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I. INTRODUCTION

The history of personal jurisdiction jurisprudence in the United States is familiar to courts, scholars, and first-year law students alike. The Supreme Court of the United States decided *Pennoyer v. Neff*[1] in 1877 by borrowing international law and conflict of laws principles to shape a law of personal jurisdiction based on territorial power of the states. *Pennoyer* held that an unwilling, nonresident defendant must be served within the boundaries of the state. During the ensuing sixty-eight years, courts struggled with application of this rigid principle to an expanding and increasingly mobile economy, and to a new type of defendant, the corporation.[2] *Pennoyer* was not working.

In 1945, the Supreme Court started afresh in *International Shoe Co. v. Washington.*[3] The jurisdictional reach of a court expanded beyond its state borders. Henceforth, due process would allow a court to assert personal jurisdiction over a nonresident defendant served outside the state so long as that defendant had "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[4] During the ensuing fifty-eight years, courts have struggled not only with the application of this test to a myriad of factual patterns but also with a maze of

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1. 95 U.S. 714 (1877); *see infra* note 6.

2. *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958); *infra* text accompanying notes 8-9.

3. 326 U.S. 310 (1945).

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

attempted refinements of the flaccid minimum contacts principle itself.[5] *International Shoe* is not working.

The Supreme Court should again start afresh. A workable test placed between the extreme rigidity of *Pennoyer* and the extreme malleability of *International Shoe* is needed.

This Article begins in Part II with an examination of the origins of the *International Shoe* minimum contacts test, and then in Part III analyzes and critiques the opinion and the test. Part IV looks at later Supreme Court cases that attempt to refine and apply the test, and Part V looks at the same pattern for other federal courts and state courts. These Parts lead to the conclusion that the minimum contacts test should be abandoned in favor of a new law for personal jurisdiction, and so to Part VI, which proposes that the Court should "drop the *Shoe*." After an examination in Part VII of whether state boundaries should be considered in the formulation of a new law of personal jurisdiction, the Article proposes new law in Part VIII. In order to determine the practicality of the proposed new law, the Article applies it to the facts presented in previous Supreme Court personal jurisdiction cases, and to some of today's commonly recurring factual situations, in Part IX. The Article concludes in Part X.

II. ORIGINS OF THE MINIMUM CONTACTS TEST

American constitutional law of personal jurisdiction largely began in 1877 with the Supreme Court's decision in *Pennoyer v. Neff*.[6] The Court decided that due process prohibits personal jurisdiction over a nonconsenting nonresident who is not served within the boundaries of the state:

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5. *See infra* Parts IV, V.

6. 95 U.S. 714 (1877). The English and American decisions leading to *Pennoyer* are traced in Geoffrey C. Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-62. He concludes that the strands of the decisions were pulled together earlier by Justice Joseph Story in the context of conflict of laws, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834), and transplanted into personal jurisdiction rooted in the Due Process Clause by Justice Stephen J. Field, the primary author of *Pennoyer*. "The basic organization, the intellectual structure, and much of the language of Justice Field's opinion is taken straight from Story . . . ." Hazard, *supra*, at 262; *see also* Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 452-54 (1981). Part of *Pennoyer*'s intellectual lineage is also found in international law principles of sovereignty among nations. *See* Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 929 (2000); Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALA. L. REV. 1237, 1250-54 (1998).

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse.[7]

The *Pennoyer* test endured for nearly seven decades.

During those years, both the Supreme Court and other courts increasingly struggled to apply this seemingly clear test in individual cases for two primary reasons. First, the test was created at a time in American history when travel from state to state was difficult and meaningful; in the twentieth century, interstate travel became cheap and common. Second, the test was created for natural persons, not for fictional entities such as corporations; in the twentieth century, America's business was becoming the domain of corporations. A court could rather easily determine when a natural person was served within state boundaries, but faced difficulties when dealing with a fictional person without a corporeal body. Courts attempted to satisfy *Pennoyer* by finding a corporate defendant had "consented" to suit in a state, was "present" in a state, was "doing business" in a state, or had engaged in "solicitation plus" activity in a state.[8]

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7. *Pennoyer*, 95 U.S. at 720. The Court recognized that personal jurisdiction could also be based on consent, status, and domicile. *Id.* at 720-21, 733. These other bases for personal jurisdiction are not the subject of this Article.

8. The Supreme Court itself later said, "In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations." McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957). This evolution is traced in some detail in sources such as 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 108.42[7][b] (3d ed. 2003); 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1065-66 (3d ed. 2002); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 911, 919-23 (1960). Perhaps the "final" refinement of *Pennoyer* before its abandonment was the "solicitation plus" rule:

> The case of *Green v. Chicago B. & Q. R. Co.* laid down the rule that solicitation of business is not of itself sufficient to constitute such doing of business in the state as to vest the state courts with jurisdiction *in personam* over the foreign corporation. The *International Harvester Co. v. Kentucky* case modified that decision by holding that when solicitation was coupled with other activities, although the activities were incident to interstate commerce, the corporation was doing business within the state.

Recent Decisions, *Conflict of Laws—Personal Jurisdiction over Foreign Corporations*, 21 N.Y.U. L.Q. REV. 442, 443 (1946) (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Green v. Chicago, B. & Q. Ry. Co., 205 U.S. 530 (1907)); *see also* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 806-07 (1995); Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a*

Because the Court kept attempting to fit new and unanticipated factual situations into the *Pennoyer* test, it "produced a 'torrent' of decisions attempting to define the precise circumstances under which a state could hale defendants into its courts consistent with the Due Process Clause."[9] Increasingly from year to year, these decisions sacrificed predictability for flexibility, which in turn encouraged more jurisdictional challenges. Finally, the Supreme Court in 1945 abandoned the *Pennoyer* test in favor of an entirely new test: the test of *International Shoe Co. v. Washington.*[10]

The impetus for the Court's decision to abandon *Pennoyer* in favor of a new test for personal jurisdiction is thus fairly clear. Unfortunately, the origins of the Court's minimum contacts test announced in *International Shoe* are almost entirely obscure. The new test for personal jurisdiction, i.e., when the exercise of in personam jurisdiction by a state court satisfies the requirements of the Due Process Clause,[11] would no longer be service within the boundaries of a state. A state could henceforth serve beyond its boundaries, as

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[12]

State, 32 HARV. L. REV. 871 (1919).

The courts struggled with jurisdictional concepts applied to a corporation acting outside its state of incorporation in part because even long before *Pennoyer*, the judicial attitude toward corporations was as follows:

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

Bank of Augusta v. Earle, 38 U.S. (1 Pet.) 519, 588 (1839).

9. Cameron & Johnson, *supra* note 8, at 785.

10. 326 U.S. 310 (1945).

11. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

12. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The new *International Shoe* test is rooted in the Due Process Clause. Some writers have suggested that choice was a mistake. The Court might have decided instead to look for a limitation on state court exercises of personal jurisdiction in the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *Developments in the Law*, *supra* note 8, at 983-87. The Court might have employed the Full Faith and Credit Clause, U.S. CONST. art IV, § 1. Sarah R. Cebik, Note, *A Riddle Wrapped in a Mystery Inside an Enigma: General Personal Jurisdiction & Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 15-16. The Court might have employed the Tenth Amendment, U.S. CONST. amend. X. Allen R.

Certainly the court carefully chose these words. But chose from where? Did Chief Justice Harlan Fiske Stone, the primary author of the opinion, find "minimum contacts" in an earlier text, or did he invent it? Where did he find "traditional notions of fair play," or "substantial justice"? Tracing the first use and subsequent development of these words or like phrases would shed light on the intended meaning of the new test.

The effort to find an earlier origin of "minimum contacts" is futile. Others have searched for the derivation with no success.[13] I joined the search with the same result. The two-word phrase does not appear in any earlier opinion of the Supreme Court or of any other court. It does not appear in any earlier law review article or commentary. The inescapable conclusion is that Chief Justice Stone created the phrase wholly out of his fertile legal imagination. Consequently, we are left with the bare language of this portion of the test itself. No history aids our interpretation.

A search for the origins of the other portion of the test, i.e., "traditional notions of fair play and substantial justice," is only slightly more successful. Certainly, the *International Shoe* opinion indicates that the phrase is quoted from *Milliken v. Meyer*,[14] a case decided only five years earlier. Yet the phrase plays no part in the *Milliken* Court's holding that domicile provides a sufficient basis for personal jurisdiction; instead, it appears in dicta that personal service outside

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Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 38 (1980). The Court might have refused to place any constitutional limit on state court jurisdiction. Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561 (1995). This Article does not engage in such an inquiry, and accepts that the Court has placed jurisdictional analysis in the Due Process Clause.

As part of its new test, the Court quoted from one of its recent decisions on notice. *See infra* text accompanying notes 14-18. The fact that part of the *International Shoe* test traces back to a notice case may have some meaning. Notice has always been rooted in the fairness notions of the Due Process Clause. That may explain in part why the Court continued to base the law of personal jurisdiction in due process rather than another portion of the Constitution.

13. A heroic effort was made in Cameron & Johnson, *supra* note 8, at 809-15, to find the origin of "minimum contacts." The authors examined precedents, the record, the parties' submissions, internal Court memoranda, and Chief Justice Stone's personal papers; they even corresponded with surviving law clerks of the 1944 Term of Court. All sources yielded nothing.

The same authors also included fascinating accounts of the detailed factual record of the case, *id.* at 786-96, and of the subsequent history of the corporate defendant, *id.* at 796-99.

14. 311 U.S. 457 (1940).

the state satisfies the due process jurisdictional requirement of notice.[15] The *Milliken* opinion in its turn cited *McDonald v. Mabee*[16] as precedential support for the phrase. *McDonald* was a notice case as was *Milliken*. A defendant, although remaining domiciled in the state, had departed with no intention to return, and the case held that notice through service by publication did not satisfy due process.[17] More importantly, the Court did use the terms "fair play" and "substantial justice" in the opinion. Yet the terms were employed separately to support the conclusion that notice was insufficient. The two terms were not connected or even on the same page in the opinion.[18] Thus, *Milliken* is the first case to have used the phrase.

A search of opinions prior to *Milliken* and *McDonald* yields little. The Supreme Court had used the phrase "fair play" in two other opinions shortly before *Milliken*, so a strong likelihood exists that the language in those opinions influenced Chief Justice Stone. Each was authored by another Justice, but Stone was a member of the Court at the time. Two years before *Milliken*, Justice Felix Frankfurter wrote that an administrative agency is required to conduct a fair and open hearing as part of "fair play,"[19] and in the same year as *Milliken*, Chief Justice Charles Evans Hughes wrote that administrative agencies must "accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."[20] Thus, language from

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15. The adequacy of service outside the state

> so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied.

Id. at 463 (citations omitted).

16. 243 U.S. 90 (1917).

17. *Id.* at 91.

18. "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the *fair play* that can be secured only by a pretty close adhesion to fact." *Id.* (emphasis added).

"To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if *substantial justice* is to be done." *Id.* at 92 (emphasis added).

19. *Federal Communication Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940), states, "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion."

20. *Morgan v. United States*, 304 U.S. 1 (1938), uses the phrase twice. The Court wrote first:

> The [vast] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the

administrative law cases appears to have influenced the due process requirements of notice in *Milliken*; *International Shoe* in turn borrowed the language for a new test of personal jurisdiction. Prior to these cases, the phrase "fair play" appears only three times in Supreme Court opinions, and twice earlier in counsel arguments: on none of these occasions does the Court or counsel appear to be using a term of art.[21]

A search of earlier opinions of other courts for the phrase "fair play and substantial justice" yields only some indirect hints of possible sources. "Traditional notions of fair play and substantial justice" appears in no opinion. "Fair play and substantial justice" appears in no opinion. Two early opinions do use the terms "fair play" and "justice" in close proximity.[22] The first decision that actually uses both the phrase "fair play" and the phrase "substantial justice" is a 1914 state decision on priority of creditors, but the opinion does not link the phrases together, and each phrase is used to support a different discussion in the opinion.[23] Later, in 1924, a federal decision on personal jurisdiction uses similar

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> standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play.

Id. at 14-15. Later, the Court employed the two-word phrase again:

> For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Id. at 22.

21. A dissenting opinion in *Wilson v. New*, 243 U.S. 332, 370 (1917) (Day, J., dissenting), argues that a taking of property is a "violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause." Three years earlier, the Court had invalidated a double damages penalty because "the rudiments of fair play required by the 14th Amendment are wanting." Chicago, Milwaukee, & St. Paul Ry. v. Polt, 232 U.S. 165, 168 (1914). The Court in *Klein v. Hoffheimer*, 132 U.S. 367, 378 (1889), said a garnishee must act with "[f]air play and honest dealing." Counsel in two earlier cases argued to the Court that it should use its powers to ensure that their clients receive "fair play." Sinnot v. Davenport, 63 U.S. (1 How.) 227, 237 (1859); Williams v. Gibbes, 58 U.S. (1 How.) 239, 246 (1854).

22. A federal court wrote that requiring an officer charged with an impeachable offense to testify "is abhorrent to our feelings of justice and fair play." United States v. Collins, 25 F. Cas. 545, 550 (C.C.S.D. Ga. 1873) (No. 14,837). A state court wrote that the duty on a plaintiff to plead with clarity "appeals to our sense of justice and fair play." State *ex rel.* Major v. Mo. Pac. Ry., 144 S.W. 1088, 1091 (Mo. 1912) (quoting Shohoney v. Quincy, O. & K.C. Ry., Co., 122 S.W. 1032, 1032 (Mo. 1909)).

23. *McKinney v. Street*, 81 S.E. 757, 758 (N.C. 1914) (quoting Norwood v. Thorp, 64 N.C. 682, 685 (N.C. 1870)), opines that refusing priority to any one of all debts obtained against a party during the same court term is "simply an affirmance of an ancient principle of the common law, adopted in furtherance of justice, to give fair play,

terms in close proximity in denying a motion to quash service.[24] Finally, the closest match of all occurs in a 1941 opinion on notice by the high court of Massachusetts.[25] The language of all of these earlier opinions is suggestive. Chief Justice Stone may have been influenced by any of them. Yet that is speculation. He cited none.

Certainly when Chief Justice Stone wrote of "traditional notions of fair play and substantial justice," he had in mind the traditions of equity jurisprudence. Perhaps the most basic principle of equity has been fairness, which came to mean fairness in each individual case.[26] That tradition fits the *International Shoe* case-by-case test snugly. Indeed, some cases in the early history of the law of personal jurisdiction support a fairness-in-the-individual-case principle. These cases first came together in the Supreme Court's due process personal jurisdiction doctrine in *Pennoyer*.[27] True, *Pennoyer* was not a case-by-case test, yet its equity heritage contributed to the "traditional notions" given substance in *International Shoe*. Consequently, one can say with confidence that the "fair play and substantial justice" portion of the new test traces back into equity. The

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to prevent an indecent rush to get a judgment docketed first." Later on the same page, the court writes, "[T]he court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days . . . ." *Id.* (quoting HERBERT BROOM, BROOM'S LEGAL MAXIMS 128 (8th ed. 1882)).

24. *Knutson v. Campbell River Mills*, 300 F. 241, 242 (W.D. Wash. 1924), concludes, "Fair play and orderly administration of justice require that the defendant answer to the courts of this jurisdiction for the injury complained of."

25. "Such a notice must comply with the requirements of natural justice and of fair play, and must, in conjunction with the hearing, be sufficient to accomplish substantial justice in accordance with the general aim of similar statutory proceedings." Higgins v. Bd. of License Comm'rs, 31 N.E.2d 526, 529 (Mass. 1941). While the language of this opinion is closest to the language of *International Shoe*, it comes after *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), used the phrase as a whole.

26. "The linguistic origins of equity were the Greek *epieikeia* and the Latin *aequitas*. The original classical meaning was 'fairness,' but the Romans added a related notion, the ideal of a 'fairness' that transcends that strict positive law in those individual situations where a mechanical application of a rule of law would be unjust." DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 184 (1999); *see also* PETER M. HORSFIELD, EQUITY IN A NUTSHELL 1 (1960) ("Much of such natural justice cannot be judicially enforced but must be left to the individual conscience to decide what is right and fair.").

27. "Some of the cases justified nonenforcement of sister state judgments by relying on natural law notions of fairness, laying the foundation for the Supreme Court's use of the due process clause in *Pennoyer v. Neff*." John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1023 (1983). "Traditionally, equity would not direct a party to take actions outside its territorial jurisdiction . . . . The availability of equitable relief also was hedged by doctrines of fairness and justice." JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 497-98 (8th ed. 2000); *see also* 4 WRIGHT & MILLER, *supra* note 8, § 1064, at 334.

realization that the phrase had its roots in equity leads to the conclusion that the *International Shoe* test is one of doing fairness in the individual case. Yet that realization is not a revelation, as that reading of the test is apparent from the plain meaning of the words of the test itself.[28] So tracing the test back into equity yields little of substance.

This Part has attempted to discover the origins of the words and phrases used in the *International Shoe* test. The result was some interesting speculation, but no definitive lineage was found beyond the conclusion that a major portion of the test traces back into traditional equity jurisprudence. The next Part of this Article attempts to interpret the words of the test itself.

III. THE *INTERNATIONAL SHOE* TEST AND ANALYSIS

A. The Test as Originally Stated

The Supreme Court, in 1945, decided to end incrementalism in the constitutional supervision of exercises of state personal jurisdiction by abandoning the rule of *Pennoyer v. Neff*,[29] which required that a nonconsenting nonresident be served within the boundaries of the state, in favor of the brand-new rule of *International Shoe Co. v. Washington*,[30] which allowed a state to assert jurisdiction over a defendant served out of state in appropriate circumstances. To determine what circumstances are appropriate is to state the new rule. Looking to the language of the opinion, we find what has come to be called the minimum contacts test:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[31]

This of course is the language that has since been universally accepted as the law of personal jurisdiction.

Another statement of the new test—in differing language—is found four pages later in the opinion:

> It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to

28. *See infra* text accompanying notes 45-46.
29. 95 U.S. 714 (1877).
30. 326 U.S. 310 (1945); *see supra* note 7.
31. *Int'l Shoe*, 326 U.S. at 316.

> our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.[32]

One can quickly compare the two statements to see that the former refers to "minimum contacts," and the latter refers to "sufficient contacts or ties." The former refers to "traditional notions of fair play and substantial justice," and the latter refers to "our traditional conception of fair play and substantial justice." The most interesting difference is that the latter inserts "reasonable and just" into the middle of the phrase.

While the former statement is clearly the correct one to identify as the new law in the area because it is included in the Court's discussion of the law instead of its later factual application,[33] we can gain insight from the latter statement. First, even though the Court creates the "minimum contacts test" as the law, it does not even use the term to decide the case. Instead, it mentions "sufficient contacts or ties."[34] This should give us pause in identifying "minimum contacts" as a term of art. Second, even though the new law is that a defendant must have minimum contacts "such that" jurisdiction does not offend "traditional notions of fair play and substantial justice,"[35] four pages later jurisdiction over this defendant is found to be "reasonable and just," with "fair play and substantial justice" in a subordinate clause.[36]

Even casting aside the second statement of the test as being one of factual application rather than law, we find two additional, alternative statements of what the law requires—and both are in the law section of the opinion. First, after rejecting the old "presence" test, the Court indicates that the "demands of due process . . . may be met by such contacts of the corporation with the state of the forum as make it reasonable" to require defense of a suit there.[37] Here "minimum contacts" is replaced by "such contacts," and "fair play and substantial justice" is supplanted by "reasonable." Second, at another point in the opinion the Court says, "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly

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32. *Id.* at 320.

33. The Court's opinion in *International Shoe* can be dissected cleanly. Following an opening paragraph stating the issues to be decided, *id.* at 311, the Court states the facts of the case, *id.* at 311-15, sketches out defendant/appellant's argument, *id.* at 315-16, states the law, *id.* at 316-19, applies the facts of the case to the new law, *id.* at 320-21, and reaches its conclusion, *id.* at 321-22.

34. *Id.* at 320.

35. *Id.* at 316.

36. *Id.* at 320.

37. *Id.* at 317.

administration of the laws . . . ."[38] Here, "minimum contacts" is replaced entirely by "quality and nature of the activity," and "fair play and substantial justice" becomes "fair and orderly administration of the laws."

Thus, the opinion states or applies the new law no fewer than four times, and uses different language every time. One can hardly believe that the Court can create a brand-new test for a major area of the law and then backtrack on it three times in the next four pages. Either this is truly sloppy writing or the Court never intended for "minimum contacts" to be a precise legal test. All of this lends credence to the conclusion that the *International Shoe* test is in its essence simply a test of reasonableness or fairness.[39]

Some commentators have argued the new test was nothing new, as "minimum contacts" requires the same analysis as the rejected tests of "presence" or "doing business."[40] This Article does not follow that lead. Because *International Shoe* uses new language to create a new test for personal jurisdiction, the Article takes the Court's efforts at face value, and proceeds to analyze the new "minimum contacts" test.

B. Analysis of the Original "Minimum Contacts" Test

What test has the Court wrought? Two observations are fair and accurate. First, the Court created a unitary test. Although in recent years the Court has claimed the test to be two-part, or even multi-part,[41] the original, unpolished *International Shoe* test is clearly a one-step, unitary test. A court is not required to find "minimum contacts" *and* "fair play and substantial justice." Neither is a court required to find "minimum contacts" *or* "fair play and substantial justice." The opinion requires a court find "minimum contacts with [the state] *such that* the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[42] The connective words "such that" meld the test

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38. *Id.* at 319.

39. *See infra* text accompanying notes 45-49.

40. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 55 (1990); Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1184-85; Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 201 (1998) ("In retrospect, the Court seems simply to have replaced the formalist abstractions of presence and consent with a different abstraction: contacts."); John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591, 597 (1995); *Developments in the Law*, *supra* note 8, at 923.

41. *See infra* Part IV.

42. *Int'l Shoe*, 326 U.S. at 316 (emphasis added). This is the generally accepted test from *International Shoe*. Even in the other three variants of the test in the opinion,

into a single, unitary whole.[43] This conclusion is reinforced by the language on the next page of the Court's opinion: the demands of due process "may be met by such contacts . . . as make it reasonable . . . to require the corporation to defend the particular suit which is brought there."[44] In other words, the contacts must make jurisdiction reasonable, just as under the initial statement, the minimum contacts must make the exercise of jurisdiction consonant with fair play and substantial justice. That is a unitary test.

Second, what is the test? Fairness. Dressed up in fancy word clothing, the test is nothing more—and nothing less—than that a court should consider all the circumstances of the case and decide whether jurisdiction over the defendant by that state in that case strikes the court as fair. All four of the Court's formulations of the test are variants of the same fairness theme.[45] Others have agreed that the sum of the *International Shoe* test, whether it is labeled the minimum contacts test or something else, is basic fairness.[46] Probably the most

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the test is unitary. *See supra* notes 30-39 and accompanying text.

43. *Cf.* McMunigal, *supra* note 40, at 226; Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 759 (1995).

44. *Int'l Shoe*, 326 U.S. at 317.

45. The Court states four variants of the same test. The defendant must "have certain minimum contacts" such as not to "offend . . . fair play and substantial justice." *Id.* at 316. Due process demands "such contacts . . . as make it reasonable." *Id.* at 317. Due process depends on the "quality and nature of the activity in relation to the fair and orderly administration of the laws." *Id.* at 319. This defendant established "sufficient contacts or ties . . . to make it reasonable and just according to . . . fair play and substantial justice." *Id.* at 320; *see supra* text accompanying notes 30-38.

46. Borchers, *supra* note 12, at 580; Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 103-04 (1992); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 709-10 (1983) ("Chief Justice Stone's calculus did not measure fairness directly, according to the forum's convenience to a given defendant, but only indirectly, through measures of defendant-forum contacts designed to ensure that a forum would be at least minimally 'fair' as between the parties . . . ."); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 587; *Developments in the Law*, *supra* note 8, at 918; Michael D. Wellington, Comment, *Minimum Contacts Confused and Reconfused—Variations on a Theme by* International Shoe*—Or, Is this Trip Necessary?*, 7 SAN DIEGO L. REV. 304, 310 (1970); *cf.* Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 934 (1995), where the authors write of "the frank and open use of a balancing process" as a "pragmatic calculus [that] was given the title 'minimum contacts.'"

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952), decided only seven years later, with five of the *International Shoe* Justices still on the Court,

unfortunate error in reading *International Shoe* is concluding that the opinion states a new "minimum contacts" test for personal jurisdiction. A far more accurate reading is that the opinion creates a new "fair play" test.

Perhaps an even better summary of the test would be to say that the exercise of jurisdiction by the state over the defendant in a particular case must be "reasonable." Indeed, the opinion itself states that the contacts must make jurisdiction "reasonable," with no reference to "fair play,"[47] and in its only factual application uses both concepts—with reasonable first and fair play second.[48] Also, others have summarized the test as one of reasonableness.[49] And yet in the end, that alternative formulation makes no difference. What is fair is reasonable, and what is reasonable is fair. The test is the same.

Why then would the Court, through Chief Justice Stone, not simply say the test is reasonableness or fairness? Various reasons come to mind. First, the prospect of replacing the rigid, time-honored rule of *Pennoyer* with a test of "we'll let you know what strikes us as fair" must have been particularly problematical. Chief Justice Stone likely dressed up the test with his newly-created phrase "minimum contacts" and added quotations and references to precedent for "traditional notions of fair play and substantial justice" as the solution. Second, to say a rule of law is "fairness" is hardly law at all. Jurisdiction turning on factual fairness—just as negligence turning on reasonable conduct—is more appropriately decided by a jury than a judge. Juries are not,

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states, "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation." *See also* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 462 (1st Cir. 1990).

47. *Int'l Shoe*, 326 U.S. at 317.

48. The defendant's "operations establish sufficient contacts or ties . . . to make it reasonable and just according to our traditional conception of fair play and substantial justice" to permit a suit. *Id.* at 320.

49.

A defendant doing an act in a state, or causing effects in a state by doing an act elsewhere, is subject to jurisdiction in the state unless jurisdiction is "unreasonable." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36 (1971). What is likely the first commentary on the case opined, "The practical test now laid down seeks to determine . . . do the contacts of the corporation with the forum state make it reasonable to require the corporation to defend a suit brought there." Recent Decisions, *supra* note 8, at 445. Lower court judges have recognized this as well. *E.g.*, Hutter N. Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968) ("Whether sufficient minimum contacts exist cannot be answered by applying a formula or rule of thumb, but by ascertaining what is fair and reasonable in the circumstances of the particular situation."); S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968) ("But 'traditional notions of fair play and substantial justice' is hardly a precise and definitive standard; it gives us no more basis for judging than the highly amorphous and ultimately subjective standard of reasonableness."); LaMarca v. Pak-Mor Mfg. Co., 735 N.E.2d 883, 888 (N.Y. 2000).

however, available on preliminary motions to dismiss. Third, Chief Justice Stone must have been aware that creation of an apparent rule of law was vital to future stability in the area. Courts and commentators can respect a rule of law, even one that is far less than it seems, but not a claim that the Court will know fairness when it sees it.[50]

The lone dissenter in *International Shoe*, Justice Hugo Black, was concerned in two ways with the new test: vagueness, and usurpation of power by the judiciary at the expense of states and other branches of the federal government.[51] As to the former concern, he complained that the Court had "announced vague Constitutional criteria" and "introduced uncertain elements confusing the simple pattern" by its new "elastic standards."[52] He was correct. The years have proved him even more prescient.[53] The words of the new "test" have been described on a roughly escalating scale of criticism as "vague,"[54] "ambiguous,"[55] merely a "guide" to the facts,[56] only a "statement of policy,"[57] more "an art than a science,"[58] a "manipulable" test of "uncertainty and unpredictability,"[59] "vessels of unknown size,"[60] and "empty vessels."[61] The

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50. Justice Potter Stewart received much negative commentary over the years for writing honestly of obscenity that "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Early commentary on *International Shoe* was generally favorable. *See, e.g.*, Note, *The Growth of the* International Shoe *Doctrine*, 16 U. CHI. L. REV. 523, 533 (1949) ("The broad standards of the *International Shoe* case may be expected to prevail in a mature legal system."); Recent Decisions, *supra* note 8, at 445 ("Certainly the standards adopted by the Supreme Court provide a realistic approach to this jurisdictional problem.").

51. *Int'l Shoe*, 326 U.S. at 323 (Black, J., dissenting).

52. *Id.* at 325 (Black, J., dissenting).

53. *See infra* Parts IV-V.

54. Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 14 (1993) ("Obviously, the term 'minimum contacts' is far too vague to guide the decision of real-life cases. Nor does it guarantee fair decisions.").

55. Jay, *supra* note 6, at 473.

56. 4 WRIGHT & MILLER, *supra* note 8, § 1067, at 399.

57. 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, 591 (1958). Kurland also asserts, "The *International Shoe* case, like *Erie R.R. v. Tompkins*, served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow." *Id.* at 586.

58. Donatelli v. Nat'l Hockey League, 893 F.2d 459, 468 n.7 (1st Cir. 1990).

59. McMunigal, *supra* note 40, at 218.

60. Kalo, *supra* note 40, at 1184.

61. "The primary error was, of course, the emptiness of the famous language 'certain minimum contacts' so that the assertion of state court power is 'fair play and substantial justice.' I call it 'language' because it is too vacuous to be considered 'doctrine' or 'norm' or even 'general norm.' . . . [T]he opinion means that the contacts

Supreme Court itself has attempted to sharpen the test several times, and the lower courts in turn have devised many glosses on the test in their efforts to interpret and apply it.[62] A fair summary of the *International Shoe* test is that it is a statement of conclusion rather than reasoning.[63] The famous minimum contacts test is no more than an *ipse dixit* in each case.

Justice Black also objected because the new test placed too much discretion in the hands of judges to invalidate state policies. While he particularly objected to the possibility of curtailment of a state's regulatory powers over corporations operating within its borders, he also complained that the new test would allow judges to strike down a state's regulations based on their personal ideas of what is "justice" or what is "undesirable":

> There is a strong emotional appeal in the words "fair play", "justice", and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment . . . . No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. . . . For application of this natural law concept, whether under the terms "reasonableness", "justice", or "fair play", makes judges the supreme arbiters of the country's laws and practices. . . . "I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."[64]

On this point too, Justice Black was correct.

The irony is that the Court sacrificed predictability for fairness and now the result is only what one judge—or a majority of judges—concludes is fair in an individual case. The minimum contacts test certainly does not guarantee "fair" decisions. Instead, it guarantees that each case will turn on what one judge thinks fair. While this does harken back to the test's roots in equity, which allowed the chancellor to do justice on the facts of the case, it hardly qualifies as

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must be sufficient in order for jurisdiction to be fair. . . . We can also quickly dismiss any idea that the phrases 'fair play' and 'substantial justice' have different meanings. Nothing in *International Shoe* or its progeny offers any ground for distinguishing 'fair' and 'just.' They seem to be two identical empty vessels waiting for contents." Cappalli, *supra* note 46, at 103-04.

62. *See infra* Parts IV-V. To this point, this Article is discussing the test as announced in *International Shoe*, not the later developments.

63. Kurland, *supra* note 57, at 623.

64. Int'l Shoe Co. v. Washington, 326 U.S. 310, 325-26 (1945) (Black, J., dissenting). The last sentence is from *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

a rule of law. Even in equity, the law depends on the appearance of doing justice, not individual whim.[65]

One might think the accretion of decisions over the years would lessen or even eliminate this problem, but precedents have helped little to solidify the rule, because the test is personal predilection, not law.[66] One of the Supreme Court's more recent personal jurisdiction decisions presents a perfect example. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court decided whether the exercise of state court jurisdiction satisfied the *International Shoe* fairness test.[67] The eleven-page opinion, authored by Justice Harry Blackmun, prompted a ten-page dissent authored by Justice William Brennan. An accurate summary of the two opinions is that Justice Blackmun said, "I think jurisdiction is unfair," and Justice Brennan said, "I think jurisdiction is fair." *Helicopteros* is an object lesson that in the absence of a meaningful rule of law, a judge can justify any result that seems reasonable to him or her.[68] Frankly, I like what some judges think is reasonable, and am mystified and mortified by what other judges think is reasonable. In the Court's most recent statement on personal jurisdiction, Justice Antonin Scalia wrote that "traditional standards of fair play and substantial justice" can be found in "traditional doctrines in this country, including current state-court practices"; he objected to the concurrence's proposed application of a fairness standard because it would require the test to be reformulated as "*our* notions of fair play and substantial justice."[69] Justice Scalia is correct that the jurisdictional standard might well be recast as "*our* notions." He is wrong that the concept of "traditional notions" is any more firm. Judges have had, from the day of *International Shoe*, largely unbounded discretion to uphold or to reject a state's assertion of jurisdiction.[70] Another, less

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65. Sir Thomas More expressed well the need that justice appear to be done:

> If you take away laws and leave everything free to the judges, they will either command or forbid nothing, in which case judges will be useless, or they will rule as their own nature leads and order whatever pleases them, in which case the people will be in no wise more free but worse off, in a condition of slavery, since they will have to submit, not to settled and certain laws, but to uncertain whims changing from day to day. And this is bound to happen even under the best judges . . . .

2 THE REPORTS OF SIR JOHN SPELMAN 81 (J. H. Baker ed., 1978).

66. *See infra* text accompanying notes 67-70.

67. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 409 (1984).

68. *See* Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 447-51 (1991); Heiser, *supra* note 6, at 927.

69. Burnham v. Superior Court, 495 U.S. 604, 623 (1990).

70. *See* Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and its Progeny*, 28 U.C. DAVIS L. REV. 965, 985 (1995); Silberman, *supra* note 43, at 755.

palatable, way to state the matter is that judges have almost absolute power in the area. That is exactly what Justice Black feared.

C. *Effects of the New Test*

During October Term, 1945, the Supreme Court must have been eager to refashion the law of personal jurisdiction. In the sixty-eight years since its decision in *Pennoyer*, the Court had revisited the area at least fifty-three times.[71] As a consequence, the Court replaced *Pennoyer*, and its many modifications, with *International Shoe*.

The new test has succeeded over the years, if the standard of success is the number of times the Court has felt the need to return to the area. In the fifty-eight year reign of *International Shoe*, the Court has revisited the area of personal jurisdiction only twenty times.[72] Even more remarkable is that the Court has not returned to the minimum contacts test for sixteen years.[73] The Court has cleared its personal jurisdiction docket.

The price of this success to the national judicial system has been huge. Adaptation of the rigid rule of *Pennoyer* to unexpected facts could come only from the Court that created the rule. Adaptation of the flaccid rule of *International Shoe* to the facts of a case is almost never needed as the basic rule is that the court should do fairness on the facts. Consequently, the Supreme Court has eliminated its "torrent" of once-a-year decisions by requiring lower courts to decide thousands of cases annually.[74] What a trial judge, or even an appellate panel, will think is fair is often unpredictable.[75] Because the decision is unpredictable, potential plaintiffs are encouraged to try their luck in choice of forum, and defendants are encouraged to try their luck in challenging that forum choice.[76] Both are discouraged from settling.[77] The Supreme Court itself has not

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71. Cameron & Johnson, *supra* note 8, at 785 n.57. One commentator refers to a "torrent" of opinions attempting to round out the law in the area. Borchers, *supra* note 40, at 43.

72. Cameron & Johnson, *supra* note 8, at 785 n.57, 817.

73. The last Supreme Court decision addressing the minimum contacts test was *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). The Court's later decision in *Burnham*, 495 U.S. at 604, involved service within a state, not long-arm jurisdiction.

74. *See infra* note 113.

75. *E.g.*, Borchers, *supra* note 40, at 102 ("Worse than the strange results, however, is the lack of predictability and the resources consumed litigating the most elementary of questions: Where can I file suit?"); Juenger, *supra* note 54, at 14 ("far too vague to guide the decisions of real-life cases"); Perschbacher, *supra* note 46, at 629 ("broad principles using vague terms that are difficult to apply in specific cases"); *see infra* note 116.

76. *See* Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 395 (1992);

been able to step back entirely and on occasion has felt the need to clarify and inject some predictability into the test—or perhaps just to assert a different understanding of what is fair on the facts of a case.[78] The lower courts have clearly demonstrated that they need more certainty, predictability, and ease of application in the area by placing a plethora of glosses on the test.[79] All of these results should have been foreseeable to the Court at the time it decided *International Shoe*.

IV. THE TEST CANNOT ENDURE: DEVELOPMENT BY THE SUPREME COURT

Nearly six decades have passed since the Supreme Court established the minimum contacts/fair play test. One might expect that a court, having created a test that is more exhortation than law, would later attempt to make it more certain and predictable. Indeed, the *International Shoe* opinion itself offers a grid created from two variables to assist the decision of future cases.[80]

Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992) ("Because outcomes are often difficult to predict, parties are inclined to litigate the question of personal jurisdiction in every case where the issue is not crystal clear."); *infra* note 113. One commentator concluded, "Judged by its internal costs, our current law of personal jurisdiction is a disaster." Borchers, *supra* note 12, at 582.

77. *E.g.*, Borchers, *supra* note 12, at 584.

78. *See infra* Part IV.

79. *See infra* Part V.

80. While in form writing of the discarded "presence" test for jurisdiction over a corporation, the *International Shoe* Court offers the first guidance for application of the new test. The opinion mentions four possible combinations of two variables. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317-18 (1945). The first variable is whether the defendant's contacts with a state have been continuous and systematic or have been single or isolated. *Id.* at 317. The second variable is whether the plaintiff's claim arises out of the contact(s) with the state. *Id.* Accordingly, the four possible combinations are (1) defendant has systematic and continuous contacts with the state and plaintiff's claim arises from them, (2) defendant has systematic and continuous contacts with the state and plaintiff's claim arises elsewhere, (3) defendant has only a single contact or isolated contacts with the state and plaintiff's claim arises from it, and (4) defendant has only a single contact or isolated contacts with the state and plaintiff's claim arises elsewhere. The Court suggests strongly that personal jurisdiction will exist, i.e., the minimum contacts test will be satisfied, in the first three situations but not the fourth. *Id.* at 317-18.

These combinations have been used in several state cases as a guide to decision. *See infra* note 143.

A. Developments in the Minimum Contacts/Fair Play Test 1945 to Present

The Court has attempted to clarify the test and its application in nineteen cases since 1945. These opinions expound and expand on the test, but never express any interest in expunging it. After six decades of "development," the minimum contacts test remains the linchpin of personal jurisdiction.[81]

Yet instead of crystalizing the law in the area, these decisions have made the law of personal jurisdiction more fantastic. The minimum contacts test today is no more certain and predictable than it was in 1945, and may well be worse.[82] This Part will explore that phenomenon by highlighting only a few of the Court's attempts to solidify the law of personal jurisdiction. It will not follow the usual pattern of analyzing and commenting on each of the twenty decisions in turn. That has already been well done.[83] This Part instead plucks from the stream of the Court's judicial process four decisions that are important in terms of attempts to contour and reshape the minimum contacts test. After highlighting these four cases, the Article turns to an analysis of the status of the law of personal jurisdiction today.

The first noteworthy development is the little-heralded decision in *Travelers Health Ass'n v. Virginia*,[84] decided only five years after *International Shoe*. Justice Black, the lone dissenter in *International Shoe*, wrote the opinion, deciding that Virginia could assert personal jurisdiction over nonresident insurance companies selling certificates to Virginia residents.[85] The opinion gives the first guidance as to some considerations a court should use in deciding a jurisdiction challenge, which is an improvement over the inchoate "traditional notions of fair play and substantial justice." In *Travelers Health*, the Court considered not only "the contacts and ties of appellants with Virginia residents,"

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81. Cebik, *supra* note 12, at 5-6. Sometimes this is true more in word than in practice. For example, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), the Court announced, "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Yet the initial portion of the opinion states, "The question presented is whether this exercise of long-arm jurisdiction offended 'traditional conception[s] of fair play and substantial justice' embodied in the Due Process Clause of the Fourteenth Amendment." *Id.* at 464. Two things should be noted here: (1) the Court's call of the issue in the case does not even mention "minimum contacts," and (2) the opinion quotes the test formulation from the application section of *International Shoe* rather than the law section. *See supra* text accompanying notes 30-36.

82. *See infra* Part IV.B.

83. *See, e.g.*, Borchers, *supra* note 40, at 56-87; Heiser, *supra* note 6, at 918-29; Kurland, *supra* note 57, at 586-623.

84. 339 U.S. 643 (1950).

85. *Id.* at 646-47.

but also the "state's interest in faithful observance of the certificate obligations," the interest of plaintiffs in having a convenient local forum, and the interests of witnesses in being able to testify in a convenient forum.[86] Justice Black blended these additional considerations into the mix with only the simple notation that they "have been given great weight in applying the doctrine of *forum non conveniens*," and then concluded Virginia's assertion of personal jurisdiction "is consistent with 'fair play and substantial justice' and is not offensive to the Due Process Clause."[87]

This opinion is completely consistent with *International Shoe*. The ultimate legal conclusion was that jurisdiction was fair—with only a passing nod to "minimum contacts."[88] While the additional considerations the Court used to reach a decision on "fair play and substantial justice" were not made explicit in *International Shoe*, certainly they would be among the factors any court would take into account in deciding whether jurisdiction in an individual case represents "fair play and substantial justice." *Travelers Health* remains of interest today because it is the first opinion to make consideration of such factors explicit.

Eight years after *Travelers Health* the Court decided *Hanson v. Denckla*.[89] The Court emphasized that the trend toward broader assertions of jurisdiction did not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts" which are not based on convenience but instead "are a consequence of territorial limitations on the power of the respective States."[90]

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86. *Id.* at 648-49; *see also* McMunigal, *supra* note 40, at 196-97.

87. *Travelers Health*, 339 U.S. at 649.

88. *Id. Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), is also of interest since it was written only one year after *International Shoe*. The opinion states, "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in *International Shoe Co. v. Washington*." *Id.* at 445.

89. 357 U.S. 235 (1958).

90. *Id.* at 251. This language is the high water mark of the philosophy carried over from *Pennoyer* that state jurisdictional limits are based in whole or in part on the sovereign rights and limits of the states. *See infra* Part VII. The other case highlighting the sovereignty of the states is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That case, while not contributing new ideas or language to the minimum contacts/fair play test (and so not included in text here), is important in the history of the minimum contacts test for another reason. From the opening of extraterritorial jurisdiction in *International Shoe* in 1945, and over the next three-and-one-half decades, the long arms of the state courts had grown longer and longer. While the states may have been slow at first to realize the extent of their new power, by 1980 they were asserting their reach into other states with a vengeance. Seemingly each new decision found jurisdiction on fewer contacts with the state. The trend of the law of personal jurisdiction was savagely expansionary. *World-Wide Volkswagen* brought this trend to a screeching halt. The Supreme Court showed it was serious about state boundaries and examining

Consequently, said the Court, the necessary contact of a defendant with a state must be found in "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."[91] Here we have the next assistance to lower courts as they struggle to decide what is fair: a defendant must purposefully (voluntarily) avail itself of the benefits and protections of the laws of a state for that state to assert jurisdiction over it. Presumably, when a defendant purposefully avails itself of entry into a state, it can reasonably anticipate being haled into a court there, so this idea in *Hanson* is likely the genesis of the statement in later opinions that a defendant's expectations of being haled into court in a state are meaningful.[92] Because anticipation of a possible suit inseparably follows purposeful entry into a state, the guidance that a defendant must expect being haled into court in a state adds nothing beyond a recognition that the defendant has voluntarily availed itself of the benefits and protections of state laws, which in turn is no more than a particularized aspect of fairness.[93]

While *Hanson* and its progeny celebrate state sovereignty and emphasize purposeful availment, the next major development denigrates state sovereignty and emphasizes convenience as the overriding concern. *Burger King Corp. v. Rudzewicz*[94] is important primarily because it fractures the unitary *International Shoe* test into halves: a minimum contacts half and a fairness half.

The *Burger King* opinion, authored by Justice Brennan, began analysis by collecting precedents in an attempt to give meaning to "minimum contacts."[95] The opinion summarized these precedents, stating that minimum contacts are satisfied when a "defendant purposefully avails itself of the privilege of conducting activities within the forum state."[96] It even asserted that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[97] The important portion of the opinion was not, however, about minimum contacts. Instead, it was the following language:

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the defendant's contacts with the state on a case-by-case basis. The outer limits of state jurisdiction based on minimum contacts was reached. Pre-*World-Wide Volkswagen*, plaintiffs won a large majority of the jurisdictional challenges. Post-*World-Wide Volkswagen*, defendants win half of the jurisdictional challenges. For the two-plus decades after *World-Wide Volkswagen*, all decisions have become fact-bound.

91. *Hanson*, 357 U.S. at 253.

92. *See World-Wide Volkswagen*, 444 U.S. at 297; Kulko v. Superior Court, 436 U.S. 84, 97-98 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

93. *See* Jay, *supra* note 6, at 466.

94. 471 U.S. 462 (1985).

95. *Id.* at 471-75.

96. *Id.* at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

97. *Id.* at 474; *see supra* note 81.

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." . . . Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies."[98]

As a result, a court hearing a jurisdictional challenge must address two issues: minimum contacts, plus fair play and substantial justice. "Minimum contacts" means some sort of purposeful availment of the benefits and protections of the forum state, which is essentially the analysis of *Hanson*. "Fair play and substantial justice" refers to the five-step consideration of fairness that was begun in *Travelers Health*.[99] The use of these five considerations is not surprising because many precedent cases had mentioned one or more of them.[100] Indeed, the opinion places each of the five considerations into quotation marks to demonstrate that each has support in precedent. Nor is it surprising that Justice Brennan creates what amounts to a two-step test: he advocated such a sharp change in personal jurisdiction standards in earlier dissents.[101] What is

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98. *Id.* at 476-77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

99. Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950). *Travelers Health* mentions the interests of the plaintiff, the interests of the forum state, and the convenience interest of witnesses. *See supra* text accompanying notes 84-88. A comparison with the *Burger King* list of considerations shows the convenience interest of witnesses has been dropped, but the other two interests have been retained and expanded, and three additional considerations have been added.

100. For example, *World-Wide Volkswagen*, 444 U.S. at 292, mentions all five as considerations in reaching a decision on "'reasonableness' or 'fairness.'"

101. In *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting), Justice Brennan says in dissent, "[T]he standards enunciated by [*International Shoe* and its progeny] may already be obsolete as constitutional boundaries." He argues that the cases have been too concerned with a defendant's contacts with a state, and the law should be that "minimum contacts must exist 'among the *parties*, the contested transaction, and the forum State.' The contacts between any two of these should not be determinative." *Id.* at 309-10 (Brennan, J., dissenting) (quoting Shaffer v. Heitner, 433 U.S. 186, 220 (1977)).

Some commentators had previously analyzed the test as being two-fold: a power test and a fairness test. *See* Kevin Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 413-29 (1981); Bruce

surprising is that he gathered the votes of five other Justices to sign on to his previously idiosyncratic view that the test should be fractured into two parts. This division of the test for personal jurisdiction into two branches, a power branch and a fairness branch, was greeted with no applause and a loud round of boos.[102]

The Court seems to be committed to the division. Two years after *Burger King*, in *Asahi Metal Industry Co. v. Superior Court*,[103] the Justices split on the constitutional validity of an assertion of jurisdiction based on placing a product into the stream of commerce. Yet the bifurcation of the minimum contacts test did not split the Court at all: the Justices were unanimous in considering minimum contacts and fair play separately. Justice Sandra Day O'Connor, writing the opinion, cleaved the two parts cleanly. In Part II.A of the opinion,

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Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 730 (1981); Winton D. Woods, Pennoyer*'s Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 881-82 (1978) (splitting first part into two for three-part test); Comment, *Contacts and Fairness: A Dual Test for Personal Jurisdiction*, 11 STAN. L. REV. 344, 345 (1959).

102. Critical analysis approaches from many directions. One criticism is that the split of the test is neither acknowledged nor justified by the Court. McMunigal, *supra* note 40, at 226. Another criticism is that the separate reasonableness part "tends to suggest a free-form 'fairness' inquiry where additional criteria such as choice of law, over-all convenience, and specific individual characteristics might be considered." Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 581 (1991). One commentator argues that the two parts of the test merely repeat each other. Jay Conison, *What Does Due Process Have To Do with Jurisdiction*, 46 RUTGERS L. REV. 1071, 1200 (1994). Others complain that the five considerations assist the court no more than "fair play and substantial justice." Borchers, *supra* note 40, at 77; Heiser, *supra* note 6, at 925-26; Bruce Posnak, *The Court Doesn't Know its* Asahi *from its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 891-95 (1990).

Others attack the Court's new analysis on the ground that it allows courts to make arbitrary decisions and reach any result desired in an individual case. *E.g.*, Abramson, *supra* note 68, at 447-51; Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 845 (1988). This criticism I doubt, however, as it implies that only since *Burger King* have courts been allowed to decide on idiosyncratic notions of fairness. They have been free to do so since *International Shoe*. *See supra* text accompanying notes 64-70.

Even prior to *Burger King*, commentators criticized *World-Wide Volkswagen* for considering fairness factors separate from minimum contacts. Jay, supra note 6, at 463 (stating that "minimum contacts" separated from "fair play and substantial justice" means little).

103. 480 U.S. 102 (1987).

she concluded that placing a product into the stream of commerce does not satisfy "minimum contacts," and in Part II.B she further concluded that the exercise of jurisdiction over the defendant does not satisfy "traditional notions of fair play and substantial justice."[104] Concurring, Justice Brennan argued that placing a product into the stream of commerce would satisfy the requirement of minimum contacts even though the facts of the case do not establish "fair play and substantial justice."[105] In other words, jurisdiction cannot be asserted if it is unfair even though it meets the minimum contacts test.[106] Justice John Paul Stevens, in concurrence, agreed that jurisdiction would be "unreasonable and unfair," but he did not join Part II.A of the O'Connor opinion, in part because the Court should not have even considered minimum contacts! He wrote that "it is not necessary to the Court's decision. An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional."[107]

The last opinion is the most remarkable. Justice Stevens—and Justices Byron White and Harry Blackmun, who signed his opinion—asserted that the test for personal jurisdiction is two-part: (1) minimum contacts/purposeful availment, and (2) reasonable and fair.[108] Each part is equally important. When "fair play and substantial justice" is clearly not satisfied, they say a court engages in dictum even to consider "minimum contacts."[109] In one sense, that view turns the "minimum contacts test" completely onto its head; in another sense, it does no more than apply the *International Shoe* test as it was originally intended, as a simple test of fairness.[110]

For sixteen years and counting, *Asahi* is the Court's final word on the test for personal jurisdiction established in *International Shoe*.

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104. Justice O'Connor's opinion is unanimous on the factual section, *id.* at 105-08, musters only four votes for a discussion concluding that placing a product into the stream of commerce does not establish "minimum contacts," *id.* at 108-13, and then gathers eight votes for the view that assertion of jurisdiction over the defendant violates "traditional notions of fair play and substantial justice," *id.* at 113-16.

105. *Id.* at 116 (Brennan, J., concurring).

106. "This is one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Id.* at 116 (Brennan, J., concurring) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1995)) (alterations in original).

107. *Id.* at 121 (Stevens, J., concurring). Despite refusing to consider minimum contacts, Justice Stevens does opine that placing a product regularly into the stream of commerce would satisfy purposeful availment. *Id.* at 122 (Stevens, J., concurring).

108. *Id.* (Stevens, J., concurring).

109. *Id.* at 121 (Stevens, J., concurring).

110. *See supra* text accompanying notes 45-49.

B. The Residue: The Minimum Contacts/Fair Play Test Today

Since *International Shoe* created the minimum contacts/fair play test in 1945 for constitutional supervision of assertions of state court personal jurisdiction, the Supreme Court and lower courts have labored to refine and clarify the test. While a small minority of commentators have declared these efforts a success,[111] the great majority of commentators have branded these efforts a dismal failure.[112]

Decision-making in the individual case is no easier today than in 1945, so the transactional costs of litigation on the threshold issue of personal jurisdiction remain high: hundreds of appellate decisions with little or no precedential value are rendered annually.[113] This is the inevitable result of the *International Shoe* decision to require courts to engage in a pointillist process[114] with little guidance

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111. *See, e.g.*, Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 866 n.2 (1995); Silberman, *supra* note 43.

112. *See, e.g.*, Cappalli, *supra* note 46, at 109 (stating that the doctrine has mutated "into its current, incoherent form"); Heiser, *supra* note 6, at 915 ("Despite these several attempts at judicial fine-tuning, the doctrine today is unwieldy, incoherent, and unpredictable."); Lewis, Jr., *supra* note 46, at 699 (decisions include notions "vague, and counterproductive and unworkable"); Lawrence W. Moore, S.J., *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 598 (2001) (stating that the minimum contacts structure is now "architecturally grotesque"); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 434 (1998) ("After fifty years of doctrinal development, the minimum contacts test remains so fact-specific and uncertain that the outcome of the jurisdictional analysis in any particular case is unpredictable.").

113. Statistics from state courts are difficult to obtain, and those statistics that exist count only reported cases. These numbers severely underreport the number of personal jurisdiction challenges because the heavy lifting on motions to dismiss for want of personal jurisdiction occurs in unreported trial court decisions. Even so, one study counts 3,900 reported cases from 1960 to 1983, and an additional 4,000 reported cases from 1983 to 1992. ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS, at v, vii (3d ed. 1998). Another author conducts a computer-assisted search for "minimum contacts" and discovers more than 2,000 reported decisions from 1990 to 1995. Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 n.5 (1995). One article attempts to study forum-shopping through personal jurisdiction challenges. The author looks at 975 cases from 1970 to 1994 that decide a "core personal jurisdiction issue." Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 24 (1998); *see also* Borchers, *supra* note 40, at 102; Hazard, *supra* note 6, at 283; Heiser, *supra* note 6, at 917 ("frequently litigated and hotly contested").

114. "The twenty years since [*International Shoe*] have been occupied by the pointillist process of locating particular cases on one side of the line or the other." Hazard, *supra* note 6, at 274. What was true when Professor Geoffrey Hazard wrote in

other than instructing them to do what is fair.[115] What follows naturally is a seemingly endless stream of decisions declaring either that jurisdiction on this set of facts is fair or jurisdiction on that set of facts is unfair. The decisions have little or no precedential value, so the decision stream flows unabated year after year. The minimum contacts test was, and after six decades remains, a conclusion rather than a reason.[116]

The problem is of course that the Supreme Court, and other courts under its mandate, are trying to define the undefinable. When is personal jurisdiction in a singular case consistent with "fair play and substantial justice"? Or to state the question differently, what is fair in this case? That is not law. That is fiat. No wonder the courts cannot define it with any precision.

Time and again, the Supreme Court opinions return to the basic question of what is fair.[117] Even with the addition of at least five measures of "fair play and

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1965 is true today.

115. *See infra* note 117. As one state court recognized of the transition from the rule of *Pennoyer* to the rule of *International Shoe*, "[r]igid concepts have yielded to fiction, and fiction has yielded to forthright and realistic considerations of fairness . . . ." Nelson v. Miller, 143 N.E.2d 673, 676 (Ill. 1957).

116. *See, e.g.*, LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 34 (1986); Cameron & Johnson, *supra* note 8, at 836 ("[T]he core of jurisdiction doctrine is unsettled."); Jay, *supra* note 6, at 475 ("More fundamentally, the theory itself lacks any kind of sustaining foundation."); Kurland, *supra* note 57, at 623 ("[N]ew doctrine to replace it has not been firmly fashioned. The language of 'reasonableness' and 'fair play' to which the Court has resorted is rather a statement of a conclusion than a reason."); McMunigal, *supra* note 40, at 199 ("[A] central problem in making sense of current minimum contacts doctrine is the lack of a clear foundation to anchor and explain its amorphous conglomeration of factors and use of different temporal viewpoints."); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 479 (1987) ("Yet despite this growing body of case law, the doctrinal underpinnings remain elusive."); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) ("So quite obviously we now have a body of rules without reasons."); *cf.* Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 805 (1988) ("[T]he current test is difficult to apply, and it is unlikely to promote consistent and predictable results.").

117. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (Stevens, J., dissenting) ("In my opinion there is a significant element of unfairness in requiring a franchisee to defend a case of this kind in the forum chosen by the franchisor."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) ("That is, the contacts between respondent and New Hampshire must be such that it is 'fair' to compel respondent to defend a multistate lawsuit in New Hampshire . . . ."); Rush v. Savchuk, 444 U.S. 320, 329 (1980) ("In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable . . . ."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300

substantial justice" and the apparent split of the test into two parts, the test today is essentially the same test that existed in 1945: a balancing test of fairness in the individual case.[118]

Not only has the Court over the past half-century been unable to create a consistent, coherent law of personal jurisdiction, but also it has issued some opinions that are flatly inconsistent with others. That situation may not seem unusual, as other areas of the law show similar inconsistencies produced when closely-divided factions on the Court shift back and forth in the majority from case to case. The situation is not, however, one of differing views of what the law should be. The rub is that opinions appear to be inconsistent from inadvertence and confusion, not crafty analysis and writing.[119] Even more

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(1980) (Brennan, J., dissenting) ("The clear focus in *International Shoe* was on fairness and reasonableness. . . . The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness."); *id.* at 285 (Blackmun, J., dissenting) ("It therefore seems to me not unreasonable . . . to uphold Oklahoma jurisdiction . . . ."); Kulko v. Superior Court, 436 U.S. 84, 91, 100, 101 (1978) ("a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum"; "these interests simply do not make California a 'fair' forum"; "no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction"); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952) ("The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation."); *cf.* Goldstein, *supra* note 70, at 982, 985 (criticizing the dissent in *Burger King*, 471 U.S. at 487 (Stevens, J., dissenting), and the opinions signed by eight of the nine Justices in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), on the grounds that they are based merely on what is fair).

118. "The Court has listed a huge number of factors in its modern jurisdictional cases, but without ascribing any particular weight to any of the factors, preferring to throw several of them in the pot and then magically arriving at the result." Borchers, *supra* note 40, at 78. "The constitutional sufficiency test—whether it is called 'fair play and substantial justice,' 'minimum contacts,' the 'power theory,' or something else—functions as a balancing test." Roy L. Brooks, *The Essential Purpose and Analytical Structure of Personal Jurisdiction Law*, 27 IND. L. REV. 361, 364 (1993). "A balancing process can have exactly this undesirable result—the court simply runs through a catalogue of competing considerations, eventually to conclude with the bare assertion that the better view lies with one side or the other." Jay, *supra* note 6, at 467. "Fairness, not sovereignty or some simple-to-apply test, remains the touchstone for evaluating the constitutionality of assertions of jurisdiction." Moore, *supra* note 112, at 596. "In its minimum contacts cases, the Court has exploited rather than remedied the inherent vagueness of the terms fairness, justice, and reasonableness. It has never given them specific content, often using them interchangeably and inconsistently." McMunigal, *supra* note 40, at 221-22.

119. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), states that *International Shoe* requires a defendant not be subject to jurisdiction in a state unless he has had "minimal contacts" with the state. The opinion places the two words into quotation marks, and

striking, some Justices are inconsistent with themselves from opinion to opinion or even within the same opinion.[120]

In sum, the Supreme Court's personal jurisdiction cases in the six decades since *International Shoe* have done little to solidify doctrine.[121] In fact, the Court

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cites to a page in *International Shoe*. Needless to say, the word "minimal" or the phrase "minimal contacts" does not appear on that page, or anywhere else in *International Shoe*. Interestingly, defense counsel in *World-Wide Volkswagen*, 444 U.S. at 289, apparently moved to dismiss for want of "minimal contacts," but the Court appeared to recognize the error by placing the phrase into quotation marks in its recitation of the facts.

Probably the clearest example of opinions shifting positions is the back-and-forth on whether state boundaries are meaningful in jurisdictional analysis. *See infra* note 120, Part VII.

120. Justice White writes in *World-Wide Volkswagen*, 444 U.S. at 292, that due process, through the minimum contacts test, "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Only two years later, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982), he writes, "The restriction on state sovereign power . . . however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause . . . makes no mention of federalism concerns."

Justice Brennan writes in dissent in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 420 (1984), that "maintenance of this suit in the Texas courts 'does not offend [the] traditional notions of fair play and substantial justice,' that are the touchstone of jurisdictional analysis under the Due Process Clause." (alterations in original) (citations omitted). One year later, he writes for the Court in *Burger King*, 471 U.S. at 474, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Within the *Burger King* opinion itself, Justice Brennan writes, "The question presented is whether this exercise of long-arm jurisdiction offended 'traditional conception[s] of fair play and substantial justice' embodied in the Due Process Clause of the Fourteenth Amendment." *Id.* at 464 (Brennan, J., concurring). He also writes, "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Id.* at 471-72 (Brennan, J., concurring). For both propositions, he cites *International Shoe*.

In a similar fashion, Justice Brennan writes in concurrence in *Keeton*, 465 U.S. at 781 (Brennan, J., concurring), that "interests of the State should be relevant only to the extent that they bear upon the liberty interests of the respondent that are protected by the Fourteenth Amendment." Within a year, he writes for the Court in *Burger King*, 471 U.S. at 477 (Brennan, J., concurring), that courts may evaluate the forum state's interest, the plaintiff's interest, the interstate judicial system's interest, and the shared interest of the several states in evaluating an assertion of jurisdiction over a defendant.

"Thus, the confusion in the Supreme Court case law exists not only among the Justices but also within the opinions of individual Justices themselves." Goldstein, *supra* note 70, at 980.

121. "[P]ersonal jurisdiction doctrine has drifted aimlessly, producing an unacceptably confused and irrational set of jurisdictional 'rules.'" Borchers, *supra* note

even removed one anchor of certainty when it decided to subject the previously predictable area of in rem and quasi in rem jurisdiction to the minimum contacts test.[122] The Court has swallowed the mostly harmless but little helpful distinction between general and specific jurisdiction.[123] One small victory for certainty, predictability, and ease of application was the Court's refusal to abandon service within the boundaries of a state as a sure jurisdictional hold.[124] Beyond that one island of certainty, all else seems to be at sea in the Court's stream of personal jurisdiction cases.

V. THE TEST CANNOT ENDURE: DEVELOPMENT BY OTHER COURTS

Part II of this Article attempts to trace the origins of the minimum contacts test with little success, finding that the test was woven into whole cloth from strands of largely unknown and untraceable origins. Part IV chronicles the attempts of the Supreme Court over the years to develop and clarify the test. Lower federal courts and state courts, acting in absolute good faith, have in turn experienced great difficulty in their own attempts to understand and apply the test. This Part explores those efforts, and the attempts of those other courts to place glosses on the minimum contacts test in an effort to create law from formless equity.

Lower courts have naturally expressed frustration at being required to decide the same questions year after year with little additional guidance.[125] Responding to their frustration, these courts have placed various polishes on the *International Shoe* test in an attempt to give themselves some guidance. The courts are defining terms to define terms. Whether one calls these efforts definitions, glosses, interpretations, expansions, clarifications, developments, substitute tests,[126] or some other characterization, the result is the same: the lower courts have not wished to—or more likely been able to—hold to the unadulterated language of *International Shoe.*

40, at 105; *see supra* notes 112-16.

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

123. *See Helicopteros Nacionales*, 466 U.S. at 408; *see infra* note 186.

124. Burnham v. Superior Court, 495 U.S. 604, 619 (1990).

125. Perhaps the most memorable characterization is that of Judge Bruce Selya of the First Circuit:

> In the late 1930s, Winston Churchill disclaimed any ability to forecast the Soviet Union's reaction to Nazi aggression, reputedly terming the Russian colossus "a riddle wrapped in a mystery inside an enigma." That phrase might just as aptly describe the doctrinal vagaries of the concept of personal jurisdiction.

Donatelli v. Nat'l Hockey League, 893 F.2d 459, 462 (1st Cir. 1990).

126. Wellington, *supra* note 46, at 307.

The next Section of this Article looks at the efforts of the thirteen federal courts of appeals to define the law of personal jurisdiction. The Section that follows it looks at the efforts of some selected state courts to do the same.

A. Federal Courts of Appeals Cases Interpreting the Minimum Contacts Test

Each of the federal courts of appeals deals with the minimum contacts/fair play test in its own fashion. This Section summarizes briefly the approach of each of the thirteen courts. Only four circuits attempt to follow closely the language of Supreme Court decisions. The other nine circuits, while applying the Court's language, add substantial amounts of their own understanding to the test.

The District of Columbia, Third, Fifth, and Eleventh Circuits largely follow the language of the Supreme Court's decisions, but even these four courts have their own nuances in applying the Supreme Court's decisions. The District of Columbia Circuit, of all the federal courts of appeals, follows most closely the Court decisions. Indeed, in two recent personal jurisdiction decisions, the court cites primarily to *International Shoe* itself, with a secondary citation to *World-Wide Volkswagen*.[127] The Third Circuit generally follows the two-step test of *Burger King* for specific jurisdiction, yet adds its own more detailed test when a plaintiff is suing for an intentional tort committed outside the state.[128] The Fifth Circuit takes great pains to lay out in detail what it understands to be the test,[129] although in its essence the detailed test is merely a synthesis of Supreme Court decisions in expanded language. The Eleventh Circuit follows the *Burger*

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127. GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1347 (D.C. Cir. 2000); United States v. Ferrara, 54 F.3d 825, 828 (D.C. Cir. 1995).

128. "First, the defendant must have committed an intentional tort. Second, the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort. Third, the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity." IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 256 (3d Cir. 1998).

129. "First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with that forum state. And second, the exercise of jurisdiction over the nonresident defendant must not offend 'traditional notions of fair play and substantial justice.' The 'minimum contacts' prong of the inquiry may be further subdivided into contacts that give rise to 'specific' personal jurisdiction and those that give rise to 'general' personal jurisdiction. . . . [T]he 'fairness' of requiring a nonresident to defend a suit in a distant forum is a function of several factors, including the 'interests of the forum State.'" Wilson v. Belin, 20 F.3d 644, 647 (5th Cir. 1994) (citations omitted). The court then lists the five factors in a footnote. *Id.* at 647 n.3.

King two-step test with little or no gloss of its own, although it does emphasize foreseeability by the defendant of being haled into court in the forum state.[130]

The other nine courts of appeals have dealt with the *International Shoe* minimum contacts/fair play test in widely varying fashions. The Eighth Circuit, in a 1965 opinion written by Judge Harry Blackmun, created a five-part test that the court uses to this day:

> We also think it is fair to say that these five Supreme Court cases establish only general and not precise guidelines. Perhaps they purposely do no more than this. We observe, however, that, at one time or another in the opinions, three primary factors, namely, the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts, are stressed, and that two others, interest of the forum state and convenience, receive mention.[131]

In contrast to the heavy gloss of the Eighth Circuit, the Seventh Circuit appears to have proceeded in the opposite direction. The court recently applied the *International Shoe* unitary test without even mentioning later Supreme Court developments such as *Burger King*, although it did emphasize that a defendant forced to litigate in an inconvenient forum must have derived some benefit from the state, and also said that whether the defendant solicited the transaction within the proposed forum is important.[132]

Three of the courts of appeals create a "sliding scale" of reasonableness to assist in evaluating fair play. The Second Circuit first applies the two-step test it discerns from the Supreme Court cases: "the 'minimum contacts' inquiry and the 'reasonableness' inquiry."[133] Then the Second Circuit employs a sliding scale test it borrows from the First and Fourth Circuits:

> [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing [on minimum contacts], the

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130. Olivier v. Merritt Dredging Co., 979 F.2d 827, 830-31, 833 (11th Cir. 1992); Madara v. Hall, 916 F.2d 1510, 1516 (11th Cir. 1990).

131. Aftanase v. Econ. Baler Co., 343 F.2d 187, 197 (8th Cir. 1965). Eighteen years later, the court said that the *International Shoe* test "has devolved" into consideration of the five factors, although it added that "the last two factors are said to be of secondary importance and not determinative." Land-O-Nod Co. v. Bassett Furniture Indus., Inc., 708 F.2d 1339, 1340 (8th Cir. 1983) (citing Aaron Ferer & Sons Co. v. Am. Compressed Steel Co., 564 F.2d 1206, 1210 n.5 (8th Cir. 1977)).

132. Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co., 18 F.3d 389, 394 (7th Cir. 1994).

133. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996).

> less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].[134]

The Fourth Circuit employs the two-part test of *Burger King* with the same sliding scale as the First and Second Circuits, and also particularly emphasizes that the defendant must have "purposefully" made contact with the forum state.[135]

While the First Circuit also uses the sliding scale, the court more importantly joins four other circuits in creating their own three-part test for personal jurisdiction. The first of the five courts of appeals to use this three-part test was the Sixth Circuit:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.[136]

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134. *Id.* at 569 (quoting Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994)); *see also* Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 479 (4th Cir. 1993).

135. *Ellicott Machine*, 995 F.2d at 477, recognizes that several Supreme Court opinions require that a defendant "purposefully established 'minimum contacts'" (*Asahi, International Shoe*), "'purposefully direct[ed]' its activities toward the residents of the forum" (*Burger King, Keeton, Hanson*), and "purposefully 'availed himself of the privilege of conducting business there'" (*Burger King*).

136. S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). Four years later, the court was dissatisfied with its earlier efforts at concreteness and attempted to become even more specific:

> The first aspect of the *Southern Machine* approach relating to the "purposeful doing of an act or causing of consequence within the forum state" . . . sought to set forth in somewhat more concrete terms one essential element of the "traditional notions of fairplay" required by *International Shoe*. An essential element of such "fairness" in our society has always been that a person is not asked to bear a special burden (such as defending in a foreign forum) unless he has done something in a purposeful manner or with such knowledge as to make his deeds the equivalent of purposeful action. . . . With such view of the "purposeful action" requirement in mind, this Court in *Southern Machine* elaborated on that requirement in terms of the "transacting any business" clause of a long-arm statute. In this Circuit one has "acted" so as to transact business in a state "when obligations created by the defendant or business

Following this lead, the Ninth Circuit "has established a tripartite test for determining whether due process will allow jurisdiction."[137] The Tenth Circuit both attempts to define "purposeful availment" more fully and also approves the Ninth Circuit's three-part test for specific jurisdiction.[138] The Federal Circuit follows the *Burger King* two-part test, but subdivides the first part into whether the defendant "purposefully" directed its activities at the forum state and whether the claim arose from those activities.[139] This in effect creates the same three-step test. The First Circuit not only follows the same tripartite test but also places its own name on the third step: it calls the five fairness criteria from *Burger King* the "Gestalt factors."[140]

The above Section sketches briefly the courts of appeals' treatment of *International Shoe* and its progeny. The purpose of sketching the personal jurisdiction guides created or applied by each of the courts of appeals is not to show circuit conflicts[141] or to evaluate the tests of the differing courts of appeals.

> operations set in motion by the defendant have a realistic impact on the commerce of that state." Such "acts" become purposeful if the defendant "should have reasonably foreseen that the transaction would have consequences in that state."

In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 226 (6th Cir. 1972) (citations omitted).

The Sixth Circuit has also suggested that jurisdiction is more often upheld against a nonresident seller than a nonresident buyer. *Id.* at 232.

137. "(A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable." Cubbage v. Merchent, 744 F.2d 665, 668 (9th Cir. 1984); *see also* Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

138. Rambo v. Am. S. Ins. Co., 839 F.2d 1415, 1419-20 n.6 (10th Cir. 1988). The court has also created considerations for personal jurisdiction specific to contract cases. *See* Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1359-60 (10th Cir. 1990).

139. Akro Corp. v. Luker, 45 F.3d 1541, 1545-46 (Fed. Cir. 1995).

140. United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992); Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990). "Gestalt" means "a unified whole; a configuration, pattern, or organized field having specific properties that cannot be derived from the summation of its component parts." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 594 (1996).

141. Circuit conflicts do exist. The primary example is disagreement about the test to apply to stream of commerce cases. The Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), produced a badly fragmented Court. *See supra* notes 103-10 and accompanying text. That fragmentation produced in its turn sharp divisions among the courts of appeals:

> The Third, Sixth, and Eleventh Circuits choose to apply all three minimum contacts analyses used in *Asahi* to the facts in the record without supporting

The point is to show that the courts of appeals have not held tightly to the decisions of the Supreme Court. Every court of appeals has, to a varying degree, added its own language, understanding, or gloss. A reasonable inference is that the judges of these courts felt an inherent need for greater certainty in the law and consequently created their own more specific tests, even though their creations could not stray too far from the Supreme Court's language.

B. State Court Cases Interpreting the Minimum Contacts Test

The minimum contacts test has fared no better, and has probably fared worse, in state court decisions. Although some state judges have attempted to hold closely to the language of the Supreme Court precedents,[142] far more have placed their own understandings into the test. This Section sketches only a few examples.

Some state courts have looked to the four-position grid suggested in *International Shoe* as a guide to decision-making.[143] Others have made a passive-aggressive, buyer-seller distinction: jurisdiction is more likely to be upheld over a nonresident who aggressively enters the state as a seller to a local buyer, than over a nonresident who is a passive buyer from an aggressive resident seller.[144] Still others have attempted to stay within the boundaries of the Supreme Court decisions, but have required page after page of discussion to determine what they interpret those boundaries to be.[145] Some state courts have

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> one analysis over the other. The Fourth and Tenth Circuits reconciled the decisions in *World-Wide Volkswagen* and *Asahi* in order to apply one test. The First Circuit is the only circuit to conclusively adopt the position of Justice O'Connor in applying the stream of commerce analysis in product liability suits. Because *Asahi* did not command a majority of the Court on the amount of contact required under stream of commerce, three of the circuits still apply the standard in *World-Wide Volkswagen*.

Kristin R. Baker, *Product Liability Suits and the Stream of Commerce After* Asahi*:* World-Wide Volkswagen *Is Still the Answer*, 35 TULSA L.J. 705, 712 (2000) (footnotes omitted).

142. *See, e.g.*, Ga. Insurers Insolvency Pool v. Brewer, 602 So. 2d 1264 (Fla. 1992); LaMarca v. Pak-Mor Mfg. Co., 735 N.E.2d 883 (N.Y. 2000).

143. The four-position grid of *International Shoe* is explained *supra* note 80. State court decisions applying the grid are collected in John T. McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1, 39-40 (1985); Stravitz, *supra* note 116, at 734 n.32.

144. *E.g.*, Cascade Lumber Co. v. Edward Rose Bldg. Co., 596 N.W.2d 90, 92 (Iowa 1999); Dent-Air, Inc. v. Beech Mountain Air Serv., Inc., 332 N.W.2d 904, 907-08 (Minn. 1983); Higgins v. Rausch Herefords, 609 N.W.2d 712, 719-20 (Neb. Ct. App. 2000); Barile v. Univ. of Va., 441 N.E.2d 608, 614 (Ohio Ct. App. 1981).

145. For example, *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1091-94 (Cal. 1996), requires nearly five pages of text to summarize the current state of the law from

openly announced their own "tests" for personal jurisdiction. Examples are Washington and Texas. Under the subheading "THE TEXAS TEST," the Texas Supreme Court announced the following test for specific jurisdiction cases:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
> (2) The cause of action must arise from, or be connected with, such act or transaction; and
> (3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[146]

The same opinion goes even further for general jurisdiction cases by expanding the second of the three parts to read as follows:

> (2) The cause of action must arise from, or be connected with, such act or transaction. Even if the cause of action does not arise from a specific contact, jurisdiction may be exercised if the defendant's contacts with Texas are continuing and systematic.[147]

In sum, as with the federal courts of appeals, most state courts have not been satisfied merely to apply the Supreme Court's language, but instead have placed their own imprints on the due process test. One popular treatise synthesizes both federal and state cases as follows:

> Today, courts typically employ a three-step test to determine the constitutionality of asserting specific personal jurisdiction. First, did the defendant purposefully avail itself of the forum state? Second, did the cause of action arise from the defendant's contacts with the forum

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Supreme Court cases.

146. Schlobohm v. Schapiro, 784 S.W.2d 355, 358 (Tex. 1990). The Texas test traces back to *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966).

147. *Schlobohm*, 784 S.W.2d at 358. Texas may have borrowed from Washington, or Washington may have borrowed from Texas, or one may have borrowed from another court. No matter what the time line, Washington's test is nearly identical to the Texas test. *See* Grange Ins. Ass'n v. State, 757 P.2d 933, 937 (Wash. 1988). The Washington test traces back to *Tyee Construction Co. v. Dulien Steel Products, Inc.*, 381 P.2d 245, 251 (Wash. 1963).

> state? Finally, would the exercise of personal jurisdiction be reasonable?[148]

The authors of the treatise do not reveal which court decisions they are synthesizing, but they are synthesizing decisions of courts other than the Supreme Court.

The freedom of the state courts to go their own way has become more boundless both as state legislatures enact long-arm statutes that expressly reach to the limits of due process, and as state courts interpret enumerated acts long-arm statutes to reach to the limits of due process. More than three-fifths of the states now have statutes that either expressly provide or are interpreted to reach to the limits of due process.[149] What was formerly a two-step test, consisting of statutory interpretation of a long-arm statute, followed by the minimum contacts/fair play test, has in a majority of states become a one-step test. The statutory anchor has been removed and the entire decision is placed on the

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148. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.11, at 140 (3d ed. 1999). This synthesized test is quite like the tests employed by the First, Sixth, Ninth, Tenth, and Federal Circuits, and states including Texas and Washington. *See supra* notes 136-40, 146-47.

149. Classification of states into these categories is difficult because some states have not made their interpretation clear, several states have flip-flopped back and forth between interpretations, and several states have added catch-all no limits clauses to their enumerated acts long-arm statutes. For that reason, different commentators have created differing lists of where the states stand. *See, e.g.*, 4 WRIGHT & MILLER, *supra* note 8, § 1068, at 577-81 (identifying twenty-eight states that have enacted long-arm statutes or court rules that reach to the limits of due process, either by their own terms or by court interpretation); *see also* David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233, 237 (1990). In research for an article currently in preparation, I conducted a fifty-state study of long-arm statutes. The findings are that only eighteen states today have an enumerated acts long-arm statute that the state courts interpret as a prerequisite to a finding of long-arm jurisdiction (Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, West Virginia, Wisconsin). The other thirty-two states, in one way or another, stretch their long-arm jurisdiction to the limits of due process. Eleven states have comprehensive long-arm statutes that by their own terms are limited only by due process (Arizona, Arkansas, California, Iowa, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Vermont, Wyoming). Nine states have enumerated acts long-arm statutes that have added a no limits catch-all clause (Alabama, Alaska, Illinois, Indiana, Maine, Nebraska, Oregon, South Dakota, Tennesee). The remaining twelve states have enumerated acts long-arm statutes that, despite the limited language of the statute, the state courts have interpreted to reach the limits of due process (Colorado, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, North Dakota, South Carolina, Texas, Utah, Virginia, Washington). Douglas D. McFarland, Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process (unpublished manuscript, on file with author).

court's "notions of fair play." This development obviously makes even more acute the problem of judges deciding jurisdiction cases on their personal predilections of fairness.[150] In turn, it provides additional support for the argument that a new, more certain and predictable standard for personal jurisdiction is needed.

VI. DROP THE *SHOE*

This Article has already documented problems with the *International Shoe* minimum contacts/fair play test. These problems include the test's rootlessness and inherent flaccidity, as well as the confusion, unpredictability, high transaction costs, and inconsistent results it produces because it places unfettered power into the pens of individual judges to decide what strikes them as "fair."

The irony of *International Shoe* is that the Court's creation of the minimum contacts/fair play test was intended to and did expand the personal jurisdiction reach of the states. Yet today no one thinks of minimum contacts as supporting the assertion of state authority; rather, one thinks of minimum contacts as an outer limit of state authority. In a large sense, the test has been turned inside out.

While everyone realizes the Supreme Court is reluctant to cast aside even one of its decisions, let alone a whole area of law, in favor of beginning anew, sometimes that is exactly what is needed. After all, the Court did so when it abandoned *Pennoyer* in favor of *International Shoe*.[151] That new test has had its six decades of usefulness. No one seems to be happy or satisfied with it, not the lower federal courts,[152] the state courts,[153] or the commentators.[154]

Courts and commentators are searching for law, not a doctrine that produces close cases with no overriding philosophy to decide them.[155] People want law,

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150. *See supra* text accompanying notes 64-70.

151. "To abandon a theoretical construct is to unsettle habits of mind, to deplete stores of knowledge, and perhaps to invite unforeseeable difficulties. A system of legal concepts, however inelegant, can easily persist beyond the point when it produces or invites bad results—these can be avoided by decisional manipulation. But when a conceptual system has become so involved that understanding it is more difficult than deciding how to apply it to particular cases, searching for new concepts is as attractive as attempting to retain the old." Hazard, *supra* note 6, at 243. In 1965 Professor Hazard was writing of the need to abandon *Pennoyer*. This Article proposes that *International Shoe* has reached the same stage of life.

152. *See supra* Part V.A.

153. *See supra* Part V.B.

154. *See, e.g.*, Cameron & Johnson, *supra* note 8, at 771-74 nn.5-13; Heiser, *supra* note 6, at 915; Weinberg, *supra* note 116, at 102 ("Clearly, it is time to jettison minimum contacts. *International Shoe* is bankrupt.").

155. *See* Heiser, *supra* note 6, at 958.

not an advisory guide to fact-finding. The Supreme Court should drop the *Shoe*. This Article proposes a law of personal jurisdiction.

VII. SHOULD A TEST CONSIDER STATE BOUNDARIES?

Before proposing a new law of personal jurisdiction, this Article discusses whether a test for personal jurisdiction should take into account state boundaries. In other words, do state boundaries have continuing legal significance for the jurisdictional reach of state courts? Or have state boundaries become largely irrelevant as the law moves toward a convenience test for personal jurisdiction? For want of a better term, this has become known as the "federalism debate" in personal jurisdiction.[156] This Part attempts to give a pragmatic and objective answer, not a philosophical or normative answer,[157] to the question of whether state borders matter in personal jurisdiction.

The debate over the years has permeated the opinions of the Supreme Court. This is so because the Court fastened on the Due Process Clause as its source of authority to oversee state court assertions of jurisdiction.[158] The Clause itself appears to protect individual rights: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[159] It makes no mention of state sovereignty, so placing state power interests into an analysis

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156. *E.g.*, Borchers, *supra* note 40, at 78; McMunigal, *supra* note 40, at 212. To call the personal jurisdiction debate over state boundaries a "federalism" debate seems inappropriate. Granted, the question is one of Supreme Court control through the Due Process Clause over the jurisdictional power of state courts. That seems to be a federalism question. Yet the true debate is not federal versus state, but rather is state versus state. Under what circumstances can a state court reach out beyond its boundaries to summon a defendant from another state without violating the sovereignty of the other state? That was the question to which *Pennoyer* gave a too-rigid answer, and *International Shoe* gave a too-flexible answer. Consequently, this debate might well be better titled a "sovereignty" debate, or even perhaps a "states' rights" debate. Even so, because the debate is commonly referred to as one of federalism, that is the term used here.

157. Some articles arguing that federalism concerns are, or are not, appropriate for jurisdictional decisions are collected *infra* notes 164-65. One example of a normative approach is Kurland, *supra* note 57, at 569: "[D]octrines of federalism have been subordinated by the Supreme Court to concepts of convenience. The result is another major step—in this instance, perhaps a desirable one—toward the limitation of the federal principle."

158. Even though the holding in *Pennoyer* was grounded in international law and public law principles, the opinion identified the Due Process Clause, U.S. CONST. amend. XIV, § 1, as the source of the Court's future power to supervise state court jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), agreed. Other sources of authority in the Constitution could have been used. *See supra* note 12.

159. U.S. CONST. amend. XIV, § 1.

based on due process is analytically difficult.[160] Yet the analytical foundation of *Pennoyer*, the first major Supreme Court decision on state jurisdictional reach, was state sovereignty, and *International Shoe* required minimum contacts with the state to make jurisdiction by a state over a defendant fair and just; it was not about convenience without boundaries.

No wonder that opinions since *International Shoe* have exhibited ambivalence and outright disagreement on whether federalism concerns should play a part in jurisdictional analysis. In the opinions, concerns for federalism have flowed and ebbed.[161] In some opinions, federalism concerns have been paramount.[162] In other opinions, the Court has seemingly dismissed federalism and state borders in favor of a convenience analysis.[163] The debate continues

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160. *See* McMunigal, *supra* note 40, at 212.

161. Borchers, *supra* note 40, at 78; McMunigal, *supra* note 40, at 211-12.

162. Certainly the first rise of federalism in Supreme Court decisions after *International Shoe* was *Hanson v. Denckla*, 357 U.S. 235 (1958), in which the Court stated, "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Id.* at 251 (citations omitted). The Court's concern for federalism was expressed even more forcefully in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-93 (1980):

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. . . . [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

163. Only two years after authoring *World-Wide Volkswagen*, Justice White authored *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), in which the Court seemed to dismiss federalism concerns from jurisdictional analysis in a footnote:

> The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

today. Commentators make arguments both for[164] and against[165] federalism/state boundaries as a proper consideration in jurisdictional decisions.

Before this Article can propose a new test for personal jurisdiction, it must face the question squarely: do state boundaries matter for jurisdictional purposes? The answer is yes. State boundaries matter. They cannot conveniently be ignored.

The Supreme Court opinions grounded in state sovereignty concerns cannot be brushed aside. All would agree that *Pennoyer v. Neff*,[166] the first major Court opinion on personal jurisdiction, was based on concerns for state sovereignty. Judges of that era agreed, "The foundation of personal jurisdiction is physical power."[167] While *International Shoe Co. v. Washington*[168] largely replaced the *Pennoyer* regime, it did not ignore state boundaries, requiring that a corporate defendant have "minimum contacts" within the forum state "such that" jurisdiction *by that state* would not offend "traditional notions of fair play and substantial justice." Much of the opinion's language refers to activities within a state, retaining importance for state borders.[169] Later opinions expressly ground the minimum contacts test in "federalism" concerns.[170] The two most

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Id. at 703 n.10.

Again in a footnote, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985) (quoting *Bauxites*, 456 U.S. at 703 n.10), the Court reaffirmed the rejection of federalism concerns: "Although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'"

164. *See, e.g.*, BRILMAYER, *supra* note 116, at 39-40; Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85; Cebik, *supra* note 12, at 16; Goldstein, *supra* note 70, at 974; Hazard, *supra* note 6, at 246-47; Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 257 (1990); Sheehan, *supra* note 112, at 439; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 690 (1987).

165. *See, e.g.*, Kevin Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 451-55 (1981); Perdue, *supra* note 116, at 514; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evolution*, 75 NW. U. L. REV. 1112 (1981); Redish & Beste, *supra* note 46, at 939-40; Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 527 (1984); Weintraub, *supra* note 113, at 548-49.

166. 95 U.S. 714 (1877).

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

168. 326 U.S. 310 (1945).

169. *Cf.* Robert C. Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61, 65 (1977).

170. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958); *see supra* note 162.

recent Supreme Court decisions on personal jurisdiction, while not discussing federalism and state sovereignty directly, are clearly based on the assumption that state borders matter.[171] State authority and power over the individual defendant appear consistently to mean something to the Court.

The argument that state boundaries are irrelevant posits the Due Process Clause as a protector of individual liberties. Because an objection to personal jurisdiction can be waived, the argument continues, state jurisdictional reach cannot be based on state sovereignty, for an individual would not be able to waive a state's sovereignty. So states a famous footnote.[172]

Although Justice White, the author of the footnote, thought that the possibility of waiver by a party must negate any sovereignty basis for personal jurisdiction, his thinking was mistaken. First, the Court has based many of its personal jurisdiction decisions over the years, both before and after writing the footnote, on sovereignty concerns.[173] Second, other areas of the law—as well as comparative systems of personal jurisdiction—are rooted in interests beyond that of the individual, yet the individual can waive objection.[174] Third, if in fact personal jurisdiction based on due process were grounded solely in individual liberty, one would expect a court to look solely to the interests of the defendant in making its decision on fair play, yet a court is instructed to consider also the interests of the plaintiff, the forum state, the interstate judicial system, and the several states.[175] Those concerns far transcend the defendant's individual liberty interests. Finally, the answer to the "waivable" sovereignty conundrum is one that has existed for well more than a century. *Pennoyer*'s analysis is based on recognition and protection of state sovereignty, yet the opinion recognizes pre-

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171. Burnham v. Superior Court, 495 U.S. 604, 625 (1990) (holding that service within the borders of a state is effective to establish personal jurisdiction); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (holding that placing a product into the stream of commerce is insufficient for jurisdiction absent purposeful direction toward the forum state).

172. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982); *see supra* note 163.

173. *See supra* notes 166-71 and accompanying text. These decisions cannot be regarded as mere aberrations. Drobak, *supra* note 27, at 1047.

174. Professor Stephen Goldstein points out (1) that doctrines of res judicata and statutes of limitation in part protect interests of the judicial system, and (2) that the personal jurisdiction doctrines of the Brussels Convention, England, and Israel protect sovereignty interests, yet all can be waived by individual action of the defendant. Goldstein, *supra* note 70, at 974-75. In that sense, the Due Process Clause can be considered as requiring an inquiry into the ability of a state to impose jurisdiction on a defendant instead of the liberty of the defendant to be free from jurisdiction. Brilmayer, *supra* note 164, at 85.

175. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985). Interestingly, these additional considerations were foreshadowed in *World-Wide Volkswagen*, 444 U.S. at 292, an opinion that clearly emphasized federalism concerns.

existing law that provides alternatives to service within a state's borders: domicile and consent.[176] In other words, a defendant has always been able to consent to personal jurisdiction in a state, even at a time when the law of personal jurisdiction was based entirely on state sovereignty. Waiver is a form of consent. The ability to waive a personal jurisdiction defense no more undercuts a state sovereignty analytical base for personal jurisdiction than does the ability to consent to that same jurisdiction.

Accordingly, this Article answers the question of whether state boundaries matter in jurisdictional analysis with a clear "yes." The United States is composed of fifty states, each with a measure of sovereignty. Accordingly, any proposal for a new law of personal jurisdiction must take that fact into account. The next Part of the Article makes such a proposal.

VIII. A LAW OF PERSONAL JURISDICTION

The fairness test of *International Shoe*, even as it has become the fairness/convenience test of today, has failed. It has failed because it is not law. This Part proposes a law of personal jurisdiction.

Three primary threads comprise the new law. The first two of these threads are consistent with and synthesize Supreme Court cases over the years. The first thread is that state boundaries are meaningful.[177] This rules out a test based on convenience—similar to *forum non conveniens*—in which state boundaries are irrelevant.[178] The second of these two threads requires a defendant voluntarily to bring itself within a state's sphere of authority. The Court has often called this "purposeful availment."[179] The "purposeful availment" thread in the Court's

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176. Pennoyer v. Neff, 95 U.S. 714, 733 (1877). Consent to personal jurisdiction has long been recognized in the common law. *See* SIR FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 145 (1904). One can even argue that the base of a personal jurisdiction doctrine of fairness is consent. Cappalli, *supra* note 46, at 106.

177. *See supra* Part VII.

178. Some have proposed a pure convenience test. *See infra* note 206.

179. The requirement of "purposeful availment" was introduced in *Hanson v. Denckla*, 357 U.S. 235, 253 (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." The purposeful availment requirement has been powerful in several other Court decisions over the years. *E.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987); *Burger King*, 471 U.S. at 474-75 ("purposefully established 'minimum contacts' in the forum State"); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) ("purposefully directed"); *World-Wide Volkswagen*, 444 U.S. at 297; Kulko v. Superior Court, 436 U.S. 84, 94 (1978). "[J]urisdiction is acquired when defendants bring themselves within the range of a state's power. Like magnetism, jurisdiction is a force field surrounding the forum . . . ." Jay, *supra* note 6, at 474.

decisions does not require the expectation of economic gain, although that appears to be implicit in many of the opinions.[180]

The third thread of the proposed new law of personal jurisdiction rejects the "fair play" flexibility of *International Shoe* and its progeny in favor of a bright-line test. A bright-line test provides foreseeability and predictability of results and thus eliminates large, unnecessary initial transaction costs in litigation over the threshold issue of personal jurisdiction.[181] In other areas of the law, such as

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Several of the Court's opinions have also mentioned a requirement that a defendant must be able to foresee "being haled into court" in the forum state. *E.g.*, *World-Wide Volkswagen*, 444 U.S. at 297. This idea adds nothing to the "purposeful availment" idea. Rather, it is merely an extension of the same thought. When a defendant purposefully avails itself of entry into the forum state, it will be able to foresee being haled into court there. *See supra* text accompanying notes 92-93.

180. The clearest submission occurs when a person intentionally enters a state's sphere of authority to gain economic advantage. In some opinions, the expectation of economic benefit is explicit in the holding that the defendant intentionally entered the sphere of the state's authority. *E.g.*, *Keeton*, 465 U.S. at 781 ("Where [defendant] has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there . . . ."); *World-Wide Volkswagen*, 444 U.S. at 297 ("Hence if the sale of a product . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market . . . it is not unreasonable to subject it to suit in one of those States . . . ."). Even before the creation of the "purposeful availment" theme in *Hanson*, 357 U.S. at 253, the Court in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957), upheld jurisdiction over an insurance company that had a single active policy in the forum state in large part because "modern transportation and communication have made it much less burdensome"—and thus more fair—to defend "in a State where [the defendant] engages in economic activity." *Cf.* Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407, 426-28 (1980).

181. The transaction costs of the current minimum contacts/fair play test are high. *See supra* note 113. These costs are both unacceptably high and unnecessary "for issues which need to be determined quickly and efficiently at the outset of litigation." Silberman, *supra* note 102, at 582. Yet challenge to jurisdiction is almost mandatory under the current case-by-case balancing test in which the outcome is largely unpredictable. The result is large expenditures of judicial resources at the trial level and inability of appellate courts to perform their function of applying the law. When foreseeability in a test is achieved, these transaction costs largely disappear. "This foreseeability can best be insured, not by case-by-case, particularized, after-the-fact balancing tests, but by clear, uniform limits." Sheehan, *supra* note 112, at 438.

One can state the need no better than did the American Law Institute, when it wrote about subject matter jurisdiction: "It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction [even though] differentiations of treatment . . . appear somewhat arbitrary." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 128 (1969). One commentator summed this up well: "Jurisdiction should be as self-

subject matter jurisdiction and preclusion, the Supreme Court has valued the need for certainty over the need for achieving "pure" justice in each individual case.[182] What is true for the lesser-litigated issue of subject matter jurisdiction and the seldom-litigated issue of res judicata should also be true for the often-litigated issue of personal jurisdiction. The policies of efficiency, certainty, foreseeability, stability, and uniform treatment are no less applicable. A challenge to personal jurisdiction should be determined surely and quickly. Therefore, the proposed new test for personal jurisdiction is clear and understandable law.

The proposed new law of personal jurisdiction deals only with long-arm jurisdiction—the area of the law laid down in *International Shoe*. It does not change current law of jurisdiction over nonconsenting persons domiciled or served within the state.

With those considerations in mind, I propose a new law of personal jurisdiction. *A state has jurisdiction over a person for any claim arising out of that person's intentional transactional entry into the state.* This might be called the intentional transactional entry test.

This law is both broader and narrower than *International Shoe* and its progeny. A brief discussion of the elements making up the proposed law will aid understanding.

First, jurisdiction exists only for an *intentional* transactional entry. The defendant must know, or be substantially certain, that its actions will pierce the borders of the forum state.[183] Unintentional entry does not suffice for jurisdiction.[184] While "intentional" seems best to capture the required state of

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regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1, 1 (1968).

182. With regard to subject matter jurisdiction, the Court said in *Navarro Saving Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980), "The relative simplicity of the established principle is one of its virtues," and added quotations from the American Law Institute and David P. Currie. *See supra* note 181. On another occasion, the Court said, "[P]rompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts . . . ." Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 8 (1951). With regard to preclusion, the Court said in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."

183. This definition is borrowed from RESTATEMENT (SECOND) OF TORTS § 8A (1965). Intent is used "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

184. *Cf. Developments in the Law*, *supra* note 8, at 939 ("When the defendant's presence is a result of compulsion or fraud, or when he could not have foreseen or prevented his entry into the state, his presence should be irrelevant in determining

mind producing the entry, alternative formulations might be possible; some come from Supreme Court cases.[185]

Second, jurisdiction exists only for intentional *transactional* entry. The claim must arise out of the defendant's entry into the state. This means all assertions of personal jurisdiction are specific; the concept of general jurisdiction is abolished.[186] Here the new law is narrower than current law. This might raise

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whether jurisdiction exists.").

185. Of course, the Court has often used the terms "purposeful availment" or "purposeful direction." It has also used other synonymous phrases. In *Keeton*, 465 U.S. at 781, the Court wrote, "[The defendant] has continuously and deliberately exploited the [state] market . . . ." In *Calder v. Jones*, 465 U.S. 783, 789-90 (1984), the Court wrote that the "actions were expressly aimed at California," and the defendants were "primary participants in an alleged wrongdoing intentionally directed at a California resident." Like phrases come from commentators. "[D]efendant has a 'deliberate impact' in the forum . . . ." Brilmayer, *supra* note 164, at 91. "[I]f the defendant has been involved in the distribution of goods to the forum state, his contacts with it are volitional and financially beneficial." Louis, *supra* note 180, at 426.

One commentator has asserted that a court cannot ascribe cognitive intent to a corporation, Woods, *supra* note 101, at 885, but the response is that intent can be inferred from actions and knowledge. A manufacturer does not intentionally direct the automobile in question into a state by placing it into the stream of commerce, yet the manufacturer is "substantially certain" a percentage of its products will enter the state. That is intentional entry.

186. General jurisdiction is thought to exist over a defendant that is engaged in systematic and continuous activity within a state, even though the claim giving rise to the lawsuit does not arise from the in-state activity. This possibility was first recognized in *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945), and christened "general jurisdiction" in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). The Supreme Court accepted the terminology in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

The serious question is not what to call this jurisdictional phenomenon. The serious question is whether it has a reason to exist. Specific jurisdiction will always exist in at least one forum, and almost always in at least one forum convenient to the plaintiff. General jurisdiction based on continuous activity of a defendant in a forum otherwise unrelated to the claim accomplishes no more than to invite the plaintiff to forum-shop. Even the commentators who coined the term believed that as specific jurisdiction expanded, the need for general jurisdiction would diminish, perhaps to the vanishing point, because it is unfair to defendants. von Mehren & Trautman, *supra*, at 1177-79. Others have argued that general jurisdiction should be eliminated. *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 271-80 (1991); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 629 (1988); *cf.* Cebik, *supra* note 12, at 21-22; Heiser, *supra* note 6, at 924-25; P. John Kozyris, *Reflections on* Allstate*—The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV. 889, 894 (1981); Donald J. Werner, *Dropping the Other* Shoe*:* Shaffer v. Heitner *and the Demise of Presence-*

objections, as some forum choices are taken from plaintiffs. Yet the loss is not large, as few general jurisdiction cases are brought today.[187] And plaintiffs retain forum choices.[188] More importantly, loss of a few opportunities to forum-shop is a small price for plaintiffs to pay for the many benefits a sure-footed new law of personal jurisdiction will bring.

Third and finally, jurisdiction exists for intentional transactional *entry*. The defendant must enter the state. Intentional entry supplies any submission to the authority of the state thought necessary.[189] Here the new law is broader than current law. When a defendant's intentional entry into a state gives rise to a claim, the state has personal jurisdiction over the defendant with no ifs, ands, or buts. This is true whether or not the defendant has any additional ties with the state. A single act that gives rise to a claim will always provide jurisdiction. The court will not consider "fair play and substantial justice," reasonableness, "convenience factors," or anything of the sort. Defendants will lose the opportunity to escape the forum based on fairness. Yet the loss is not large, as few defendants are likely to succeed in a challenge to jurisdiction when the claim arises from the entry.[190] More importantly, removal of a few opportunities to escape an "inconvenient forum" is a small price for defendants to pay for the many benefits a sure-footed new law of personal jurisdiction will bring.

Any real concerns about fairness in the individual case are better addressed by other doctrines, primarily *forum non conveniens*.[191] Choice of law is another.[192] In the federal system, venue can be transferred,[193] or the court might

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Oriented Jurisdiction, 45 BROOK. L. REV. 565, 591 (1979).

187. Twitchell, *supra* note 186, at 630. Only one of the nineteen personal jurisdiction cases the Supreme Court has decided since *International Shoe* was a general jurisdiction case. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); *see* McDermott, *supra* note 143, at 47-48.

188. In addition to any forum where a defendant might consent, the plaintiff has other options. Another variant of "general" jurisdiction will always exist over a natural person in any state where he or she is served, and over a corporation in its state of incorporation. Additionally, one transaction may well enter multiple states. For example, in a case of injury from a product placed into the stream of commerce, the plaintiff could sue in any state in the distribution chain that the defendant knew the product would enter.

189. *See supra* Part VII.

190. Even *International Shoe* recognized that when a claim arises from a single act in the forum, jurisdiction is possible. *Int'l Shoe*, 326 U.S. at 318.

191. Cameron & Johnson, *supra* note 8, at 843; Stravitz, *supra* note 116, at 811. European systems provide precision in their jurisdiction laws, with any unfairness alleviated by a doctrine similar to *forum non conveniens*. *See* Silberman, *supra* note 43, at 762-63.

192. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985), mentions choice of law and transfer of venue as methods to reduce inconvenience.

193. The interests for the court to consider in a transfer of venue are "the convenience of parties and witnesses, in the interests of justice." 28 U.S.C. § 1404(a)

even abstain.[194] The realistic fact is that a defendant's fairness concerns are few or none. The real issue is choice of forum, i.e., forum-shopping by a defendant.[195]

Some applications of the new law of personal jurisdiction will be considered in the next Part of this Article. Before turning to these applications, however, I respond here to two objections to this new law that will likely be raised.

First, as a bright-line test, the intentional transactional entry test will run afoul of judges and commentators who assert generally that any bright-line test is simplistic and an effort to hold back the moving sands of legal realism, and assert specifically that such a test will not work for personal jurisdiction. In *International Shoe* itself, Chief Justice Stone wrote, "It is evident 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."[196] Of course, this was a bald assertion, transparently meant to protect the test that Chief Justice Stone had just created. The assertion brings with it no authority or reasoning to answer the question of whether a test in the area should be a bright-line test or should be akin to the *International Shoe* balancing test. Even though some later Court opinions parrot Chief Justice Stone's admonition, they add no reasoning to support it.[197]

(2002). In the federal system, venue is unlikely to be properly laid in a district that is truly inconvenient for the defendant. This is so because the two primary venues are (1) a district in a state in which all defendants reside, or (2) a district in which "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." *Id.* § 1391(a), (b). Certainly neither of these venues should be inconvenient for the defendants. The third possibility for venue is a district in which "any defendant is subject to personal jurisdiction" in diversity cases or in which "any defendant may be found" in federal question and other cases. *Id.* While a district chosen under this third option may sometimes be inconvenient, the third option can be used only when neither of the first two options is available.

194. *See generally* CHARLES A. WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 52 (6th ed. 2002).

195. *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 775-79 (1988); Stanley E. Cox, *The Interested Forum*, 48 MERCER L. REV. 727, 742-48 (1997); Heiser, *supra* note 6, at 936-38; Maier & McCoy, *supra* note 186, at 253-56; Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 560-73 (1991).

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

197. *E.g.*, *Burger King*, 471 U.S. at 478; Kulko v. Superior Court, 436 U.S. 84, 92 (1978). While Chief Justice Stone was apparently protecting his new creation, one may question whether repetition in these later opinions is intended more to protect the test or more to protect the power of judges to reach whatever result they think fair in the individual case.

Other arguments opposing a bright-line test are equally groundless. *E.g.*,

Granted, many areas of the law must be drawn in shades of grey.[198] Personal jurisdiction need not be. The judicial system will be far better served by a test that promotes the policies of predictability, stability, certainty, uniformity, and efficiency of result than by a test that virtually guarantees litigation in every case to the end of producing a result that an individual judge thinks "fair." The Supreme Court gladly advances bright-line rules in reliance on these policies in analogous areas of the law such as subject matter jurisdiction and res judicata.[199] The same attitude should prevail even more for the threshold issue of personal jurisdiction.

Second, this Article proposes that the Supreme Court scrap nearly sixty years of precedent in favor of a new law of personal jurisdiction. That is unlikely. Yet that is what the Court did in *International Shoe* when it realized the prior law of *Pennoyer* was no longer serviceable.[200] The wheel has turned round again.

From another perspective, the proposed law should be palatable to the Court because in many ways it is not truly starting afresh. The intentional transactional entry test is crafted in large part from Court precedents. The test can in part be seen as a restatement of the Court's requirement that a defendant must "purposefully avail" itself of the benefits and protections of the laws of the forum state.[201] It could even be seen as a restatement of minimum contacts with "fair

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Chemerinsky, *supra* note 111, at 866, 868:

> [U]ncertainty in the law of personal jurisdiction is inevitable and desirable. Ultimately, the minimum contacts test is about fairness; when is it unfair to hale an out-of-state defendant to another state? No bright-line test for this can ever be created. . . . Minimum contacts, although inherently vague, is a desirable test because it properly focuses courts on what should be at the core of personal jurisdiction analysis: does the person have sufficient connections to the state as to make it fair to hale her into the state?

The argument begs the question. It starts with the point of view that a personal jurisdiction test should be about fairness, identifies the minimum contacts test as one of fairness, and concludes therefore that the test is good. Conversely, a bright-line test, which is not one of fairness, would be bad. Where is the support for the initial proposition that a personal jurisdiction test should be about fairness?

198. The Supreme Court wrote in beautiful prose in *Estin v. Estin*, 334 U.S. 541, 545 (1947), "[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree." Having written this ode to complex thought, the Court reversed itself in the next paragraph: "The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections." *Id.* at 545.

199. *See supra* note 182.

200. *See supra* note 151 and accompanying text.

201. This concern was first recognized in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and has appeared in many of the Court decisions over the years, including the

play and substantial justice" shorn away; certainly the test eliminates any "convenience factors" identified in the progeny of *International Shoe*.[202] The test is, however, even stronger than a bare minimum contacts test. It is a minimum contact test. A single intentional entry into a state will always result in a finding of jurisdiction over that transaction. The proposed law is actually similar to the three-step test used today by many lower federal courts and state courts[203]—again with the third part, the reasonableness step, deleted. The fact that the "new" law is a molding of precedents should make it more attractive to the Supreme Court.

I hardly write on a clean slate in proposing that the Supreme Court drop *International Shoe*. The Court itself has not left the test alone and has modified it many times over the years.[204] Lower courts have created their own more concrete considerations in attempts to clarify and apply the test.[205] Commentators have proposed many other tests.[206] All of these calls for action

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Court's most recent decision on the subject, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109 (1987). *See supra* note 179. Sometimes the same concern is expanded in prose to include the notion that a defendant "should reasonably anticipate being haled into court there." *Burger King*, 471 U.S. at 474. This expansion adds nothing to purposeful availment, as any defendant that purposefully avails itself of the benefits and protections of a certain state will always be able to foresee being haled into court there. *See supra* text accompanying notes 92-93. The requirement of purposeful availment is reflected in the defendant's intentional entry into the state.

202. *E.g.*, *Burger King*, 471 U.S. at 476-77.

203. *See* FRIEDENTHAL ET AL., *supra* note 148, § 3.11, at 140.

204. *See supra* Part IV.

205. *See supra* Part V.

206. Some of the proposals are for convenience or fairness based tests, and are really *International Shoe* with a different coat of polish. *See* Cameron & Johnson, *supra* note 8, at 841 (proposing that jurisdiction rules should mirror venue rules); Heiser, *supra* note 6, at 937, 955 (proposing use of "significant contacts/interested forum" test from conflict of laws); McDermott, *supra* note 143, at 53 (proposing that a court should assess fairness of trial at end); McMunigal, *supra* note 40, at 231 (proposing a three-step test based on federalism, utility, and fairness); Stravitz, *supra* note 116, at 811 (proposing a tripartite balancing test); David C. Tunick, International Shoe *Should Get the Boot: An Essay on Suggested Changes to the Law of Personal Jurisdiction*, 70 U. DET. MERCY L. REV. 241, 267, 276 (1993) (proposing two groups of factors plus a "catch-all" factor); Woods, *supra* note 101, at 881-82 (proposing a "three-step analytical model"). These tests based on a balancing of fairness solve none of the problems of the *International Shoe* test.

Other commentators advise the Court to get out of the policing of state jurisdiction entirely. *See* Borchers, *supra* note 12, at 589-90 (constitutional test cannot "do the trick"); Borchers, *supra* note 40, at 103-04 (Court should leave jurisdiction entirely to states or Congress.); Jay Conison, *What Does Due Process Have To Do with Personal Jurisdiction*, 46 RUTGERS L. REV. 1073, 1208-09 (1994). After a century-and-a-half of Supreme Court policing of state court jurisdiction under the Due Process Clause, that

will remain cries in the wilderness so long as the *ipse dixit* test of *International Shoe* endures. The new test proposed in this Article will provide the stable and predictable law so greatly needed in personal jurisdiction cases.

IX. APPLICATIONS OF THE LAW OF INTENTIONAL TRANSACTIONAL ENTRY

While a proposed law may make sense in the midnight quiet of the library, it must be tested in the daylight hurly-burly of litigated cases. This Part first describes how the new law will achieve the policy goals of deciding personal jurisdiction challenges with certainty, predictability, and efficiency. Following that, this Article turns to practical, concrete applications of the law to the facts of actual cases. It demonstrates how *International Shoe* and its progeny would be decided. It then demonstrates how the new law will apply in two areas of current controversy, stream of commerce cases and internet cases.

A. Benefits

The primary benefit of the new law of personal jurisdiction will not appear in opinions deciding personal jurisdiction challenges under the new law; it will be apparent in the disappearance of those opinions. The new law will make the result of personal jurisdiction challenges much more predictable, and as a result will greatly reduce the incentive to litigate this threshold issue.[207] All concerned, from courts to counsel to clients, will benefit. A second benefit is that the new law will greatly reduce the opportunities for forum-shopping by both parties. The *International Shoe* test currently allows—even invites—both plaintiffs and defendants to forum-shop through personal jurisdiction.[208]

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seems quite unlikely to happen.

Some proposals are more specific and even unusual. *See* Cappalli, *supra* note 46 (advocating jurisdiction based on John Locke's social compact theory); Juenger, *supra* note 54, at 20-23 (an international compact based on the Brussels Convention should be negotiated); Moore, *supra* note 112, at 599-600 (analogizes to criminal defendant); Weinberg, *supra* note 116, at 103-04 (advocating "pragmatic, minimalist approach" to identify few cases of unfairness).

Professor Russell Weintraub first advocated jurisdiction based on fairness, and filled more than one-half page listing all the factors the court should consider in reaching its fairness decision. Weintraub, *supra* note 165, at 527-28. A decade later, he changed his mind to propose that jurisdiction should exist whenever a state has a "rational basis for wishing to decide the case," such as "defendant acted or caused consequences there, or both," with unfairness handled easily by transfer of venue. Weintraub, *supra* note 113, at 545. That proposal is somewhat similar to the one made in this Article.

207. *See supra* notes 181-82.

208. *See supra* note 195; *cf.* Solimine, *supra* note 113, at 18-20.

Third, when a rare challenge to personal jurisdiction is made, the new law should produce a far more concise resolution of the challenge. In the typical case, the court will be able to produce a brief opinion.[209] Even in factually complicated cases, the opinions will be much shorter.[210] The chronicling of activities the defendant performed—or did not perform—in the state, as has become almost boilerplate in minimum contacts decisions, will disappear. Courts will no longer have to work down a checklist of contacts such as office, agents, advertising, banking, sales, contracting, and delivery in the state. *International Shoe* explicitly discarded the "presence" test for jurisdiction over

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209. A few examples illustrate. The first is *LaMarca v. Pak-Mor Manufacturing Co.*, 735 N.E.2d 883 (N.Y. 2000). A Texas manufacturer sold a rear-loading garbage truck device to its New York distributor, which resold it to the town of Niagara, New York. *Id.* at 885. The plaintiff fell off the truck there due to an alleged defect. *Id.* The Texas defendant sold the device into New York: that without question constituted intentional transactional entry into the state. *Id.* at 886. The New York Court of Appeals wrote five pages to reach the same result. The second is *Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994). The plaintiff from Pennsylvania gave a speech in Texas. *Id.* at 646. A Texas reporter telephoned defendants in Indiana and Iowa for reactions to the speech. *Id.* The plaintiff sued the defendants in Texas for defamation. *Id.* The defendants, responding to a telephone call directed to them, did not intentionally enter Texas. *Id.* at 649. The Fifth Circuit wrote six pages to reach the same result. The third is *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998). The plaintiff alleged that the defendant, a German corporation, tortiously interfered with its attempt to sell an Italian subsidiary by sending letters to the subsidiary in Italy and a bank in New York. *Id.* at 256. The plaintiff sued in New Jersey. *Id.* The defendant clearly made no intentional transactional entry into New Jersey. *Id.* The Third Circuit wrote thirteen pages to reach the same result.

210. Two examples illustrate. In *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), customers suffered food poisoning at many Jack-in-the-Box fast food restaurants in California. *Id.* at 1088. Franchise restaurant owners whose customers had not been injured sued both the corporate franchisor and meat suppliers in their home state of California for damages due to the adverse publicity. *Id.* at 1089. The defendant meat suppliers then filed a cross-complaint under California state practice (a third-party complaint under Federal Rule of Civil Procedure 14) against other franchisees located in Washington state for damage to its own reputation and for indemnification against any claims that might be brought by customers there. *Id.* The claim in the cross-complaint arose from shipments of meat to the Washington defendants; they undoubtedly not only paid for the meat but also communicated extensively with the California meat suppliers over their multiple purchases. *Id.* That is intentional transactional entry. The California Supreme Court wrote twenty-seven pages to reach the same result. In *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002), an individual defendant living in Minnesota posted messages on a website challenging the professional credentials of an individual plaintiff living in Alabama. *Id.* at 530. That is not intentional transactional entry into Alabama. *See infra* Part IX.D. The Minnesota Supreme Court wrote nine pages to reach the same result.

a foreign corporation, but did not discard these remnants of that test.[211] The new law will finish that job.

Finally, when a jurisdictional challenge is raised, the court will decide based on a law that all can understand. The *International Shoe* test, based on fairness, necessarily results in what judges think is fair in the individual case. That result may appear to be arbitrary to the losing party. Consequently, the current test creates the appearance of injustice to the losing litigant even as it seeks to squeeze the last drop of "justice" from each case. The proposed new test—an understandable, bright-line law—will remove any appearance of impropriety or injustice.

The new law of intentional transactional entry will not eliminate all challenges to personal jurisdiction. Even though a bright-line test, it has some play in the joints. Defendants may argue they did not enter the forum state, their entry was not intentional, or their intentional entry was not part of the same transaction giving rise to the plaintiff's claim. A court should seldom have difficulty deciding whether a defendant entered a state, or whether the entry was intentional. The element of the intentional transactional entry test that may occasionally cause difficulty is the decision as to whether an intentional entry was part of the transaction at issue. Even though it is not precise, the term "transaction" is far more concrete than "fair play and substantial justice." Many cases from related areas of the law already define the scope and meaning of transaction.[212] Accordingly, even this analytical step should present little difficulty in the vast majority of cases.

B. Application to Supreme Court Cases

Including *International Shoe* itself, the Supreme Court has granted plenary review and decided twenty personal jurisdiction cases since 1945.[213] Of those,

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211. After working its way down the checklist of these evidences of "presence" of a defendant in a state, Int'l Shoe Co. v. Washington, 326 U.S. 310, 313-14 (1945), the Court later rejected the "presence" test. *Id.* at 316-17.

212. The term "transaction" is essentially equivalent to "transaction or occurrence," which in its turn is essentially equivalent to "claim," which has been identified as a "common nucleus of operative fact" in *United Mine Workers v. Gibbs*, 383 U.S. 715, 715 (1966), or "the same case or controversy under Article III" in 28 U.S.C. Section 1367. All of these concepts are largely synonymous and derive from the concept of a single set of facts that a lay person would expect to see tried together. That is the concept on which Professor Charles E. Clark, reporter of the advisory committee, required "a short and plain statement of the claim" in Federal Rule of Civil Procedure 8(a)(2). *See generally* Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L.J. 1059, 1061-68, 1076-77 (1993).

213. The cases following *International Shoe* are collected and analyzed in Borchers, *supra* note 40, at 56-87; Cameron & Johnson, *supra* note 8, appendix I;

six involved an aspect of personal jurisdiction not of concern in this Article,[214] leaving fourteen cases to illustrate the application of the intentional transactional entry test.

The decisions in thirteen of the fourteen cases would have been quite straightforward under the proposed intentional transactional entry test.[215] The defendants in those cases would likely not even have raised a personal jurisdiction challenge in most of the cases upholding personal jurisdiction; the plaintiffs likely would not have even attempted to obtain jurisdiction over the

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Kurland, *supra* note 57, at 586-623.

214. The six cases in chronological order are *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice case also involving in personam or in rem jurisdiction over beneficiaries of trusts); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (waiver of jurisdictional objection); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (jurisdiction over plaintiff class members in class action suit); *Burnham v. Superior Court*, 495 U.S. 604 (1990) (jurisdiction based on service within the state); *Argentina v. Weltover, Inc.*, 503 U.S. 917 (1992) (brief jurisdictional issue in sovereign immunity case); and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (brief jurisdictional issue in tax case).

215. The one case of the fourteen that presents a difficult analysis is *Kulko v. Superior Court*, 436 U.S. 84 (1978). The facts of the case were most unusual. The plaintiff and the defendant were married in California when the defendant was there on a military stopover en route overseas, but their entire married life was spent in New York. *Id.* at 86-87. The wife left New York, obtained a Haitian divorce, and moved to California. *Id.* at 87. The husband retained custody of the couple's two children in New York, although they were to visit their mother in California during school and summer vacations. *Id.* The father agreed to pay child support for those periods, and we must assume he sent some payments to California. A year later, he purchased an airplane ticket so his daughter could move permanently to California to live with her mother. *Id.* at 87-88. Another three years later, unbeknownst to the father, the son also moved to California. *Id.* at 88. The plaintiff mother then sued the defendant father in California for increased child support. *Id.*

Did the defendant make an intentional transactional entry into California? All three parts of the test present difficulties. First, neither the defendant's military stopover nor the defendant's sending his daughter to California seems to be intentional, as that term implies voluntary and uncoerced. As the Court stated the matter, "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' . . . ." *Id.* at 94. Second, the defendant's single entry into the state at the time of the marriage would not likely be considered part of the same transaction as an obligation to pay child support two decades later. Defendant's transmittal of child support payments into California might be considered part of the same transaction in question, but that would return the analysis to the question of whether his actions were intentional (voluntary). Finally, the defendant did enter the state at the time of his marriage, but acquiescing in a daughter's wish to live with her mother by buying her a ticket to the forum state would not likely constitute entry into the state by the defendant.

defendants in most or even all of the cases rejecting personal jurisdiction. If the attempt were made by the plaintiff, the trial court decision on a challenge by the defendant likely would have ended the jurisdictional dispute, and the challenge would not reasonably have been taken to the appellate level.

Eleven of the fourteen cases are decided the same both by the Court and by the intentional transactional entry test.

Six of those eleven same-result cases uphold personal jurisdiction over the defendant. Those six cases are *International Shoe Co. v. Washington*,[216] a state suit to collect unemployment compensation contributions; *Travelers Health Ass'n v. Virginia*,[217] a suit by the state commission to halt an unregistered nonresident's insurance sales in the state; *McGee v. International Life Insurance Co.*,[218] a beneficiary's suit to collect the proceeds of a life insurance policy; *Keeton v. Hustler Magazine, Inc.*,[219] a suit for defamation in a magazine; *Calder v. Jones*,[220] a suit for defamation in a tabloid newspaper; and *Burger King Corp. v. Rudzewicz*,[221] a franchisor's suit to collect payments due on a contract with a franchisee.

Five of the eleven same-result cases reject personal jurisdiction over the defendants. Those five cases are *Shaffer v. Heitner*,[222] a shareholders' derivative

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216. 326 U.S. 310 (1945) (the defendant made numerous intentional transactional entries by hiring the sales personnel, soliciting sales, and shipping the product into the state).

217. 339 U.S. 643 (1950) (the defendant made numerous intentional transactional entries by soliciting insurance sales, investigating claims, and insuring 800 persons in the state).

218. 355 U.S. 220 (1957) (the defendant made a single intentional transactional entry by servicing a life insurance policy in the state).

219. 465 U.S. 770 (1984) (the defendant made an intentional transactional entry by mailing the magazine containing the defamatory material into the state).

220. 465 U.S. 783 (1984) (Plaintiff, an actress living in California, sued four defendants—the corporation, the local distributor, the reporter, and the editor—in California state court for defamation in an article that appeared in the National Enquirer. The corporation and the local distributor did not challenge jurisdiction. The reporter and the editor, who both lived and worked on the article in Florida, did challenge jurisdiction. Defendant reporter made numerous intentional transactional entries into California by making telephone calls concerning the article into the state. The defendant editor would have been dismissed. Even though he edited the article in question, and knew the subject of the article lived in California, no facts in the record indicate he personally made an intentional transactional entry into the state.).

221. 471 U.S. 462 (1985) (the defendant made numerous intentional transactional entries by communications and sending payments into the state).

222. 433 U.S. 186 (1977) (the defendants made no intentional transactional entry—even though they were officers and directors of a corporation domiciled in the forum state—as all of their official actions giving rise to the claim took place in another state).

suit against the officers and directors of a corporation for causing the corporation to engage in actions that resulted in an award of antitrust damages and a fine for criminal contempt against it; *Kulko v. Superior Court*,[223] a divorced wife's suit against the husband for increased child support payments; *Rush v. Savchuk*,[224] a quasi in rem suit against a driver for an auto accident in another state based on ownership of an auto insurance policy issued by a company also having offices in the forum state; *World-Wide Volkswagen Corp. v. Woodson*,[225] a products liability suit for injury from a car fire during an accident in a state other than where the car was purchased; and *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[226] a tort suit for a helicopter crash in Peru.

The results in only three of the fourteen cases would be different. In one case, *Perkins v. Benguet Consolidated Mining Co.*,[227] the Court upheld personal jurisdiction, but the new law would reject it. In two cases, the Court rejected personal jurisdiction, but the new law would uphold it. The first is *Hanson v. Denckla*,[228] a suit by residuary beneficiaries under a trust against persons taking by power of appointment under the trust (and the bank trustee) over distribution of the trust assets. The second is *Asahi Metal Industry Co. v. Superior Court*,[229] a third-party claim by a Japanese tire manufacturer against a Taiwanese tire valve supplier arising out of a motorcycle accident in California. Both of these cases are easy applications of the intentional transactional entry rule.[230] This

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223. 436 U.S. 84 (1978) (the defendant made no intentional transactional entry into the state); *see supra* note 215.

224. 444 U.S. 320 (1980) (the defendant auto driver made no intentional transactional entry into the state as the auto accident occurred in another state).

225. 444 U.S. 286 (1980) (the defendants, a local retail auto dealer and regional distributor, made no intentional transactional entry into the distant state where the accident occurred).

226. 466 U.S. 408 (1984) (the defendant made no intentional transactional entry into the forum state, even though it had negotiated a contract, purchased equipment, and received personnel training there, as these entries were not transactionally related to a helicopter crash in a foreign country).

227. 342 U.S. 437 (1962) (The Court found jurisdiction over a foreign corporation based on its continuous and systematic activities in a state. The intentional transactional entry test would refuse jurisdiction as the defendant's intentional entry into the state was transactionally unrelated to the claim. The intentional transactional entry test does not recognize general jurisdiction.); *see supra* text accompanying notes 186-88.

228. 357 U.S. 235 (1958) (the defendant bank trustee made numerous intentional transactional entries through active management of trust business in cooperation with settlor of trust located in forum state).

229. 480 U.S. 102 (1987) (the defendant made an intentional transactional entry by placing its product into the stream of commerce with knowledge that a substantial percentage of units would enter the forum state); *see infra* text accompanying note 231.

230. Both *Hanson* and *Asahi*, in which the Supreme Court refused jurisdiction, cry out for application of the trite admonition, "hard cases make bad law." The defendant

adjustment of a few outcomes is a reasonable price to pay for the many benefits that will accrue from the new law.

This Article has demonstrated how the law of intentional transactional entry would decide the same cases presented to the Supreme Court during the regime of *International Shoe*. Now the law will be applied to two areas of current controversy.

C. Stream of Commerce Cases

Placing a product into the stream of commerce is not an intentional entry into any state except the one that is the headwaters of the stream. The defendant does not know where the stream might flow. As soon as one adds facts, however, an intentional transactional entry can be found. When the defendant is aware of the route a particular product will follow, and that product gives rise to a suit, the defendant rather obviously intentionally enters every state on the shipping route. Of course, that level of knowledge is highly unlikely.

More likely, the defendant will not be aware of the destination of any one unit; the defendant will be aware only that a certain percentage of its product will be shipped into the forum state. Here also the defendant makes a transactional entry into the state. The only question is whether the entry is intentional. A defendant must aim to hit a state for the state's courts to be able to hit back. A defendant who places multiple units of a product into the stream of commerce with knowledge that some of those units will enter the forum state aims at that

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Delaware bank in *Hanson* engaged in continuous and systematic communications to and from the forum state (Florida) in managing the trusts, yet upholding jurisdiction would have resulted in two contestants for the assets winning big and two contestants losing big. *Hanson*, 357 U.S. at 252-53. When the Court rejected jurisdiction, the resulting distribution of assets allowed all parties to share. The primary action in *Asahi* was a products liability suit arising from a motorcycle accident in California. *Asahi*, 480 U.S. at 105-06. The action settled, leaving only a cross-complaint (third-party action) between a Taiwanese tire manufacturer and a Japanese tire valve supplier. The Court rejected jurisdiction over this derivative dispute even though the record showed that the Japanese tire valve supplier knew approximately 100,000 of its valves annually reached California in the stream of commerce. Adjudication in California of a dispute between two parties located across the Pacific Ocean did not strike the Justices as "fair." *Id.* at 116.

state.[231] The defendant's product is "substantially certain" to enter the state; substantial certainty is intent.[232] The state can hit back with a suit arising from a unit of the product that actually did enter the state. That is intentional transactional entry.

D. Internet Cases

The current law of personal jurisdiction in cases arising through transmissions over the internet is a hodgepodge.[233] Albeit other articles have attempted to suggest paths through that hodgepodge,[234] this Article enters the area briefly to demonstrate the path that the intentional transactional entry test would blaze.

A person who does no more than post information on a web site on the internet intentionally transactionally enters no state. The alternative is that a person who creates a web site or responds to a web site enters every state and indeed every nation in the world. After all, the name is the World Wide Web.

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231. The Court in *Asahi*, 480 U.S. at 112, reasoned, "[M]inimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" That concept governing stream of commerce cases is consistent with the argument made here. The error in *Asahi* is the Court's next assertion that the "defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* Awareness that some—certainly awareness that a substantial percentage—of the units of the product will flow into the forum state should qualify as "purposefully directed." Even the case that represents the zenith of Court concern for state sovereignty, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980), opined in dictum that a state could assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."

232. *See supra* note 183.

233. The "current hodgepodge of case law is inconsistent, irrational, and irreconcilable." Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 939 (1998); *see, e.g.*, Joseph S. Burns & Richard A. Boles, *Personal Jurisdiction and the Web*, 53 MAINE L. REV. 29, 31 n.3 (2001) (collecting articles on "the inconsistencies that have resulted from the inherent difficulty in conceptualizing the Web"); Sarah K. Jezairian, *Lost in the Virtual Mail: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?*, 42 ARIZ. L. REV. 965 (2000); Erica D. O'Loughlin, Note, *The Times They Are A-Changin': Personal Jurisdiction in Cyberspace*, 66 MO. L. REV. 623, 636-39 (2001) (showing split of courts).

234. *E.g.*, Susan Nauss Exon, *A New* Shoe *Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1 (2000); Todd D. Leitstein, Comment, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999); Recent Cases, CTE New Media Services Inc. v. BellSouth Corp., *199 F.3d 1343 (D.C. Cir. 2000)*, 113 HARV. L. REV. 2128 (2000).

The act of posting information on a web site is analogous to placing a product into the stream of commerce with no knowledge of the direction of the stream.

When a person undertakes additional acts beyond the bare posting of information on a web site, an intentional transactional entry into a state may occur. One example is a defendant who sells over the internet. An internet seller who accepts an order for a product with knowledge that the customer is making the order from a particular state does not enter the state on that fact alone; however, sending confirmation of the order to the customer in the forum state is an intentional transactional entry. Also, shipping the product to the customer in the forum state is without question an intentional transactional entry.[235] A second example is a person who sets up an interactive web site that automatically responds to an internet user. That fact alone is not an intentional entry into any state, but an individualized response with knowledge of the state where the person is located clearly is an intentional transactional entry. Sending an e-mail to a person known to be in state A is an intentional transactional entry into state A as much as is addressing and mailing a letter via the U.S. mail into state A.

X. CONCLUSION

This Article analyzes why the minimum contacts/fair play test for personal jurisdiction created in *International Shoe*, and expanded in later decisions of both the Supreme Court and other courts, is not working. The Article then proposes a new law of personal jurisdiction: the intentional transactional entry test. Some will label this new bright-line law abecedarian. That is its major benefit. The new law decides the threshold issue of personal jurisdiction with efficiency, certainty, predictability, stability, and uniformity, instead of demanding a case-by-case quixotic quest for pure fairness and justice.

I am not naive enough to suggest that this new law will eliminate close cases, but it will answer a jurisdictional challenge quickly and clearly in the vast bulk of cases. That will be a great improvement over current law, in which nearly every case is a close case requiring extended analysis, often at the appellate level. True, the new law may reach some defendants in situations where the jurisdictional reach does not seem "fair," and may waive aside some defendants in situations where a convenience-based jurisdictional reach would

235. In this manner the intentional transactional entry test operates in a similar fashion as the rule that the cases appear to be developing: a passive web site does not give rise to jurisdiction, but an active web site does. This has come to be called a sliding scale approach from its creation in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *See* Recent Cases, *supra* note 234, at 2129-30. This developing law of the internet brings to mind also the active/passive, buyer/seller gloss some states place on the minimum contacts test. *See supra* text accompanying note 144.

seem "fair,"[236] but the tail of those few cases should not wag the personal jurisdiction dog. The law is far better served by recognizable and applicable legal principles that decide the overwhelming majority of cases surely and swiftly than by an amorphous search for "fair play" in each and every individual case.

236. *See supra* text accompanying notes 227-30.