5-20-2013

Another Look at General Personal Jurisdiction

Carol Andrews
University of Alabama - School of Law, candrews@law.ua.edu

Another Look at General Personal Jurisdiction

Carol Rice Andrews

47 WAKE FOREST LAW REVIEW 999 (2012)

ANOTHER LOOK AT GENERAL PERSONAL JURISDICTION

Carol Andrews[*]

General personal jurisdiction—whereby a state court asserts jurisdiction over a defendant on claims unrelated to the defendant's activities in the forum state—has long been a doctrine with uncertain parameters. It was the primary, but untested, form of personal jurisdiction under *Pennoyer v. Neff*.[1] The Supreme Court in *International Shoe Co. v. Washington*[2] recognized general jurisdiction as one of two basic types of jurisdiction under minimum contacts analysis but did little to define it. Lower courts struggled for decades with general jurisdiction. In the 1980s, Professors Lea Brilmayer[3] and Mary Twitchell[4] engaged in extensive debate concerning general jurisdiction. Other scholars weighed in.[5] Since

---

* Douglas Arant Professor of Law, The University of Alabama School of Law.

1. 95 U.S. 714, 722 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

2. 326 U.S. 310, 316 (1945).

3. *See generally* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV 721 (1988) [hereinafter Brilmayer et al., *General Look*]; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (1980) [hereinafter Brilmayer, *How Contacts Count*]; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter Brilmayer, *Related Contacts*].

4. *See generally* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) [hereinafter Twitchell, *Myth*]; Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988) [hereinafter Twitchell, *Rejoinder*]. *See also* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172–79 (2001) [hereinafter Twitchell, *Doing Business*].

5. *See generally* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (2001); Sarah R. Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1 (1998); Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From Or Related To" Requirement . . . What Does It Mean?,* 50 WASH. & LEE L. REV. 1265 (1993); Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004); Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CALIF. L. REV. 1545 (1994); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998) [hereinafter Simard, *Hybrid Jurisdiction*]; Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for*

the 1980s, the Court has been nearly silent on all matters of personal jurisdiction. In 2011, the Court broke the silence in two new cases: *Goodyear Dunlop Tires Operations, S.A. v. Brown*[6] and *J. McIntyre Machinery, Ltd. v. Nicastro*.[7] *Goodyear* is only the Court's third case addressing general jurisdiction. *McIntyre*, a specific jurisdiction case, gives insights as to the philosophy of current members of the Court regarding personal jurisdiction as a whole. In this Article, I use the standards of *Goodyear* and the policy debate of *McIntyre* as a springboard for a "fresh look"[8] at general jurisdiction.

In Part I, I review the history of general personal jurisdiction. General jurisdiction was the usual form of jurisdiction under *Pennoyer,* but, in the early period, the distinction between unlimited and specific jurisdiction largely was irrelevant. As the world modernized and disputes more frequently crossed state lines, the breadth of the jurisdiction became a more pressing concern. Courts developed a variety of theories and fictions, which provided inconsistent results, particularly as to jurisdiction over corporate defendants. In *International Shoe*, the Court substituted a new analysis, in the form of the minimum contacts test, and recognized that jurisdiction could be either general or specific.[9] The new test shifted emphasis to specific jurisdiction and left the role and scope of general jurisdiction relatively uncertain.

In Part II, I explore the policies that underlie general personal jurisdiction. The lack of a coherent policy rationale has been a persistent academic criticism of general jurisdiction. Indeed, the

---

Specific Jurisdiction, 38 IND. L. REV. 343 (2005) [hereinafter Simard, *Two Profiles*]; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987). I joined the debate by analyzing general jurisdiction tests and policies as applied to national class actions. *See generally* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness*," 58 SMU L. REV. 1313 (2005).

6. 131 S. Ct. 2846 (2011).

7. 131 S. Ct. 2780 (2011).

8. I draw inspiration for this term from Professor Brilmayer's seminal article, *A General Look at General Jurisdiction*, *supra* note 3. I am not alone in my review of *McIntyre* and *Goodyear*. The *South Carolina Law Review* held a symposium in October 2011, in which Professor Brilmayer and other scholars addressed the cases. *See generally* Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. REV. 617 (2012). Professor Stein examined the implications of *Goodyear* on general jurisdiction. *See generally* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527 (2012). Meir Feder, counsel in the *Goodyear* case, also addressed its impact. *See generally* Meir Feder, Goodyear*, "Home" and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012).

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

Court cannot seem to reach a consensus on the policies underlying any form of personal jurisdiction. This divide was particularly evident in the differences between Justice Kennedy's majority opinion and Justice Ginsburg's dissent in *McIntyre*. I use this current debate to frame the Court's policy statements as to personal jurisdiction as a whole, and I then explore the policies supporting general jurisdiction in particular. I propose that the best guide to the policies relevant to general jurisdiction are the two factors that the Court set out in *International Shoe*: the relatedness of the defendant's forum contacts to the plaintiff's claim and the extent of those contacts. I examine why these two factors are critical to the outcome of minimum contacts analysis. I propose that the two factors help ensure the fairness of personal jurisdiction in four ways: (1) they help achieve reciprocity between the benefits and burdens of acting in a state; (2) they promote predictability; (3) they limit state sovereignty; and (4) they assure a minimum level of convenience. These four fairness components in turn are useful guideposts for testing the parameters of the two factors themselves—relatedness and extent of contacts.

In Part III, I examine in detail the threshold question of whether a contact is related. This question marks the dividing line between specific jurisdiction and general jurisdiction. Because the Court has not addressed the question, courts and scholars have developed a variety of tests for relatedness, ranging from strict legal causation to noncausal similarity. I evaluate a variety of tests under both the Court's jurisdiction cases and the four fairness concerns. I conclude that the proper test for relatedness is one based on causation that requires a "meaningful link" between the defendant's forum contacts and the plaintiff's claim.

In Part IV, I develop the many issues that arise in general jurisdiction analysis once the claim is deemed unrelated. I start with the basic question of the extent of contacts necessary for general jurisdiction. This has been the source of confusion: courts and commentators for decades labored to apply a vague "continuous and systematic" standard. I argue that the Court appropriately clarified this standard in *Goodyear* and announced the test to be the place at which the defendant is "at home." I then apply this at-home standard and assess whether several common factual situations meet the standard for general jurisdiction.

I conclude with a capsule summary of the lessons drawn from this new look at general personal jurisdiction. First, general jurisdiction analysis applies to all claims that have no meaningful causal link to the defendant's forum state contacts. Second, general jurisdiction is proper only in the single state (or, very rarely, the very few states) in which the defendant currently is at home. Both standards strike the proper balance between the plaintiff's choice of forum and the four fairness concerns underlying jurisdictional

analysis—reciprocity of benefit and burden, predictability, sovereignty, and convenience. Although these standards do not eliminate all uncertainty, they clarify the questions and significantly advance general jurisdiction analysis.

I. THE HISTORY AND DEVELOPMENT OF GENERAL PERSONAL JURISDICTION

In the *Pennoyer* era, before *International Shoe*, the primary bases for personal jurisdiction were general and did not require that the claim relate to the forum state. As courts extended the *Pennoyer* bases to fit the modern era, many struggled with the extent of that jurisdiction, whether general or specific. This struggle was particularly troublesome with regard to corporations. Courts applied the fictional concepts of corporate presence and implied corporate consent with mixed results. The Court in *International Shoe* eliminated some of the confusion by discarding these fictions and substituting a new minimum contacts analysis. In doing so, the Court recognized that although many exercises of specific jurisdiction would satisfy the minimum contacts test, many exercises of general jurisdiction would not.

A. General Jurisdiction in the Pennoyer *Era*

Under *Pennoyer*, a state court could assert jurisdiction over a defendant if, at the beginning of the suit, the defendant was found and served in the forum state, or if his property in the state was properly attached.[10] Without physical power over the defendant or his property, the assertion of jurisdiction violated the defendant's right to due process, and any resulting judgment was void and unenforceable.[11] This physical power rule had two exceptions—suits determining the marital status of forum citizens and suits in which the defendant consented to jurisdiction—but in all other cases, a

10. Pennoyer v. Neff, 95 U.S. 714, 722–24 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977). The Court based its holding on general principles of law because the judgment preceded enactment of the Fourteenth Amendment, but the Court also stated that due process would test the limits of proper jurisdiction thereafter. *Id.* at 733.

11. Initially, courts applied *Pennoyer* to enforcement of judgments in subsequent proceedings, but the Court later held that a judgment entered without jurisdiction was itself a violation of due process. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 196–97 (1915) ("[T]he fact that because unobservedly or otherwise judgments have been rendered in violation of the due process clause and their enforcement has been refused under the full faith and credit clause affords no ground for refusing to apply the due process clause and preventing that from being done which is by it forbidden and which if done would be void and not entitled to enforcement under the full faith and credit clause.").

state court's jurisdiction required in-state service on the defendant or attachment of the defendant's in-state property.[12]

The two primary bases for personal jurisdiction—physical in-state presence of either the person or the property of the defendant—encompassed both specific and general jurisdiction. If a court had power over the person or his property, it had jurisdiction regardless of whether the suit related to the person's activities in the state or his property. The state had power to adjudicate a claim that arose outside the forum. Only a few forms of jurisdiction under *Pennoyer* were case specific. The best example is the marital status exception, which necessarily was limited to marital status. A state could not assert jurisdiction over an absent defendant on other civil claims solely because his wife was present in the forum state. Likewise, most forms of consent-based jurisdiction were limited to the particular matter. If, for example, a person agreed in a contract to forum state jurisdiction over all claims arising from that contract, the resulting jurisdiction was specific to that contract. These distinctions between limited and general jurisdiction, however, were rarely tested. Although broad general jurisdiction was theoretically possible in many cases, it often was unnecessary because the suits tended to be local and related to the forum.[13]

This distinction between specific jurisdiction over particular claims and unlimited jurisdiction over any claims proved more problematic as the courts attempted to expand the *Pennoyer* jurisdictional bases to fit the modernizing world. As people became more mobile and corporations became a common business form, courts and lawmakers began to more frequently consider the breadth of jurisdiction. In some applications, the distinctions were easy or obvious. The treatment of jurisdiction in the early automobile cases is a good example. The Court permitted state court jurisdiction over absent drivers through theories of express or implied consent, but such jurisdiction was specific and limited to suits arising from the defendant's driving in the forum state.[14] The state could not assert jurisdiction over an unrelated contract claim,

---

12. *Pennoyer*, 95 U.S. at 733 (holding that, "[e]xcept in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance," a defendant must be personally served in the state or his property must be brought under the control of the court).

13. *See* Twitchell, *Myth*, *supra* note 4, at 614–18 (describing "the [e]arly [s]tatus of [g]eneral [j]urisdiction" and noting the legal and practical considerations that tended to make actions local).

14. *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (allowing implied appointment of agent for service of process in suits arising out of driving in Massachusetts); Kane v. New Jersey, 242 U.S. 160, 167 (1916) (permitting actual appointment of in-state agent for service on suits arising out of driving in New Jersey).

for example, solely because the absent defendant had once driven in the forum state.

Jurisdiction over corporations was not as easy or obvious.[15] The conceptual difficulty, which preceded *Pennoyer*, coincided with the law's evolving treatment of the corporate structure. In the early nineteenth century, courts considered corporations incapable of acting beyond the borders of the state in which they were incorporated.[16] Because a corporation could act only in its state of incorporation, jurisdiction was limited to that state. By the mid-nineteenth century, courts permitted a corporation to act in another state, outside of its state of incorporation, but only with the other state's permission. Most states conditioned this permission on the corporation's affirmative consent to jurisdiction in the state, usually as part of the formal registration process, through appointment of an in-state agent for service of process.[17] The Court soon expanded this doctrine to hold that even when a corporation failed to affirmatively consent to jurisdiction, the state could imply consent from the corporation's act of doing business in the state.[18] In *Pennoyer*, the Court recognized this scheme and explained that both express and implied consent provide a basis for jurisdiction over corporations.[19]

---

15. *See generally* GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 77–100 (photo. reprint 1999) (1918) (tracing early history and development of jurisdictional principles about corporations).

16. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) ("[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."); *see also* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts–From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 578 (1958).

17. In 1855, the Court stated this common condition: a "corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State," and "[t]his consent may be accompanied by such conditions as Ohio may think fit to impose," including in-state service of process. Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855).

18. *Id.* at 407–08; *see also* R.R. Co. v. Harris, 79 U.S. 65, 81 (1870) ("[A corporation] cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. . . . If it does business there it will be presumed to have assented and will be bound accordingly.").

19. The Court stated:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association, within its limits, or making contracts enforceable there, to appoint an agent . . . in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts . . . and provide, upon their failure, to make such appointment . . . that service may be made upon a public officer designated for that purpose . . . .

After *Pennoyer*, many courts, including the Supreme Court, suggested an additional or alternative theory of corporate jurisdiction based on corporate presence. Under the presence theory, a corporation that conducted a certain level of in-state business was deemed to be present and subject to jurisdiction in the state.[20] Courts and regulators tended to use the term "doing business" to describe the level of in-state activity that would trigger jurisdiction under either the presence or the implied consent theory.[21] No single theory predominated. Particular states and courts typically chose to use only one theory—implied consent or presence—but the Supreme Court treated both as proper. The particular theory, however, tended to impact the jurisdictional consequences of the corporation's in-state activities, especially as to whether the jurisdiction was general or specific to the in-state activities, and these consequences were far from certain.

In *Old Wayne Mutual Life Ass'n v. McDonough*[22] and *Simon v. Southern Railway Co.*,[23] the Court held that implied consent to appointment of a state officer for service of process necessarily was limited to claims arising from the corporation's in-state activity. Yet, only a few years later, in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,[24] the Court held that actual appointment of an agent for service of process could authorize general jurisdiction over claims having no relation to the forum state.[25] The Court distinguished *Old Wayne* and *Simon* as cases of

---

Pennoyer v. Neff, 95 U.S. 714, 735 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

20. *See* St. Louis Sw. Ry. Co. v. Alexander, 227 U.S. 218, 226–28 (1913) (considering various "doing business" standards for determining "the presence of the corporation within the jurisdiction of the court").

21. *See* Kurland, *supra* note 16, at 584 (noting that the application of either the consent or the presence doctrine "created difficulties, for whichever was chosen it became necessary to determine whether the foreign corporation was 'doing business' within the state, either to decide whether its 'consent' could properly be 'implied,' or to discover whether the corporation was 'present'"). *See generally* HENDERSON, *supra* note 15, at 84–100 (discussing the two competing theories of implied consent and actual presence).

22. 204 U.S. 8, 21 (1907) (rejecting jurisdiction over an Indiana insurance company that did business in Pennsylvania because "it cannot be held that the company agreed that the service of process upon the insurance commissioner of that commonwealth would alone be sufficient to bring it into court with respect to *all* business transacted by it, no matter where, with, or for the benefit of, citizens of Pennsylvania").

23. 236 U.S. 115, 130 (1915) ("[The] power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. . . . [T]he statutory consent to be served does not extend to causes of action arising in other states.").

24. 243 U.S. 93 (1917).

25. *Id.* at 95–96.

fictional consent: "[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."[26]

In the corporate presence cases, the Supreme Court did not directly address whether the claim must be related to the corporate defendant's forum activities. A few courts held that a corporation's presence through doing business was analogous to the physical presence of a natural person and, accordingly, permitted the state to exercise general jurisdiction over the corporation.[27] Commentators of the era also observed that lack of relationship was in fact a critical factor (albeit unstated) in most cases in which the Supreme Court invalidated jurisdiction.[28]

These distinctions created anomalies.[29] The same level of activities ("doing business") conferred different levels of jurisdiction depending on whether the court used a theory of implied consent or presence, and under consent theory, a corporation who defied registration statutes could face lesser jurisdictional consequences than a corporation who complied and registered.[30] Judge Learned Hand called for reform in an influential case cited by the Court in *International Shoe*.[31] Judge Hand decried the developing doctrine under which "an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform" and which confused "a legal fiction with a statement of fact."[32]

Also bearing on the extent of jurisdiction over out-of-state corporations was a minor line of cases in which the Court used the Dormant Commerce Clause to test jurisdiction that otherwise

---

26. *Id.*

27. *See, e.g.*, Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 268 (1917) (quoting Phila. & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917)) ("[T]he jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted. . . . The essential thing is that the corporation shall have come into the state."); *see also* Kurland, *supra* note 16, at 582–83 ("A foreign corporation is amenable to process to enforce a personal liability, in the absense of consent, only if doing business within the State in such manner and to such extent as to warrant the inference that it is present there.").

28. Note, *What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction*, 29 COLUM. L. REV. 187, 190–91 (1929) ("Few courts consider directly where the cause arose . . . . [W]hile courts continue to talk in the traditional jargon . . . whether the cause of action arose in the forum is more often than not the determinative factor.").

29. *See generally* HENDERSON, *supra* note 15, at 96–100; Kurland, *supra* note 16, at 584–86.

30. *See* Kurland, *supra* note 16, at 579–80.

31. Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 150–51 (S.D.N.Y. 1915); *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (citing *Smolik*, 222 F. at 151).

32. *Smolik*, 222 F. at 150–51.

satisfied the due process limits of *Pennoyer*.[33] These cases involved corporations engaged in interstate commerce, usually railroads, where the plaintiff relied upon a form of general jurisdiction under *Pennoyer*, commonly consent or attachment of in-state property. Lack of relationship was a key factor. The only cases in which the Court invalidated state court jurisdiction under the Dormant Commerce Clause involved claims that arose outside the forum state.[34] The theory was that a state could not unduly burden interstate commerce by asserting jurisdiction, or extracting consent to jurisdiction, over claims unrelated to the state. The lack of relationship in these cases tended to be extreme, in that even the plaintiff had little or no relation to the forum state.

In sum, in the era immediately preceding *International Shoe*, the concept of general personal jurisdiction was an integral part of the law of personal jurisdiction. Yet, its parameters, especially as applied to corporations, were not well understood. In *International Shoe*, the Court adopted a new approach, which embraced the concept of general personal jurisdiction but also failed to define it.

B. General Jurisdiction Under International Shoe *Minimum Contacts Analysis*

In 1945, the Court in *International Shoe v. Washington* spoke directly to the confusion regarding the due process limits on corporate jurisdiction.[35] The Court discarded both the consent and presence theories as unnecessary fictions. In their place, the Court

---

33. *See, e.g.*, Davis v. Farmers' Co-op Equity Co., 262 U.S. 312, 317–18 (1923) (holding that the Dormant Commerce Clause forbade Minnesota from asserting jurisdiction over a Kansas railroad on a claim that was brought by a Kansas corporation and that arose in Kansas and noting that although the case resembled two cases in which the Court previously had upheld jurisdiction, "in both cases, the only constitutional objection asserted was violation of the due process clause").

34. *See id.* at 316–17 (noting that the statutory authorization of jurisdiction might withstand commerce clause scrutiny if, among other things, "the transaction out of which [the claim] arose had been entered upon within the [forum] state" (internal quotation marks omitted)); *see also* Missouri *ex rel.* St. Louis, B. & M. Ry. Co. v. Taylor, 266 U.S. 200, 207 (1924) (upholding jurisdiction against a commerce clause challenge and distinguishing *Davis*, in part based on possibility that the suit at issue in *Taylor* concerned negligence in the forum state). That a cause of action arose outside the state, however, did not necessarily mean that the Court would invalidate the assertion of jurisdiction as unreasonably burdening interstate commerce. The Court also looked at other factors, including party residence. *See* Hoffman v. Missouri *ex rel.* Foraker, 274 U.S. 21, 22–23 (1927) (upholding Missouri state court jurisdiction over a claim that arose in Kansas where the defendant was incorporated in Missouri).

35. The Court did not address the Dormant Commerce Clause theory. It cited the *Davis* case but limited its discussion of jurisdiction to the proper due process test for corporate jurisdiction. *Int'l Shoe*, 326 U.S. at 318.

created a new minimum contacts test for jurisdiction. The minimum contacts test asks whether the defendant had sufficient minimum contacts with the state so that the assertion of personal jurisdiction would not offend "traditional notions of fair play and substantial justice."[36] The aim of the minimum contacts test, according to the Court, is to more directly ask the question that had been at the heart of both the presence and implied consent cases: whether it is fair to subject the corporation to jurisdiction.[37]

To illustrate and give meaning to the new test, the Court collected many of its prior decisions from the *Pennoyer* era and grouped them into four categories.[38] According to the Court, the easiest case for finding jurisdiction (what I call the "easy yes" case) was one "when the activities of the corporation [in the forum] have not only been continuous and systematic, but also give rise to the liabilities sued upon."[39] At the other extreme, the easiest case against jurisdiction (the "easy no" case) was one where the corporation had "isolated" forum activities "unconnected" to the claim.[40] The more difficult cases (the two "maybe" cases) for deciding jurisdiction, according to the Court, were those in which the two factors were mixed—extensive but unrelated contacts[41] or

---

36. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

37. *Id.* at 316–17 (stating that "presence" in its prior decisions was "used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process"); *id.* at 318 (stating that some of its earlier jurisdiction decisions were "supported by resort to the legal fiction that [the corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents" and that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction").

38. *Id.* at 311–19. The Court in *Goodyear* recounted these four categories and described them as giving "specific content to the 'fair play and substantial justice' concept" of *International Shoe*. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011).

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

40. *Id.* ("Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. . . . To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process." (citations omitted)).

41. *Id.* at 318 ("While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, . . . there have been instances in which the continuous corporate operations within a state were thought so

isolated but related contacts.[42] Jurisdiction in either "maybe" case could fail or satisfy the demands of due process, depending on the facts of each case.

The Court now labels the two categories of cases in which the plaintiff's claim is related to the defendant's forum state contacts (the "easy yes" case and one "maybe" case) as cases of "specific personal jurisdiction."[43] The other two *International Shoe* categories —cases where the claim is unrelated to the defendant's forum contacts (the "easy no" case and the other "maybe" case)—are cases of "general personal jurisdiction."[44] In all four categories, the Court manipulated two key factors: the extent of the defendant's contacts with the forum state and the relatedness of those contacts to the plaintiff's claims. The Court did not explain why these two factors were important, but the Court's four illustrations demonstrate their importance.

First, in terms of the number of contacts, extensive contacts by themselves might have been enough for proper jurisdiction in some cases without relatedness (a "maybe" case), but relatedness moved the substantial contacts case to the "easy yes" category. Likewise, where the defendant had only a few contacts with the forum, the relationship of the contacts to the claim might have been enough to justify jurisdiction (a "maybe" case), but lack of relationship was absolutely fatal to jurisdiction (the "easy no" category). In other words, relatedness was a positive factor, and lack of relatedness was a negative factor. Likewise, an extensive amount of contacts was a positive factor, and a low amount was negative.

The Court's classification scheme also illustrates the relative role of specific jurisdiction, on the one hand, and general jurisdiction, on the other. Specific jurisdiction is relatively easy to establish—the cases were either in the "easy yes" category or, at worst, in the "maybe" category. By contrast, general jurisdiction is more difficult, either an "easy no" or a "maybe" case. Extensive

---

substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." (citations omitted)).

42. *Id.* ("[A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, . . . other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." (citations omitted)).

43. The Court adopted this terminology in *Helicopteros Nacionales de Columbia, S.A. v. Hall* (*Helicol*), 466 U.S. 408, 414 n.8 (1984), based on an influential article by Professors Arthur von Mehren and Donald Trautman: *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1144–64 (1966).

44. *Helicol*, 466 U.S. at 414 n.9.

contacts are essential to general jurisdiction but not necessarily enough. Cases of specific jurisdiction over related claims are more likely to satisfy the minimum contacts test than cases of general jurisdiction. Indeed, in *Goodyear*, the Court quoted Professor Twitchell's observation that "in the wake of *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction plays a reduced role.'"[45]

Not surprisingly, the Court since *International Shoe* has focused on the more common case of specific jurisdiction, attempting to answer when the "maybe" case of an isolated but related contact satisfies due process and when it does not. The most important development in the specific jurisdiction cases was the "purposeful availment" factor, first announced in the 1958 case *Hanson v. Denckla*.[46] In 1980, the Court in *World-Wide Volkswagen Corp. v. Woodson*[47] further refined minimum contacts analysis for specific personal jurisdiction by breaking the test into two parts, each correlating to a separate function.[48] The first prong primarily looks to whether the defendant's related forum contact was sufficiently purposeful and ensures "that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[49] The second prong "protects the defendant against the burdens of litigating in a distant or inconvenient forum"[50] and balances that burden against other

---

45. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011) (quoting Twitchell, *Myth, supra* note 4, at 628).

46. Hanson v. Denckla, 357 U.S. 235 (1958). "[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." *Id.* at 253.

47. 444 U.S. 286 (1980).

48. *Id.* at 291–92; *see* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 565 (2012) (observing that *World-Wide Volkswagen* "brought clarity" on several fronts, including that "the *International Shoe* test consists of two parts: contact and fairness"); *see also* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 485 (2012) (concluding that *World-Wide Volkswagen* "presaged a two-step approach to personal jurisdiction that crystallized during the 1980s").

49. *World-Wide Volkswagen*, 444 U.S. at 292.

50. *Id.* I have reversed the order of the two functions, as originally stated by the Court. The Court considers the sovereignty function to be the crucial first inquiry:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of

factors, including the forum state's interest, the plaintiff's interest in suit in the forum, interstate judicial efficiency, "and the shared interest of the several States in furthering fundamental social policies."[51]

The Court has been relatively quiet on the question of general jurisdiction. Until *Goodyear*, the Court had issued only two holdings regarding whether general jurisdiction was proper under minimum contacts analysis: *Perkins v. Benguet Consolidated Mining Co.*[52] and *Helicopteros Nacionaloes de Columbia, S.A. v. Hall* (*Helicol*).[53] In *Perkins*, the Court upheld general jurisdiction in Ohio over a foreign corporation, engaged in mining in the Philippines, that had temporarily moved its limited business operations to Ohio during the pendency of World War II.[54] Thirty-two years later, in *Helicol*, the Court rejected general jurisdiction in Texas over a Columbian helicopter charter business, despite the company's purchase of helicopters in Texas, negotiation of the charter service with the decedent's Texas employer, and acceptance of checks drawn on a Texas bank.[55] The defendant in *Helicol*, according to the Court, did not have the level of general business contacts that the Court found in *Perkins*.[56] In *Goodyear*, twenty-seven years later, the Court rejected general jurisdiction in North Carolina over foreign-national manufacturers that had a "small percentage" of tire sales in North Carolina.[57] The unanimous Court held that the tire sales were like the contacts in *Helicol* and fell short of the level of business contacts in *Perkins*.[58] North Carolina was not the "home" of the defendants.[59]

The Court has left open many questions regarding general personal jurisdiction. The biggest void is the threshold question of whether the plaintiff's claim is unrelated to the defendant's forum contacts (thereby triggering general jurisdiction analysis), or related (thereby triggering specific jurisdiction analysis under the two-part *World-Wide Volkswagen* test). Even assuming an unrelated claim

---

> interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294 (citing *Hanson*, 357 U.S. at 251, 254). Five years after *World-Wide Volkswagen*, the Court explained that the first "contacts" prong was the "constitutional touchstone." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

51. *World-Wide Volkswagen*, 444 U.S. at 292 (citation omitted).
52. 342 U.S. 437 (1952).
53. 466 U.S. 408 (1984).
54. *Perkins*, 342 U.S. at 447–49.
55. *Helicol*, 466 U.S. at 416–18.
56. *Id.*
57. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct 2846, 2852 (2011).
58. *Id.* at 2856–57.
59. *Id.* at 2857.

and general jurisdiction analysis, the Court has not entirely settled the question of the necessary extent of contacts. Although the Court seemingly set an at-home standard in *Goodyear*, questions remain as to the proper application of this standard. When is the proper time for judging the extent of contacts? Does general jurisdiction based on contacts (as opposed to general jurisdiction based on in-state tag service) apply at all to natural persons? Can a corporation have multiple places in which it is subject to general jurisdiction? Is the doctrine one of strict categories, or is there some "hybrid" form, or "sliding scale," of intermediate degrees of relatedness and contacts? An analysis of the Court's personal jurisdiction cases, along with the policies underlying jurisdictional analysis, helps answer these questions.

II. THE POLICY RATIONALES FOR GENERAL PERSONAL JURISDICTION

The policies underlying general jurisdiction should help resolve the open questions regarding general jurisdiction. The problem is that the policies themselves are not settled. Even with respect to personal jurisdiction as a whole, the Court has cited a wide range of policy concerns, including sovereignty, convenience, predictability, a balance of benefits and burdens, plaintiffs' interests, judicial efficiency, and substantive policies. The Court rarely has addressed the particular policies underlying general jurisdiction,[60] and this silence has caused academic commentators and courts to propose various theories and applications of general jurisdiction.

I start my policy analysis by surveying the Court's various statements of policy in personal jurisdiction cases, almost all of which are specific jurisdiction cases. I use *International Shoe* and *McIntyre* as two end points to identify and categorize the policies stated by the Court in the seventy-year lifespan of minimum contacts analysis. I then turn to general jurisdiction. My policy analysis focuses on the two factors that the Court listed in *International Shoe* as critical to the fairness of jurisdiction in its four example cases—relatedness and extent of contacts. I examine the two factors in light of the Court's many subsequent jurisdictional policy statements to assess how these two factors impact fairness. I argue that four "fairness components" explain why these two factors are important to the fairness of jurisdiction. They help provide a rough reciprocity between benefits and burdens, give some predictability, ensure limits on state sovereignty, and protect against inconvenience.

60. *See* Feder, *supra* note 8, at 674–75 (noting the "striking paucity of theory" underlying the Court's general personal jurisdiction cases).

A. The Broader Policy Debate as to Personal Jurisdiction

The Court has advanced different rationales for the due process limits on personal jurisdiction. In the *Pennoyer* era, the emphasis primarily was state power, or sovereignty. This was not a perfect fit. Some *Pennoyer* bases for jurisdiction, such as consent, were in tension with the power premise. In the modern era, the Court has vacillated as to the policy reasons underlying personal jurisdiction analysis, emphasizing different policy concerns in different cases. In *International Shoe*, the Court spoke foremost in terms of fairness: jurisdiction must comport with "traditional notions of fair play and substantial justice."[61] Yet, fairness is a broad concept that can have multiple components. As I explain below, the Court in *International Shoe* mentioned several individual fairness concepts—benefits and burdens, orderly administration of laws, federalism, and inconvenience—each of which has become part of the policy debate in the Court's later cases, including *McIntyre*.

In *World-Wide Volkswagen*, the Court stated that the *International Shoe* minimum contacts test served two functions: to protect interstate federalism, in terms of states acting as coequal sovereigns, and to protect the defendant from unreasonable burdens in litigating in a distant forum.[62] The Court developed a two-part test to serve each function, and, in explaining each prong, the Court cited other fairness concerns. The first prong requires a nexus between the defendant, the forum, and the claim; predictability, in the form of purposeful availment, is an essential element of that nexus.[63] The second prong balances the burdens of the defendant against competing interests, including the forum state's interest, the plaintiff's interest in that forum, judicial efficiency, and substantive policies.[64]

The individual members of the Court, however, have not agreed on the Court's articulation of each of these policies or their relative roles. Justice Brennan, in particular, urged a different assessment of fairness.[65] For example, he long battled the Court's purposeful availment standard as being too protective of defendants and ignoring other interests, particularly those of the plaintiff. Indeed, he joined in dissent from the Court's original articulation of the

---

61. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

62. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980); *see supra* notes 48–51 and accompanying text

63. *See World-Wide Volkswagen*, 444 U.S. at 291–92.

64. *Id.* at 292.

65. *See generally* Freer, *supra* note 48 (discussing Justice Brennan's views on personal jurisdiction).

purposeful availment standard in *Hanson*.[66] Justice Brennan also dissented in *World-Wide Volkswagen*, arguing that the Court focused too tightly on the defendant and "accord[ed] too little weight to the strength of the forum State's interest in the case and fail[ed] to explore whether there would be any inconvenience to the defendant."[67]

The philosophical divide remains among current members of the Court, as demonstrated in *McIntyre*.[68] *McIntyre* was a specific jurisdiction case that tested the purposeful availment standard. The plaintiff was injured at work in his home state, New Jersey, by a recycling machine manufactured in England by the defendant.[69] The defendant did not send the machine directly to New Jersey but instead sold it to an intermediary in Ohio.[70] The case asked whether the manufacturer was subject to jurisdiction in New Jersey given that it targeted a national U.S. market, which necessarily included New Jersey, but did not target any state in particular. In a six-to-three decision, the Court held that New Jersey could not properly assert jurisdiction.[71]

Justice Kennedy wrote the plurality opinion and was joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas. Justice Ginsburg, joined by Justice Sotomayor and Justice Kagan, wrote a dissenting opinion. Justice Breyer, joined by Justice Alito, wrote a narrow opinion concurring in the judgment and did not reach many of the broader policy questions. The ultimate decision turned solely on the purposeful availment standard, but the opinions by Justice Kennedy and Justice Ginsburg reflect a sharp divide on the fundamental policies underlying personal jurisdiction as a whole.

Justice Kennedy emphasized power and sovereignty as the principal concerns of personal jurisdiction analysis. He began his discussion by construing the Due Process Clause as generally protecting "an individual's right to be deprived of . . . property only by the exercise of lawful power."[72] As applied to personal jurisdiction, this right, according to Justice Kennedy, requires that the defendant submit to the state's authority.[73] A defendant could

66. Hanson v. Denckla, 357 U.S. 235, 258–59 (1958) (Black, J., dissenting) (arguing for jurisdiction in cases in which the forum state has a significant interest, unless jurisdiction would impose a "heavy and disproportionate burden on a nonresident defendant").

67. *World-Wide Volkswagen*, 444 U.S. at 299–300 (Brennan, J., dissenting).

68. *Goodyear* did not add much to the underlying policy debate. It was a unanimous decision in which the Court primarily applied standards for general personal jurisdiction rather than explore the policies underlying the standards.

69. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

70. *Id.*

71. *See id.* at 2785, 2791, 2794.

72. *Id.* at 2786.

73. *Id.* at 2787.

submit to a state's authority "in a number of ways": explicit consent (for all defendants); in-state tag service, citizenship, or domicile (for individual defendants); and incorporation or principal place of business (for corporate defendants).[74] "Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State."[75] In assertions of specific jurisdiction in product cases, Justice Kennedy described the principal inquiry as whether the defendant's activities manifest an intention to submit to the power of the sovereign.[76]

Justice Kennedy rejected broader fairness explanations for personal jurisdiction. In particular, he condemned an approach that he attributed to Justice Brennan, based on "general notions of fairness and foreseeability," as "inconsistent with the premises of lawful judicial power."[77] "Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."[78]

Justice Ginsburg rejected sovereignty as the principal concern of personal jurisdiction analysis,[79] and she characterized Justice Kennedy's submission theory as a *Pennoyer*-era fiction rejected by *International Shoe*.[80] According to Justice Ginsburg, the "modern approach to jurisdiction over corporations and legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness."[81] Although Justice Ginsburg did not limit her assessment of reason and fairness exclusively to the burden on the defendant—her assessment included the convenience of the plaintiff and the forum state's interest—the burden on the defendant was a dominant factor.[82] Her focus on the defendant's burden was reflected by her

---

74. *Id.*

75. *Id.* (citation omitted).

76. *Id.* at 2788.

77. *Id.* at 2789.

78. *Id.* at 2787.

79. "[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty." *Id.* at 2798 (Ginsburg, J., dissenting).

80. "[I]nvocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful." *Id.* at 2799 (citing Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985)); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957)); *see also* Steinman, *supra* note 48, at 497 (characterizing Justice Kennedy's submission theory as a "long-discarded framework" of implied consent).

81. *McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

82. She followed her statement of "reason and fairness" with a litany of questions laden with convenience concerns:

> The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international

incredulity at Justice Kennedy's remark that different personal jurisdiction analysis applies to federal courts because a different sovereign is at issue.[83] Noting that the defendant's burden in defending a case in a New Jersey federal court would be the same as that in a New Jersey state court, Justice Ginsburg concluded: "I see no basis in the Due Process Clause for such a curious limitation."[84] In other words, according to Justice Ginsburg, because the burden is roughly the same, the propriety of jurisdiction should be the same.

Neither policy view is entirely right or entirely wrong. Fairness is the fundamental aim of personal jurisdiction analysis. After all, due process requires due or fair process. The question is not whether personal jurisdiction must be fair but instead how to measure this fairness. The Court never has measured fairness by looking solely at the defendant's burden or convenience. To be sure, the Court in *International Shoe* recognized a concern for convenience: "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" to assess the fairness of personal

---

> seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?

Id. at 2800–01 (Ginsburg, J., dissenting) (footnotes omitted); *see also* Steinman, *supra* note 48, at 507 (noting that Justice Ginsburg's argument in *McIntyre* sounded in both prongs of the *World-Wide Volkswagen* test).

83. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *McIntyre*, 131 S. Ct. at 2789 (plurality opinion). According to Justice Kennedy, this conclusion was a "corollary" of the principle that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.*

84. Justice Ginsburg stated:

> The plurality suggests that the Due Process Clause might permit a federal district court in New Jersey, sitting in diversity and applying New Jersey law, to adjudicate McIntyre UK's liability to Nicastro. . . . In other words, McIntyre UK might be compelled to bear the burden of traveling to New Jersey and defending itself there under New Jersey's product liability law, but would be entitled to federal adjudication of Nicastro's state-law claim. I see no basis in the Due Process Clause for such a curious limitation.

Id. at 2800 n.12 (Ginsburg, J., dissenting) (citation omitted).

jurisdiction.[85] Yet, in the immediately preceding sentence, the Court characterized personal jurisdiction as a broader question that turned in part on federalism concerns: the demands of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[86]

Likewise, in *World-Wide Volkswagen*, the Court recognized both sovereignty and convenience as concerns.[87] In explaining sovereignty in *World-Wide Volkswagen*, however, the Court spoke broadly—perhaps too broadly. It stated that "the Due Process Clause ensures not only fairness, but also the 'orderly administration of laws.'"[88] In other words, the Court articulated orderly administration of laws, which it linked to sovereignty, as a concept distinct from "fairness." The problem with this statement is not its recognition of sovereignty as a component of personal jurisdiction analysis but instead its characterization of sovereignty as a concept divorced from fairness and therefore, perhaps, a concept divorced from due process.

The Court in *International Shoe* spoke of "orderly administration of laws" as an aspect of fairness and due process. It stated that "[w]hether due process is satisfied," in terms of personal jurisdiction, depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[89] In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[90] the Court clarified that the sovereignty component of personal jurisdiction analysis does not arise from Article III but instead arises from the Fourteenth Amendment Due Process Clause.[91] Importantly, *Bauxites* did not remove notions of sovereignty from jurisdictional analysis, but rather clarified that sovereignty is itself a component of fairness.[92] The defendant has a due process right to have states act only within the limits of their sovereignty. Otherwise, the process would not be fair or reasonable. Professor Brilmayer concisely captured this point: "[T]he sovereignty concept inherent in

85. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

86. *Id.*

87. *See supra* notes 48–51 (discussing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1979)).

88. *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *Int'l Shoe*, 326 U.S. at 319).

89. *Int'l Shoe*, 326 U.S. at 319.

90. 456 U.S. 694 (1982).

91. *Id.* at 702.

92. *Id*. at 702–03 & n.10.

the Due Process Clause is not the reasonableness of the burden but the reasonableness of the particular State's imposing it."[93]

Although the debate between Justice Kennedy and Justice Ginsburg focused on the relative roles of sovereignty and convenience, both opinions addressed other policies. One was predictability. The Court in *World-Wide Volkswagen* explained that predictability was an element of the "orderly administration of laws" recognized in *International Shoe*:

> The Due Process Clause, by ensuring the "orderly administration of laws," . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State.[94]

Defining the necessary degree of predictability has been the primary focus of the Court's specific jurisdiction cases, almost all of which, including *McIntyre*, turned on the purposeful availment factor.[95]

Neither Justice Kennedy nor Justice Ginsburg in *McIntyre* objected to predictability as a relevant policy. They instead debated the type or nature of the required predictability. Justice Kennedy condemned reliance on "general notions" of "foreseeability" and required a higher degree of predictability than did Justice Ginsburg.[96] Justice Ginsburg characterized the requirement of purposeful availment as "simply" ensuring that jurisdiction will not be based on "'random,' 'fortuitous,' or 'attenuated' contacts.'"[97]

The distinction between different types of predictability is not new to jurisdictional analysis. The Court in *World-Wide*

---

93. Brilmayer, *How Contacts Count*, *supra* note 3, at 85; *see also* Feder, *supra* note 8, at 685–88 (exploring the role of due process in limiting a state's sovereignty in the context of personal jurisdiction).

94. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citing *Int'l Shoe*, 326 U.S. at 319; Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

95. *E.g.*, J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2783 (2011) (discussing the importance of purposeful availment to the finding of personal jurisdiction).

96. *See* Steinman, *supra* note 48, at 492–93 (discussing the foreseeability elements of Justice Kennedy's opinion in *McIntyre* and noting that the "idea is nothing new").

97. *McIntyre*, 131 S. Ct. at 2801. (Ginsburg, J., dissenting) (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)).

Volkswagen distinguished between different types of predictability or foreseeability and refused to rely upon the mere likelihood that the defendant's product might enter the forum state.[98] The key predictability concern in specific jurisdiction cases, according to the Court in *World-Wide Volkswagen*, is that the defendant, through his actions, must "reasonably anticipate being haled [sic] into court" in the forum state.[99]

Predictability has been the source of controversy in part because the concept has so many dimensions. The Court has defined the relevant predictability in specific jurisdiction cases as anticipation of amenability to suit, but this standard is unsatisfying. In some ways, it is circular or, as Professor Brilmayer put it, "incomplete."[100] In other words, if a state or court announces that personal jurisdiction may be asserted under certain conditions, the defendant should anticipate suit under those conditions. This does not render predictability an invalid concern. Most applications of due process, even those outside the context of personal jurisdiction, value notice or fair warning. The question is the type or nature of the requisite predictability.

Another policy concern in personal jurisdiction analysis is a quid pro quo or balance theory of fairness. One justification for jurisdiction is that a defendant who has enjoyed benefits in a state must bear reciprocal burdens in that state. In *International Shoe*, the Court explained that when a corporation "exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" and that the "exercise of that privilege may give rise to obligations."[101] Although this policy was not the centerpiece of the debate in *McIntyre*, Justice Kennedy's submission theory arguably encompasses it in that a defendant's submission involves both benefits and burdens.[102] Justice Ginsburg likewise suggested some notion of reciprocal benefits and burdens when she spoke of the burden of jurisdiction being a "reasonable cost" of doing business.[103]

---

98. *World-Wide Volkswagen*, 444 U.S. at 296–97.

99. *Id.* at 297.

100. Brilmayer, *Related Contacts*, *supra* note 3, at 1462; *see also* Rose, *supra* note 5, at 1587 (noting that if all limits on personal jurisdiction were abolished, it would be "perfectly predictable and foreseeable" to be subject to suit in all places).

101. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

102. *See McIntyre*, 131 S. Ct. at 2787–88 (discussing a party benefitting from the laws of a state as well as submitting itself to an otherwise foreign sovereign).

103. *Id.* at 2800–01 (Ginsburg, J., dissenting) ("Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England . . . .").

Finally, Justice Ginsburg emphasized, but Justice Kennedy downplayed, the importance of other fairness factors, such as the plaintiff's interest in bringing suit in the particular forum and the forum state's interest in adjudicating the dispute.[104] The Court has long recognized these and other concerns, including the interests of the interstate judicial system and, sometimes, substantive policies. In *Kulko v. Superior Court*,[105] the Court noted a substantive policy to tread lightly and not discourage amicability among divorcing couples.[106] In *Asahi Metal Industry Co. v. Superior Court*,[107] the Court stated that both substantive policy and judicial efficiency concerns argued for restraint in disputes between foreign national parties.[108] In *World-Wide Volkswagen*, the Court combined all of these concerns as factors to weigh against the defendant's burden in assessing the overall reasonableness of specific jurisdiction.[109] Importantly, however, the Court in *World-Wide Volkswagen* also established that these were secondary concerns, at least in specific jurisdiction cases, to be evaluated only if the defendant purposefully availed itself of forum state benefits.[110]

Thus, on the specific jurisdiction side, the Court has identified a wide range of policy concerns. For the most part, however, these policy concerns are not freeform elements of specific jurisdiction analysis. Instead, the Court has developed and prioritized the policies in identifiable tests, such as the purposeful availment standard of the first prong of the *World-Wide Volkswagen* test and the competing interests of the second prong. In other words, the Court has explained how the policies translate into a test to evaluate the propriety of specific personal jurisdiction. Individual members of the Court may disagree as to how the policies influence application of each element of a test, especially the purposeful availment standard, but the Court has set and repeatedly refined the tests for specific jurisdiction. This is not true for general jurisdiction.

---

104. *Compare id.* at 2800, *with id.* at 2783–84, 2789 (plurality opinion).
105. 436 U.S. 84 (1978).
106. *Id.* at 94.
107. 480 U.S. 102 (1987).
108. *Id.* at 115.
109. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
110. *See id.* at 294; *see also* Steinman, *supra* note 48, at 507 (noting that plaintiff and state interest factors were secondary considerations under "the prevailing jurisdictional framework" set by *World-Wide Volkswagen* and that Justice Ginsburg's approach in *McIntyre* "does not draw such a stark boundary between the two inquiries that crystallized during the 1980s").

B. The Four Fairness Concerns Underlying the Related and Extent of Contacts Factors

The lack of guidance from the Court as to general jurisdiction has spurred debate among lower courts and scholars. Lower courts have used foreseeability and quid pro quo policy arguments to shape tests for general jurisdiction.[111] The academic policy debate tends to be more wide ranging. The scholarly debate is best captured by the multiple exchanges between Professors Twitchell and Brilmayer in the 1980s. Professor Twitchell argued that there was no principled rationale for most exercises of general jurisdiction and that general jurisdiction should be confined to "its most essential function: providing one forum where a defendant may always be sued."[112]

Professor Brilmayer offered a fuller litany of policies underlying general jurisdiction. She developed these rationales by analyzing what she described as the "paradigm[] . . . unique affiliations" that permitted general personal jurisdiction: domicile of an individual and, for corporations, the states of incorporation and principal place of business.[113] Professor Brilmayer identified four theoretical justifications for general jurisdiction in these locations: convenience for the defendant, convenience for the plaintiff, state power, and reciprocal benefits of and burdens on the defendant.[114] She then applied these policies to test and justify other bases or in her words, proper affiliations, for general jurisdiction.

I agree with both Professors Twitchell and Brilmayer on different points. I agree that general jurisdiction should be limited to a defendant's home, but I offer a broad fairness rationale for that conclusion.[115] My policy rationales come closer to mirroring those of Professor Brilmayer, except that I derive and justify them in a different manner. Rather than looking at the end result—assumed examples of general jurisdiction—I look at the two factors that the Court in *International Shoe* identified as being crucial to analysis of general and specific jurisdiction: relatedness and extent of contacts.

Before the Court struggled to develop and apply different policy concerns in its specific jurisdiction cases, the Court in *International Shoe* identified the factors of relatedness and extent of contacts as

---

111. *E.g.*, O'Connor v. Shady Lane Hotel Co., 496 F.3d 312, 323 (3d Cir. 2007) (using quid pro quo and foreseeability policies to frame a test for relatedness); *see also infra* notes 216–22 and accompanying text (discussing *O'Connor*).

112. Twitchell, *Myth*, *supra* note 4, at 635–36, 667; *see also* Twitchell, *Doing Business*, *supra* note 4, at 172, 178–81 (describing the "[b]affling [r]ationale" of general jurisdiction based on "doing business").

113. Brilmayer et al., *General Look*, *supra* note 3, at 728–35; *see also* Cebik, *supra* note 5, at 33–36 (developing theories of general jurisdiction based on assumption that residence or domicile is a proper basis).

114. Brilmayer et al., *General Look*, *supra* note 3, at 730–35.

115. *See infra* Part IV.A.

crucial to the fairness of jurisdiction.[116] An analysis of these two factors reveals four concerns that influence the fairness of jurisdiction: reciprocity, predictability, state sovereignty, and convenience. The relatedness and extent of contacts factors are important to fairness because each helps to (1) ensure a rough reciprocity between benefits and burdens, (2) promote predictability, (3) limit state sovereignty, and (4) guard against inconvenience. These are not tests but instead broad explanations of what makes jurisdiction fair or unfair.

Reciprocity is shorthand for a relative balance between the forum state benefits that the defendant enjoys and the forum burdens that he must bear in the form of adjudicative jurisdiction. In other words, because a corporation received benefits from the state, it is fair for the corporation to bear burdens in the state in the form of jurisdiction over it, but only burdens that are roughly equal to the benefits. It is a variation on a quid pro quo theory of fairness. Reciprocity does not require an exact balance but is instead a rough measure to help assure fairness. A system is fair when the benefits and burdens of that system are proportionate.

Both the relatedness and extent of contacts factors help achieve reciprocity. First, as to the relatedness factor, the Court in *International Shoe* explained that because relatedness helps achieve a balance of benefits and burdens, it helps ensure fairness: "[S]o 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."[117] In other words, because the claim over which the forum state asserts jurisdiction (the burden) is related to the defendant's forum activities (the benefit), the burdens and benefits are proportionate, and the procedure is not "undue" or unfair.[118]

Reciprocity also helps explain the extent of contacts factor. In this context, a concern for reciprocity asks whether the contacts are so extensive and the benefits so great as to justify great burdens in the form of general jurisdiction. Under general jurisdiction, a defendant is subject to jurisdiction on any and all claims, no matter where the claims arose. The potential burden, in terms of

116. *See* text accompanying *supra* notes 41–44.

117. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

118. *See* Rose, *supra* note 5, at 1561–64 (describing this policy concern as embodying several principles: "proportionality" of benefits and burdens, nonaffiliation—by which defendants can sever or avoid contact—and "consent/exchange"); Twitchell, *Doing Business*, *supra* note 4, at 175 ("A quid-pro-quo justification works well for specific jurisdiction" because "the scope of the *risk* of being subject to jurisdiction in the state is proportionate to the scope of the defendant's forum-related activities").

jurisdiction over claims, is unlimited. The Court in *International Shoe* did not specify this balance, but it did describe the target balance point: "[I]nstances in which the continuous corporate operations within a state [are] 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."[119] Mere continuity or multiplicity of contacts is not enough. Indeed, the Court began this sentence with the point that "continuous activity of some sorts within a state is not enough."[120] The benefits must be substantial enough that they offset almost unlimited burdens, in the form of general jurisdiction on any claim, arising anywhere. If the defendant received few benefits from the forum state, it would be unfair to impose unlimited or extensive burdens.

A second fairness rationale is predictability. Although the Court traditionally uses this rationale to support the purposeful availment standard in specific jurisdiction analysis of related claims, predictability also explains the more fundamental *International Shoe* factors of relatedness and extent of contacts. Indeed, in *Burger King Corp. v. Rudzewicz*,[121] the Court noted that the "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, . . . *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities."[122]

As to relatedness, in order for a defendant to properly structure its behavior, it not only must know that a contact has been made in a particular state (an aim protected through the purposeful availment standard), but it also must have some minimal appreciation of the effect of that contact.[123] The relationship standard helps give this appreciation. Without some form of relatedness standard, the defendant would not be able to predict the

---

119. *Int'l Shoe*, 326 U.S. at 318. To some extent, reciprocity overlaps with predictability. *See* O'Connor v. Shady Lane Hotel Co., 496 F.3d 312, 322 (3d Cir. 2007) ("The animating principle behind the relatedness requirement is the notion of a tacit quid pro quo that makes litigation in the forum reasonably foreseeable."); *see also infra* notes 216–22 and accompanying text (discussing *O'Connor*, 496 F.3d 312).

120. *Int'l Shoe*, 326 U.S. at 318; *see supra* note 41 (quoting *Int'l Shoe*, 326 U.S. at 318).

121. 471 U.S. 462 (1985).

122. *Id.* at 472 (emphasis added) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 414 (1985)).

123. *See* uBID, Inc. v. Godaddy Grp., Inc., 623 F.3d 421, 429 (7th Cir. 2010) (quoting RAR, Inc., v. Turner Diesel, Ltd., 107 F.3d 1272, 1278 (7th Cir. 1997)) (arguing that relatedness helps give people "confidence that 'transactions in one context will not come back to haunt them unexpectedly in another'").

jurisdictional consequences of its actions.[124] Any action of any type in a state might open up jurisdiction on a claim arising from other actions elsewhere. A requirement of relatedness helps the defendant appreciate the claims, or types of claims, subject to specific jurisdiction.

The predictability concern underlying relatedness overlaps with, but is distinct from, the predictability concern underlying the purposeful availment factor. Relatedness focuses more on the claim, and purposeful availment focuses more on the forum. An assessment of predictability in either context should take the protection of the other into account. So, for example, where the purposeful availment standard by itself cannot achieve predictability, relatedness must do so.

In contrast, in general jurisdiction cases, the extent of contacts factor arguably acts alone in providing predictability. On this side, the question is whether the defendant's contacts with a particular state are so substantial that it is predictable that the defendant could be sued in that state on any claim arising anywhere in the world. When a defendant chooses to engage in substantial activities in a state, such as centering its corporate operations there, the defendant might reasonably predict that those activities would expose it to unlimited suits in that state. Lesser contacts, even continuous ones, would not necessarily give the defendant this appreciation. The defendant would not anticipate that a low level of contacts with a state would expose it to suit there on any claim arising elsewhere in the world. In order for general personal jurisdiction to comport with the "orderly administration of laws," the defendant must have such extensive contacts with the state that it reasonably could anticipate or predict unlimited jurisdiction in the state.

The third general fairness component is sovereignty. The Court cited sovereignty as a primary concern underlying the purposeful availment factor in both *World-Wide Volkswagen*[125] and *McIntyre*.[126] The key to sovereignty for general personal jurisdiction is that a state has sovereignty both over activities within its borders and over persons who are its "citizens" (in the broad, nontechnical sense of the word).

The relatedness factor protects against a state exceeding its sovereignty, perhaps more obviously than does the purposeful availment standard. Relatedness helps ensure that the activity at issue in the suit—that over which the state is asserting

---

124. Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1223 (11th Cir. 2009) ("[F]oreseeability constitutes a necessary ingredient of the relatedness inquiry.").

125. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291–93 (1980).

126. J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

sovereignty—has some connection to the defendant's activity in the forum state. A fair system would permit a state to assert sovereignty, in the form of judicial jurisdiction, over activity conducted within its borders or having an impact there.[127] By contrast, the fact that a defendant once conducted isolated business in the forum state would not give the state sovereignty over the defendant's unrelated actions outside the state.[128]

Similarly, sovereignty helps explain the extent of contacts factor. A state not only has sovereignty over activities within its borders, but it also has sovereignty over its persons or citizens, no matter where they act. Citizenship in this sense is not necessarily any literal definition used for other purposes, such as a federal court's diversity subject matter jurisdiction.[129] Instead, the question in this context is whether the defendant's contacts with the forum state are so extensive that the state fairly may assert its sovereignty over the person of the defendant, rather than the actions of the defendant.

A fourth policy concern underlying the fairness of jurisdiction is inconvenience. In the modern era, the Court used convenience as shorthand in specific jurisdiction cases for the balance of the defendant's burdens in litigating in the forum state against other interests that might argue for jurisdiction, such as the plaintiff's interests in the specific forum.[130] Convenience in the context of general jurisdiction reflects somewhat different concerns. It is a broad notion to help ensure the fairness of general jurisdiction by helping define relatedness and extent of contacts.

One reason that jurisdiction over related claims is relatively convenient is that the evidence concerning the claim is more likely to be found in the forum state. On the other hand, when the claim is unrelated, the evidentiary convenience is less, but other conveniences emerge when the contacts are extensive. When the defendant has extensive contacts with the state, the defendant will

---

127. *See* Brilmayer, *How Contacts Count*, *supra* note 3, at 86 ("[T]he most convincing justification [for a related standard] is the State's right to regulate activities occurring within the State.").

128. *Id.* (arguing that if a test of substantive relevance is adopted, then state attempts at regulation of non-dispute-related activities "would be either arbitrary and capricious or discriminatory").

129. Professor Brilmayer uses a variety of terms to connote this standard, including "insider." *Id.* at 86–87.

130. *See, e.g.*, *McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting) (arguing that specific jurisdiction considers the "litigational convenience and the respective situations of the parties" in order to "determine when it is appropriate to subject a defendant to trial in the plaintiff's community"; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78 (1985) (stating that preventing great inconvenience to the defendant and providing the plaintiff with a convenient forum in which to litigate his claims are both factors in establishing specific jurisdiction).

have little burden in traveling to and defending under that state's legal system.

This statement of the convenience concern focuses solely on the defendant's convenience or burdens. This is not to say that other convenience concerns or interest factors—those under the second prong of the *World-Wide Volkswagen* two-part test[131]—are entirely irrelevant in setting general jurisdiction standards. For the most part, the other concerns are either less apt in this context or otherwise addressed. For example, on the extent of contacts factor, because the claim is unrelated to the forum, the plaintiff has no evidentiary interest in the forum. The plaintiff might have some interests in the forum—for example, that she perceives the forum as being favorable and otherwise convenient for her—but this interest cannot itself determine jurisdiction. Otherwise, there would be no limits on jurisdiction. Instead, this interest properly is a secondary concern that can influence jurisdictional standards when other primary concerns are met.

In sum, these four fairness concerns help explain why the two *International Shoe* factors are important, and they in turn inform general jurisdiction analysis. The fairness concerns are not themselves a jurisdictional test. They are not talismanic standards that must be met in every case. They instead help guide analysis of the many unanswered questions regarding general jurisdiction, including the two major issues of the degree of relatedness and extent and nature of contacts necessary for general jurisdiction analysis.

III. RELATEDNESS OF CONTACTS AND CLAIMS—THE THRESHOLD QUESTION

The biggest void in general jurisdiction analysis is the threshold question of how to determine if a claim is fit for such analysis. In other words, related claims are subject to the specific jurisdiction two-part analysis set forth in *World-Wide Volkswagen*, and unrelated claims are subject to general jurisdiction analysis. What test should decide this essential fork in personal jurisdiction analysis?

In *International Shoe*, the Court used several different terms to describe relationship and lack of relationship: activities that "give rise to" liabilities, as opposed to activities that are "unconnected," "unrelated," or "entirely distinct" from the claims.[132] Since then, the Court has not defined the necessary degree of relationship, reserving decision on the question. Lower courts and commentators

131. *See supra* notes 50–51 and accompanying text.

132. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–18 (1945); *see supra* notes 39–42 (quoting *Int'l Shoe*, 326 U.S. at 317-18).

have developed various tests for relatedness. Most of these tests involve some element of causation, but some scholars propose a standard that does not rely on causation and instead looks to product or subject-matter similarity. As I explore below, both the Court's precedent and policy analysis argue for a midlevel causation test.

A. Possible Tests for Relatedness

In 1984, the Court in *Helicol* officially adopted the terminology of general and specific jurisdiction,[133] but it reserved decision on the essential question of how to differentiate the two forms of jurisdiction. In reserving the decision, the Court highlighted three potential issues: whether "arise out of" and "relate to" were synonymous standards;[134] the connection necessary to satisfy either or both standards;[135] and whether a lesser connection than "arise out of" would suffice for specific jurisdiction.[136]

Lower courts and scholars have attempted to answer these questions.[137] At one time, the most prominent tests were those developed in a line of vacation travel cases. Generally, in these cases, the defendant, a business in the travel industry, reached into the forum state, the plaintiff's home state, to entice the plaintiff to travel to a distant location. The plaintiff was hurt in the distant locale and sued the defendant in tort in the plaintiff's home state. The question was whether the formalization of the vacation, such as a ticket sale or reservation contract, in the plaintiff's home state, was sufficiently related to the defendant's allegedly tortious conduct in the vacation locale to support jurisdiction in the plaintiff's home state. Some courts answered yes, and others no.

The Ninth Circuit reviewed the conflict in the 1990 case *Shute v. Carnival Cruise Lines, Inc.*[138] There, the plaintiffs were injured on a cruise, several hundred miles from their Washington state

133. Helicopteros Nacionales de Columbia, S.A. v. Hall (Helicol), 466 U.S. 408, 414 nn.8–9 (1985); *see supra* note 43 (noting adoption of the terminology).

134. *Helicol*, 466 U.S. at 415 n.10.

135. *Id.*

136. *Id.* at 415–16 n.10.

137. Some judicial opinions addressing relatedness are in the context of the local long-arm statute, but these inquiries usually, though not always, merge into the constitutional issue of relatedness. *See, e.g.*, Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 713–14 (1st Cir. 1996) (addressing whether the court's prior opinions were constructions of long-arm statutory or constitutional requirements of relatedness); *infra* notes 223–27 (discussing *Nowak*, 94 F.3d at 711, 716).

138. 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *see infra* text accompanying notes 148–50 (discussing Supreme Court ruling).

home, and they sued the cruise company in their home state.[139] The plaintiffs bought their cruise ticket in Washington. The defendant had advertised and sold cruise tickets to other Washington residents, amounting to 1.29% of its total cruise ticket sales.[140] Because these other sales were not sufficient contacts for general jurisdiction,[141] the court explored whether the connection between the ticket sale and the cruise injury claims was sufficient for specific jurisdiction. If it were, then jurisdiction likely would be proper, given that the defendant knowingly sent the ticket to the plaintiffs in Washington and met the purposeful availment factor.[142] Thus, the relatedness issue was essential to whether a court in Washington properly could assert jurisdiction over the cruise line on this claim.

The Ninth Circuit observed that some other circuits, including the First, Second, and Eighth Circuits, then used a strict test, often called "proximate cause," to reject jurisdiction in vacation travel cases.[143] Under this strict test, the personal injury tort claim was not sufficiently related to the defendant's forum activities because proof of the claim depended on the defendant's wrongful actions in the vacation locale, not the advertisements or ticket sales in the forum.[144] Perhaps a breach of contract or misrepresentation claim would be sufficiently related under this test but not the personal injury claim. In other words, the personal injury tort plaintiff would not be able to rely on any of the defendant's forum activities to establish her claim.

The Ninth Circuit in *Shute* also surveyed vacation travel cases applying a less stringent "but-for" test.[145] The court concluded that the but-for test was the better test because the proximate cause test was not necessary to protect defendants and was too restrictive of plaintiffs' forum choices.[146] It held that the ticket sale in Washington was sufficiently related to the plaintiff's personal injury claim: without the ticket the plaintiff never would have taken the cruise where she was injured.[147] The Supreme Court granted certiorari in *Carnival Cruise Lines, Inc. v. Shute*,[148] and although it

139. *Shute*, 897 F.2d. at 379.
140. *Id.* at 381; *see infra* Part IV.D.2 (discussing this aspect of the extent of contacts factor).
141. *Shute*, 897 F.2d at 380–81.
142. *Id.* at 381–83.
143. *Id.* at 383.
144. *Id.*
145. *Id.* at 385–86.
146. *Id.*
147. *Id.* at 386.
148. 499 U.S. 585, 589 (1991).

heard argument on the relatedness issue,[149] the Court avoided the constitutional question of relatedness by relying on a forum selection clause printed on the back of the cruise ticket.[150]

The question of the proper relatedness standard, of course, extends beyond the vacation cases. The First Circuit, for example, has announced a test for relatedness in contract suits, under which courts "look to the elements of the cause of action and ask whether the defendant's contacts with the forum were instrumental either in the formation of the contract or its breach."[151] The Federal Circuit has announced a "flexibl[e]" "disjunctive" test for patent cases—requiring that the claim either "arise out of" or "relate" to the defendant's forum state activities.[152] Under this test, the Federal Circuit has held that forum manufacture, sale, and use of an offending product are all related to a patent infringement claim, but are not sufficiently related to a patent declaratory unenforceability action.[153]

Academics have pondered the proper test. Professor Brilmayer has long advocated a "substantive relevance" test.[154] Under her test, a claim is related if "the applicable rules of law actually make the contact in question one of substantive relevance,"[155] or, put another way, "if the forum occurrence . . . would ordinarily be alleged as part of a comparable domestic complaint."[156] Her test is similar to the proximate cause test, and courts have categorized the two tests as one.[157]

A few commentators[158] and courts[159] have advocated liberal tests that do not include any form of causation. These tests have

---

149. *See* Proceedings Before the Supreme Court of the United States at 2–11, 22–36, *Carnival Cruise*, 499 U.S. 585 (1991) (No. 89-1647), 1991 WL 636293, at *3–11, *22–26 (oral argument concerning relationship issue).

150. *Carnival Cruise*, 499 U.S. at 589 ("Because we find the forum-selection clause to be dispositive of this question, we need not consider [the relatedness issue].").

151. Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 289 (1st Cir. 1999).

152. Avocent Huntsville Corp. v. Aten Int'l Co., 552 F.3d 1324, 1330, 1337 (Fed. Cir. 2008) (quoting Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1362 (2001)) (internal citations omitted).

153. *Id.* at 1336.

154. *See generally* Brilmayer, *How Contacts Count*, *supra* note 3; Brilmayer, *Related Contacts*, *supra* note 3.

155. Brilmayer, *Related Contacts*, *supra* note 3, at 1455.

156. Brilmayer, *How Contacts Count*, *supra* note 3, at 82.

157. *See, e.g.*, Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 333 (D.C. 2000) (en banc) ("These tests have sometimes been described as one test: substantive relevance/proximate cause."); *see also* Maloney, *supra* note 5, at 1282–83 (characterizing the proximate cause and substantive relevance tests as the same).

158. *See, e.g.*, Rhodes, *supra* note 5, at 886–90 (proposing a three-prong test for general jurisdiction that would ask first whether the defendant's forum

various names, but, generally speaking, they would apply specific jurisdiction analysis so long as there is a minimal relationship between the contacts and the claim.[160] Some of these tests could be described generally as requiring a topical or subject similarity. Professor Twitchell, for example, advocated a similarity test that would apply specific personal jurisdiction analysis when the "defendant's forum contact is similar to, but not causally related to, the conduct that forms the basis for the cause of action."[161]

In products liability cases, a similarity test would find sufficient relatedness so long as the defendant sold, in the forum state, a product similar to that at issue in the suit.[162] That the forum sales had no causal relationship to the plaintiff's claim would not defeat relatedness. By contrast, an entirely unconnected claim, such as an employment contract or discrimination suit by an employee in the defendant's headquarters, likely would not be sufficiently related to the defendant's product sales in the forum state under this test.

A similarity test arguably might align with that proposed by Justice Brennan in *Helicol*. There, although the Court majority did not address relatedness, Justice Brennan refused to concede lack of relationship. He rejected a formal "arise out of" test and agreed that the claims there "did not formally 'arise out of [the defendant's] specific activities'" in Texas.[163] He argued that the claims at issue were otherwise related, and in doing so, he used terms such as not "wholly unrelated"[164] and "significantly related."[165]

B. The Invalidity of a Broad Noncausation Test for Relatedness

Both the Supreme Court's precedent and the policies underlying general jurisdiction analysis point to a causation test. Although the Court has not settled the question of relatedness, a close examination of the cases suggests that the Court rejects a

---

activities are analogous to the in-state activities of a forum domiciliary); Rose, *supra* note 5, at 1589 (arguing for a substantive relevance test with two exceptions, including a similarity test in product cases); Simard, *Hybrid Jurisdiction*, *supra* note 5, at 599 (arguing that jurisdiction should exist if the defendant has forum contacts that are similar to those underlying the plaintiff's claim).

159. *See Moreno*, 746 A.2d at 334–35 (surveying cases applying broad, noncausation tests).

160. *See* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 319 (3d Cir. 2007) (noting that noncausation tests require a "substantial connection" or "discernible relationship" between the contacts and the claim, but, "[u]nlike the but-for test, causation is of no special importance").

161. Twitchell, *Myth*, *supra* note 4, at 660.

162. *Id.* at 660–61.

163. Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 425 (1984) (Brennan, J. dissenting).

164. *Id.* at 426.

165. *Id.* at 425.

noncausation standard. Likewise, the four fairness policies argue for a causation test.

1. The Court's Precedent on Noncausation Relatedness

Most of the Court's jurisdiction cases are specific jurisdiction cases. These cases necessarily involve related contacts. Yet, in these cases, the Court rarely mentions relatedness, let alone the distinctions between causation and noncausation tests for relatedness. Most of the Court's specific jurisdiction cases are "easy" in terms of relatedness because the claims arguably satisfy even strict causation tests. I discuss these cases in more detail below;[166] my point here is that the Court's specific jurisdiction cases leave open whether a lesser form of noncausation relatedness would suffice.

Some observers cite *World-Wide Volkswagen* as supporting a similarity test.[167] They do not base this argument on the plaintiff's actual claim against the dealer, likely because the plaintiff suffered injury in the forum state of Oklahoma and her claim would satisfy most causation tests for relatedness.[168] Instead, the argument for a noncausation similarity test builds on the Court's dictum regarding Audi, the car's manufacturer. The Court stated:

> [I]f the sale of a product of a manufacturer . . . such as Audi . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others."[169]

The dictum is ambiguous.

On the one hand, the dictum may be an explanation why the Oklahoma court in the actual case would have had jurisdiction over Audi, if it had objected to jurisdiction.[170] If this is a correct reading, the dictum would suggest a liberal test of relationship, under which similarity in product sales would be enough.[171] In other words, Audi's marketing and sales of similar cars in Oklahoma would be sufficiently related to plaintiffs' claims to justify suit against Audi

166. *See infra* Part III.C.1.

167. *See* Twitchell, *Myth*, *supra* note 4, at 661 (arguing that jurisdiction over Audi in *World-Wide Volkswagen* was justified on product similarity, not extent of contacts).

168. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980); *see infra* Part III.C.1 (discussing the role of injury under relatedness tests).

169. *World-Wide Volkswagen,* 444 U.S. at 297.

170. Audi did not contest jurisdiction. *Id.* at 288 n.3.

171. This hypothetical presents a question under a hybrid theory, which I discuss *infra* Part IV.D.

there, even though the plaintiffs bought the actual car elsewhere without regard to any of Audi's marketing in Oklahoma. On the other hand, the Court's dictum may suggest only that Audi would be subject to jurisdiction if its marketing reached an Oklahoma consumer (as opposed to the actual New York plaintiffs) and motivated that Oklahoma consumer to buy the car, which later caused injury in Oklahoma. This latter interpretation suggests a causal test for relationship. The sale and the later injury would not have occurred but for Audi's marketing in Oklahoma.

The Court's cases outside of the specific jurisdiction context are more informative on the relatedness question. The Court seemingly rejected a broad similarity standard in *Shaffer v. Heitner*,[172] a case in which the Court described relatedness as a key concern. There, the Court held that in-state property by itself was no longer an independent basis for personal jurisdiction and that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[173] The Court noted that, under *Pennoyer*, property could support personal jurisdiction even if the property was "completely unrelated to the plaintiff's cause of action."[174] By contrast, the Court explained in *Shaffer* that relatedness was "central" under *International Shoe*: "[T]he central concern of the inquiry into personal jurisdiction" involves "the relationship among the defendant, the forum, and the litigation."[175] According to the Court, the defendant's forum state property is a relevant contact under the minimum contacts test, but the problem is that the property contact is unrelated to the claim.[176]

The Court in *Shaffer* did not adopt a particular test for relationship, but it did state that the property at issue in the case before it was not sufficiently related. *Shaffer* was a shareholder's derivative action, filed in Delaware state court, that alleged wrongdoing committed by the defendant officers and directors in Oregon.[177] The property used to support jurisdiction over most of the individual defendants was their Greyhound stock.[178] There was

---

172. 433 U.S. 186 (1977).

173. *Id.* at 212.

174. *Id.* at 209; *see supra* Part I.A (discussing Pennoyer v. Neff, 95 U.S. 714 *overruled in part by Shaffer*, 433 U.S. 186).

175. *Shaffer*, 433 U.S. at 204.

176. *Id.* at 207–09.

177. *Id.* at 189–90. The action charged that the defendants violated their duties to Greyhound by causing the company to be held liable for civil damages in excess of $13 million and a large criminal fine in antitrust suits. *Id.* at 190 & n.2.

178. *Id.* at 191–92. Delaware law provided that Delaware was the physical location of stock issued by Delaware corporations and that shares of stock could be sequestered as a means of asserting jurisdiction over absent defendants. *Id.* at 193–94.

a form of subject-matter relationship between the defendants' stock and the claim: both involved the Greyhound Corporation. The defendants' stock holdings were more related to the suit than other property that the corporate executives might have owned in Delaware, such as a vacation home. This minimal relationship was not enough for the Court, which stated that the defendants' Greyhound stock was "not the subject-matter of [the] litigation, nor [was] the underlying cause of action related to the property."[179]

The Court's general jurisdiction cases also seem to reject a standard based solely on similarity. In *Perkins*, the Court summarily stated, without analysis of the question, that the "cause of action . . . did not arise in Ohio and does not relate to the corporation's activities there."[180] This sentence is ambiguous. It uses both "arise" and "relate to" to describe the lack of connection that triggered general jurisdiction analysis. The facts of the case, however, suggest that the necessary relatedness was something more than topical or subject similarity.

In *Perkins*, the plaintiff sought dividends and damages due to the defendant's failure to issue certificates for her stock.[181] These corporate governance failures had a subject-matter similarity to the defendant corporation's Ohio activities.[182] At the time of the suit, Ohio was the center of corporate operations, which included meetings of the board, maintenance of bank accounts, and stock transfer decisions.[183] Yet, the Court stated that there was an insufficient relationship between these Ohio activities and the claim.[184] Therefore, the Court seemingly viewed relatedness as connoting something more than mere subject similarity.

In *Helicol*, a majority of the Court reserved decision on relatedness, but even Justice Brennan's opinion did not necessitate a test as liberal as noncausal similarity.[185] To be sure, he suggested a broad test when he stated that the contacts were "not wholly unrelated" to the claim,[186] but the facts of the case did not necessitate such a test in order to find relatedness. The claim in *Helicol* might have satisfied a but-for test. The defendant negotiated in Texas the very charter service that led to the deaths

179. *Id.* at 213.
180. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952).
181. *Id.* at 439.
182. *See* Borchers, *supra* note 5, at 124 (describing *Perkins* and stating that "one can now easily imagine an argument that the corporation's Ohio activity . . . as related to the claims in the case").
183. *Perkins*, 342 U.S. at 447–48.
184. *Id.* at 448–49.
185. *See supra* notes 163–65 and accompanying text.
186. Helicopteros Nacionales de Columbia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 426 (1984) (Brennan, J., dissenting).

that were at issue in the wrongful death suits.[187] The plaintiffs could have argued, as in the vacation travel cases, that but for the defendant's Texas activities, the plaintiffs' husbands would not have died in the Peru helicopter crash. Moreover, although Justice Brennan rejected an "arise out of" test, he suggested a form of substantive relevance test by arguing that the actual claims concerned, in part, the pilot's negligence, which might have been due to improper training in Texas.[188]

In 2011, the Court in *Goodyear* came close to ending any debate on product similarity as the test for relatedness. The Court summarily stated that the claim there was unrelated: "Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction."[189] The case was not sufficiently related even though the claim concerned tires and the defendants sold tires in North Carolina. This would suggest that the Court did not consider mere product similarity to be a sufficient relationship to trigger specific personal jurisdiction analysis.[190]

Yet, on this issue, the Court left the door open, by just a crack. Elsewhere in the opinion, when discussing the question of the necessary extent of the defendants' contacts, the Court mentioned that the defendants did not sell the same type of tire in North Carolina as that involved in the bus accident.[191] This point, perhaps, suggests that a product similarity might be sufficient if it is a very close similarity. This, of course, begs the question of how similar the product must be. Professor Brilmayer recognized this "tricky question" raised by a similarity test.[192] She pondered not only the degree of similarity of the product itself—make, model, and year, for example—but also the similarity of the alleged product

187. *Id*. at 410–11 (majority opinion); *see also id*. at 426 (Brennan, J., dissenting) (arguing that the "negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were begin used at the time of the crash").

188. *Id*. at 426 ("[T]he helicopter involved in the crash was purchased by Helicol in Texas, and the pilot whose negligence was alleged to have caused the crash was actually trained in Texas.").

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

190. *See* Pervasive Software Inc. v. Lexware GMBH & Co. KG, No. 11-50097, 2012 WL 2948543, at *11–12 (5th Cir. July 20, 2012) (rejecting personal jurisdiction based on the defendant's website sales to other forum consumers).

191. *Goodyear*, 131 S. Ct. at 2852 ("[T]he type of tire involved in the accident . . . was never distributed in North Carolina" and defendants instead sold in North Carolina "typically custom ordered to equip specialty vehicles such as cement mixers, waste haulers, and boat and horse trailers.").

192. Brilmayer, *Related Contacts*, *supra* note 3, at 1460.

defect.[193] These implementation issues alone might argue against any form of "close similarity" test.

2. A Policy Assessment of Noncausation Relatedness

A broader policy analysis argues against a noncausation similarity test. In addition to the practical implementation problems, the four fairness components argue against any form of a noncausation test. Product cases are good examples to test and illustrate this policy analysis.

First, the benefits and burdens of entering a state would not be reciprocal. In a product case, a similarity test would expose the seller to all product suits in any state in which it sells a similar product, regardless of the extent of sales in that state. This is not an entirely unlimited burden, in that the test would not support suits that have no connection at all, such as an employment action, but it would be a severe burden, in the form of broad jurisdiction over all product sales. The burden would exceed most benefits from forum state sales. Indeed, if mere product similarity were the test, specific jurisdiction could be founded on a single forum sale of a similar product to another customer, so long as that other sale was purposeful.

Second, a similarity test also fails to give claim-specific predictability. The defendant does not have an adequate basis on which to predict its amenability to suit as result of product sales. Even a single sale in the forum state would subject the defendant to jurisdiction there on product claims arising from sales that took place anywhere in the world. The Court recognized this potential reach in *Goodyear*, when it warned that under a "sprawling view of general jurisdiction . . . any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed."[194] Although this statement was in the context of the other general jurisdiction factor—extent of contacts—its warning applies equally to the question of relatedness.

Here, the purposeful availment standard by itself would not adequately protect predictability because the defendant would not appreciate the claims to which its actions subjected it to jurisdiction. Where the defendant deliberately targeted sales to the forum, the purposeful availment standard is met as to those targeted sales, but that finding does not resolve predictability concerns for the defendant's other sales outside the forum state. In these hypothetical product cases, the defendant's only connection to the current suit is that he deliberately sold a similar product in the forum state. That lone sale would not give him any basis on which

193. *Id.* at 1459–60.
194. *Goodyear*, 131 S. Ct. at 2856.

to predict suits by persons other than that single consumer. In other words, the defendant reasonably could anticipate suit on this sale by this consumer, but that appreciation does not mean that the defendant could anticipate all other products suits by other consumers, no matter where they bought their similar product. There would be no claim-specific predictability.

Third, the forum state exceeds its sovereignty when it asserts jurisdiction over claims that are merely similar to activities within its borders, as opposed to causally connected to the forum conduct. The state may have an interest in regulating the safety of similar products sold within its borders, but its sovereignty should not extend to products sold and causing injury outside its borders. Otherwise, a state would be justified in reaching out to any activity committed anywhere, based solely on the fact that a similar act was committed within its border.[195]

Finally, convenience does not argue strongly for jurisdiction based solely on product similarity, as opposed to a causal link.[196] The defendant's burden of travel may not be great, given its earlier ability to sell products in the state, but presumably the case would have no evidentiary advantage. Neither the claim-related evidence nor the defendant-related evidence would be located in the state.

In sum, a relatedness standard based on similarity, as opposed to some form of causation, is not the proper test. It does not have support in the Court's jurisdiction precedent, and a policy analysis argues against it. In practice, rejection of this standard will work little change. The First Circuit summarized the prevailing view in 1996: "Most courts share [an] emphasis on causation, but differ over the proper causative threshold. Generally courts have gravitated toward one of two familiar tort concepts—'but for' or 'proximate cause."[197] Few courts have applied a similarity test of a single sale in its pure form, in that they typically do not base jurisdiction solely on similarity without regard to at least an intermediate level of

---

195. *Cf.* BMW of N. Am. v. Gore, 517 U.S. 559, 572–73 (1996) (invalidating a punitive damages award that punished extraterritorial conduct that was lawful where it occurred and did not harm forum citizens).

196. *See* Brilmayer, *Related Contacts*, *supra* note 3, at 1461 (arguing that a similarity test would not promote "either litigational or party convenience").

197. Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 714 (1st Cir. 1996); *see infra* notes 223–27 and accompanying text (discussing *Nowak*, 94 F.3d at 711, 716); *see also* Licciardello v. Lovelady, 544 F.3d 1280, 1285 n.3 (11th Cir. 2008) ("[I]t is not enough that there be some *similarity* between the activities that connect the defendant to the forum and the plaintiff's claim."); Seymour v. Parke, Davis & Co., 423 F.2d 584, 587 (1st Cir. 1970) (holding that a New Hampshire court could not assert jurisdiction over a drug maker in a product liability claim brought by a Massachusetts consumer of drugs purchased in Massachusetts, even though the defendant advertised and solicited orders for the same drug in New Hampshire).

forum activities. I discuss this blended form of jurisdiction below in Part IV.E.

C. The Proper Causation Test for Relatedness

That mere similarity is not an adequate test for relatedness does not solve the issue. It leaves the question of the proper causation test. The lower courts use different tests with many labels, all requiring some sort of causal connection between the claim and the defendant's forum contacts. I contend that the proper causation test is a midlevel causation test, perhaps best described as "meaningful link." The terminology, however, is not as important or as instructive as the proper application of the test.

1. Causation Relatedness in the Court's Specific Jurisdiction Cases

A useful first step is to ask what sort of connection was enough in the Court's specific jurisdiction cases. These cases necessarily involve related claims, and although the Court rarely mentioned the question of relatedness, the facts of the cases may suggest a pattern or test for relatedness. The common element in these cases is injury. In virtually all of the Court's specific jurisdiction cases, the plaintiff suffered all or part of her injury in the forum state.

The easiest cases in which to locate injury are the product liability cases. In *World-Wide Volkswagen*, the plaintiffs were injured in a car accident while driving in Oklahoma.[198] In *Asahi*, the primary plaintiff was injured in California, and the third-party indemnity plaintiff incurred damages in California in the form of defense costs and settlement funds.[199] In *McIntyre*, the plaintiff was injured at work in New Jersey.[200] Even in the Court's other cases, those involving intangible injury and economic loss, some injury occurred in the forum state. In two defamation cases—*Keeton v. Hustler Magazine, Inc.*[201] and *Calder v. Jones*[202]—the Court recognized that the plaintiff incurred at least some reputational injury in the forum state. In *Burger King*, a breach of contract and trademark case, the Court noted that the plaintiff, Burger King, suffered injury in the forum state.[203]

198. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).
199. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105–06 (1987).
200. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).
201. 465 U.S. 770, 776–77 (1984).
202. 465 U.S. 783, 789–90 (1984).
203. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480 (1985) ("[T]he defendant's refusal to make the contractually required payment in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injury to the corporation in Florida.").

Several insights can be drawn from this role of the place of injury. First, forum state injury satisfies the Court's conception of relatedness.[204] Although some interpretations of the strict tests suggest that injury alone may not suffice—under a theory that a wrongful act must occur in the forum state[205]—this view is incorrect. Unlike causation in tort cases, the causation tests for jurisdictional relatedness do not necessarily look for the cause of the injury. These tests in essence look to the cause of the claim. The claim arises out of the injury. The injury is an essential element of the claim.[206]

Second, a corollary of the first, the underlying wrongful conduct need not occur inside the forum. In all of the listed cases, all or part of the defendant's allegedly wrongful actions occurred in states other than the forum state. In *World-Wide Volkswagen*, for example, the dealer's alleged wrongful act—the sale of the car—occurred in New York, not Oklahoma. This means that relatedness does not require that all elements of the claim occur in the forum state. Indeed, most articulations of even the stricter tests, such as the substantive relevance test, require that only one of the operative elements occur in the forum state.[207]

Third, although the Court's specific jurisdiction cases were brought in the state of injury, place of injury is not the sole standard for relatedness. The place of the defendant's wrongful conduct also is a related contact. The wrongful act is a proximate cause of the claim or is at least substantively relevant to the claim. In *Goodyear*, the Court phrased the place of wrong as an alternative when it stated that the case was one of general jurisdiction because neither the injury nor the manufacture-sale of the tire occurred in North Carolina.[208]

Finally, the Court's specific jurisdiction cases demonstrate the difference between the predictability underlying the relatedness

---

204. Justice Ginsburg in *McIntyre* stated that "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim." *McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting). That the claim is related does not mean that the place of injury is a permissible forum. The case must pass the purposeful availment test.

205. *Cf.* Shute v. Carnival Cruise Lines Inc., 897 F.2d 377, 385 (9th Cir. 1990) (pondering whether the proximate cause test would "compel the conclusion that [product] claims arise from negligence in manufacturing and design, rather than from forum-related activity"), *rev'd on other grounds* 499 U.S. 585 (1991); *see also supra* notes 138–49 and accompanying text (discussing *Shute*, 897 F.2d 377).

206. *See* Brilmayer, *Related Contacts*, *supra* note 3, at 1453–58 (listing injury as a substantively relevant event).

207. *Id.* (describing application of the substantive relevance test and emphasizing that it is met by the occurrence of a single event).

208. Goodyear Dunlop Tires Operations, S.A. v. Brown,131 S. Ct. 2846, 2851 (2011); *see supra* note 189 and accompanying text (quoting *Goodyear*, 131 S. Ct. at 2851).

standard and that underlying the purposeful availment standard. The place of injury, when divorced from the underlying wrongful conduct, as it is in most product cases, is unpredictable. Yet, injury was enough to trigger specific jurisdiction analysis in the Court's product cases. The explanation is that the relatedness standard promotes claim-specific predictability while the purposeful availment standard protects forum predictability. In other words, in a product case, the relatedness standard gives predictability as to the types of claims subject to specific jurisdiction, and the purposeful availment ensures that the defendant appreciate the location.

In a product case, where a plaintiff chooses to file suit in the state in which the defendant manufactured the product, the defendant gains both claim-specific and forum-specific knowledge when it commits the act of manufacture. In cases where injury occurs in a state different from manufacture, the relatedness requirement ensures the claim-specific knowledge—claims arising from that injury, as opposed to claims not related to that injury—and the purposeful availment standard ensures that the defendant knowingly sought out that particular forum. Together, they ensure that the defendant has sufficient appreciation and notice of the jurisdictional consequences of his actions.

By contrast, a broad similarity test for relatedness would not give sufficient claim-specific predictability, and the purposeful availment standard would not fill the void. Purposeful availment analysis would ask if this forum contact was purposeful, and the answer often would be yes. The defendant purposefully sold similar products in the forum state. The purposeful availment standard ensures that the defendant knows that he made contact with a particular state, but in this context, it does not tell him the jurisdictional consequences of his contact. The purposeful availment standard, acting alone, would not give sufficient predictability. Relatedness, by contrast, can fill the void and give claim-specific predictability.

2. The But-For, Proximate Cause, and Meaningful Link Causation Tests

Because the Court's specific jurisdiction cases all have fact patterns in which a key element of the claim—the injury—occurred in the forum state, they leave open whether that element is necessary or whether a lesser form of connection also would pass constitutional muster. The lower courts have used a wide variety of terms to describe the possible causation tests. The terminology often confuses the issue. Yet, some common elements can be found.

First, the but-for test, if unrestrained, is too broad. This test asks whether, "but for" the defendant's forum state contacts, the underlying events of the plaintiff's claim would have occurred. A

hypothetical based on *International Shoe* demonstrates its potential reach. A Washington state consumer wants to bring a products suit against the International Shoe company in Colorado based on the fact that the company sent shoe crates on a train, which started in St. Louis and traveled through Colorado on its way to Seattle. In a broad sense there is some historical connection: but for the train ride through Colorado, the plaintiff never would have received her shoes and been injured by them.[209]

Such an unrestrained but-for test would fail a policy analysis, for many of the same reasons that a similarity test fails. Carried to its extremes, such a test would not achieve reciprocity. Using the train hypothetical, the company enjoyed benefits from Colorado by sending its product through the state. The jurisdictional burden of defending in Colorado, however, would not be reciprocal to that benefit. The jurisdictional burden would extend to all products the company ever sent on a train through Colorado, no matter where the products were sold or caused injury.[210]

By the same token, the company could not predict the types of claims as to which it would be amenable to suit in Colorado. The company would have claim-specific predictability as to suits directly arising from an event in Colorado—a negligence suit alleging that the shoe company improperly loaded a box car that caused injury in Colorado. But that would not extend to any and all claims concerning any product that the company ever sent by train through Colorado.

Colorado would have sovereignty over the activities within its borders if, for example, the product caused injury while on the train in Colorado, but Colorado has no sovereignty on the products once they leave its borders without causing any harm in Colorado. Finally, convenience would not be served because there would be no evidentiary connection between Colorado and the claim of defective manufacture in Missouri and injury in Washington.

Few, if any, observers would endorse an unrestrained but-for test. The First Circuit rejected a pure but-for test, explaining that it had "no limiting principle" and encompassed "every event that

---

209. Professor Brilmayer gave the example of a car accident case in which the defendant's act of driving through the forum state is a but-for cause, even though the trip originated elsewhere and the accident occurred in another state. Brilmayer, *Related Contacts*, *supra* note 3, at 1445–46; *see* Brilmayer, *How Contacts Count*, *supra* note 3, at 83–84 (California case variation). Professor Brilmayer still argues that but-for causation is not a proper jurisdictional test. *See* Brilmayer & Smith, *supra* note 8, at 628 (noting the "undesirable consequence" of "causality in the strict, but-for sense").

210. uBID, Inc. v. GoDaddy Grp., Inc., 623 F.3d 421, 430 (7th Cir. 2010) (arguing that but-for causation would be "vastly overinclusive" and that the "tacit quid pro quo would break down").

hindsight can logically identify in the causative chain."[211] Even the Ninth Circuit, which adopted the but-for test in *Shute*,[212] recognized that the test could be too broad. It elected to remedy any case of a "too attenuated" connection through the reasonableness prong of the *World-Wide Volkswagen* test, as opposed to a "restrictive" reading of the relatedness standard.[213]

On the other end of the causation spectrum is the proximate cause test. It can be pushed too far in the other direction. In strict applications, the test would find insufficient relatedness simply because the defendant's forum contacts are contractual and the plaintiff's claim is based in tort. Even the First Circuit, once "the main proponent of the proximate cause standard," concluded that "strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive."[214]

Whatever the terminology, many (but not all) courts seem to be moving toward the center. This is best seen in the vacation travel cases. As noted in *Shute*, at one time, the circuit courts were markedly split in their holdings in these cases.[215] Today, the test terminology still differs, and the holdings sometimes differ, but the differences usually are more attributable to factual variations than to the nature of the relatedness test.

The vacation travel cases are good illustrations because they have an intermediate connection between the claim and the defendant's forum state contacts. The defendant formalized the transaction, through a ticket sale or booked reservation, in the plaintiff's home state. The defendant did not merely advertise its cruise ship or resort in the forum state; it acted specifically with regard to this plaintiff in his home state and formalized a business relationship in that state, the forum state.

The Third Circuit in *O'Connor v. Sandy Lane Hotel Co.* found relatedness in a vacation case, under what it described as a "meaningful link" standard.[216] There, a resort in Barbados engaged the plaintiff in his home state of Pennsylvania and there formed a

---

211. Nowak v. Tak How Invs., Ltd., 94 F.3d. 708, 715 (1st Cir. 1996); *see also* PETER HAY ET AL., CONFLICT OF LAWS 407 (5th ed. 2010) (arguing that the "'but for' test is so potentially broad as to collapse the distinction between specific and general jurisdiction" and the "mere fact that the contact ultimately led to other events that produced the dispute . . . is not sufficient to qualify it as related").

212. Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

213. *Id.*

214. *Nowak*, 94 F.3d at 715.

215. *Shute*, 897 F.2d at 383–85; *see supra* notes 143–47 (discussing the Ninth Circuit's analysis of other circuits' approaches).

216. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 324 (3d Cir. 2007).

contract for spa services in Barbados.[217] The court permitted jurisdiction over the resort in Pennsylvania on the plaintiff's claim that the resort had negligently injured him in performing the spa treatments.[218] The court emphasized the policies of predictability and reciprocity:

> With each purposeful contact by an out-of-state resident, the forum state's laws will extend certain benefits and impose certain obligations. . . . Specific jurisdiction is the cost of enjoying the benefits. . . . The relatedness requirement's function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact closely tailored to that contact's accompanying substantive obligations. The causal connection can be somewhat lower than the tort concept of proximate causation . . . but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.[219]

The Third Circuit disclaimed use of a proximate cause standard: "Our relatedness analysis . . . requires neither proximate causation nor substantive relevance. . . . It is enough that a meaningful link exists between a legal obligation that arose in the forum and the substance of the plaintiffs' claims."[220] On the other hand, it used but-for causation as only an initial screen.[221] The spa reservation was not only a but-for cause of the later spa injury, but, the court emphasized, it also created duties of reasonable care and was therefore a "meaningful link" between the defendant's forum contact and the claim.[222]

Other courts have used this "meaningful link" phrasing. A key case is *Nowak v. Tak How Investments, Ltd.*,[223] in which the First Circuit, a former proponent of the "proximate cause" test,[224] relaxed its standard somewhat in a vacation case. There, the defendant operated a hotel in Hong Kong, and the plaintiff's wife drowned in the hotel pool.[225] The plaintiff, a Massachusetts resident, sued the

---

217. *Id.* at 315–16.
218. *Id.* at 323–25.
219. *Id.* at 323 (citations omitted).
220. *Id.* at 324 (citations omitted).
221. *Id.* at 322 (noting that the but-for test "at least makes an attempt to preserve the distinction between general and specific jurisdiction" and "provides a useful starting point for the relatedness inquiry").
222. *Id.* at 323–24 (noting that the defendant, through its Pennsylvania contacts, formed a contact for spa services and "acquired certain rights" and "accompanying obligations").
223. 94 F.3d 708 (1st Cir. 1996).
224. *See* Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 383 (1988), *rev'd on other grounds*, 499 U.S. 585 (1991); *supra* note 211.
225. *Nowak*, 94 F.3d at 711.

hotel in Massachusetts. The defendant hotel had solicited the long-term business of the plaintiff's Massachusetts employer.[226] The defendant negotiated a contract in Massachusetts, under which the employer agreed to make the defendant hotel the exclusive hotel for its employees when traveling to Hong Kong. The First Circuit concluded that these Massachusetts contacts were sufficiently related to the plaintiff's wrongful death claim: "While the nexus between [the defendant's] solicitation of [the employer's] business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link."[227]

This is the correct result. An intermediate, "meaningful link" test is consistent with the four fairness components when applied to vacation travel cases. First, reciprocity is met.[228] When an out-of-state travel destination, such as a hotel, makes formal arrangements with a forum state resident in the forum state, the hotel enjoys benefits from the forum state. The hotel both solicited and secured business in the forum state. That the injury and literal cause of the injury occurred elsewhere does not remove the hotel's forum state benefit. Jurisdiction in the forum on the injury claim would be proportional to the benefits received from the forum.

Likewise, jurisdiction is sufficiently predictable. When a hotel knowingly engages a forum state resident in the forum state, the hotel can reasonably anticipate that it might be subject to suit on any claim arising out of that business relationship. The plaintiff's subsequent injury at the hotel is a foreseeable incident of that business relationship. That the relationship in the forum state is contractual in nature, rather than tort, does not affect the foreseeability of the injury that might arise out of the business relationship.[229]

Application of the sovereignty concern is more difficult. The forum state arguably has some sovereignty over the claim because the business relationship began in the forum. Yet, the sovereignty

---

226. *Id.*

227. *Id.* at 716.

228. *See* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 323–24 (3d Cir. 2007) (discussing "the reciprocity principle" of the meaningful link test).

229. The Ninth Circuit rejected a tort-contract distinction in *Shute*:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortuous "striking distance" of one another. While the relationship between a tort suit and a contractual contract is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contract.

Shute, 897 F.2d at 385 (citing Prejean v. Sonatrech Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981)).

argument underlying relatedness focuses primarily on the state having sovereignty over activities that occur in its borders, and the underlying wrongful acts in the typical vacation case occurred outside the forum state. But the same argument could be made in any case in which only injury occurs in the forum state. If a state's sovereignty were limited to the actual wrongful actions, injury would not be enough. To be sure, injury is a more significant element than the formalization of the initial business relationship, but the state arguably has sovereignty going forward from the initial formalization, just as it does going backwards from the injury.

Convenience is mixed, at least when viewed solely from the perspective of the defendant. The initial contact and ticket sale or reservation would not be critical items of evidence. Indeed, for the defendant, little, if any, evidence would be located in the forum state. Some evidence regarding the plaintiff himself, presumably some of his postinjury evidence, would be in the forum state if it were the plaintiff's home state. The plaintiff personally would find it more convenient to litigate there. Nevertheless, on balance, the four fairness concerns are adequately served, and an intermediate causation test would be fair to the defendant.

Not all courts have moved to the middle ground in the vacation cases, and some still deny specific jurisdiction.[230] *Oldfield v. Pueblo De Bahia a Lora, S.A.*[231] is a recent example. There, the plaintiff, from his home in Florida, booked a room reservation and charter fishing trip with a resort in Costa Rica.[232] The plaintiff was injured on the fishing trip in Costa Rica and sued the resort in Florida, alleging vicarious liability for the charter boat captain's negligence.[233] The Eleventh Circuit held that the reservation contact was too "tenuous" to provide foreseeability and therefore was not sufficiently related to the plaintiff's negligence claims.[234] This is too narrow a reading of foreseeability and relatedness.

The Eleventh Circuit relied at least in part on the fact that the fishing captain was not an employee of the resort.[235] That reliance is misplaced. Whether the resort was legally responsible for the boat captain's actions was a question of liability, not jurisdiction. The relevant point for jurisdictional analysis was the plaintiff's allegation that the resort was legally responsible, in part due to the resort's exchanges with the plaintiff in Florida regarding the

230. *See O'Connor*, 496 F.3d at 319 & n.7 (describing cases that apply "a purer, more rigid" version of the proximate cause test).
231. 558 F.3d 1210 (11th Cir. 2009).
232. *Id.* at 1214.
233. *Id.*
234. *Id.* at 1223.
235. *Id.* at 1223–24.

chartering of the boat. The jurisdictional question is whether that exchange, which occurred in the forum state of Florida, was sufficiently related to the plaintiff's claim for the resort to be legally responsible for the captain's negligence. The answer should be yes. Indeed, the contact likely would be substantively relevant in that the plaintiff almost certainly would rely upon the resort's booking of the charter trip to support his claim that the resort is responsible for the fishing captain's negligence. The charter reservation may not be a technical element of the claim, but it is a but-for cause that has a relevant and meaningful connection to the plaintiff's claim.

The problem with a too-strict test is not fairness to the defendant. It would not be unfair to the defendant to insulate it from jurisdiction under a strict test. The problem instead is that a strict relatedness standard unnecessarily limits the plaintiff's forum choice. In cases where a relatedness test, such as a similarity test, would not comport with the four fairness rationales, the fact that the plaintiff would find the forum desirable or convenient does not argue for a finding of relatedness. However, where an intermediate relatedness standard adequately serves the four fairness concerns, a stricter test is not necessary. The concern for the plaintiff and available forums now would come into play and argue for the intermediate test, as opposed to a stricter test. In this sense, these other interests—those of the plaintiff—play a role similar to that in the second prong of the *World-Wide Volkswagen* test.[236]

Thus, an intermediate, meaningful link test is the better test. The question of how to apply a meaningful link test necessarily will require case-by-case development, similar to that of the purposeful availment standard. The foregoing analysis, however, offers some parameters. First, if the forum state contact constitutes a substantive element of the claim—injury or wrongful act—relatedness always will be met. Second, but-for causation is essential but not sufficient. For all cases in between, the four fairness factors will guide application of the standard to test whether the claim is sufficiently related to the contact to make specific jurisdiction fair. There will be hard cases.

I offer here a difficult case for consideration. In this "hard case" hypothetical, the defendant advertises in the forum state, but the plaintiff, a forum state resident, both bought the product and was injured in another state. This advertising case hypothetical assumes that the advertising is not itself a substantive element of the claim. In other words, the plaintiff is not claiming that the advertisement fraudulently induced him. If he were making such a charge, then the case would be related. On the other hand, this hypothetical assumes some but-for causation. If the advertising had

236. *See* text accompanying *supra* note 64 (discussing the second prong).

no causal connection to the plaintiff's purchase, there would be no relatedness. The plaintiff would have been injured even without the defendant's forum state advertising contacts. The forum state advertisement passes the initial screen of but-for causation but is not a substantive element of the claim. Is this a significant enough connection? Is it a meaningful link? The four fairness policies give some guidance in this analysis.

The policy analysis is aided by focusing on the difference between this advertising example and a vacation travel case such as *O'Connor*.[237] In this hypothetical, the defendant did not have any plaintiff-specific knowledge or formalize a business relationship with the plaintiff in the forum state. It merely advertised to an unknown forum state audience that happened to include the plaintiff. The difference—between general advertising and a plaintiff-specific relationship—is likely enough to tip the scale toward a finding of unfairness.

Analysis of three of the four fairness factors—reciprocity, sovereignty, and convenience—in the advertising hypothetical is similar to those in the vacation travel case. Reciprocity likely is met. The defendant's advertisements in the forum state resulted in a benefit—the plaintiff's purchase of the defendant's product. Jurisdiction in the forum would be a burden proportionate to that benefit. Sovereignty is weak, as it was in the vacation case, because none of the activities at issue—the product defect and injury—occurred in the forum state. But, just as with the vacation travel case, the advertising is the start of the relationship that led to the injury, albeit one step removed. Convenience again is weak in that the conduct and injury evidence are largely located in another state.

The key difference in the advertising hypothetical is predictability. In the vacation travel case, the defendant had a knowing relationship with the plaintiff in the forum state and could assume that all such relationships might lead to suit in the state. In the advertisement example, because there is no known relationship in the forum state, the defendant would have to assume jurisdiction in the forum state on any claim brought by any person who ever was influenced by advertising in the forum state.

This is a close case. I conclude that, on balance, the policy concerns argue against a finding of relatedness based on mere advertising. The primary weakness is predictability, a key concern of the Court in specific jurisdiction cases. Purposeful availment here would not protect predictability in that courts would find the advertisement—the related contact—to be purposeful. The

237. *See supra* notes 216–22 (discussing O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312 (3d Cir. 2007)).

defendant knowingly and deliberately targeted its advertisements to the forum state.

This hypothetical is difficult in part because, in most applications, it presents a question of blended or intermediate jurisdiction. It not only raises the foregoing question of relatedness, but it also implicates the extent of contacts factor. A defendant rarely posts a single advertisement. Because advertising is a close case on relatedness, and because it usually involves multiple contacts, this hypothetical raises the question of the fairness of jurisdiction in cases where there are intermediate amounts of both relatedness and extent of contacts. I address this form of blended or hybrid jurisdiction below, in Part IV.E. Here, the question is narrowly focused solely on relatedness. Does a single forum state advertisement, by itself, have a sufficient connection to a product claim that arises from manufacture, sale, use, and injury in another state? I conclude no.[238]

There are seemingly infinite variations and applications of the meaningful link test. Many standards, including constitutional standards such as the purposeful availment element, turn on subtle factual distinctions. Indeed, the Court in *International Shoe* warned that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[239]

In sum, a causation standard best differentiates between specific and general jurisdiction. The proper test would impose a but-for test as an initial screen and also require some form of meaningful link between the plaintiff's claim and the defendant's contacts with the forum state. The four fairness concerns should guide courts in determining whether that but-for cause is sufficiently meaningful. This meaningful link test is consistent with the Court's precedent. It avoids the problems of an unrestrained but-for test and adequately serves the four fairness components. Yet, it also avoids the sometimes too restrictive applications of the proximate cause test and thereby gives plaintiffs a greater choice of forums.

---

238. *Cf.* Lingo v. Harrah's Entm't, Inc., No. 10–7032, 2011 WL 2621396, at *4 (E.D. Pa. July 1, 2011) (distinguishing *O'Connor*, 496 F.3d 312, which arose out of a contract, and finding that a Nevada hotel advertisement mailed to Pennsylvania was not sufficiently related to plaintiff's injury in Nevada).

239. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

IV. GENERAL JURISDICTION OVER UNRELATED CLAIMS—EXTENT OF CONTACTS AND OTHER QUESTIONS

Having decided that a claim is unrelated and thus mandates general jurisdiction analysis, several other questions remain. The basic question is the extent and nature of the forum state contacts necessary to justify exercise of general jurisdiction. For years, courts and commentators struggled to apply a test asking whether the defendant's forum state contacts were "continuous and systematic,"[240] the phrase used in *International Shoe* to describe the "maybe" case of general jurisdiction. The Court in *Goodyear* brought some resolution by clarifying that the defendant's contacts not only must be "continuous and systematic," but they also must be such that the defendant is at home in the forum state.[241] The Court gave some guidance in applying the test when it rejected general jurisdiction based on a low amount of sales in the forum state. Nonetheless, uncertainty remains as to the proper application of the at-home standard, including the timing of the contacts, general jurisdiction over natural persons, and general jurisdiction over corporations in states where they have varying degrees of business contacts. I analyze these and other questions under the Court's precedent and the four fairness concerns. I conclude that general jurisdiction is very narrow—limited to the few places, most often only a single place, where the defendant currently is at home.

A. "At Home"—The Proper Test for Extent of Contacts

Prior to *Goodyear*, the Court issued only two holdings addressing the extent of contacts necessary to justify jurisdiction on unrelated claims. In the 1952 case *Perkins v. Benguet Consolidated Mining Co.*, the Court held that an Ohio state court properly could assert general jurisdiction in a shareholder's claim against a Philippine mining company that had halted operations during World War II and moved its scaled-back office to Ohio.[242] The Court stated that the issue was one of fairness, referring to *International Shoe*'s multiple "[a]ppropriate tests" (the four case examples listed in *International Shoe*).[243] The Court explained that the case was in the category where the defendant's contacts were "so substantial" that they justified suit on causes of action entirely distinct from the forum activities.[244] The defendant's president "carried on in Ohio a

240. *See generally* ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS, § 2-5[3][a] (3d ed. 1998); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 348–52 (3d ed. 2000) (discussing "continuous and systematic" contacts).

241. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011).

242. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952).

243. *Id.* at 445.

244. *Id.* at 446.

continuous and systematic supervision of the necessarily limited wartime activities of the company."[245] The company in essence had relocated in Ohio for the duration of the war.

Thirty-two years later, the Court returned to the issue in *Helicol*.[246] There, the defendant operated a helicopter charter service in South America, and one of its helicopters crashed in Peru, killing American oil pipeline workers.[247] Their widows sued in state court in Texas. The defendant had purchased helicopters in Texas, sent some of its staff for training in Texas, negotiated the particular charter service with the decedents' employer in Texas, and taken payment from checks drawn on Texas banks.[248] The Court held that these contacts were not enough to support jurisdiction in Texas over the case at hand, where the plaintiffs conceded that the claim was unrelated to Helicol's Texas contacts.[249] Unlike the Ohio contacts in *Perkins*, Helicol's contacts did not show a continuous and systematic business presence in Texas.[250]

Perkins and *Helicol* by themselves did not give much clarity with regard to general jurisdiction analysis. They affirmed the legitimacy of general jurisdiction under the *International Shoe* minimum contacts analysis, but they provided only marginal guidance in determining the extent of contacts necessary to support jurisdiction over unrelated causes of action. They used vague references to "general business" contacts to describe the necessary basis for general jurisdiction. In terms of their actual holding, the two cases were relatively far apart with respect to the extent of contacts at issue.[251]

In 2011, the Court in *Goodyear* did not completely resolve the question, but it significantly advanced the analysis by setting an "at home" standard for the continuous and systematic contacts necessary for general jurisdiction. The Court declared that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[252]

---

245. *Id.* at 448.

246. Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408 (1985).

247. *Id.* at 409–10.

248. *Id.* at 410–12.

249. *Id.* at 417–19.

250. *Id.* at 416.

251. *See* SCOLES ET AL., *supra* note 240, at 350 (stating that *Perkins* and *Helicol* provided "some guidance at the margins" and that there are "literally infinite numbers of factual permutations falling between the two cases").

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

In *Goodyear*, the defendants were separately incorporated foreign subsidiaries of the Goodyear Tire and Rubber Company,[253] based and operating in Turkey, France, and Luxembourg. The three foreign defendants' only contact with North Carolina was "a small percentage" of their total tire sales.[254] The Court held that these sales were insufficient to support jurisdiction in North Carolina on an unrelated claim.[255]

Importantly, the Court clarified that the mere presence of continuous and systematic contacts was not, by itself, sufficient for general jurisdiction. It stated that "[a] corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"[256] This is an important point because courts and commentators often applied this *International Shoe* phrase—continuous and systematic—as the sole test of general personal jurisdiction.[257]

The *Goodyear* clarification is not a new standard but is instead the correct reading of *International Shoe*. The Court in *International Shoe* used this phrase to describe the "maybe" case of jurisdiction (continuous and systematic contacts unrelated to the suit), just as it used other terms to describe the "maybe" case for specific jurisdiction (isolated or casual contacts that give rise to the

---

253. Goodyear USA, the parent company, also was a named defendant, but it did not contest North Carolina's jurisdiction over it. *Id.* at 2852. The Court declined to consider whether all Goodyear defendants should be treated as a "single enterprise" because the plaintiffs "forfeited" this contention by not raising it in the lower court. *Id.* at 2857.

254. *Id.* at 2852 ("tens of thousands out of tens of millions").

255. *Id.* at 2851 ("A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State."). A key aspect of the Court's analysis was its rejection of the lower court's misapplication of "stream of commerce" theory, a concept used in specific jurisdiction cases to test purposeful availment, to justify its exercise of general jurisdiction over the defendants:

> The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum . . . may bolster an affiliation germane to *specific* jurisdiction. . . . But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.

Id. at 2855 (citations omitted).

256. *Id.* at 2856 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

257. *See supra* note 240.

suit).[258] These were merely "maybe" cases. Just as "related" is an essential threshold for specific jurisdiction but not the sole question (i.e., among other things, the contacts must be purposeful), "continuous and systematic" is essential for general jurisdiction but not necessarily sufficient.

The Court in *Goodyear* used *Perkins* as the "textbook" case to clarify the "sorts" of continuous and systematic activities that would satisfy due process.[259] "Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina."[260] Elsewhere, the Court described the "paradigm" case for general jurisdiction over corporations as the place "in which the corporation is fairly regarded as at home."[261] The Court thus adopted an at-home test for the "continuous and systematic" contacts necessary to establish general jurisdiction.

The at-home standard narrows *Perkins* from its potentially wide reach. Prior to *Goodyear*, *Perkins* was susceptible to a broad reading. In terms of quantity, the Ohio activities were relatively minor and few in number when compared either to the defendant corporation's mining operations in the Philippines prior to World War II or to the normal business activities of many domestic corporations.[262] Although the Court in a dictum in *Keeton* described the forum in *Perkins* as the defendant's "principal, if temporary, place of business,"[263] the Court in *Helicol* used a more open-ended phrase, describing the defendant in *Perkins* as having "continuous and systematic general business contacts" in Ohio.[264] That phrase could result in general jurisdiction in almost every state for many

---

258. *Int'l Shoe*, 326 U.S. at 317–18.

259. *Goodyear*, 131 S. Ct. at 2856 (citation omitted).

260. *Id*. at 2857.

261. *Id*. at 2853–54 (citing Brilmayer, *Related Contacts*, *supra* note 3, at 728). Justice Ginsburg, the author of the opinion in *Goodyear*, again used the at-home standard in her opinion in *McIntyre* when describing general personal jurisdiction. *Id.* at 2797 (Ginsburg, J., dissenting) ("[A]ll agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly 'at home' in New Jersey.").

262. *Compare* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (listing the defendant's activities in Ohio), *with* Perkins v. Benguet Consol. Mining Co., 95 N.E. 2d 5, 7–11 (Ohio Ct. App. 1950) (per curiam) (indicating that the defendant's principal place of business was not in Ohio), *aff'd*, 98 N.E. 2d 33 (Ohio 1951), *cert. granted*, 34 U.S. 808 (1951), *vacated*, 342 U.S. 437 (1952).

263. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 n.11 (1984) (citing *Perkins*, 342 U.S. at 448).

264. Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 415–16 (1984) ("We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*.").

major corporations. In *Goodyear*, the Court reined in that description by using the at-home standard and by stating that the defendant in *Perkins* "had ceased activities in the Phillippines" and "[t]o the extent that the company was conducting any business during and immediately after the Japanese occupation . . . , it was doing so in Ohio."[265] The new *Goodyear* language has a tighter focus than that of *Helicol*. A corporation might have "general business contacts" in several states, but it is "at home" in very few states, and, likely, in only a single place, as in *Perkins*.

The at-home standard is a good fit with the four fairness principles. First, if a defendant has so many contacts with a state that it is at home there, the great benefits of those contacts will be reciprocal to the burden—unlimited jurisdiction.[266] Second, suits are predictable in the defendant's home state. Because the defendant is at home in the state, it can expect to be sued there on any act it did anywhere in the world. Third, although the state may not have sovereignty over the activities that occurred in another state, it has sovereignty over persons who make the state their home.[267] Finally, a defendant can conveniently defend an action from its home, even if the claim arose elsewhere. The defendant will be familiar with the legal system, culture, and infrastructure of his home state.

The Court in *Goodyear* did not develop a multipart test for general jurisdiction as it did for specific personal jurisdiction in *World-Wide Volkswagen*.[268] Once a claim is unrelated and subject to general jurisdiction analysis, the sole question becomes whether the defendant is "at home" in the forum state. There is no second "reasonableness" prong. But that does not mean that courts cannot look to broader fairness policy in making the at-home assessment. Indeed, I contend that the four fairness concerns, derived from *International Shoe*, appropriately should guide courts in applying the at-home standard. I use those four fairness factors below to define and apply the at-home standard in a variety of contexts.

---

265. *Goodyear*, 131 S. Ct. at 2856.

266. *See* Cebik, *supra* note 5, at 35–36 (arguing that residents "look to the state for the enforcement of their rights and duties–if not through the courts then through the general administration of the laws").

267. *See* Brilmeyer et al., *General Look*, *supra* note 3, at 732.

268. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92, 294–98 (1980); *see supra* note 45.

B. Timing of the Contacts for General Jurisdiction "At-Home" Analysis

One element of general jurisdiction assessment is the timing of the contacts.[269] Which contacts, in terms of their timing, are relevant to general jurisdiction analysis? The Court has not directly addressed this timing issue, but, previously, many lower courts looked to a period of years immediately preceding and including the filing date.[270] A period of years may be appropriate in some cases, but the primary focus should be current contacts at the time plaintiff filed suit. This is especially true in light of the *Goodyear* at-home standard.

To be sure, the Court in *Perkins* did not look at one particular date in isolation but instead looked at the broader period in which the defendant had been operating in Ohio.[271] The point of this inquiry, however, was whether the defendant had a general business presence or, in the terms of *Goodyear*, whether it was then at home in Ohio. A period of a few years might help assess whether the defendant is now at home in a particular state, but former contacts, which are now terminated, should be largely irrelevant.[272]

The timing element necessarily differs for general and specific jurisdiction.[273] Specific jurisdiction is claim specific, so it properly looks at all of the events that relate to the claim, even though those contacts may be long terminated. General jurisdiction, by contrast, is defendant specific. It is not based on the activity at issue in the suit but instead is based on the defendant's general activities in the state. It is the current activity that makes unrelated jurisdiction fair.

---

269. *See generally* Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202 (2011) (discussing relevant timing of jurisdictional contacts).

270. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 569–70 (2d Cir. 1996) (holding that the trial court erred in limiting its jurisdictional inquiry to the year that the suit was filed and explaining that a reasonable period for examining the defendant's contacts might entail several years); Pac. Emp'rs Ins. Co. v. AXA Belgium, S.A., 785 F. Supp. 2d 457, 461, 468–69 (E.D. Pa. 2011) (applying general jurisdiction analysis of contacts over a nine-year period).

271. Perkins v. Benguet Consol. Mining Co., 95 N.E. 2d 5, 6 (Ohio Ct. App. 1950) (noting that the defendant's bank accounts in Ohio had been active for five years), *aff'd*, 98 N.E. 2d 33 (Ohio 1951), *cert. granted*, 34 U.S. 808 (1951), *vacated*, 342 U.S. 437 (1952).

272. *See* Potts v. Dyncorp Int'l, LLC, 465 F. Supp. 2d 1254, 1258–59 (M.D. Ala. 2006) (stating that the individual defendant's prior residency and contacts with Alabama were "no longer . . . relevant").

273. *See* Simard, *Hybrid Jurisdiction*, *supra* note 5, at 581–82 (discussing the timing difference); *see also* Peterson, *supra* note 269, at 204 (discussing the difference in timing between specific and general jurisdiction).

General jurisdiction based solely, or even primarily, on former, terminated contacts with the forum state would not satisfy the four fairness concerns. It would not advance reciprocity. Although the defendant once had a great deal of forum benefits, he no longer has any. It would not be proportional to hold a defendant amenable to suit for all time solely because he once had extensive contacts with the state. It would not be predictable. The defendant would have to assume that he would be subject to suit in any state in which he once had extensive contacts, no matter how long ago. The state of his former home would no longer have sovereignty over him. That a state once had sovereignty over its resident does not mean that the state retains that sovereignty for all time. Finally, although the defendant might find defense of a suit in his former home state more convenient that some other states—he would be familiar with the legal system and culture of his former home—such convenience would not be significantly greater than that in any other state with which the defendant is generally familiar. He still would have the burden of traveling to and defending in a state that has no relationship to the claim.

Before *Goodyear*, lower courts often addressed this timing question in the context of deciding the breadth of jurisdictional discovery, and they typically allowed discovery over a period of multiple years.[274] *Goodyear* made such broad discovery less essential. Formerly, the focus on the jurisdictional discovery in lower courts often was the defendant's sales and other business activities in the forum state to determine whether they were "continuous and systematic." The examination now should focus on where the defendant is at home. That inquiry need not focus exclusively on a single day, but it likely does not need to cover a period of multiple years. In sum, the proper test for the extent of contacts is whether the defendant is now at home in the forum state.

C. General Jurisdiction Over Natural Persons

Because the Court's discussions of general jurisdiction based on contacts all involved corporate defendants, the question arises whether the doctrine applies at all to natural persons.[275] Justice

274. *See Metro. Life*, 84 F.3d at 569 (allowing discovery for six years prior to filing suit); Birnberg v. Milk St. Residential Assoc., No. 02 C 978, 2002 WL 1162848, at *4 (N.D. Ill. May 24, 2002) (rejecting the plaintiff's request for jurisdictional discovery over nineteen years but permitting discovery for a five-year period).

275. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1268 (2010) (noting the "pressing" question of "whether contacts-based general jurisdiction applies at all to individuals").

Scalia raised this question in *Burnham v. Superior Court*.[276] After noting that the only holding (at that time) that had applied general contacts-based jurisdiction was *Perkins*, involving a corporate defendant, Justice Scalia said, "It may be that whatever special rule exists permitting 'continuous and systematic' contacts . . . to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, which have never fitted comfortably in a jurisdictional regime based primarily on 'de facto power over the defendant's person.'"[277] He is only partially correct with regard to the history. It is true that, under *Pennoyer*, general personal jurisdiction over natural persons usually arose solely from in-state service, and the expansion of general jurisdiction based on forum activities typically applied to corporations.[278] However, the Court in *Milliken v. Meyer*[279] also expanded general jurisdiction to apply to absent individuals who were domiciled in, but served outside, the forum state.[280]

Moreover, nothing about *International Shoe* or the minimum contacts test requires this limitation. *International Shoe* itself involved a corporate defendant, but the Court subsequently applied specific minimum contacts analysis to individual defendants.[281] General jurisdiction based on contacts is an integral part of minimum contacts analysis,[282] and it seemingly should apply to individuals, just as the specific jurisdiction component does. The Court in *Goodyear* assumed general jurisdiction over individuals,

276. 495 U.S. 604 (1990).

277. *Id.* at 610 n.1 (citations omitted).

278. Some assertions of jurisdiction over corporations, however, were specific based on their forum state activities. *See supra* Part I.A (discussing uncertain jurisdictional repercussions of corporate in-state activity in the *Pennoyer* era).

279. 311 U.S. 457 (1940).

280. *Id.* at 462.

281. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–73 (1985) (applying minimum contacts analysis to an out-of-state, natural person defendant); Kulko v. Superior Court, 436 U.S. 84, 96–97 (1978) (assessing the nature of an individual defendant's activities in California in a family law dispute).

282. Some scholars characterize the general jurisdiction analysis as distinct from "minimum contacts" analysis. *See, e.g.*, THOMAS D. ROWE, JR., *Beyond Minimum Contacts: Other Bases for Jurisdiction*, *in* CIVIL PROCEDURE (3d ed. 2012) (Chapter Nine, Section D) (placing the topics of general jurisdiction and the minimum contacts analysis into separate chapters). *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (establishing what some observers call the first prong of the *World-Wide Volkswagen* test—i.e., the "minimum contacts" prong), *with* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (articulating general jurisdiction as part of its minimum contacts test), *and* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011) (framing general jurisdiction as part of the minimum contacts analysis).

albeit in a dictum,[283] and Justice Kennedy's opinion in *McIntyre* (in which Justice Scalia joined) did the same.[284]

Having said this, general jurisdiction based on an individual's extensive contacts with a state may be a largely academic point. This is because the Court permitted general jurisdiction over natural persons based on in-state service in *Burnham*.[285] In any situation in which an individual defendant has significant enough contacts with a particular state to be at home there and warrant general jurisdiction, the plaintiff usually can avoid and render moot any minimum contacts analysis by serving the defendant in that state.

The question nevertheless remains as to the nature of an individual's contacts that would support general jurisdiction. The Court largely answered this question in *Goodyear* by defining the place as where the defendant is at home. However, dictum in *Goodyear* also described an individual's domicile as the "paradigm forum" for proper general jurisdiction.[286] In most cases, domicile would describe the home of a natural person. "Domicile," in most applications, best captures the essence of a person being at home, as opposed to a case, for example, where a person merely visited the state on a frequent basis.[287] But, in a few cases, even "domicile" is not the proper at-home state for a natural person.

That domicile is an adequate basis on which to base general jurisdiction is a very common proposition. It was one of Professor Brilmayer's paradigm cases of unique affiliations.[288] The doctrine has historical pedigree. In *Milliken v. Meyer*, the Court held that the state of a defendant's domicile properly could assert personal jurisdiction even if the defendant were absent and could not be served in the state.[289] Although the case predated *International Shoe*, the Court in *International Shoe* cited *Milliken* for the

283. *Goodyear*, 131 S. Ct. at 2854–55.

284. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

285. Burnham v. Superior Court, 495 U.S. 604, 615 (1990).

286. *Goodyear*, 131 S. Ct. at 2853; *see also McIntyre*, 131 S. Ct. at 2787 (listing citizenship and domicile as examples of general jurisdiction over natural persons).

287. *See* Giraldo v. Drummond Co., No. 2:09-CV-1041-RDP, 2012 WL 2358306, at *7 (N.D. Ala. June 20, 2012) (rejecting discovery as to an individual defendant's visits to Alabama—potentially as many as sixty-one visits in seven years—because, even if true, those visits would not subject the defendant to general jurisdiction in Alabama under the *Goodyear* standard); Red Strokes Entm't, Inc. v. Sanderson, No. 3:12-CV-0008, 2012 WL 1514892, at *6–7 (M.D. Tenn. May 1, 2012) (rejecting general jurisdiction in Tennessee over a California resident who regularly transacted entertainment business in Nashville).

288. Brilmayer et al., *General Look*, *supra* note 3, at 729.

289. Milliken v. Meyer, 311 U.S. 457, 462 (1940).

minimum contacts test itself, quoting *Milliken*'s "traditional notions of fair play and substantial justice" language.[290]

The historical pedigree might cause Justice Scalia and others to conclude that domicile, like in-state service in *Burnham*, is an automatic basis for general jurisdiction, consistent with due process, independent of minimum contacts analysis.[291] A majority of the Court, however, has not adopted the historical pedigree argument.[292] Moreover, even Justice Scalia's reasoning arguably does not extend to a technical domiciliary. In *Burnham*, Justice Scalia avoided *Shaffer*'s holding that all assertions of jurisdiction must be assessed under minimum contacts analysis by arguing that the *Shaffer* mandate applied only to absent defendants, not persons in the state at the time of service.[293] General jurisdiction based on domicile, rather than in-state service, almost certainly would connote an absent defendant. Thus, even under Justice Scalia's logic in *Burnham*, *International Shoe* minimum contacts analysis should apply to determine if general jurisdiction based on domicile satisfies due process.

Domicile is a legal term used to fix one's location for a wide variety of purposes, including federal diversity subject matter jurisdiction and many aspects of choice of law. First-year law students learn that the legal tests for domicile—usually phrased as physical residence coupled with an intention to remain in that place indefinitely[294]—can have odd results, fixing domicile in some cases where a person has not had any contact for years. A good example is the diversity case of *Mas v. Perry*,[295] commonly included in Civil Procedure casebooks.[296] There, a woman kept the domicile of her childhood home of Mississippi, even though she had been married and living elsewhere for years and had no intention of returning to Mississippi.[297] She kept her domicile because she had yet to reside in a new state in which she intended to remain indefinitely. The court held that "[u]ntil she acquire[d] a new domicile, she

290. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken*, 311 U.S. at 463).

291. Justice Scalia's opinion in *Burnham* relied extensively on the fact that in-state personal service was an established form of personal jurisdiction at the time of the adoption of the Fourteenth Amendment. Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990).

292. In *Burnham*, only three justices joined Justice Scalia's opinion. *Id.* at 607.

293. *Id.* at 620–21; *see supra* notes 175–79 (discussing Shaffer v. Heitner, 433 U.S. 186 (1977)).

294. *See* SCOLES ET AL., *supra* note 240, at 251.

295. 489 F.2d 1396 (5th Cir. 1974).

296. *See, e.g.*, JOSEPH GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 51 (2011); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 851 (5th ed. 2009).

297. *Mas*, 489 F.2d at 1400

remain[ed] a domiciliary, and thus a citizen, of Mississippi."[298] Mississippi would have remained her domicile even if she had not had any contact with Mississippi for several years.

Not all courts would reach the same result on the domicile issue,[299] but the holding in *Mas* demonstrates that domicile is not always a fair basis for general jurisdiction. The problem is that domicile, in some applications, prioritizes intent, or more aptly lack of intent, over contacts. Justice Kennedy spoke of intention to submit to a state's authority in *McIntyre*,[300] but he did not base jurisdiction on the failure to form an intention to stay elsewhere. In the *Mas* example, Mrs. Mas had no intention to submit to Mississippi's authority. To the contrary, she had an intention not to return to Mississippi. She simply had not decided where else she wanted to live indefinitely.

Under the four fairness concerns, it would not be fair to make Mrs. Mas return to Mississippi to defend a claim unrelated to the state. Mrs. Mas had not received benefits from Mississippi in years, so the burden of continuing broad jurisdiction there would not be reciprocal. She could not predict that she would have to return to Mississippi to defend a claim concerning her activities in another state. Mississippi had no sovereignty over a citizen who left the state years before and had never returned. Mississippi, as her childhood residence, would not provide convenience in her adulthood, years after leaving the state.

This is not to say that the place that qualifies as a domicile for most persons will not be proper for general jurisdiction. In most cases, jurisdiction will be proper in the state where the person is domiciled. But, because it is a technical legal term, loaded with an intent element, "domicile" is not an appropriate shorthand for the place at which general jurisdiction is proper for a natural person. The *Goodyear* Court coined a better term: "at home."

D. General Jurisdiction Over Corporations

There is no question that general jurisdiction properly applies to corporations, and the test now seems to be clarified—where the defendant corporation is at home. *Goodyear* gives some guidance on the proper application of the at-home standard, but it obviously did not settle every application. The Court in dictum cited two places where general jurisdiction properly would apply to corporations—

298. *Id.*

299. Professor Glannon's casebook juxtaposes the *Mas* case with a similar case in which the court found that the student had changed her domicile. *See* GLANNON, *supra* note 296, at 42 (reprinting Gordon v. Steele, 376 F. Supp. 575 (W.D. Pa. 1974)).

300. *See supra* notes 72–75 (discussing Justice Kennedy's submission theory).

the place of incorporation and the principal place of business.[301] In addition, in its actual holding, the Court rejected the very low percentage of sales present there as a proper basis for general jurisdiction.[302] This leaves many questions, including the propriety of jurisdiction where the corporate defendant has an intermediate level of business contacts falling short of principal place of business. I contend that a reasonable summary of the proper places for general jurisdiction can be taken from *Goodyear*—incorporation and principal place of business are proper bases for general jurisdiction, but sales are not. Indeed, all other business contacts, including mere registration to do business, fall short of the standard for general jurisdiction.[303]

1. Incorporation and Principal Place of Business

The Court in *Goodyear* identified the paradigm at-home states of a corporation as the states of its incorporation and principal place of business.[304] Like domicile, these descriptions of jurisdiction are both common and rooted in history. They describe citizenship for purposes of federal diversity subject matter jurisdiction, but unlike domicile, these terms also properly describe places in which a corporate defendant has sufficient contacts to justify general jurisdiction. General jurisdiction fairly may be asserted against a corporation in the state in which it is incorporated and the state in which in maintains its principal place of business. This conclusion, however, stems from the nature of the contacts associated with incorporation and principal place of business, not any technical legal conclusion.

The state of incorporation is the easiest case. At one time, it was the only state in which a corporation could be sued.[305] More importantly, the state of incorporation would pass modern minimum

---

301. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011).

302. *Id.* at 2857.

303. Sarah Cebik argued for these as the only bases for general jurisdiction:

> In general, three circumstances exist in which a forum would be able to assert jurisdiction over a defendant corporation under the minimum contacts test which looks to the limits of state interests in the defendant. First, the defendant's state of incorporation will have an interest in the defendant. Second, the state in which the defendant shapes is corporate policy will have the required minimum contacts. Finally, the state in which the defendant conducts the core activities of the corporation will have an interest in exercising jurisdiction. A state does not have an interest in a defendant merely because it registers to do business in the state or is 'doing business' there.

Cebik, *supra* note 5, at 36.

304. *Goodyear*, 131 S. Ct. at 2853–54.

305. *See supra* note 16 and accompanying text.

contacts analysis for general jurisdiction. The corporation is at home in its state of incorporation even if it has no offices and does no business there. That state is in essence the birth state of the corporation, and it is a birthplace that the corporation never left. The corporation continues as an entity solely because of the laws of the state of its incorporation.

General jurisdiction in the state of incorporation is consistent with the four fairness rationales.[306] The corporation arguably gets more benefits from this state than any other. It owes its very existence to this state.[307] Extensive burdens in the form of unlimited jurisdiction would not be disproportionate. The corporation easily could predict this state as the state of general jurisdiction.[308] The state has sovereignty over entities it creates. Finally, the state is a convenient place in which to defend suits, even unrelated suits. The corporation's personnel may have some travel burden, but they are intimately familiar with the laws and court system of the state.

The state of a corporation's principal place of business—at least as currently defined by the Court for purposes of subject matter jurisdiction—also passes the *Goodyear* at-home test. "Principal place of business" is a term of art by which Congress defined a corporation's state of citizenship for purpose of federal diversity subject matter jurisdiction.[309] Courts for years struggled to define this statutory term. In 2010, the Court in *Hertz Corp. v. Friend*[310] settled on a "nerve center" test defining principal place of business as "the place where a corporation's officers direct, control, and coordinate the corporation's activities."[311]

The *Hertz* test has no direct application to general jurisdiction, which is a question of due process, not a question of federal statutory subject matter jurisdiction. Yet, in every case, the state of a corporation's nerve center under *Hertz* also should qualify as the

306. *See* Brilmayer et al., *General Look*, *supra* note 3, at 733 (outlining the policy reasons why the state of incorporation is the paradigm basis for general jurisdiction and stating that "the decision to incorporate in a particular state provides a more powerful basis for adjudicatory jurisdiction than does domicile").

307. *See* Cebik, *supra* note 5, at 36–37 ("The state [of incorporation] provides a registered corporation the full array of rights and duties necessary to the corporate existence: the state provides a set of rules which structure corporate governance, the state allows the corporation to issue stock, and the state established the limited liability of investors which is the hallmark of corporations.").

308. Professor Brilmayer argues that the incorporation process and papers themselves give this notice. Brilmayer et al., *General Look*, *supra* note 3, at 733–34.

309. 28 U.S.C. § 1332(c)(1) (2006).

310. 130 S.Ct. 1181 (2010).

311. *Id.* at 1192.

corporation's home for purposes of general jurisdiction.[312] Unlike "domicile," a term laden with an artificial intent element, the *Hertz* test for principal place of business turns on the corporation's actual activities. The activities that *Hertz* finds decisive—direction, control and coordination of the corporation's overall activities—appropriately capture the place at which a corporation is at home.

This would be true even in the "anomaly" cases cited by the Court in *Hertz*.[313] The Court recognized that application of the nerve center test in some applications would put the principal place of business in a state that did not predominate in terms of the corporation's workforce or business operations. As an example, the Court described a corporation with the bulk of its business activities visible to the public taking place in New Jersey but with officers in New York City.[314] The Court concluded that the nerve center, and thus the principal place of business for diversity purposes, would be New York.[315]

The *Hertz* nerve center standard, even in this anomaly case, satisfies the four fairness concerns as applied to general jurisdiction. The corporation receives significant benefits from the place in which its core operations are directed, controlled, and coordinated. Even if the corporation has most of its other operations in another state, the corporation could not function absent this direction. The officers of the corporation could predict that the entity would be subject to suit in this state. It is where they personally are centered. This state has sovereignty over the corporation because it is the state from which all actions of the corporation flow. Finally, convenience is met. The corporate officers have chosen this state as their base. They are familiar with the state's laws and legal system, and, to the extent they must personally participate in the defense, this state is the most convenient for them. It is their home as well as that of the corporation.

This anomaly case, however, suggests a very limited exception where a corporation might have more than one home based on business contacts (as opposed to incorporation). In cases where the vast bulk of operations are in a single state other than the nerve center, the corporation might be at home in two states—the nerve center state and the operations state. Few corporations would qualify for this additional state in which they are at home. In the

312. *Compare* Feder, *supra* note 8, at 692 n.108 (arguing that the *Hertz* principal place of business standard satisfies the *Goodyear* at-home standard), *with* Stein, *supra* note 8, at 546 (urging caution in finding multiple at-home states but rejecting the *Hertz* test as the single standard for general personal jurisdiction).

313. *Hertz*, 130 S. Ct. at 1194.

314. *Id.*

315. *Id.*

anomaly case, the operations state is an additional state because the corporation always would be at home in its true nerve center, regardless of where its operations occur. This extension of an additional home state would not apply to corporations that have operations spread out across the nation. In these cases, the only at-home state for general jurisdiction would be the nerve center state.

This narrow extension of the at-home finding is limited and would not include states that might satisfy alternative tests for principal place of business. In particular, I would reject the test used by the lower court in *Hertz*, which found Hertz's principal place of business to be California because California, due to its relative population and size, constituted the vast majority of its business.[316] I explain this reasoning more in the next two Subparts, but I state the proposition here to clarify my conclusion that the corporation is at home, for purposes of general jurisdiction, in its principal place of business. That place is usually only a single state, but in rare cases, it may include two states.

2. Sales in the Forum State

Courts and commentators long have struggled with whether sales alone are sufficient to support general jurisdiction, and, if so, what amount or proportion of sales is necessary for general jurisdiction.[317] In a previous article, I devoted substantial discussion to these questions.[318] *Goodyear* brought some closure to this issue when the Court rejected general jurisdiction based on the sales.[319] However, because the North Carolina sales there constituted only a "small percentage" of the defendants' total sales, some questions remain as to larger volumes of sales.[320] I contend

316. *Id.* at 1186–87.

317. *Compare* Wood, *supra* note 5, at 614–15 (arguing that general jurisdiction "should not be found in every state where a defendant has a significant amount of business," but instead should be "confined to those few places that can legitimately be viewed as . . . [a] corporation's base of operations"), *with* Brilmayer et al., *General Look*, s*upra* note 3, at 741–43 (arguing that place of incorporation and principal place of business are not the only legitimate places for general jurisdiction and that "the nonunique relationship of continuous and systematic activities . . . satisfies the reciprocal benefits and burdens rationale as well as do unique affiliations").

318. *See* Andrews, *supra* note 5.

319. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856–57 (2011); *see* Charles W. Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 429 n.258 (2012) (noting that *Goodyear* caused him to "rethink" his position that a corporation could be subject to general jurisdiction by "by producing goods or services in the state").

320. *See* Peterson, *supra* note 269, at 214–18 (arguing that an "appropriate interpretation of *Goodyear"* would find general jurisdiction based on "some substantial volume of sales made directly into the forum state").

that forum state sales, no matter how substantial, are never, by themselves, sufficient to make the defendant "at home" for purposes of general jurisdiction.

Prior to *Goodyear*, the Court had provided only dictum regarding forum sales and general jurisdiction. The Court stated in *Keeton v. Hustler Magazine Co.* that the defendant's sales of 10,000–15,000 magazines every month in New Hampshire were not enough to support general jurisdiction there.[321] Although the New Hampshire sales were a very low percentage of Hustler's national sales,[322] the sales arguably could have met a vague "continuous and systematic" standard because they were regular, monthly sales. Yet, they did not put Hustler at home in New Hampshire.

Lower courts were divided as to whether sales volume alone could support personal jurisdiction.[323] Many refused to base general jurisdiction on even relatively large amounts of sales. In *Bearry v. Beech Aircraft Corporation*,[324] for example, the Fifth Circuit reversed a finding of general jurisdiction where the defendant sold $250 million in airplane products in the forum.[325] Likewise, the Ninth Circuit in *Shute* rejected general jurisdiction based on forum cruise sales of only 1.29% of the defendant's total cruise sales.[326] Yet, other courts before *Goodyear* based general jurisdiction on a low relative amount of sales in the forum state.[327]

---

321. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984).

322. Keeton v. Hustler Magazine, Inc., 682 F.2d 33, 33 (1st Cir. 1982), *rev'd and remanded*, 465 U.S. 770 (1984).

323. SCOLES ET AL., *supra* note 240, at 351 (stating that courts "are severely divided as to whether substantial in-state sales" support general jurisdiction); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 108.41[3] (3rd ed. 2012) (stating that "lower courts have evinced a reluctance to assert general jurisdiction over . . . foreign corporations even where the contacts with the forum are quite extensive").

324. 818 F.2d 370 (5th Cir. 1987).

325. *Id.* at 372–73. The court relied in part on the fact that the defendant structured the sales to occur in its home state of Kansas in an attempt to shield itself from the general jurisdiction of other states. *Id.* at 375–76 (stating that the defendant "has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them").

326. Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 381 (9th Cir. 1988), *reversed on other ground*, 499 U.S. 585 (1991); *see supra* notes 138–46 (discussing *Shute*, 897 F.2d 377).

327. *See, e.g.*, Metro. Life Ins. Co. v. Robertson-CeCo Corp., 84 F.3d 560, 566, 570 (2d Cir. 1996) (finding general jurisdiction where the defendant had less than one percent of its total sales in the forum); *Ex Parte* Newco Mfg. Co., 481 So. 2d 867, 869 (Ala. 1985) (basing general jurisdiction on sales ranging only from $65,000 to $85,000 over a five-year period, even though the defendant structured its sales to occur either through independent agents or through mail from its home state of Missouri); *see also Ex Parte* United Bhd. of Carpenters, 688 So. 2d 246, 251–52 (Ala. 1997) (reaffirming *Newco* and permitting general jurisdiction over the defendant union based on ten local affiliates with Alabama membership constituting only one half of one percent of total membership).

Scholars debated these issues. Professor Brilmayer argued that general jurisdiction properly could be based on "substantial local [forum state] activities," but she did not specify the nature of those activities—sales, local offices, or manufacturing.[328] She argued that the adequacy of the forum state activities should not be based on their amount relative to the corporation's activities in other states but instead should be based on their absolute quantity in the forum state.[329] Professor Twitchell argued for a more narrow interpretation of the proper places for general jurisdiction and noted that courts tended to look at comparative sales volumes "because they lack any better guide."[330]

A policy analysis argues against ever basing general jurisdiction on mere sales volume. First, this standard would not help achieve reciprocity. The defendant has a defined set of benefits—whatever the sales volume in the state—but almost unlimited burdens in defending all possible claims, by all plaintiffs, on all matters worldwide. Second, a sales standard would give little predictability. The defendant would have to assume that it was subject to jurisdiction on all possible claims, even unrelated employment or antitrust suits, merely because it regularly sold a certain product in the state. The state would have a weak sovereignty interest. The actual activity underlying the claims necessarily occurred elsewhere, and the defendant is far from being a forum citizen. The state has sovereignty over that defendant's particular sales in the state, but those sales alone do not give the state a legitimate sovereignty interest in every activity that the defendant does anywhere in the world.

Considerations of convenience are mixed. They do not argue strongly against general jurisdiction based on sales alone, but they also do not argue for it. On the one hand, the defendant found access to the state to be sufficiently convenient to distribute its products there. On the other hand, the fact that the defendant was able to sell its product in the forum state does not mean that defense of an unrelated suit is convenient. By definition, the claims do not derive from the defendant's forum activities, so relevant evidence is unlikely to be located in the state. Unlike the defendant's home base, sales alone do not necessarily mean that the defendant has ease and familiarity with the state's entire legal system and culture.

This analysis would be true for all levels of sales. Admittedly, when the defendant has a significant amount of sales, it gets greater forum benefits, but balance is not achieved because the burdens would be unlimited. The seller would have to face suit on any claim

328. Brilmayer et al., *General Look*, *supra* note 3, at 741–42.
329. *Id.*
330. Twitchell, *Doing Business*, *supra* note 4, at 187–89.

arising anywhere in the world. As I explore more fully in the next Subparts, reciprocity needs a significant, arguably unique, relationship to offset these burdens. Mere sales, no matter how significant, do not create this unique connection to a state. Similarly, a high volume of sales would not make suits on other nonsales matters predictable. Nor would such sales give the state any greater sovereignty interest over these outside matters. Convenience might begin to tilt with a greater volume of sales, creating greater familiarity with the legal system and forum state culture, but convenience alone does not outweigh the other fairness considerations. In sum, although the fairness concerns are not as compelling for a high volume of sales as they are with low volumes, such as those in *Keeton* and *Goodyear*, the concerns, on balance, do not support general jurisdiction based solely on any level of sales. The state would have fairly extensive specific jurisdiction on claims arising from the high volume of in-state sales.

3. "Doing Business" and Corporate Registration

I next address whether there is any significance of the corporation "doing business," or registering to do business, in the forum state.[331] To some degree, this issue is redundant of the above analyses of principal place of business and sales volume. However, because these terms seem to have special significance to the Court and others, I separately analyze whether either "doing business" or registration is an adequate basis for general jurisdiction.

In many jurisdiction cases, the court's statement of the pertinent contacts of the corporate defendant include whether the defendant was "doing business" in the forum state or registered to do business there. The implication is that these places might support general jurisdiction. The Court in *Rush v. Savchuck*[332] stated this explicitly, albeit in dicta, where it said that the defendant insurer was "'found,' in the sense of doing business, in all 50 States" and that its "forum contacts would support *in personam* jurisdiction even for an unrelated cause of action."[333] In *Goodyear*, the Court stated that "[i]n contrast to the parent company, Goodyear USA, which does not contest . . . jurisdiction over it, petitioners are

331. *See* Feder, *supra* note 8, at 678–84 (analyzing "doing business" as a basis for general jurisdiction after *Goodyear*); Rhodes, *supra* note 319, at 430 (discussing *Goodyear* and concluding that "[t]he long-standing fiction that 'doing business' creates corporate 'presence' and supports a corporation's amenability to general jurisdiction has been vanquished"); Stein, *supra* note 8, at 547–48 (rejecting registration as a basis for general jurisdiction).

332. 444 U.S. 320 (1980).

333. *Id.* at 330.

not registered to do business in North Carolina."[334] I contend that neither "doing business" nor registration, by itself, confers general jurisdiction. General jurisdiction is limited to the one or two states in which the corporation is at home.

The "doing business" standard has a long history, but that history does not answer whether "doing business" is itself enough for general jurisdiction. In the *Pennoyer* era, courts often used this standard to determine whether corporations who had not registered were nonetheless subject to jurisdiction in the state through a theory of implied consent or fictional presence.[335] Satisfaction of that standard resulted in general jurisdiction in some cases but only specific jurisdiction in others, depending on the court and theory of jurisdiction. Indeed, this was one of the anomalies of the *Pennoyer*-era standards that the Court in *International Shoe* attempted to eliminate. The Court substituted the minimum contacts analysis and used the "maybe" case of general jurisdiction as a shorthand to describe all of these cases. It would be a distortion of the historical role of the "doing business" standard to conclude that it automatically confers general jurisdiction.

A preliminary consideration is defining what activities constitute "doing business" in the state.[336] It is a very broad standard, as it was in the *Pennoyer* era.[337] It may connote merely that the defendant has sales in the forum state. It also may mean that the defendant is engaged in marketing and advertising, which likely would occur whenever a corporation has any regular sales in a state. General jurisdiction should not follow from this form of "doing business" for the same reasons that I outline in Part IV.D.2 for sales volume. "Doing business" also might connote corporate offices and facilities in the state. Such operations might rise to the level of a "nerve center" principal place of business, and if so, the corporation would be at home in that state, subject to general jurisdiction. However, if the contacts fall short of the principal place of business standard, the fact that they may be described as "doing business" does not confer general jurisdiction.

Take as an example a corporation such as McDonald's. Before *Goodyear* was decided, Professor Glannon argued that, because the

---

334. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2852 (2011). The Court continued with a litany of contacts that the defendants did not have—"no place of business, employees, or bank accounts in the State," no manufacturing, no advertising, and no solicitation of business in North Carolina. *Id*.

335. *See supra* Part I.A.

336. One of Professor Twitchell's principal objections to general jurisdiction based on "doing business" is its uncertainty and malleability. *See generally* Twitchell, *Doing Business*, *supra* note 4.

337. *See supra* Part I.A. (discussing "doing business" determinations before *International Shoe*).

corporation has a very strong physical presence in most states, through its numerous employees and restaurants, McDonald's has "continuous and systematic" contacts in these states and is subject to general jurisdiction in all such states.[338] This is too broad a standard. Under *Goodyear*, the question is not whether McDonald's has "continuous and systematic" contacts in these states but instead is whether it is at home in the states. I answer no. Merely doing business in a state should not confer general personal jurisdiction for many of the same reasons that a large quantum of sales should not. The mere fact that the defendant has many physical properties and employees, in addition to sales, in the state does not render that state the home of the corporation.

I contend that the at-home standard is necessarily limited. That phrase suggests a single place or very few places.[339] The Court in *Goodyear* focused on the singular nature of the defendant's Ohio contacts in *Perkins*.[340] It described the defendant as doing business in Ohio and in no other place.[341] Some scholars before *Goodyear* advocated for a single place, similar to home, for general personal jurisdiction.[342] Professor Twitchell, for example argued for a single place of general jurisdiction in order to provide a single predictable forum in which the defendant always may be sued.[343]

---

338. *See* GLANNON, *supra* note 296, at 259–60; *see also* Peterson, *supra* note 269, at 259–60 (noting that before *Goodyear*, "most scholars" assumed that a company such as General Motors would be "subject to general jurisdiction in every state").

339. As I set out in Parts IV.C.1 and IV.C.2, a corporation can have more at-home states than literally one–its state of incorporation, and if different, its principal place of business. Also, in a very few cases, the corporation might have two principal places of business. However, for ease of reference, I will refer to a single place.

340. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2856 (2011).

341. *Id.*

342. *See* Stein, *supra* note 5, at 758 (arguing that the test for general personal jurisdiction should be "whether the defendant has adopted the forum as its sovereign" and that the court should not ask about convenience but instead should ask whether the defendant has "for most other purposes treated the forum as its home, notwithstanding its domicile elsewhere"); Wood, *supra* note 5, at 614 ("The point of general jurisdiction theory is to permit suit in the defendant's 'home'—the one or two places where a person or entity has settled.").

343. *See supra* note 112 (quoting Professor Twitchell). Other scholars point out that Professor Twitchell later modified her view to encompass "doing business" jurisdiction. *See* Stein, *supra* note 8, at 532 n.45. Professor Twitchell did announce a "change of heart," but she still argued that "the best solution would be for the Supreme Court to recognize, and insist that . . . due process does not permit 'general' doing business jurisdiction unless the state has such significant ties with the forum that the court would feel equally justified in deciding a wholly-unrelated claim." Twitchell, *Doing Business*, *supra* note 4, at

Although I agree that general jurisdiction is necessarily limited and narrow, I do not agree that the rationale underlying general jurisdiction is the need for an available forum. General jurisdiction is not a doctrine of jurisdiction by necessity.[344] I acknowledge that this rationale can be seen in *Perkins*,[345] but *Helicol* confirms that there need not be an available forum.[346] Texas was the closest state for general jurisdiction, but the Court rejected it.[347] There apparently was no state in the nation in which the South American defendant would be subject to general jurisdiction. Likewise, under the facts stated in both *Goodyear* and *McIntyre*, there likely is no state in which any of the foreign national defendants are subject to general jurisdiction.[348]

I instead justify the narrow reach of general jurisdiction under the four fairness concerns. I contend that a single home is the proper standard, not because the aim is to provide a single forum but rather because, in almost all circumstances, only a single place satisfies the four fairness aims of general jurisdiction.

To achieve reciprocity, the benefits of the forum state must be very high to offset the unlimited burdens of general jurisdiction. Indeed, the burden of unlimited jurisdiction is quite high, prompting the question whether any amount of business can offset that burden. Professor Stein used this point—the unlimited burdens of general jurisdiction—to argue that reciprocity is not a legitimate policy concern underlying general jurisdiction.[349] In a similar vein, Professor Twitchell questioned whether reciprocity or quid pro quo theory properly applied to general jurisdiction.[350] She acknowledged that reciprocity was important to specific jurisdiction because relatedness keeps the risks proportionate to the benefits, but she observed that there was no equivalent proportionality for activities based on general jurisdiction.[351] She based this observation on the fact that courts regularly exercise general jurisdiction over defendants with no physical presence in the forum state.[352]

171, 213. That conclusion is consistent with a narrow, single place view of general jurisdiction.

344. *See* Andrews, *supra* note 5, at 1350–72 (discussing the uncertain validity of the doctrine of jurisdiction by necessity).

345. Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 447–48 (1952).

346. Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 419 n.13 (1984).

347. *Id.* at 418–19.

348. This would not be true for domestic U.S. corporations because they have at least a local state of incorporation.

349. *See* Stein, *supra* note 8, at 537.

350. Twitchell, *Doing Business*, *supra* note 4, at 175–76.

351. *Id.*

352. *Id.*

I argue that reciprocity does in fact have a proper role in general jurisdiction analysis. The potential breadth of the burdens imposed by general jurisdiction does not undermine reciprocity as a fairness concern but instead argues for limiting the locations for general jurisdiction to unique or special places. Reciprocity helps demonstrate why lower courts were incorrect in asserting general jurisdiction on "doing business" contacts. Reciprocity demonstrates why the Supreme Court correctly limited general jurisdiction to the home state. In order to achieve even a rough reciprocity, there must be something special about the benefits. For example, in *Perkins*, the defendant had a relatively low level of business activity, in terms of sheer quantity, but Ohio was unique to the corporation. During the war, it owed its existence to Ohio.

A standard based on a single at-home state, as opposed to one embracing multiple states of doing business, also promotes predictability. The corporation would know that it is subject to general jurisdiction in one state and that, in all other states, it would be subject to specific jurisdiction only on suits related to its conduct in those other states. The at-home standard easily identifies the state of general jurisdiction. The business knows its jurisdictional exposure based on where it chose to base its operations. Without such a limitation, the corporation would have to guess as to which intermediate levels of business would expose it to unlimited jurisdiction.

The sovereignty concern also argues for a narrow reach of general jurisdiction. A state does not have sovereignty over all of a corporation's activities solely because the corporation chose to conduct some, or even a significant amount, of its business there. To be sure, the state would have a great deal of sovereignty over a corporation that conducts a significant amount of business within its borders—because the amount of the activity is significant—but the state's sovereignty would extend only to that particular business, in the form of specific jurisdiction. To justify jurisdiction over a case entirely unrelated to that state, the state must have sovereignty over the person of the defendant. Professor Stein and others have defined this to be a "citizen-like affiliation": "There is something different about the authority that one's home state has toward members of its political community."[353] I agree with the concept, if not the literal term "citizen." The special sovereignty concern is precisely what "home" conveys.

Finally, for the corporation to enjoy full convenience in defense of unrelated claims, the suit must be brought in the corporation's unique home state. By definition, the corporation already must transport the case-specific evidence to the home state, but it should

353. *See* Stein, *supra* note 8, at 538, 542.

not also have to transport its home conveniences to another state. In sum, the corporation should not be subject to general jurisdiction based merely on it "doing business" in the forum.

The term "doing business" may be jurisdictionally significant in another way because it often connotes that the corporation is registered to do business in the state. Many state registration statutes use the term "doing business" as the triggering event requiring registration.[354] These statutes have a long history. In the *Pennoyer* era, states and courts used registration statutes as a means to get a corporation to formally consent to jurisdiction.[355] Because the typical triggering condition was "doing business," courts borrowed that term to imply consent or find fictional presence when the corporation had not formally registered and consented to jurisdiction.

Perhaps due to this historical connection between "doing business," registration, and jurisdiction, many modern observers conclude (or assume) that registration to do business automatically confers jurisdiction. This is perhaps why so many corporate defendants, such as the Goodyear parent company, do not challenge jurisdiction. This likely is a mistaken assumption, even as to Goodyear USA.[356]

First, most corporate registration statutes do not state the jurisdictional repercussions of registration.[357] In a tradition dating back to the *Pennoyer* era, most registration statutes require merely that the corporation name an in-state agent for service of process

---

354. *E.g.*, DEL. CODE ANN. tit. 8, § 371(b) (2011); M.D. CODE ANN., CORPS. & ASS'NS § 7-202 (LexisNexis 2007).

355. *See supra* Part I.A (discussing registration under the *Pennoyer* doctrine).

356. I previously argued that this mistaken assumption is why so many corporate defendants fail to challenge personal jurisdiction in the states in which they are registered. *See* Andrews, *supra* note 5, at 1331–32, 1360–67. *But see* Borchers, *supra* note 275, at 1267 (arguing that, if *Goodyear* is read narrowly, it would make the parent corporation's decision not to challenge jurisdiction "foolish" and that it is "unlikely" that the Court would have failed to affirm jurisdiction over Goodyear USA).

357. *See* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 2 (1990) (collecting statutes and stating that "each state mandates that an agent be appointed" but that "most statutes fail to discuss the effects of appointment on the state's jurisdiction over the foreign corporation"); *see also In re* Mid-Atlantic Toyota Antitrust Litig., 525 F. Supp. 1265, 1278 n.10 (D. Md. 1981), *modified*, 541 F.Supp. 62 (D. Md. 2000) ("[C]onsent statutes are largely obsolete and serve only to confuse matters . . . ."); William L. Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C. L. REV. 733, 734–38 (1969) (arguing that the requirement that corporations appoint local agents has no jurisdictional purpose after *International Shoe* and that registration statutes "have encouraged inappropriate expansions of unlimited general jurisdiction and discouraged worthwhile analysis").

and do not mention "jurisdiction."[358] A few states interpret this appointment of an agent only as a means of facilitating service (notice) where jurisdiction is otherwise proper under minimum contacts analysis.[359] Some hold that the local registration statute confers jurisdiction but only specific jurisdiction over claims arising out of the corporation's in-state activities.[360] In these states, mere registration would not confer general jurisdiction over a registering corporation.

Some states, however, interpret their registration statutes as conferring general jurisdiction.[361] They do so on one of two theories. First, a very few cite to *Burnham* and use a theory of tag jurisdiction over corporations based on the corporation's appointment of an in-

358. *See* MODEL BUS. CORP. ACT ANN. § 15.03 (1998) (providing that an application for a certificate of authority to transact business in the state must set forth the name and address of the corporation's registered agent in the state); *see also id.* § 15.10 ("The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation."). Very few states have modified their statutes to specify that they have no impact on a foreign corporation's amenability to suit. *See, e.g.*, FLA. STAT. § 607.1501(4) (2007) (providing that the requirement of a certificate of authority "has no application to the question of whether any foreign corporation is subject to service of process and suit in this state").

359. *See* Freeman v. District Court, 1 P.3d 963, 968 (Nev. 2000) ("[T]he appointment of an agent to receive service of legal process pursuant to [the Nevada foreign insurance corporation registration statute] does not in itself subject the non-resident insurance company to the personal jurisdiction of Nevada courts."); *see also* Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) (holding that the Texas registration statute may extend only jurisdiction that is otherwise "constitutionally permissible" under independent minimum contacts analysis).

360. *See* Freeman Funeral Home Inc. v. Diamond S. Constructors, Inc., 266 So. 2d 794, 795–96 (Ala. Civ. App. 1972) (holding that "a statutory agent may be served with process only in cases where the cause of action arose in [Alabama]" because the Alabama foreign registration statute was "enacted to protect the citizens of the state as to causes of action arising within the state and resulting from the doing of business by foreign corporations in this state," and thus a corporation's consent to jurisdiction "is confined to transactions or causes of action arising in this state and not those arising in other states"); Gray Line Tours v. Reynolds Elec. & Eng'g Co., 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) (holding that a California statute requiring consent for service on an in-state agent did not confer jurisdiction on suits not arising out of business done in California). *See generally* JAMES WM. MOORE ET AL, *supra* note 323, ¶ 108.41[4] (stating that some statutes are limited to specific jurisdiction and others are interpreted to confer only specific personal jurisdiction).

361. *See* CASAD & RICHMAN, *supra* note 240, § 3-2[2][a] (surveying interpretations of statutes); Kipp, *supra* note 357, at 44 ("[O]nly a few states have registration statutes that expressly provide for the assertion of general jurisdiction.").

state agent for service.[362] This almost certainly is not a proper view.[363] *Burnham* involved in-state service on a natural person, and Justice Scalia suggested that tag jurisdiction is limited to natural persons.[364] Even under *Pennoyer*, where service was the primary means of securing jurisdiction, corporate jurisdiction was based on theories of implied consent or presence through business activities, not the mere fact of in-state service.[365] The Court in the *Pennoyer* era repeatedly held that in-state service on a corporate agent was not enough to confer jurisdiction where the corporation otherwise did not do sufficient business in the state.[366] In *International Shoe* itself, the defendant's salesman was served in the forum, but the Court based jurisdiction on contacts, rather than in-state service.[367] Similarly, in *Perkins*, the defendant's president was served in Ohio while acting in his corporate capacity, but the Court based general jurisdiction on the corporation's forum contacts, not in-state service.[368]

Most courts that rely on corporate registration to confer general jurisdiction do so on a second theory of consent, rather than a minimum contacts analysis.[369] A consent theory changes the constitutional inquiry. First, it shifts any due process analysis from

---

362. Allied-Signal Inc. v. Purex Indus., 576 A.2d 942, 944 (N.J. Super. Ct. App. Div. 1990) (applying *Burnham* and holding that service on the corporate defendant's registered agent conferred general jurisdiction on unrelated claims).

363. *See Wenche Siemer*, 966 F.2d at 182 (rejecting the argument that *Burnham* establishes that service on an in-state agent "automatically subjects the corporation to jurisdiction"); MBM Fisheries, Inc. v. Bollinger Mach. Shop Shipyard, Inc., 804 P.2d 627, 631 (Wash. Ct. App. 1991) (distinguishing *Burnham* and holding that in-state service on a corporate officer "cannot alone confer general jurisdiction"). *But see* Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 KAN. L. REV. 549, 600–01 (2012) (noting the possibility that *Goodyear* left open the question of personal jurisdiction through service on an official in-state agent).

364. Burnham v. Superior Court, 495 U.S. 604, 610–11 & n.1 (1990); *see supra* note 293 (discussing this dictum in *Burnham*).

365. *See supra* Part I.A (discussing corporate jurisdiction under *Pennoyer*).

366. Riverside & Dan River Cotton Mills, Inc. v. Menefee, 237 U.S. 189, 195 (1915) (holding that service on a corporate director who is a forum resident is insufficient to confer jurisdiction); Goldey v. Morning News of New Haven, 156 U.S. 518, 522 (1895) (holding that service on the defendant's president who was temporarily in forum was insufficient to confer jurisdiction).

367. Int'l Shoe Co. v. Washington, 326 U.S. 310, 312, 320 (1945) (discussing service).

368. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 438–40, 445 (1952). The Court stated that statutes requiring corporations to obtain a license and designate a statutory agent for service are not "conclusive" as to jurisdiction. *Id.* at 445.

369. Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (interpreting a Minnesota registration statute as conferring general jurisdiction and stating that "[o]ne of the most solidly established ways of giving such consent is to designate an agent for service of process within the State").

minimum contacts to the validity of the consent. Under *Bauxites*, consent is a proper basis for jurisdiction, independent of *International Shoe* minimum contacts analysis.[370] This raises the question whether registration is a valid form of consent. This topic is beyond the scope of this Article, in which I focus on general jurisdiction based on the defendant's contacts, but a few scholars have argued that forced consent to general jurisdiction through a corporate registration statute may violate due process.[371]

Even if consent through registration were to survive due process scrutiny, it would face problems under the Dormant Commerce Clause. I hope to more fully develop this question in a later article, but I briefly discuss it here to give some context to the question. In the period immediately preceding *International Shoe*, the Court used the Dormant Commerce Clause to invalidate some exercises of general jurisdiction.[372] Since then, the doctrine rarely has been invoked in the context of personal jurisdiction, but some commentators have raised Dormant Commerce Clause concerns with registration statutes.[373]

---

370. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

371. *See* Brilmayer et al., *General Look*, *supra* note 3, at 755–60 (questioning consent to jurisdiction and stating that the "most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment rather than from contract") (footnote omitted); *see also* CASAD & RICHMAN, *supra* note 240, § 3.2[2][a][ii] (stating that consent through registration statutes "may raise due process problems if the required consent is held to extend to causes of action unrelated to the state and to claims by persons having no connection with the state"); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 7 (1990) (arguing that the doctrine of "unconstitutional conditions" bars states from using corporate registration statutes to exact consent not otherwise sufficient under minimum contacts analysis); Rhodes, *supra* note 319, at 443–44 (arguing that general jurisdiction based on corporate registration is "unfair" and that the issue is "ripe for invalidation by the Supreme Court").

372. Davis v. Farmer's Co-Operative Equity Co., 262 U.S. 312, 316–18 (1923) (holding that the Dormant Commerce Clause forbade Minnesota from asserting jurisdiction and noting that the case resembled two cases in which the Court had previously upheld jurisdiction but stating that "in both cases the only constitutional objection asserted was violation of the due process clause"); *see supra* notes 33–34 (discussing *Davis* and related cases).

373. Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predic*tability, 103 COLUM. L. REV. 1163, 1189 (2003) (noting that registration-consent statutes might be "obnoxious to the Commerce Clause"); T. Griffin Vincent, Comment, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 491–92 (1989) (exploring arguments and concluding that registration-consent may violate the Commerce Clause).

The court suggested this concern in *Bendix Autolite Corp. v. Midwesco Enterprises*.[374] *Bendix* was a Dormant Commerce Clause challenge to a state law that forced out-of-state corporations to choose between registration-consent to general jurisdiction[375] and the statute of limitation defense.[376] The Court found that the law impermissibly burdened interstate commerce.[377] The Court's analysis focused primarily on the loss of the statute of limitation defense,[378] but Ohio's requirement that the corporation consent to general jurisdiction, as opposed to specific jurisdiction, was critical to the Court's holding. The Court stated that the "designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in matters to which Ohio's tenuous relation would not otherwise extend."[379] Importantly, the Court described general jurisdiction as a "substantial burden"[380] and concluded that the "extraction" of the consent through waiver of the limitation defense was "an unreasonable burden on commerce."[381]

Scholars and lower courts do not agree on the impact of *Bendix* on corporation registration statutes.[382] In the aftermath of *Bendix*, most states no longer force corporations to choose between consent to general jurisdiction and waiver of the statute of limitation defense. Registration statutes nonetheless remain coercive and

---

374. 486 U.S. 888, 889 (1988).

375. *Id.* at 894–95 ("[A] designation with the Ohio Secretary of State of an agent for the service of process likely would have subjected [defendant] to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest.").

376. *Id.* at 888–91 ("The statute [of limitation] is tolled . . . for any period that a person or corporation is not 'present' in the State. To be present in Ohio, a foreign corporation must appoint an agent for service of process, which operates as consent to the general jurisdiction of the Ohio courts.").

377. *Id.* at 894–95.

378. Some scholars have questioned why the Court did not independently condemn this aspect of the Ohio law as a matter of due process. *See* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 550–51, 557–58 n.152 (1991) (analyzing *Bendix* and questioning why "none of the Justices seemed troubled by this extorted waiver of a constitutional right").

379. *Bendix*, 486 U.S. at 892–93 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

380. *Id.* at 893.

381. *Id.* at 894–95.

382. *See* Sternberg v. O'Neil, 550 A.2d 1105, 1112–14 (Del. 1988) (relying in part on *Bendix* to hold that registration-consent remains a viable basis for jurisdiction); *see also* Lea Brilmayer, Professor, Yale Law School, Consent, Contract, and Territory, The William B. Lockhart Lecture (Mar. 30, 1989), *in* 74 MINN. L. REV. 1, 29 & n.86 (1989) (citing *Bendix* and stating that "[a]lthough the case law on this issue is not entirely clear, such assertions of jurisdiction may be unconstitutional"); Kipp, *supra* note 357, at 32–33 (arguing that *Bendix* is ambiguous and that use of registration statutes to infer consent to general jurisdiction is an "anachronism").

punish nonregistration through fines and forfeiture of the right to bring suit in local courts.[383] In sum, it is safe to conclude that corporate registration does not always confer general jurisdiction even under these other (not contacts-based) theories. Nor should registration by itself satisfy the at-home standard for general jurisdiction.

E. "Sliding Scale" or "Hybrid" Forms of Jurisdiction

Finally, some courts and commentators have suggested that jurisdiction is proper in cases that fall between the definitions or categories of specific and general jurisdiction. They object to strict characterization of a case as falling in one category or the other. They suggest either a "sliding scale" or "hybrid" approach. Professor Richman proposes a sliding scale theory,[384] and Professor Simard a hybrid form of jurisdiction.[385] The theories vary slightly, but both would find proper jurisdiction in fact patterns that are "near misses" on both the relatedness and extent of contacts factors.

The sliding scale approach argues that jurisdiction may be fair where the claim is somewhat related to the defendant's forum contacts so long as the defendant also had a moderate amount of forum contacts.[386] An example is a products liability claim based on the defendant's regular sale of similar products in the forum state. The plaintiff bought and was injured by the product in a second state, but the defendant regularly sells similar products in the forum state. The relationship of the claim to the forum contacts—product similarity—would fall short of the meaningful link causation test, and the extent of the defendant's forum state contacts—regular sales—would fall short of the at-home standard. Yet, the claim is not entirely unrelated, as would be an employment

---

383. MODEL BUS. CORP. ACT § 15.02(a) (1996) ("A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."); *id.* § 15.02(d) (providing civil penalties for transacting business without a certificate of authority).

384. *See* William M. Richman, *Jurisdiction in Civil Actions: By Robert C. Casad*, 72 CALIF. L. REV. 1328, 1343–46 (1984) (book review).

385. Simard, *Hybrid Jurisdiction*, *supra* note 5, at 580–82 (noting problems with sliding scale theory as applied to product similarity cases and arguing for a restrained specific personal jurisdiction approach for "hybrid" cases). Some observers have used the "hybrid" term to connote other theories of jurisdiction. *See* Taylor Simpson-Wood, *In the Aftermath of* Goodyear Dunlop*: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 136–40 & n.178 (2012) (proposing an aggregation of contacts across state lines for foreign national corporations under "hybrid" label). I use the term "hybrid" to describe a blending of the two *International Shoe* factors—relatedness and extent of contacts.

386. Richman, *supra* note 384.

claim filed by a corporate headquarters employee. Likewise, the contacts are not few or isolated but are instead many and regular. The sliding scale theory argues that the combination of the two intermediate levels on both elements makes jurisdiction fair.

A real life example of the sliding scale approach is *Shoppers Food Warehouse v. Moreno*,[387] decided en banc by the Court of Appeals for the District of Columbia.[388] There, the plaintiff, a resident of the District, fell in a Maryland grocery store and brought suit against the store in the District of Columbia.[389] The court found personal jurisdiction based on the fact that the Maryland store had advertised "extensively and over a substantial period of time in the District's major circulation newspaper."[390] The court held that the plaintiff's claim had a "discernible relationship" to this advertising.[391] The court did not consider whether the advertising actually caused the plaintiff to go to the defendant's store in Maryland. In other words, it did not base its finding of jurisdiction on any form of causation test. Instead, the court found it sufficient that plaintiff's claim was the type of claim that would be foreseeable to the defendant.[392] On the other element of extent of contacts, the court stated that a lesser level of contacts, such as a single or sporadic advertising, would not be sufficient for jurisdiction.[393] Under the court's ruling, the intermediate level of both factors—relatedness and extent of contacts—made jurisdiction fair.

The *Moreno* court was explicit about its intermediate approach, but, in practice, a sliding scale theory might explain the holdings of many courts which find general jurisdiction.[394] For example, in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*,[395] where the Second Circuit purported to base general jurisdiction on less than one percent of sales, the claim was loosely related to the defendant's forum contacts, a product similarity.[396] The claim concerned curtain walls installed in Florida but which the defendant

387. 746 A.2d 320 (D.C. 2000).

388. *Id.* at 335–36; *see also* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 320 (3d Cir. 2007) (surveying cases that do not make a "rigid distinction between general and specific jurisdiction" and apply some sort of "sliding scale").

389. *Moreno*, 746 A.2d at 322.

390. *Id.* at 336.

391. *Id.*

392. *Id.* at 335–36.

393. *Id.* at 336.

394. *See* Twitchell, *Doing Business*, *supra* note 4, at 191–93 (studying hundreds of cases and concluding that in most cases in which the court found general jurisdiction, the claim was somehow related to the defendant's forum contacts).

395. 84 F.3d 560 (2d Cir. 1996).

396. *Id.* at 569–70; *see supra* notes 270, 274, 327 (discussing *Metro. Life*, 84 F.3d at 566, 569-570).

also sold in the Vermont forum.[397] The court likely would not have based jurisdiction on an obviously unrelated claim—for example, an employment contract claim brought by an employee at the defendant's headquarters located in another state. Likewise, the court likely would not have found jurisdiction over an out-of-state consumer claim if the defendant had only a single, though similar, sale in the forum state.[398] Yet, the court never formally made these distinctions and instead found jurisdiction seemingly based on a theory of general jurisdiction.

The hybrid theory has a slightly different focus and involves a case where the defendant has both a related nonpurposeful contact and a purposeful nonrelated contact. It is demonstrated by a hypothetical based on the manufacturer Audi in *World-Wide Volkswagen*. The hypothetical assumes the actual claim at issue in *World-Wide Volkswagen*—the plaintiffs' claim of injury in Oklahoma by an allegedly defective Audi car sold to them in New York. The hypothetical asks whether Audi, which did not contest jurisdiction in the actual case, would have been subject to jurisdiction under minimum contacts analysis. The problem assumes that Audi regularly sells in Oklahoma cars similar to the car that the Robinsons alleged caused them injury in Oklahoma.

This hypothetical has an underlying sliding scale fact pattern—regular sales of similar products—but it adds another factor—the plaintiff's injury in the forum state. Under a hybrid theory, the addition of this factor might justify jurisdiction even where the two factors are not at the intermediate levels essential for jurisdiction under a sliding scale theory. The key is that a purposeful unrelated contact combines with a nonpurposeful related contact. Under the hybrid theory, this combination makes jurisdiction fair.

A hybrid theory might explain aspects of Justice O'Connor's opinion in *Asahi*.[399] In *Asahi*, Justice O'Connor refused to find purposeful availment in a product suit based solely on the manufacturer's putting that product into the stream of commerce.[400] She wanted something more: "an action of the defendant

397. *Metro. Life*, 84 F.3d at 565. A similar analysis could explain the holding in *Ex parte Newco Mfg. Co. v. Southern Ry. Co.*, 481 So. 2d 867, 869 (Ala. 1985), where the out-of-state claims likewise concerned a product that the defendant sold in the forum state. *See supra* note 327 (discussing *Newco*, 481 So. 2d at 869).

398. *See, e.g.*, Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 385 & n.7 (9th Cir. 1990) (noting that, where the defendant has only one contact with the forum state, a closer nexus may be required than in a case where the defendant has "engaged in significant and continuing efforts to solicit business in the forum state"), *rev'd on other grounds*, 499 U.S. 585 (1991); *see also supra* notes 138–46 (discussing *Shute*, 897 F.2d at 379–83, 385–86).

399. Simard, *Hybrid Jurisdiction*, *supra* note 5, at 576–77.

400. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112–13 (1987).

purposefully directed toward the forum State."[401] Justice O'Connor listed "additional conduct" that might "indicate an intent or purpose to serve the market in the forum," including advertising in the forum, establishing channels for advice to customers in the state, and marketing a product through a distributor in the forum.[402] At least some of these additional acts are not causally related to the claim. For example, advertising the valve in California likely did not cause the consumer-plaintiff to buy the valve or the motorcycle. Similarly, the Taiwanese company probably would have purchased valves from Asahi, regardless of whether Asahi advertised in California.

It is difficult to discern the import of Justice O'Connor's statements. One reading supports the hybrid theory. In other words, jurisdiction is fair where there is both unrelated activity that is not causally related but which is purposeful (the additional factors she listed) and related activity that is not purposeful (the actual valve that caused injury in California). Another reading is narrow and addresses only the purposeful availment factor. Justice O'Connor's list of additional conduct could be read not as a list of contacts that would make an otherwise insufficient contact fair but instead as a list of evidence indicating whether the related contact—the valve at issue—was purposefully directed to California.

The Court elsewhere has not endorsed any blending of the two forms of jurisdiction. The Court's listing of the four cases of jurisdiction in *International Shoe* could be read as an attempt to untangle the two forms.[403] In *Helicol*, the Court addressed only general jurisdiction, refusing to consider any other form.[404] Most recently, in *Goodyear*, the Court articulated general and specific jurisdiction as two distinct categories: "Opinions in the wake of the pathmaking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction."[405]

Moreover, policy analysis argues against jurisdiction based on either a sliding scale or hybrid theory. First, as to a sliding scale theory, an intermediate level as to both essential elements does not make jurisdiction fair. As I set out above, mere similarity in product is not a sufficient relationship on which to base specific jurisdiction,

401. *Id.* at 112.
402. *Id.*
403. *See supra* notes 38–42 and accompanying text.
404. Helicopteros Nacionales de Colombia, S.A. v. Hall (*Helicol*), 466 U.S. 408, 415 n.10 (1984).
405. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (citing *Helicol*, 466 U.S. at 414 nn.8–9); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–88 (2011) (distinguishing between general and specific jurisdiction).

and on the extent of contacts factor, sales and advertising, alone, are not enough for general jurisdiction. The sliding scale or hybrid theories would be a partial "fix" in that they would rein in some otherwise potentially extreme forms of jurisdiction. In other words, a court would assert jurisdiction only over similar product sales, not entirely unrelated employment suits, and do so only where there is at least a moderate level of sales, not a single sale or advertisement. Yet, the fix likely is not good enough.[406]

The benefits of even moderate levels of sales volume would not be reciprocal to the burden of having to defend all product claims based on all worldwide sales of that or similar products. The defendant still would not have fair warning of its potential exposure to suit in the forum, even if limited to product liability. Rather, it would have to assume that any steady stream of product sales would expose it to suit there on all product claims arising anywhere in the world. In this case, the state still would be asserting authority over activities that occur exclusively outside its borders. There would be little or no evidentiary concern in the forum because the products were sold and caused injury elsewhere.

The hybrid theory also fails this policy analysis. The combination of unrelated-but-purposeful contacts and related-but-not-purposeful contacts does not make jurisdiction fair. In the Audi hypothetical, the car sales are not by themselves enough to justify jurisdiction, for the same reasons that a sliding scale theory fails the policy analysis. The question is whether the addition of the related contact—injury in the forum state—makes it fair. A requirement of the forum-state injury narrows the extent of jurisdiction significantly over the typical sliding scale fact pattern. Jurisdiction would extend to a much smaller group of claims—only those brought by plaintiffs who happen to be injured in the state. This smaller sphere lessens some but not all of the policy concerns.

The mere fact that the potential for suit is smaller means that the burdens of jurisdiction do not as significantly outweigh the benefits. In addition, the state would have a sovereignty interest over the injury, and some evidentiary convenience would come from the in-state injury. But this injury remains an unpredictable fortuity, which is precisely why the Court found no purposeful availment and no jurisdiction in the actual *World-Wide Volkswagen*

406. Few lower courts have addressed the question of blended jurisdiction, but the Third Circuit rejected it in *O'Connor*. O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 321 (3d Cir. 2007) (quoting Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 666 (1991)) ("When courts confine general and specific jurisdiction to their separate spheres, potential defendants can anticipate and control their jurisdictional exposure. . . . Under a 'hybrid' approach, by contrast, all factors come together in 'a sort of jurisdictional stew.'").

case.[407] Amenability to suit would travel with the product, a concept repeatedly rejected by Court.[408] To find jurisdiction on these facts would mean that all sellers of products would have to assume jurisdiction on any product they sold anywhere.

In sum, an assertion of jurisdiction that is otherwise unfair is not made fair by making modest adjustments in either the degree of relationship or the extent of local contacts. The four fairness concerns demonstrate that the claim must be *either* sufficiently related *or* the contacts must be sufficiently extensive. Jurisdiction is fair only when there either is a meaningful causal relationship between the claim and the defendant's forum contacts or enough contacts to make the defendant at home in the forum state.

CONCLUSION

General jurisdiction warranted a "fresh look." Although the doctrine has historical pedigree, it has long been ill-defined. In breaking its twenty-year silence on personal jurisdiction in 2011, the Court provided a good occasion for another look at general jurisdiction. *McIntyr*e captures the jurisdictional policy debate among the current members of the Court and thus provides a useful springboard for examining the policies underlying personal jurisdiction as a whole and general jurisdiction in particular. The unanimous decision in *Goodyear* clarifies the proper standard for general jurisdiction—"at home" as opposed to merely "continuous and systematic." Although neither case settles the policy questions or standards for general jurisdiction, they both advance understanding of the issues.

As reflected in the debate between Justice Kennedy and Justice Ginsburg in *McIntyre*, the Court has proposed a wide range of policies underlying personal jurisdiction. The fundamental policy aim is fairness, but fairness in the context of personal jurisdiction is not limited to either the sovereignty concern advocated by Justice Kennedy or the litigation convenience noted by Justice Ginsburg. Fairness can and should include a number of considerations. The Court has developed and debated these policy considerations in the context of specific jurisdiction but not general jurisdiction.

I propose that *International Shoe* itself provides essential guidance in the form of the two factors critical to minimum contacts analysis—relatedness and extent of contacts. Understanding why

---

407. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

408. *See McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 296) ("[T]his Court has rejected the notion that a defendant's amenability to suit 'travels with the chattel.'"); *see also Goodyear*, 131 S. Ct. at 2856 (rejecting the view that a substantial seller of goods is amenable to suit "wherever its products are distributed").

and how these two factors impact the fairness of personal jurisdiction both informs general personal jurisdiction as a whole and defines the factors themselves. I contend that the factors impact the fairness of jurisdiction in four ways: they help achieve reciprocity between the benefits and burdens of entering a state; they give predictability to the consequences of entering a state; they limit a state's sovereignty to either actions or persons in its borders; and they assure a level of convenience. This understanding in turn helps define the parameters of the factors themselves.

The threshold question of relatedness is the most difficult. I propose that a midlevel causation test best fits both the Court's jurisprudence and the four fairness policies. This test would require a meaningful link between the plaintiff's claim and the defendant's forum state contacts. In other words, general jurisdiction properly applies to all claims that do not have a meaningful causal link, and specific jurisdiction analysis, in the form of the two-prong *World-Wide Volkswagen* test, applies to claims that have this meaningful link. This meaningful link test would not demand that a formal element of the claim occur in the state, but it would require some connection greater than mere unrestrained but-for causation. By requiring this degree of relatedness before specific jurisdiction analysis applies, this test gives a rough reciprocity between forum benefits and jurisdictional burdens, gives the defendant a reasonable degree of predictability, limits state power to matters over which it has legitimate sovereignty, and assures some litigation convenience.

The second question of the extent of contacts necessary for general jurisdiction was made easier by *Goodyear*. General jurisdiction is proper only in the state, or states, in which the defendant is currently at home. The standard is not whether the defendant has "continuous and systematic" contacts with a state but is instead whether the defendant is currently at home in the state. This at-home standard applies to natural persons, but, contrary to the Court's dictum, it does not always align with legal domicile. As to corporations, the state of incorporation and principal place of business (under a *Hertz* "nerve center" definition) always will constitute the home state. These places usually will be the only home states for purposes of general jurisdiction. Sales and other business activities in the state, including high volumes of sales, physical operations, "doing business," and statutory registration, are not by themselves enough to support general jurisdiction. Because the burdens of general jurisdiction are unlimited, only the unique affiliation of home achieves reciprocity between forum benefits and burdens, gives sufficient predictability for unrelated suits, limits state power to persons legitimately within the state's sovereignty, and gives a sufficient measure of litigation convenience.

Just as with many other constitutional doctrines, courts must develop the standards through case application. These two standards—"meaningful link" and "at home"—will give courts a better starting point for general jurisdiction analysis, and the four fairness concerns will aid the courts in interpreting and applying the standards. Courts should strive to apply both standards in a manner that helps achieve reciprocity, protects predictability, limits sovereignty, and promotes convenience. These four policy aims are rooted in *International Shoe* itself. They explain the fairness of general personal jurisdiction.