, 326 U.S. at 322–26 (Black, J., concurring).

11. The issue was so clear that Justice Black would have “dismiss[ed] the appeal as unsubstantial.” *Id.* at 322 (footnote omitted).

12. *Id.* at 323–25.

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There is a strong emotional appeal in the words “fair play,” “justice,” and “reasonableness.” But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives.¹³

Black was worried that federal courts, including the Supreme Court, would use such open-ended concepts to *restrict* states’ exercise of personal jurisdiction. And he left no doubt as to the unconstitutionality of the federal judiciary’s invalidation of state-court jurisdiction based upon open-ended concepts of convenience:

None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court’s notions of “natural justice.” I should have thought the Tenth Amendment settled that.¹⁴

After deciding *International Shoe*, the Court stood aside for five years to allow state courts and lower federal courts to apply and interpret the new standard. When the Court returned, Justice Black took charge to ensure that *International Shoe* would be read expansively. If we were stuck with elastic terms, he seemed to think, let us use them to extend personal jurisdiction. His efforts dealt with specific, and not general, jurisdiction.

The first honest-to-goodness specific personal jurisdiction case applying the *International Shoe* test¹⁵ was *Travelers Health Association v. Virginia*,¹⁶ which has been overlooked through the years. In that case, the Court upheld a Virginia statute that required out-of-state businesses to obtain a license before offering to sell securities in the Commonwealth. The statute required such a company to appoint a state officer as its agent for service of process in Virginia. Travelers, a nonprofit health insurance company formed and operating in Nebraska, did not comply with the Virginia statute. It had never advertised or used paid agents in Virginia. Instead, it relied on recommendations from existing members; when a member recommended someone for coverage, Travelers would solicit that person by mail. The company had done this in Virginia for over 40 years, which resulted in its having 800 members there.¹⁷

13. *Id.* at 325 (Black, J., concurring).

14. *Id.* at 324 (Black, J., concurring). He continued: “Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more ‘convenient’ for the corporation to be sued somewhere else.” *Id.* at 325.

15. Earlier cases cited *International Shoe*, but none had undertaken to apply the minimum contacts test to determine whether personal jurisdiction was proper. *See, e.g.,* *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574–75 (1949) (citing *International Shoe* for the proposition that corporations are entitled to Fourteenth Amendment equal protection).

16. 339 U.S. 643 (1950).

17. *Id.* at 645–46.

The Virginia Corporation Commission filed a cease-and-desist action against the company and one of its officers. The Court upheld enforcement of the regulatory provision that required the company to accept service on the state official.¹⁸ Justice Black's discussion of personal jurisdiction under *International Shoe* comprises three paragraphs. From the first sentence, he established that "contact" and what came to be known as "reasonableness" are to be assessed together, in no set order: "[T]he contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings. . . ."¹⁹ He then addressed the company's in-state solicitation of business, and raised the notion of a *quid pro quo* between gaining a benefit and being subjected to personal jurisdiction:

[The company's] insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state. Appellants have caused claims for losses to be investigated and the Virginia courts were available to them in seeking to enforce obligations created by the group of certificates.²⁰

Justice Black then faced the open-ended notion of fairness and employed it in favor of jurisdiction. He stressed fairness to the *plaintiff* by noting that many claims against the insurance company would be so small that Virginia consumers would not find it worthwhile to litigate in the defendant's home state. Either Virginia claimants get to litigate in Virginia or they will not be able to litigate at all.²¹

Next, he expressly incorporated factors from a *forum non conveniens* analysis. Virginia was the center of gravity, "where witnesses would most likely live and where claims for losses would presumably be investigated."²² Again, he emphasized fairness to the *plaintiff* in being able to seek redress at home.²³ He coupled the plaintiff's interest with the *forum state's interest* in protecting "its citizens from . . . injustice."²⁴

Seven years later, Justice Black wrote the unanimous opinion for the Court in *McGee v. International Life Insurance Co.*²⁵ In that case, a Californian bought life

18. *Id.* at 647–48.

19. *Id.* at 648.

20. *Id.*

21. *Travelers Health Ass'n*, 339 U.S. at 649 ("[C]laims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit.").

22. *Id.* ("Such factors have been given great weight in applying the doctrine of *forum non conveniens*").

23. *Id.* (explaining it is unfair to require plaintiffs to "seek redress only in some distant state where the insurer is incorporated").

24. *Id.*

25. 355 U.S. 220 (1957). Though the opinion was unanimous, only eight Justices participated. Chief Justice Warren recused. *Id.* at 224–25.

insurance from an Arizona company. A Texas company acquired the Arizona insurer. The law required the Texas company to honor the Californian's insurance policy. It mailed a re-insurance certificate to the insured, who continued to pay premiums by mail from California. After the insured died, the company refused payment on the policy. The beneficiary of the policy sued in California, the company failed to defend, and the California trial court entered a default judgment. The Court held that Texas was required to extend full faith and credit to the California default judgment.

In one paragraph, Justice Black upheld personal jurisdiction in California, again mixing facts relating to contact, the forum state's interest, the plaintiff's interest, and *forum non conveniens* factors.²⁶ Two aspects of the *McGee* opinion are especially noteworthy. First, Black adopted a broad view of what constitutes a relevant contact under *International Shoe*. Due process was satisfied because "the suit was based on a contract which had substantial connection with [the forum] State."²⁷ In other words, the relationship between the parties, and not simply the acts of the defendant, might provide sufficient "minimum contacts" with the forum. Moreover, jurisdiction was proper even though the record indicated that the insurer had "never solicited or done any insurance business in California apart from the policy involved [in the case]."²⁸

Second, though suit in California would impose a burden on the corporate defendant, that burden was less severe than requiring the impecunious beneficiary to sue in Texas. Black weighed the relative inconvenience to the litigants, noting that Californians "would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable."²⁹ Because interstate business was becoming increasingly routine, commercial defendants should expect to be subject to suit in multiple states.³⁰ Moreover, California had "a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."³¹

With *Travelers Health* and *McGee*, Black steered the Court on a liberal course regarding the application of *International Shoe*. First, the approach did not treat contact and fairness separately. It was a *mélange*, in which facts demonstrating the defendants' contact with the forum and facts supporting the reasonableness of

26. *Id.* at 223. Though the insurer sent the certificate of re-insurance to the insured in California, and to that extent solicited business from that state, "[n]othing in the opinion suggested that jurisdiction turned on [that] fact." VITIELLO, *supra* note 1, at 26. Professor Vitiello notes that the outcome would have been the same had the insured reached out to the Texas insurer to request an update to his policy. The Court "did not suggest that the result turned on who solicited whom. The focus of the analysis was on modern transportation and communication. In light of those realities, at least a large corporate defendant could not claim that it lacked an opportunity to be heard. Indeed, Justice Black seemed to equate due process with adequate notice and the opportunity to be heard." *Id.* at 27 (footnote omitted).

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

28. *Id.* at 222.

29. *Id.* at 223.

30. *Id.* at 222–23.

31. *Id.* at 223.

exercising jurisdiction were mixed. Second, the approach gave content to the open-ended elastic terms regarding whether jurisdiction was fair. Specifically, it appealed to the state's interest in providing a courtroom for a citizen harmed by the nonresident defendant, the plaintiff's interest in seeking justice at home and avoiding suing in a distant state, the efficiency of litigating where the witnesses may be found, and the need for a convenient forum for the assertion of negative-value claims. Clearly, the Court envisioned that defendants engaged in far-flung business activities would be amenable to suit in multiple states.

Notably, factors relating to the fairness of jurisdiction—*forum non conveniens* factors—could be marshaled to support jurisdiction. In *McGee*, for instance, California had an interest in providing a forum for its citizen, who allegedly was harmed by the out-of-state insurer. The plaintiff had an interest in suing at home. And the balance of convenience dictated that the defendant insurer could litigate in the plaintiff's home state.

In *McGee*, decided on December 16, 1958, no Justice dissented from the free-ranging approach combining matters of contact with matters of fairness. Less than seven months later, however, on June 23, 1958, with no change in personnel on the Court, only four Justices would embrace the *mélange* approach.

III. A RIVAL APPROACH

In *Hanson v. Denckla*,³² another specific jurisdiction case, the Court took a radical turn. The Court split five-to-four, with Chief Justice Warren writing for the Court and Justice Black dissenting. Suddenly, factors supporting reasonableness of jurisdiction took a back seat to whether the defendant had created a sufficient contact with the forum. The requirement of contact focused exclusively on actions by the defendant, and not (as had been the case in *McGee*) on whether the relationship between the parties had some connection with the forum. *Hanson* introduced the requirement of “purposeful availment”:³³ there can be no personal jurisdiction without the defendant's volitional engagement of the forum. The contact between the forum and the defendant must be forged by the defendant itself, and not by the “unilateral act of a third party.”³⁴

Overnight, then, the Court's focus shifted from the *forum* and its interests to the *defendant* and acts by which it can be said to have reached out to the forum. Implicit in the requirement of purposeful availment is the idea that a defendant should be able to control, to limit, the fora in which it will be subject to personal jurisdiction. Moreover, personal jurisdiction involves more than protecting

32. 357 U.S. 235 (1958).

33. *Id.* at 253 (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”).

34. *Id.* (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”).

defendants from litigation in distant places. The due process limits on personal jurisdiction are “more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.”³⁵

Why the reversal of approach? *Hanson* was nasty litigation between siblings concerning inheritance. Finding that the trustee was subject to personal jurisdiction in Florida would have rewarded the seemingly avaricious siblings over the seemingly virtuous one. Eschewing the opportunity to decide the case on alternative grounds,³⁶ the Court defeated the greedy siblings by limiting personal jurisdiction. It was an example of a bad case making bad law.³⁷ Despite the new tack, the Court did not purport in *Hanson* to overrule the *mélange* approach pioneered by Black.

After *Hanson*, the Court ignored *in personam* jurisdiction for 21 years.³⁸ State and lower federal courts were left to make sense of the conflicting signals. Most courts appeared to embrace the liberal *mélange* approach of *Travelers Health* and *McGee* and to ignore *Hanson* as a sport.³⁹ Those years—the 1960s and 1970s—featured increased interstate commerce. More than before, products or components manufactured in one state were marketed in, and causing harm in, distant states. State common law in these years developed cutting-edge theories of product liability. With this expansion of liability came expansive exercises of personal jurisdiction, often supported by the *mélange* factors set out by Black and ignoring a need for purposeful availment by the defendant.⁴⁰

IV. THE 1980S THROUGH 1990 AND THE HEGEMONY OF *HANSON*

The Court returned to *in personam* jurisdiction in 1980 and, over the next decade, left no doubt as to which approach won. In *World-Wide Volkswagen*,⁴¹

35. *Id.* at 251.

36. It could have dismissed the case on grounds of failure to join an indispensable party. *Id.* at 254–55.

37. Professor Vitiello makes this point and recounts the fascinating backstory of the litigation in VITIELLO, *supra* note 1, at 28–32.

38. The one case of consequence between 1958 and 1980 was *Shaffer v. Heitner*, 433 U.S. 186 (1977), which concerned *in rem* and *quasi-in-rem* jurisdiction.

39. VITIELLO, *supra* note 1, at 31 (“Many courts ignored *Hanson* for about twenty years. Taken seriously, it presented a serious challenge to courts interested in expanding the reach of state court jurisdiction over out-of-state corporations causing harm in-state.”).

40. The best-known example is *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 68 (Ill. 1961), in which the Illinois Supreme Court upheld jurisdiction over an out-of-state corporation based upon a stream-of-commerce theory. The court was willing to assume that the company’s products were marketed and used in significant quantities in the forum state, though the record did not contain evidence of such purposeful availment. From the record, it appeared that the defendant’s product was shipped into the forum by the unilateral act of a third party (the manufacturer of a finished product that contained a component made by the defendant). Thus, under *Hanson*, it is unlikely that the forum would have had personal jurisdiction. See VITIELLO, *supra* note 1, at 31.

41. 444 U.S. 286, 291–92 (1980).

decided in 1980, the Court split the *International Shoe* inquiry into discrete parts: contact and fairness/reasonableness. Beyond this, it established the primacy of contact. There must be a relevant contact between the defendant and the forum before a court will consider factors relating to the reasonableness of jurisdiction. Moreover, as to contact, the Court embraced the *Hanson* definition: a relevant contact is one that arises from the defendant's purposeful availment.

This *World-Wide* methodology effectively ended the *mélange* approach. Now, fairness topics such as the state's interest, the plaintiff's interest, the *forum non conveniens* factors can be assessed only after a court finds that the defendant forged a purposeful contact with the forum.

The Court confirmed the secondary status of the reasonableness analysis in *Burger King Corp v. Rudzewicz*,⁴² which was the only personal jurisdiction case in which Justice Brennan wrote a majority opinion.⁴³ In that case, the Court imposed a presumption: once the plaintiff demonstrates that the defendant has forged a purposeful contact with the forum, the exercise of jurisdiction is presumed to be reasonable. The burden shifts to the defendant to "present a compelling case" that jurisdiction is "so gravely difficult and inconvenient that [he] is at a severe disadvantage in comparison to his opponent."⁴⁴ Further interring notions of fairness that had been relevant in *McGee*, *Burger King* established that a defendant "may not defeat jurisdiction simply because of his adversary's greater net worth."⁴⁵

Burger King, with its presumption and shifting burdens of proof, makes it all but impossible to defeat jurisdiction by relying on the fairness factors. The only case in which the Court rejected jurisdiction—despite contact—because it was unreasonable was *Asahi Metal Co. v. Superior Court*.⁴⁶ But that was an easy case. By the time it got to the Court, it was an "F-Cubed" dispute: foreign plaintiff, foreign defendant, with a claim that arose overseas. There was no reason for an

42. 471 U.S. 462 (1985). It is ironic that he imposed the lock-step test that hampers access to an assessment of reasonableness. Brennan had long and unsuccessfully urged the *mélange* approach of Justice Black. See Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551 (2012) [hereinafter *Personal Jurisdiction in the Twenty-First Century*].

43. Brennan had long been an advocate of the *mélange* approach to *International Shoe*. To get the opportunity to write for the majority, in *Burger King* he agreed to embrace the two-step regime adumbrated in *World-Wide*. It is his ironic legacy he imposed a presumption in favor of jurisdiction that has contributed to the current judicial obsession with the contact requirement. See *Personal Jurisdiction in the Twenty-First Century*, *supra* note 42, at 553. In fairness, Justice Brennan used the opportunity to slip into the *International Shoe* calculus a sliding-scale approach: if the reasonableness factors strongly favored jurisdiction, it might be upheld based upon a lesser showing of contact. *Burger King*, 471 U.S. at 477 ("These [fairness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."). This "forced linkage" of the contact and fairness prongs of analysis should make it difficult to dismiss on the basis of lack of contact without at least considering the fairness factors. Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Super. Ct.*, 39 S.C. L. REV. 729, 775 (1988). In no subsequent case has the Court referred to this sliding-scale approach, much less applied it.

44. *Burger King*, 471 U.S. at 478.

45. *Id.* at 483 n.25.

46. 480 U.S. 102 (1987).

American court to hear it. Indeed, it could have been dismissed without harm to personal jurisdiction doctrine on the basis of *forum non conveniens*.⁴⁷ In the common domestic case, *Burger King* will almost never counsel rejection of jurisdiction based upon the fairness factors.

The remainder of the twentieth century was marked by two particularly shambolic efforts. In *Asahi*, the Court failed to muster a majority opinion on what constitutes purposeful availment, and therefore a relevant contact, in stream of commerce cases.⁴⁸ And in *Burnham v. Superior Court*,⁴⁹ it failed to generate a majority opinion for whether service of process on the defendant in the forum state supports general jurisdiction, independent of *International Shoe*.⁵⁰

In routine domestic cases of specific jurisdiction, the *International Shoe* assessment was dominated by a concern with contact; reasonableness was pushed to a distant second position. After *Burger King*, the reasonableness inquiry had become a brake—it could defeat jurisdiction but was not used (as it had been in *Travelers Health* and *McGee*⁵¹) to support jurisdiction.⁵² The focus was contact, as shown by cases like *World-Wide*, *Asahi*, *Calder v. Jones*,⁵³ and *Keeton v. Hustler Magazine*.⁵⁴ And contact, in turn, was narrowly focused on defendant's purposeful acts. The unilateral act of a third party, even the plaintiff, could not establish a sufficient tie between the defendant and the forum. In sum, the process had become defendant-centric.

Any resulting sclerosis in specific jurisdiction was perhaps offset by a rather robust exercise of general jurisdiction. In *International Shoe*, the Court noted that a defendant's contact with the forum could be so great as to justify personal jurisdiction for claims that did not arise from that contact. The phrase that stuck was that general jurisdiction was appropriate if the defendant had forged

47. Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 19 (1988).

48. Four Justices, led by Justice Brennan, found it sufficient that a defendant placed its product into the stream of commerce with the reasonable anticipation that it would be marketed in a particular state. *Asahi*, 480 U.S. at 121 (Brennan, J., concurring). Four others, led by Justice O'Connor, concluded that something more was needed to show an "intent or purpose to serve the market in the forum State." *Id.* at 110 (O'Connor, J., plurality opinion). Justice Stevens saw no need to adopt the reasoning of either camp. *Id.* at 121 (Stevens, J., concurring).

49. 495 U.S. 605 (1990).

50. Justice Scalia, speaking for four Justices, concluded that it did. *Id.* at 628 (Scalia, J., plurality opinion). Justice Brennan, also speaking for four Justices, opined that the case must be assessed under *International Shoe*. *Id.* at 629 (Brennan, J., concurring). Again, Justice Stevens refused to take sides, and thwarted a majority opinion one way or the other. *Id.* at 640 (Stevens, J., concurring). Some observers wonder aloud whether the Court stopped taking personal jurisdiction cases in 1990 because Justice Stevens would continue to thwart majority opinions. In fact, the Court did not decide another personal jurisdiction case until 2011, after Justice Stevens had retired.

51. *McGee* is the last case in which the Court relied extensively on fairness factors to uphold jurisdiction.

52. After *Hanson*, the Court's only extended discussions of the fairness factors for the remainder of the 20th century came in *Burger King* and *Asahi*. In both cases, the outcome hinged on the assessment of whether the exercise of jurisdiction would be reasonable. In *Burger King*, the answer was yes. In *Asahi*, the answer was no, because—as noted in text—the dispute had become an F-Cubed case.

53. 465 U.S. 783 (1984) (finding contact in a defamation case).

54. 465 U.S. 770 (1984) (finding contact in a defamation case).

“continuous and systematic” ties with the forum.

In this area, the Court left big questions open, but the state and lower federal courts seemed to develop a coherent doctrine. The classic case, *Perkins v. Benguet Consolidated Mining Co.*,⁵⁵ decided in 1952, was easy. A mining company that could not engage in mining in the Philippines because of World War II conducted whatever needed to be done from an officer’s home in Ohio. Everyone had always agreed that a corporation is subject to general personal jurisdiction in the state of its incorporation. *Perkins* reached the common-sense conclusion that a corporation should be subject to general personal jurisdiction in the single state in which it undertook business activities.⁵⁶ Again, though, the Court employed the phrase “continuous and systematic” as the test for what level of activity in-forum would support general personal jurisdiction.⁵⁷

The Court’s other twentieth century effort regarding general jurisdiction was *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁵⁸ which held that a Colombian charter air transportation company was not subject to general jurisdiction in Texas. The Court again embraced the “continuous and systematic” rubric, though it did little to help define the phrase. Curiously, the Court relied upon *Rosenberg Brothers & Co. v. Curtis Brown Co.*, which held—23 years before *International Shoe*—that purchases and related trips, standing alone, cannot support general jurisdiction.⁵⁹

While cases at the margins were irreconcilable, state and lower federal courts forged common understandings of what constituted “continuous and systematic” activity.⁶⁰ The idea that general jurisdiction was proper based upon a business’s substantial commercial contacts with the forum was so commonplace that many companies simply never challenged such all-purpose power over them. As just one example, in *Ferens v. John Deere Co.*, the defendant, a Delaware corporation, never thought to challenge the exercise of general jurisdiction over it in Mississippi.⁶¹

V. THREE CHARACTERISTICS OF THE NEW ERA

Now let us move to the new era, which consists of six cases decided from 2011

55. 342 U.S. 437 (1952).

56. *Id.* at 447–48.

57. *Id.* at 448.

58. 466 U.S. 408 (1984).

59. 260 U.S. 516, 518 (1923).

60. Compare *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965) (finding general jurisdiction based upon the airline’s maintenance of a one-and-a-half room office in the forum state and employment of several people at that office), with *Follette v. Clairol*, 829 F. Supp. 840, 845–46 (W.D. La. 1993) (rejecting general jurisdiction over Wal-Mart despite its operation of 264 retail stores in the forum state).

61. 494 U.S. 516, 520 (1990).

through 2017. Others have ably described and mostly criticized these cases.⁶² My purpose here is to summarize three characteristics of this new era: (1) the continued hegemony of contact, (2) the evisceration of general jurisdiction, and (3) increased focus on relatedness.

A. *The Continued Hegemony of Contact*

The need for a defendant-initiated contact with the forum continues to dominate specific jurisdiction. The proof is the stunning decision in *J. McIntyre*. There, an English manufacturer sold machines to an Ohio distributor with instructions to sell as many machines as possible throughout North America. The distributor sold a machine to a company in New Jersey. Plaintiff, working for that New Jersey company, was severely injured while using the machine on the job in New Jersey. The Court held that the plaintiff could not sue the English corporation in his home state.

The result in *J. McIntyre* shows how far the Court has moved from Justice Black's *mélange* approach. Black would have noted that the forum state had a strong interest in protecting its citizen, as well as a legitimate interest in workplace safety. He would have noted the plaintiff's interest in suing at home. The fact that witnesses to the installation and use of the machine, to the accident, and concerning the medical issues would all be in New Jersey would support jurisdiction. So would the fact that the substantive claim would likely be governed by New Jersey law. And the balance of burdens mirrors *McGee*—it is more difficult to make the plaintiff travel (especially to Great Britain) than to expect the company to defend in a state in which its product is used (and from which, therefore, it had made money).

In the twenty-first century, those factors are entirely irrelevant. They are fairness factors, and a plaintiff cannot appeal to them until she demonstrates that the defendant forged a purposeful-avilment contact with the forum. In *McIntyre*, as in *Asahi*, the Court failed to muster a majority opinion on what constitutes purposeful avilment in a stream-of-commerce case. Six justices held that there was no contact between the English company and New Jersey. The plurality opinion, by Justice Kennedy for four Justices, and the concurring opinion by Justice Breyer, joined by Justice Alito, cobbled together the six votes against jurisdiction.⁶³

I have never understood why a simple economic observation does not solve

62. See, e.g., Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 747–59 (2018); Adam R. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018).

63. It is possible that the Court will ultimately adopt a broad view of contact in stream-of-commerce cases. Justice Breyer's concurrence, joined by Justice Alito, refused to take sides between the position staked out by Justice Kennedy on the one hand, and Justice Ginsburg on the other. By keeping their powder dry, Breyer and Alito may in an appropriate case join the dissenters from *J. McIntyre* in embracing a liberal view of what constitutes contact in these cases.

the purposeful availment issue in stream-of-commerce cases. When a manufacturer such as J. McIntyre sells through a distributor, and places no limits on distribution, any sale by the distributor will bring financial benefit to the manufacturer. Stated another way, J. McIntyre made money from the fact that there was a market in New Jersey for its machine. If no market existed, J. McIntyre would not have sold the machine that injured the plaintiff. The English company made money from New Jersey on the sale of that one machine, which should constitute purposeful availment of that state.

But the six Justices who rejected jurisdiction in *J. McIntyre* were dogged in finding that the English company did not have a relevant connection with New Jersey. They showed their doggedness through a remarkable set of hypotheticals. Justice Kennedy worried that a small Florida farmer who sells produce through a middleman for national distribution “could be sued in Alaska or any number of other States’ courts without ever leaving town.”⁶⁴ Justice Breyer expressed concern that an Appalachian potter selling through a distributor might be haled into court in Hawaii to answer for a defective coffee mug.⁶⁵ Or a Kenyan coffee grower or Egyptian shirt-maker, selling through an American distributor, might be sued in any state.⁶⁶

With respect, these Justices miss the boat. The answer in these cases is not to strain to find that the defendant has no contact with the forum. The answer is to let the fairness factors do some of the work. Yes, the Florida farmer selling through a distributor has a contact with Alaska. But on the facts of a given case, jurisdiction in Alaska would not be fair. Yes, the Appalachian potter selling through a distributor has a contact with Hawaii, but no court will ever conclude that jurisdiction in Hawaii—arising from a single defective coffee mug—would be reasonable. The Kenyan coffee grower and Egyptian shirt maker has a contact with many states in the United States, but jurisdiction in any of them might be unreasonable, depending upon the facts.

Once we recognize that there is a relevant contact, the reasonableness prong of *International Shoe* puts the ultimate conclusion in the hands of the fairness factors—to uphold jurisdiction in *McIntyre* and to reject it as to the Appalachian potter. But, as it has since *World-Wide*, the Court continues to refuse to assess such factors until a case satisfies its increasingly narrow view of a relevant contact between the defendant and the forum. Justice Black’s appeal to reasonableness is as futile now as it has been since 1980.

Indeed, in some ways the situation seems worse now. At least in *Asahi*, the Court was willing to consider the possibility that the fairness factors might counsel against jurisdiction. In *J. McIntyre*, neither the plurality nor concurring opinion entertained the possibility in their respective hypothetical cases that the

64. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (Kennedy, J., plurality opinion).

65. *Id.* at 891–92 (Breyer, J., concurring).

66. *Id.* at 892 (Breyer, J., concurring).

reasonableness factors come into play at all—to support or to defeat jurisdiction. Moreover, with *Daimler*, Justice Ginsburg, who had once supported a *mélange* method, embraced the rigid two-step approach from *World-Wide*, which gives primacy of place to contact.⁶⁷

At the end of the century, there was a safety valve: the plaintiff could invoke general jurisdiction in a state in which the defendant had continuous and systematic contacts. In *McIntyre*, then, the plaintiff presumably could sue the English company in Ohio, because it had such ties with that state. After all, every machine it sold in North America was sold and shipped to that state, which would seem to satisfy the continuous and systematic requirement. Now, however, even this avenue is restricted significantly by the second characteristic of the new era.

B. *The Restriction of General Jurisdiction*

Three of the six cases in the new era—*Goodyear*, *Daimler*, and *BNSF*—addressed general jurisdiction. They have changed the doctrine profoundly. Instead of permitting all-purpose jurisdiction in any state in which the defendant has continuous and systematic ties, now it is allowed only in which the defendant is “essentially at home.”⁶⁸

The view of “essentially at home” is quite narrow. In *Helicopteros*, as we saw, the Court held that the plaintiff cannot base general jurisdiction on the defendant’s continuous and systematic *purchases* from the forum.⁶⁹ In *Goodyear*, the Court extended the ban to prohibit general jurisdiction based upon the defendant’s continuous and systematic *sales* into the forum.⁷⁰ Justice Ginsburg gave two “paradigms” of where a corporation may be considered “essentially at home”: (1) its state of incorporation and (2) the state in which it has its principal place of business (which the Court seems to consider its nerve center).⁷¹ The implication, plainly, is that a corporation⁷² will be subject to general personal jurisdiction in a maximum of two states.

67. I have always thought that Ginsburg’s dissent in *J. McIntyre*, by giving “prime place to reason and fairness,” *id.* at 903, was consistent with the *mélange* test of *McGee*. *Personal Jurisdiction in the Twenty-First Century*, *supra* note 42, at 584. In her opinion for the Court in *Daimler*, however, she noted that specific jurisdiction is governed by the two-step analysis of *World-Wide*, in which reasonableness is consulted only after a contact is established. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014). There, she also rejected the idea that the assessment of reasonableness is a “free-floating test.” *Id.*

68. The phrase first appears in this context in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). The Court has applied it in the two more recent general jurisdiction cases, sometimes using the term “at home” instead of “essentially at home.” *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017); *Daimler*, 571 U.S. at 136.

69. *See supra* note 59.

70. *See Goodyear*, 564 U.S. at 930 n.6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”).

71. *Id.* at 924–25.

72. In no case has the Court opined on where an unincorporated business, such as a limited liability company, be “essentially at home.”

In *Goodyear*, the Court gave lip service to the possibility that a corporation could be subject to general jurisdiction in other states based upon its activities there.⁷³ Again, though, the plaintiff cannot base general jurisdiction on the defendant's purchases or sales in the forum. And, the subsequent cases make clear, any activities-based general jurisdiction will exist in, at most, only one state.⁷⁴ More pointedly, activities-based general jurisdiction will exist only on facts such as those in *Perkins*⁷⁵—the facts of which were *sui generis*. When the smoke clears, activities-based general jurisdiction is dead.⁷⁶ General jurisdiction over corporations has been limited to at most two states, which is significantly narrower than it was at the close of the twentieth century.

Even more relevant to our study is the fact that in *Daimler* the Court held that the reasonableness analysis of *International Shoe* is irrelevant in general jurisdiction. The Court dropped this stunning news in a footnote.⁷⁷ The parties had not argued or briefed the issue. Thus, today, once a court finds that the defendant is “essentially at home”—which it defined very narrowly to start with—that is the end of the matter. The fairness factors play no role.

For all appearances, then, general jurisdiction (over corporations anyway) is significantly narrower today than it has been for 50 years.⁷⁸ As Justice Sotomayor lamented in *BNSF*: “What was once a holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness has now effectively been replaced by the rote identification of a corporation's principal place of business or place of incorporation.”⁷⁹

This fact creates special problems for American plaintiffs suing foreign defendants. A foreign company will not be formed or have its decision-making

73. See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those placed paradigm all-purpose forums.”); see also *id.* at 139 n.19 (“We do not foreclose the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”).

74. This conclusion flows from the Court's statement in *Daimler* that “[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide.” *Id.* at 139 n.20. It is not enough that a company does business in a state comparable to that of local companies. Instead, the inquiry is whether the activities in that state constitute a significant proportion of the company's overall business. See Richard D. Freer, *Some Specific Concerns With the New General Jurisdiction*, 15 NEV. L. REV. 1161, 1171–74 (2015).

75. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (identifying *Perkins* as an “exceptional case” in which general jurisdiction might be based upon business activities in the forum).

76. As Justice Sotomayor concluded in her dissent in *BNSF*, “it is virtually inconceivable that [interstate] corporations will ever be subject to general jurisdiction in any location other than their principal places of business or incorporation.” *Id.* at 1561 (Sotomayor, J., dissenting).

77. *Daimler*, 571 U.S. at 139 n.20.

78. See Judith Cornett & Michael Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015) (state and lower federal courts for decades before the new era based general jurisdiction on continuous and systematic business activities in the forum).

79. *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., dissenting).

apparatus in the United States. So general jurisdiction will be available only in the foreign country. The combination of a narrow form of specific jurisdiction with the newly narrowed general jurisdiction results in telling American plaintiffs such as Mr. Nicastro in *J. McIntyre* that they must seek justice in the courts of a foreign country—even for injuries suffered in the United States.⁸⁰ Justice Black’s *mélange* approach would not have permitted such a result.

C. *The New Focus on Relatedness in Specific Jurisdiction Cases*

The third characteristic of the new era in personal jurisdiction flows from the recent restriction on general personal jurisdiction. That restriction creates a gap. Into that gap falls cases that would have invoked general jurisdiction based upon “continuous and systematic” activity in-forum, but now will not. Such cases must be handled through specific jurisdiction. The problem in these cases will not be contact; indeed, defendants will have plenty of contact with the forum. The problem—the new battleground in specific jurisdiction—is relatedness.

We see the problem in *Bristol-Myers Squibb*. Here is something new: a specific jurisdiction case in which the fight was not over whether the defendant had a relevant contact with the forum state. The company had so much contact with California—research and laboratory facilities, 160 employees, 250 sales representatives, a lobbying force, and it sold millions of Plavix pills there—that many courts before the new era would have exercised general jurisdiction. General jurisdiction is now impossible, however, because the company is neither incorporated nor headquartered in California.

The problem was relatedness: the claims by non-California plaintiffs were not sufficiently affiliated with the defendant’s contacts with the forum to qualify for specific jurisdiction. In 1984, in his dissent in *Helicopteros*, Justice Brennan suggested that the line between general and specific jurisdiction was nuanced. He pointed out the difference between a requirement that the plaintiff’s claim “arise out of” the defendant’s contact with the forum and that it “relate to” that contact.⁸¹ The latter phrase, Brennan suggested, should require a lesser connection with the forum than the former.

In *Bristol-Myers Squibb*, the Court employed the phrase “arise from or relate to,”⁸² with no suggestion that there might be a distinction between the two. There

80. The problem is even worse for Americans harmed by foreign entities abroad. The Anti-Terrorism Act, 18 U.S.C. §§ 2331–2339, creates a civil-rights claim for citizens of the United States injured or killed abroad by acts of terrorism. The current restriction on general jurisdiction makes it impossible to pursue a claim based upon general jurisdiction against organizations such as the Palestinian Authority, because they are not “essentially at home” anywhere in the United States. *See, e.g., Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2017). Perhaps courts will facilitate jurisdiction in such cases by interpreting the Fifth Amendment more broadly than the Fourteenth Amendment. *See Ariel Winawer, Comment, Too Far From Home: Why Daimler’s “At Home” Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L.J. 161 (2016).

81. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 425 n.3 (Brennan, J., dissenting).

82. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017).

is no sliding scale based upon the amount of contact between Defendant and the forum; either there is relatedness or there is not. The pills that allegedly harmed the non-California plaintiffs were not manufactured, packaged, labeled, or sold in California. They were not prescribed or ingested in California, and no harm was suffered (by the non-Californians) in California. Accordingly, the non-Californians' claims were not sufficiently affiliated with the defendant's California contacts. Apparently, for specific jurisdiction the *very product* that causes harm must have some connection to the forum. The fact that the identical product is sold in all states is irrelevant.

Bristol-Myers Squibb raises another barrier between plaintiffs and access to the factors concerning the reasonableness of jurisdiction. Even when the defendant has continuous and systematic volitional ties with the forum, jurisdiction is denied if the plaintiff's claim lacks sufficient connection with those contacts.

In fact, the subjugation of the fairness factors is even starker than that. In *Bristol-Myers Squibb*, the defendant's counsel admitted at oral argument that litigation in California was not inconvenient for the defendant. Thus, we have a case in which the defendant has continuous and systematic contact with the forum and in which the defendant admits the reasonableness of jurisdiction. The reasonableness of jurisdiction—even if admitted—is simply irrelevant. All is subservient to two very high barriers for specific jurisdiction: contact and relatedness.

VI. THE SCORECARD

Justice Black feared that *International Shoe* would be used to restrict personal jurisdiction. At the time, his concern must have seemed odd. After all, the rigid, power-based regime of *Pennoyer v. Neff* was being supplemented (if not replaced) by a flexible, pragmatic balancing test. Surely considerations of “fair play and substantial justice” would support jurisdiction beyond that permitted by the cramped historical view.

But Justice Black was on to something. The new era is startlingly restrictive—in fact and in tenor. Justice Kennedy's plurality opinion in *J. McIntyre* is a throwback to *Pennoyer*, with its emphasis on territoriality and on the need for a defendant to “submit” to jurisdiction.⁸³ Justice Alito's majority opinion in *Bristol-Myers Squibb* sounds quite similar, with an emphasis on interstate federalism. While Kennedy spoke for only three others, Alito's opinion in *Bristol-Myers Squibb* was signed by all but Sotomayor. General jurisdiction is narrower than it has been in two generations. The failure of specific jurisdiction to pull its weight is manifested by *J. McIntyre*, in which American courts are closed to American citizens injured while on the job for American companies.

Interestingly, though, Justice Black's reasoning was incorrect. The limited

83. See Miller, *supra* note 62, at 748 (“The language is somewhat reminiscent of the Court's opinion 134 years earlier in *Pennoyer v. Neff*.”).

state of modern doctrine is not the result of findings that jurisdiction would violate “traditional notions of fair play and substantial justice.” Rather, it was caused by the modern obsession with *avoiding* any assessment of the fairness of jurisdiction. *International Shoe* seemed revolutionary in injecting open-ended considerations of state’s interest and convenience. Those factors often will support jurisdiction, as they did in Justice Black’s hands in *Travelers Health* and *McGee*.

Factors of reasonableness and fairness can only support jurisdiction, however, if a court will consider them. And the Court has raised two barricades to avoid their leavening effect. One is the requirement that a defendant’s contact with the forum result from the defendant’s own purposeful availment. She must target the state in some way, in the view of four justices in *J. McIntyre*, “submitting” to jurisdiction. Without that contact, the fairness factors are irrelevant. The second hurdle is coming into focus because of the curtailment of general jurisdiction: the requirement of relatedness. Even if there is contact, the plaintiff’s claim must be sufficiently related to that contact. Without relatedness, the fairness factors are irrelevant.

VII. CONCLUSION

Justice Black wisely understood that open-ended considerations of fairness could and should be used to support the exercise of judicial authority. That wisdom has been lost because those considerations are now off the table. The modern Court⁸⁴ has managed to render them irrelevant. The state of personal jurisdiction is sclerotic today not because of the fairness factors, but despite them. Justice Black was right, but for the wrong reason.

84. Professor Vitiello argues that various modern restrictions to court access result from right-wing judicial activism on the Court. *See, e.g.*, VITIELLO, *supra* note 1, at 64–71. Interestingly, though, some key restrictions on personal jurisdiction doctrine were inflicted by liberal Justices. Justice Brennan gave us the presumption in *Burger King* that renders access to fairness factors so difficult. And Justice Ginsburg, author of all three new-era general jurisdiction decisions, has led the charge to eviscerate general jurisdiction. She has not made clear why she considered this move appropriate or necessary.