

THE IRREPRESSIBLE MYTH OF *BURNHAM* AND ITS INCREASING INDEFENSIBILITY AFTER *GOODYEAR* AND *DAIMLER*

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[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.

—O. W. HOLMES, JR.

THE COMMON LAW 35 (1881)

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

—O. W. Holmes

The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)

Perhaps the adage about hard cases making bad law should be revised to cover easy cases.

—Burnham v. Superior Court, 495 U.S. 604, 640 n.*

(Stevens, J., concurring)

INTRODUCTION

Personal jurisdiction has long been at the center of the civil procedure curriculum in law school¹ and constitutes an important part of law practice.² Ser-

¹ Some civil procedure faculty report spending as many as six to eight weeks of class time covering personal jurisdiction. Many prominent Civil Procedure casebooks devote 100 pages or more to the topic and excerpt as many as a dozen personal jurisdiction cases, as well as presenting extensive notes on personal jurisdiction cases. *See, e.g.*, DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 49–117 (6th ed. 2012) (sixty-eight pages and twenty-four excerpted cases addressing personal jurisdiction); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 71–198 (10th ed. 2009) (127 pages and twenty-two excerpted cases); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 680–824 (5th ed. 2009) (144 pages and fourteen excerpted cases on personal jurisdiction); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 680–846

vice of process, a close companion, receives considerably less attention in the law school curriculum,³ but it is perhaps even more important to the daily practice of law.⁴

The amount of class time devoted to personal jurisdiction is so great (and perhaps excessive) because it lends itself so well the traditional modified Socratic method of the classroom. Changing the facts just a little forces students to confront the problems of concrete application of doctrine—for example, “What if the defendant had intentionally shipped ten widgets into the forum state instead of ten thousand?”

The law of personal jurisdiction also presents an opportunity to teach civil procedure as legal process, as courts traverse from the territorial sovereignty and international law concepts of *Pennoyer*⁵ to the minimum contacts of *International Shoe*⁶ to the more involved modern applications of *World-Wide*

(4th ed. 2012) (166 pages and fourteen excerpted cases addressing personal jurisdiction). *But see* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 21–142 (6th ed. 2012) (devotes 121 pages of consideration to personal jurisdiction but excerpts only nine cases); JEFFREY W. STEMPEL ET AL., LEARNING CIVIL PROCEDURE 76–122 (2013) (devoting forty-six pages to the topic and excerpting only two cases). Although extensive, multi-week attention to personal jurisdiction may be excessive in relation to the importance of the topic in ordinary litigation, some instructors arguably go to the other extreme, covering the subject in a class period or less simply by setting forth controlling doctrine in the area. *See also* SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 5–6 (1986) (concluding that U.S. Supreme Court devotes too much attention to personal jurisdiction cases and notwithstanding this investment of time has failed to provide clear guidance in the area to lower courts).

² Genuinely difficult issues of personal jurisdiction akin to those presented in law school casebooks are relatively rare in practice. Most lawyers correctly elect to sue only in states where the court has personal jurisdiction over the defendants. But this still reflects substantial attorney planning as to the range of available forums as well as a decision as to the most advantageous forum. Further, even with lawyers attempting to avoid suit in a forum without jurisdiction, successful Rule 12(b)(2) motions, although comparatively rare, are still a frequent and important aspect of civil litigation.

³ In most civil procedure casebooks, service of process gets comparatively little attention. *See, e.g.*, FREER & PERDUE, *supra* note 1, at 143–62 (nineteen pages and two excerpted cases on service); FRIEDENTHAL ET AL., *supra* note 1, 199–238 (thirty-nine pages and four cases on service); MARCUS ET AL., *supra* note 1, 825–49 (twenty-four pages and two cases on service); SUBRIN ET AL., *supra* note 1, at 828–30 (three pages and one case addressing service of process). *But see* CRUMP ET AL., *supra* note 1, at 118–30 (only twelve pages but six cases presented); STEMPEL ET AL., *supra* note 1, at 118–23 (specifically addressing service of process and personal jurisdiction), 123–48 (specifically addressing service of process as a matter of notice and due process).

⁴ Although the average lawsuit does not involve serious questions regarding personal jurisdiction, all lawsuits require effective service of process to commence the action. Although this aspect of litigation is less intellectually interesting and more technical, formal, and rote, in the typical case it probably consumes more resources than analysis of personal jurisdiction.

⁵ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁶ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Volkswagen,⁷ *Helicopteros*,⁸ *Burger King*,⁹ *Keeton v. Hustler*,¹⁰ *Calder v. Jones*,¹¹ *Asahi Metal*,¹² *J. McIntyre*,¹³ *Goodyear*,¹⁴ and, most recently, *Daimler*¹⁵ and *Walden v. Fiore*.¹⁶

As society changed, doctrine changed; as the law, society, and business further evolved, so did doctrine, arguably moving from an excessively restrictive attitude toward jurisdictional reach¹⁷ to one overly permissive,¹⁸ only to retreat somewhat in response to perceived abuses or unforeseen problems.¹⁹ Students can be shown a history of judicial attitudes toward litigation and fairness reflected in case law. Although the availability of personal jurisdiction generally expanded in response to the felt necessities of the time²⁰ (the *International Shoe* line of cases),²¹ courts also put limits on at least one venerable form of jurisdiction and lawyer tool (quasi-in-rem jurisdiction) that became viewed as too fraught with potential for unfairness (*Shaffer v. Heitner*).²²

⁷ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

⁸ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

¹⁰ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

¹¹ *Calder v. Jones*, 465 U.S. 783 (1984).

¹² *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

¹³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

¹⁴ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

¹⁵ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

¹⁶ *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

¹⁷ For example, *Pennoyer v. Neff*, 95 U.S. 714 (1877) appears to grant very broad personal jurisdiction over persons or property within the territorial boundaries of the state but to deny jurisdiction even in the compelling cases in which defendants enter a state, do harm, but then leave the state before they can be served with legal process. Cases between *Pennoyer* and *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), expanded personal jurisdiction concepts to reach such cases but did so only narrowly based on fairly confined notions of whether the defendant, even if not physically present in the state at the time of suit, had been “doing business” in the state. See STEMPER ET AL., *supra* note 1, at 83–89.

¹⁸ See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1958) (upholding California’s exercise of personal jurisdiction over Texas-based insurance company that acquired another insurer that had sold a single policy in California, albeit to the plaintiff’s decedent). Because the *McGee* defendant’s contact with California is so closely related to the gravamen of the lawsuit (refusal of the insurer to pay policy benefits to a beneficiary), I have always regarded the case as correctly decided even though the defendant’s quantum of contact with the forum state is slim. But almost all commentators agree that *McGee* is the Supreme Court’s most extensive exercise of personal jurisdiction.

¹⁹ See *infra* notes 155–88 and accompanying text (discussing constriction of broad personal jurisdiction by Supreme Court).

²⁰ See O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) (law responds to “felt necessities of the time”). The Holmes gift for turning a phrase, like Shakespeare’s, has become so much a part of the legal lexicon that what might be termed Holmes-isms come unconsciously to lawyers. See *id.* (“The life of the law has not been logic. It has been experience.” This quote is another aphorism that explains a good deal of the development of personal jurisdiction).

²¹ See *supra* notes 5–16 and accompanying text; see also *infra* notes 48–49 and accompanying text.

²² *Shaffer v. Heitner*, 433 U.S. 186, 208–09 (1977), discussed *infra* notes 65–87 and accompanying text.

Service of process, by contrast, tends to get short shrift in the classroom because it is perhaps unfairly viewed as more mechanical, better suited for on-the-job learning, and less conducive to class discussion. While lacking in Socratic potential, service of process can provide some useful comic relief to overwrought law students. Consider the problems of “sewer service” by unscrupulous process servers.²³ Or the challenge of bird-dogging the defendant trying to avoid service as the limitations period nears expiration, complete with inventive process servers lurking behind bushes, including the summons and complaint with the morning paper, tossing these papers through a window while wrapped around a rock, and so on. Even if such service might not actually hold up in the face of a Rule 12(b)(5) challenge,²⁴ the examples provide useful anecdotes or illustrations for the classroom.²⁵

But in these instances of tenacious service of the reluctant defendant, there is usually no question that the defendant is subject to suit in the relevant jurisdiction. In most real life litigation, there is little connection between service of process—a technical, mechanical, bureaucratic necessity—and personal jurisdiction, as well as no serious issue regarding the existence of personal jurisdiction. Consequently, classroom illustrations about “slap” service²⁶ done in Charlie Chaplin or Keystone Cops mode usually function as amusing illustrations of a means of giving notice rather than a means of acquiring jurisdiction.

An exception, of course, arises when service is effectuated while the prospective defendant is merely passing through the relevant jurisdiction. Such “transient” or “tag” jurisdiction became seemingly out of place with the *International Shoe* decision, given its focus on whether the defendant had sufficient minimum contacts with the forum state of the lawsuit to make litigation against

²³ Sewer service is an informal term frequently used to describe service that is allegedly done (usually with an unscrupulous process server’s affidavit in support) but was never in fact completed, with the process frequently ending up discarded (in the metaphorical sewer) rather than actually given to the prospective defendant or agent. See FREER & PERDUE, *supra* note 1, at 161.

²⁴ See FED. R. CIV. P. 12(b)(5) (motion to dismiss complaint may be based on improper or inadequate service of process plaintiff); FED. R. CIV. P. 12(b)(4) (motion to dismiss may also be based on defective form or content of summons).

²⁵ Perhaps my favorite involves a staffer at the law firm where I once worked who was seeking to serve a reluctant target, a working physician. The staffer came to the medical office professing a need to see Dr. X. When asked whether he was a patient, the staffer replied that the doctor was “very familiar with my case.” The staffer, a distinguished older man and retired court clerk, was ushered into an examination room and served the doctor when he subsequently entered the room.

²⁶ In this article, I will use the term “slap service” as well as “tag” jurisdiction and “transient” jurisdiction to refer to instances in which a defendant served with a summons and complaint as a means of initiating litigation. This type of physical, in-person service also connotes ambushing a defendant who, if not unwilling to accept process, is at least surprised by the sudden nature of the service. Tag jurisdiction is a more common term referring to such cases where a defendant temporarily in the forum state is “tagged” with process in the manner of being tagged as “it” in the familiar children’s game. The exercise of personal jurisdiction over a defendant in transit through a jurisdiction through service of process is perhaps even more commonly referred to as transient jurisdiction.

the defendant in that state consistent with fair place and substantive justice under the Due Process Clause.²⁷ This tension became particularly palpable after *Shaffer v. Heitner*.²⁸

The argument against the continuing vitality of service to establish personal jurisdiction is a powerful one—that mere service is not a very weighty contact with the forum state and should not, by itself, establish the requisite minimum contacts required by *International Shoe* and its progeny. For example, a Philadelphian may drive to Southern Ohio to drop off a child at college using Interstate 70, which passes through a sliver of West Virginia wedged between Pennsylvania and Ohio. If the Pennsylvanian is served while gassing up the car at a truck stop near Wheeling, can this really subject the Philadelphian to a lawsuit in West Virginia? Even for a lawsuit over events having no connection to West Virginia? The common sense answer under a minimum contacts/fairness analysis is that, without more, this slim amount of contact with the forum state cannot make it fair to subject this transient driver to a lawsuit in West Virginia over a dispute centered elsewhere.

This hypothetical can easily be made more unfair if the college drop-off trip does not involve a litigation forum state adjacent to the defendant's own domicile. Consider, for example, a Californian who flies to Pittsburgh, rents a car, and then drives to Ohio, being served at the Wheeling truck stop in a lawsuit involving a real estate dispute in Florida. Should the Californian really have to defend himself in a West Virginia court? And what if service were effectuated by a former Navy Seal who, while suspended from a helicopter keeping pace with the Californian on a West Virginia stretch of I-70, induces the driver to roll down the window and then hands the summons through the window?

If the Philadelphian or Californian is involved in an automobile collision in West Virginia on such a trip, the questions of contact and fairness are, of course, quite different. The defendant has now had substantial, palpable, injurious contact with the forum state in connection with a matter related to the lawsuit. Only the most restrictive of pre-*International Shoe* courts would deny personal jurisdiction in such cases. But providing what is essentially general personal jurisdiction over any defendant with the misfortune of being served while in the forum state, however briefly or episodically, was always hard to square with the due process fairness approach of *International Shoe*.

At least as an intellectual endeavor, continuing to treat slap service as establishing general personal jurisdiction because the defendant was “tagged” with process while briefly in the forum state became increasingly difficult after

²⁷ See *supra* notes 5–16 and accompanying text; see also *infra* notes 48–49 and accompanying text.

²⁸ See *infra* notes 65–87 and accompanying text, discussing *Shaffer v. Heitner*, 433 U.S. 186 (1977) and scholarly reaction to the decision.

Shaffer v. Heitner.²⁹ In *Shaffer*, the Court required that another venerable jurisdictional gambit—quasi-in-rem jurisdiction³⁰—comport with the minimum contacts approach of *International Shoe*. If quasi-in-rem jurisdiction must satisfy the minimum contacts/due process test, then surely the same would logically be required of slap service and transient jurisdiction absent extenuating circumstances.³¹

²⁹ See *Shaffer v. Heitner*, 433 U.S. 186, 210–12 (1977), discussed *infra* notes 65–87 and accompanying text.

³⁰ Quasi-in-rem jurisdiction is the attachment of a defendant's property in the state as a means of obtaining personal jurisdiction over the defendant. Even if the defendant is not otherwise subject to personal jurisdiction, through quasi-in-rem personal jurisdiction, the defendant can be sued in the state of attachment—even over matters unrelated to the property—but any judgment against the defendant cannot exceed the value of the attached property. See GEOFFREY C. HAZARD, JR. ET AL., CIVIL PROCEDURE 107–08 (6th ed. 2011).

³¹ Although this article argues for the elimination of tag jurisdiction as a general matter, I concede that there may be a place for continued use of service to establish personal jurisdiction in cases where a defendant would otherwise avoid justice. For example, if there is no practical alternative forum for suing a defendant (e.g., a foreign dictator who seldom leaves his military compound) that has caused injury but is not subject to specific personal jurisdiction (discussed *infra* notes 52–62 and accompanying text), upholding personal jurisdiction while serving the dictator at an airport, seaport, or vacation hotel may be justified as necessary to vindicating substantive legal rights. This type of jurisdiction-by-necessity-for-justice thinking may undergird modern cases that exercise tag jurisdiction without much seeming reflection on the potential unfairness of such exercises of jurisdiction or its inconsistency with the minimum contacts construct. See, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 247 (2d Cir. 1995) (upholding personal jurisdiction in Alien Tort Claims Act cases on basis of service during U.S. visit over alleged ringleader of atrocities in Bosnia-Herzegovina) (citing *Burnham*); *Bourassa v. Desrochers*, 938 F.2d 1056, 1057–58 (9th Cir. 1991) (holding service of process during Florida trip sufficient for exercise of personal jurisdiction over Canadian citizen accused of fraud); *Schinkel v. Maxi-Holding, Inc.*, 565 N.E.2d 1219, 1222–23 (Mass. App. Ct. 1991) (asserting personal jurisdiction over Finland resident on Massachusetts vacation) (embracing Scalia's position in *Burnham*). But outside the topic of human rights abuses (for example, the *Kadic* court noted that suit in the former Yugoslavia was not a realistic option, 70 F.3d at 250), in almost any such hypothetical one can create, it would also seem possible to sue the defendant in at least one forum related to the underlying lawsuit, which would permit long-arm specific personal jurisdiction that eliminates the need for tag jurisdiction. For example in *Bourassa v. Desrochers*, the defendant solicited the business of plaintiff, a California resident, through calls to her home and that purportedly swindled her into paying for land that defendant misappropriated for profit, causing injury to plaintiff in her home state of California. 938 F.2d at 1057. Less clearly, in *Schinkel v. Maxi-Holding*, the defendant appears to have reached out to contract with the Massachusetts based plaintiff and then caused harm to plaintiff felt in Massachusetts (but the court did not discuss the defendant's contacts in any detail because it was content to base personal jurisdiction on service alone). 565 N.E.2d at 1221. Although the Supreme Court's most recent specific personal jurisdiction case of *Walden v. Fiore* may prompt some doubt (see *infra* notes 183–88 and accompanying text), it would seem that there is no due process bar to exercises of jurisdiction in *Bourassa* and *Schinkel* (although state long-arm statutes may not be satisfied). To the extent this analysis is incorrect, it may indicate that *Walden v. Fiore* is more problematic than has been appreciated to date. Just the same, it would seem that defendants outside a forum state that intentionally cause injury within the forum state should logically be subject to personal jurisdiction irrespective of whether physical service of process takes place. Further, in real world litigation, a bigger problem with such elusive defendants will not be obtaining personal jurisdiction (e.g., the dictator's bodyguards rough up plaintiff and plaintiff sues in

Or so one would have thought. In the Court's subsequent decision in *Burnham v. Superior Court*,³² however, the plurality opinion embraced the continued efficacy of tag jurisdiction—on the basis of historical use alone—arguably giving tag jurisdiction or slap service higher status than quasi-in-rem jurisdiction, even though the latter is at least as defensible as the former. But, as discussed below,³³ such a reading of *Burnham* is overbroad in light of the fractured nature of the Court and hedged rhetoric in that case. Nonetheless, for reasons that are both puzzling and troubling, many commentators and courts writing after *Burnham* have largely treated Justice Scalia's opinion as broadly endorsing tag jurisdiction as black letter law even though it only commanded three votes. Arguably, the opinion garnered four votes, in that Justice White's concurrence was generally supportive of tag jurisdiction but open to subjecting it to greater scrutiny if it proved problematic.³⁴ A closer reading of *Burnham* makes clear that a majority of the modern Supreme Court has never endorsed service alone as conclusively establishing general personal jurisdiction in the absence of some additional significant defendant contact with the forum state.

Both the judiciary's overenthusiastic overreading of *Burnham* and the tension between slap service or tag jurisdiction, minimum contacts analysis, and due process have become even more pronounced in the wake of the Court's recent decisions in *Goodyear*³⁵ and *Daimler*.³⁶ In these two cases, the Court narrowed the availability of general personal jurisdiction, essentially making such jurisdiction easily available only in a defendant's home state (or home states in the case of defendants who can be said to be "at home" in more than one state). To the extent *Burnham* is incorrectly read as making service of process the equivalent of general personal jurisdiction, this twenty-five-year-old precedent is completely inconsistent with the solicitude expressed for general jurisdiction defendants in *Goodyear* and *Daimler*.

Part I of this article briefly reviews the history and modern jurisprudence of transient jurisdiction via service of process on defendants. It sites this basis for jurisdiction in the larger context of evolving judicial doctrine on personal jurisdiction from *Pennoyer* to the present. This article in particular looks at *Grace v. MacArthur*³⁷—perhaps the outer limit of use of service upon a transient (while

his home state where the roughing took place or the plaintiff continued to suffer injury) so much as collecting on a judgment (e.g., the dictator may not have assets outside the state of his military dominance).

³² *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990), discussed *infra* notes 139–53 and accompanying text.

³³ See *infra* notes 150–54 and accompanying text.

³⁴ See *infra* notes 147–48 and accompanying text.

³⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011), discussed *infra* notes 158–65 and accompanying text.

³⁶ *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), discussed *infra* notes 171–82 and accompanying text.

³⁷ *Grace v. MacArthur*, 170 F. Supp. 442, 443 (E.D. Ark. 1959), discussed *infra* notes 90–109 and accompanying text.

on a plane flight over state airspace) to establish personal jurisdiction, and the puzzling manner in which *MacArthur* has been and continues to be erroneously treated as authoritative. Part II reviews *Burnham* and highlights what many courts appear to have missed: *Burnham* did not make service alone sufficient for the exercise of personal jurisdiction; Justice Scalia's opinion should not be treated as authoritative based on perceived concessions in Justice Brennan's concurrence; and a majority of the Court required something more than mere service of process to support personal jurisdiction. Part III introduces into the mix *Goodyear* and *Daimler* and illustrates how both the holdings and the reasonings of these cases make slap service (and the continuing vitality of *MacArthur* and the Scalia opinion in *Burnham*) untenable. The article concludes by reiterating the scholarly community's longstanding call for a more integrated treatment of all personal jurisdiction questions that would be fairer and more consistent than the present regime.

I. JURISDICTION BY SERVICE ALONE: THE ROAD TO *MACARTHUR* AND *BURNHAM*

A. *From Territoriality to Minimum Contacts*

Although tag jurisdiction is typically viewed as established procedure of ancient origin (and of longstanding "pedigree," to use the language of Justice Scalia in endorsing its continued vitality in *Burnham*³⁸), the most extensive legal scholarship on the topic has persuasively argued to the contrary. Professor Albert Ehrenzweig's review of historical precedent concluded that until *Pennoyer v. Neff*,³⁹ courts focused primarily on whether the forum was an adequately convenient location for subjecting the defendant to a lawsuit.⁴⁰

*Pennoyer*⁴¹ enshrined transient jurisdiction in America, wrongfully so in Ehrenzweig's view. By focusing on the territorial limits of the states' judicial

³⁸ *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990).

³⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁴⁰ Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 290–91 (1956). *But see* Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 49–51 (1989) (appearing to characterize pre-*Pennoyer* historical practice as consistent with *Pennoyer*). More important, perhaps, in *Burnham*, Justice Scalia (and three other justices) appear to view slap service and tag jurisdiction as well-established prior to *Pennoyer*. *See* *Burnham v. Superior Court*, 495 U.S. 604, 613–14 (1990), but Justice Brennan (also joined by three justices) embraced Ehrenzweig's historical analysis as authoritative. *See id.* at 634.

⁴¹ *Pennoyer*, 95 U.S. at 714. *Pennoyer* was an ejectment action brought in federal court under the diversity jurisdiction. *Pennoyer*, the defendant in that action, held the land under a deed purchased in a sheriff's sale conducted to satisfy a judgment for attorney's fees obtained against Neff in a previous action by one Mitchell. At the time of Mitchell's suit in an Oregon state court, Neff was a nonresident of Oregon. An Oregon statute allowed service by publication on nonresidents with property in the State. Mitchell had used that procedure to bring Neff before the court. The United States Circuit Court for the District of Oregon, in which Neff brought his ejectment action, refused to recognize the validity of the judgment

powers, *Pennoyer* both unduly limited a state's ability to exercise personal jurisdiction over a defendant outside its borders and gave the state excessively unbridled power over any defendant who could be physically found within state borders.

Notwithstanding the obvious shortcomings and the virtually unanimous criticism of the law of personal jurisdiction, efforts for judicial or legislative reform have been decisively impeded by the assumption, so forcefully supported by the author of the *Restatement of Conflict of Laws*, that our rules of personal jurisdiction are of ancient common law origin. . . . [N]otwithstanding dogmatic generalizations later sanctioned by the *Restatement*, appellate courts hardly ever in fact held transient service sufficient as such. Indeed, courts apparently had occasion only rarely to proceed upon such service, since state statutes, as yet [prior to *Pennoyer*] unrestricted by constitutional demand, quite liberally permitted suits against absent defendants, leaving it to the courts to determine whether they properly had jurisdiction in a given case. *Forum conveniens*—to use an unusual, but I believe helpful, phrase—was, in this sense, the basis of all personal jurisdiction.

. . . Only when transient service, hitherto a harmless adjunct of convenient jurisdiction, thus came to be *required* for the establishment of personal jurisdiction over nonresident defendants, did such service also become generally *sufficient* for this purpose. . . . The common law and common sense jurisdiction of the *forum conveniens* yielded to a dogmatic rule of personal service precariously balanced by a doctrine of *forum non conveniens*.⁴²

against Neff in Mitchell's suit, and accordingly awarded the land to Neff. The Supreme Court affirmed. *Id.* at 722–33; *see also* STEMPEL ET AL., *supra* note 1, at 83–84 (summarizing *Pennoyer*). *Pennoyer* took the view that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory, but a state cannot exercise authority over persons or property outside its boundaries. If a defendant consented to the jurisdiction of the state courts or was personally served within the state, the state could exercise personal jurisdiction. Direct assertion of extraterritorial jurisdiction exceeded the inherent limits of the state's power, making any such resulting judgment unenforceable in other states and not entitled to full faith and credit as well as being void in the rendering state because it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. *See Pennoyer*, 95 U.S. at 729–33. This analysis led to the conclusion that Mitchell's judgment against Neff could not be validly based on the state's power over persons within its borders because Neff had not been personally served in Oregon, nor had he consensually appeared before the Oregon court. *Pennoyer* also ruled that the action could not be sustained on the basis of the state's power over property within its borders because that property had not been brought before the court by attachment or any other procedure prior to judgment. Since the judgment which authorized the sheriff's sale was therefore invalid, the sale transferred no title, and Neff regained his land. *Id.*

⁴² Ehrenzweig, *supra* note 40, at 292 (footnotes omitted) (finding that only two of nineteen cases cited by *Restatement* support its position). The *Restatement* to which Ehrenzweig refers is RESTATEMENT OF CONFLICT OF LAWS (1934), whose primary author was Harvard Law Professor Joseph Beale. Beale famously championed the formalist approach of *lex loci delicti* in which the place of injury provided the applicable law of the case regardless of its connection to the parties' home states and public policy concerns. Because of his unrelenting legal formalism, Beale became a target of the legal realist movement and this approach to conflict, although retaining significant support in some quarters, was largely pushed aside by the "most significant relationship" test of the ALI's Second Restatement published in 1971. *See* STEMPEL ET AL., *supra* note 1, at 242–45; *see also* LAURA KALMAN, LEGAL REALISM AT

But after *Pennoyer*, it was generally held that service of process upon a defendant in the forum state was enough to confer jurisdiction, even if the defendant was merely passing through and had no non-transient ties to the state. Although Ehrenzweig's historical analysis was never refuted, neither did it prompt courts to back away from the view that tag jurisdiction was constitutionally endorsed by *Pennoyer*. However, over time, other developments regarding personal jurisdiction would raise questions as to the continued permissibility of tag jurisdiction. As discussed below, the territoriality rationale and framework of *Pennoyer* came under increasing criticism. Twenty years after Ehrenzweig's article, this criticism would manifest itself in changes to the doctrine of quasi-in-rem personal jurisdiction that had grown up in the wake of *Pennoyer*.⁴³ Under this doctrine, if a plaintiff could attach nonresident property within the forum state, then the state could exercise personal jurisdiction over the defendant but could only enforce a judgment up to the amount of the value of the attached property.⁴⁴

Regardless of the correct history of tag jurisdiction via service of process within the state alone, *Pennoyer* and its emphasis on state sovereignty within physical borders established a regime in which service was deemed sufficient

YALE 1927–1960, at 101 (2001) (legal realists on Yale Law faculty directed derision at Beale, including a mocking poem posted in faculty lounge). In addition to providing a window into academic debate during the twentieth century, the Beale-Ehrenzweig dispute over the historical roots of tag jurisdiction reflects an ongoing formalism-vs.-functionalism divide in American law, as well as providing an additional lens for viewing *Burnham*. As discussed below, the four-justice Scalia plurality in *Burnham* is highly formalist: service upon a defendant in the jurisdiction is conclusive of personal jurisdiction regardless of any other factors. Scalia grounds this formalism not only on his preference for this line of analysis (see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989)), but on purported strength of tag jurisdiction has supposedly ancient roots, a history that may be in error. This is not to say that formalism is inherently bad. See Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 970 (2011) (supporting Justice Scalia's formalist approach to procedure-substance divide presented by *Erie* questions). However, a narrow formalism that pays no attention to a doctrine's consistency with the rest of an area of law or overall considerations of fairness to defendants—the formalism of *Burnham*'s plurality opinion—has little to recommend it.

⁴³ See *infra* notes 65–87 and accompanying text, discussing *Shaffer v. Heitner*, 433 U.S. 186 (1977).

⁴⁴ The theory underlying quasi-in-rem jurisdiction is that it provided fairness lacking by mere publication or other means of notifying nonresident defendants that were not as tangible as personal service. In particular, the doctrine assumed that nonresidents were constructively aware of the status of their property and thus would be sufficiently alerted to an attachment and likely have notice of the action, particularly when attachment was followed by substituted service such as a mailing indicating the attachment. See RESTATEMENT (SECOND) OF JUDGMENTS § 6 (1982); see also *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958). *Pennoyer* also confirmed the constitutionality of in rem jurisdiction, in which a state exercises judicial control over property physically located in the state and can adjudicate questions of ownership, use, value, and so on, even if the owner of the property is not subject to personal jurisdiction. See *Pennoyer*, 95 U.S. at 727–30.

by most courts, perhaps most infamously in *Grace v. MacArthur*⁴⁵ (discussed below), when service was effected at thirty thousand feet as the defendant flew over the forum state. In the half-century after *Pennoyer*, little attention was focused on this area of law but much attention was trained on the problem of establishing jurisdiction over nonresident defendants for injuries arising out of their activities in the forum state. Courts expanded the reach of the states to nonresident defendants, who, because of their nonresidence, were difficult to personally serve within the state unless an enterprising plaintiff was able to track their movements and effect physical service during the comparatively brief time the defendant was on state soil (or in its airspace). For example, corporations doing business in the state were deemed to have consented to the exercise of jurisdiction or to be “present” in the state due to their business activities and thus subject to service.⁴⁶

Expanding automobile travel and its attendant increase in injury and litigation in states where parties were not normally amenable to service created an additional important tension between the nineteenth-century territoriality rule of *Pennoyer* and twentieth-century life. The tension was resolved by adopting the legal fiction that a driver using the roads of a state had “consented” to suit in the state (at least for injuries arising out of use of the vehicle), and had constructively appointed the secretary of state or a similar official as agent for service of process.⁴⁷

By 1945, when the key case of *International Shoe v. Washington*⁴⁸ came to the Court, the deficiencies of post-*Pennoyer* legal fictions had become sufficiently vexing, particularly regarding the notions of corporate “presence” in a state. As such, the Court was persuaded to take a significant step away from *Pennoyer*’s territoriality—at least with respect to the forum state’s ability to reach out and exercise personal jurisdiction over a defendant that was not physically within the state and subject to service. Famously, *International Shoe* concluded, “[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.’”⁴⁹

Although the Court’s use of the word “present” raised some issue for debate, the thrust of the opinion made clear that courts should now focus on

⁴⁵ *Grace v. MacArthur*, 170 F. Supp. 442, 443 (E.D. Ark. 1959).

⁴⁶ See, e.g., *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 268 (1917); *Int’l Harvester Co. v. Kentucky*, 234 U.S. 589, 589 (1914). *Pennoyer* itself also stated that in cases involving the personal status of the plaintiff, such as divorce actions, the plaintiff’s home state could issue a judgment on status without personal service upon the absent defendant. See 95 U.S. at 733–35. Regarding decisions expanding the reach of personal jurisdiction over nonresident defendants after *Pennoyer*, see *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919–23 (1960).

⁴⁷ See *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

⁴⁸ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴⁹ *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

whether the defendant had sufficient contacts with the state “as make it reasonable, in the context of our federal system of government, to require the corporation [or other defendant] to defend the particular suit which is brought there.”⁵⁰ *International Shoe*’s minimum contacts analysis of course had the practical effect of expanding jurisdiction over nonresident defendants. Businesses might have sufficient tangible presence in a state to be subject to suit there if they conducted sales activity or intentionally engaged in management activity—at least for lawsuits arising out of that activity—even if the businesses themselves were not actually “present” in the jurisdiction.

B. The Intellectual Underpinnings of Tag Jurisdiction Weaken with Modern Minimum Contacts Jurisprudence

The post-*International Shoe* world was one of largely expanding personal jurisdiction, with some later retrenchment, as well as retrenchment regarding the quasi-in-rem arm of territorially based personal jurisdiction. It also saw the articulation of two separate lines of personal jurisdictional analysis based on the degree to which a defendant’s contacts with the forum state were related to the facts of the lawsuit. Despite these developments, the courts and commentators have continued to treat the far-reaching use of tag jurisdiction as constitutionally permissible rather than as a bygone relic of *Pennoyer*’s theory of personal jurisdiction based on territoriality and physicality.

1. “Specific” and “General” Personal Jurisdiction

In the “modern” era of personal jurisdiction since the 1945 *International Shoe v. Washington* decision,⁵¹ courts have (assuming service of process was proper pursuant to Federal Rule of Civil Procedure 4) focused on whether the defendant had minimum contacts with the forum state to make the exercise of jurisdiction there sufficiently fair, thereby satisfying due process. Two categories of personal jurisdiction emerged: “specific” jurisdiction, for cases in which the defendant’s contacts with the state bore some relation to the substantive claims of the lawsuit (e.g., shipment of a defective product that injured the plaintiff user) and “general” jurisdiction that was available where the defendant had sufficient “continuous and systematic” contacts with the state to make it fair to sue the defendant in that state even if the defendant’s alleged wrongdoing took place outside the state and had not particular connection to the state.⁵²

⁵⁰ *Id.* at 317.

⁵¹ *See id.*

⁵² *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 723–27 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 610 (1988) (defining general personal jurisdiction as “dispute-blind, based on affiliations between the forum and one of the parties without regard to the nature of the dispute” while “[s]pecific jurisdiction is dispute-specific, based only on affiliations between the forum and the controversy”).

Over the years, most litigated disputes over personal jurisdiction have involved specific jurisdiction rather than general jurisdiction. For example, in the seventy years since *International Shoe*, the U.S. Supreme Court has decided scores of specific personal jurisdiction cases but only four general jurisdictions cases.⁵³ In specific jurisdiction cases, jurisdiction expanded significantly after *International Shoe*, perhaps reaching an apogee in *McGee v. International Life Ins. Co.*,⁵⁴ which approved exercise of personal jurisdiction by California courts over a Texas-based insurance company that serviced a single policy in California (plaintiff's), but had not otherwise directed any activity toward the forum state. Beginning in 1979, however, the Court appeared to cut back on the reach of specific jurisdiction, at least in cases where jurisdiction was founded upon mobile goods that had come to the forum state in indirect fashion.⁵⁵

Recent specific personal jurisdiction cases *J. McIntyre v. Nicastro*⁵⁶ and *Walden v. Fiore*⁵⁷ have been consistent with this more constrained view of the reach of minimum contacts to establish personal jurisdiction but appear not to have dramatically curtailed the exercise of specific personal jurisdiction. For example, courts since *Nicastro* have upheld specific personal jurisdiction on the basis of the defendant injecting its goods into the "stream of commerce" with

⁵³ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 407 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

⁵⁴ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957). The policy in question had been sold by Empire Mutual Ins. Co., an Arizona company, to Californian Lowell Franklin. Plaintiff McGee was the beneficiary. Defendant International Life acquired Empire Mutual's book of business but itself never conducted activity in California or directed toward California, save for billing and collecting on Franklin's life insurance policy. The Court concluded that although "there may be inconvenience to the insurer if it is held amendable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process." *See id.* at 224. Although the defendant insurer did not have a great quantum of contact with California, requiring it to defend its refusal to pay a California policyholder in California does not seem particularly unfair. *See* Albert A. Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer: McGee v. International Life Insurance Co. and Jurisdiction Over Individuals*, 30 ROCKY MTN. L. REV. 285 (1958) (supporting decision).

⁵⁵ *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (deciding Taiwanese tire value manufacturer not subject to personal jurisdiction in California in connection with tire blow-out on motorcycle that injured California plaintiff despite valvemaking's shipment of product to motorcycle manufacturer known to sell vehicles in California); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding New York auto retailer not subject to personal jurisdiction in Oklahoma merely because it was foreseeable that buyer might use vehicle to travel to Oklahoma were it was involved in collision). *But see* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (concluding Michigan-based fast-food franchisee had sufficient minimum contacts with Florida to support constitutional exercise of personal jurisdiction based on defendant's volitional activities in contracting with Florida-based franchisor).

⁵⁶ *J. McIntyre Mach., Ltd. v. Nicastro* 131 S. Ct. 2780 (2011), discussed *infra* notes 166–70 and accompanying text.

⁵⁷ *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

clear intent to serve markets in the forum state⁵⁸ or engaging in conduct that had distinctly targeted the forum state or had reasonably foreseeable effects in the forum state.⁵⁹ Similarly, where a defendant from another jurisdiction had intentionally hacked into a computer system in the forum state, personal jurisdiction was found for an action arising out of misappropriation of trade secrets facilitated by the hacking.⁶⁰

Although the Supreme Court has decided only four general jurisdiction cases, two (*Goodyear Dunlop Tires Operations, S.A. v. Brown*⁶¹ and *Daimler AG v. Bauman*⁶²) were issued after 2010 and appear to have narrowed the situations in which general jurisdiction is available in a more dramatic manner than *Nicastro* or *Walden v. Fiore* has constrained specific personal jurisdiction.⁶³

2. *Shaffer v. Heitner and the Partial Death Knell of Purely Territorial Exercises of Personal Jurisdiction*

As the *International Shoe* regime displaced the *Pennoyer* paradigm, questions remained not only regarding the limits of jurisdiction over nonresident defendants based on their business activities but also about the continued validity of quasi-in-rem and transient jurisdiction via service of process. As discussed below,⁶⁴ some commentators and courts saw *International Shoe* as inconsistent with tag jurisdiction, while most courts continued to view it as viable. Quasi-in-rem jurisdiction, however, was not so long lived.

⁵⁸ See, e.g., *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174 (5th Cir. 2013). *But see* *Kason Indus., Inc. v. Dent Design Hardware, Ltd.*, 952 F. Supp. 2d 1334 (N.D. Ga. 2013) (plaintiffs failure to aver any patent infringement by defendant in forum state; also no general jurisdiction because plaintiff averred to defendant incorporation, headquarters, or other substantial presence in forum state; mere sales, even if extensive, insufficient to confer general personal jurisdiction).

⁵⁹ See, e.g., *Wash. Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668 (9th Cir. 2012) (Arkansas corporation could be sued for copyright infringement in Washington, which was the state copyright holder was located even where defendant had no other contact with Washington because infringement had impact in Washington).

⁶⁰ See *MacDermid, Inc. v. Deiter*, 702 F.3d 725 (2d Cir. 2012) (Canadian employee's use of Connecticut employer's computer system, which had server physically located in Connecticut, was sufficient minimum contact to support specific personal jurisdiction). However, a Canadian broker who was providing services through the conventional means of telephone and mail and directing shipments of goods that entered the state but were not directly shipped and who had never visited Missouri was found not to be subject to personal jurisdiction there. See *Dairy Farmers of Am., Inc. v. Bassett & Walker Int'l, Inc.*, 702 F.3d 472 (8th Cir. 2012).

⁶¹ 131 S. Ct. 2846 (2011).

⁶² 134 S. Ct. 746 (2014).

⁶³ See *supra* notes 166–70 and accompanying text discussing *Nicastro* and see *supra* notes 183–93 and accompanying text discussing *Walden v. Fiore*, and the contraction of general personal jurisdiction as contrasted to the expansive reach of general jurisdiction via tag service of process pursuant to *Burnham*.

⁶⁴ See *supra* notes 81–90 and accompanying text.

Shaffer v. Heitner began as enterprising plaintiff Heitner, pursuing a shareholder's derivative suit against Greyhound and Greyhound Lines, filed suit in Delaware, seeking to exercise quasi-in-rem jurisdiction over current or former officers or directors on the basis of their stock holdings in parent company Greyhound. These stock holdings were considered to be property situated in Delaware, the state of the companies' incorporation, where the shares were registered even if not physically present in the state.⁶⁵ Subsidiary Greyhound Lines, Inc. was incorporated in California with a principal place of business in Arizona. The activities complained of occurred in Oregon.⁶⁶ Plaintiff Heitner initially effected jurisdiction through an order of sequestration of the shares pursuant to a state statute, identifying the property as the common stock owned by the director and officer defendants.

Pursuant to [the order of sequestration], the sequestrator "seized" approximately 82,000 shares of Greyhound common stock belonging to 19 of the defendants, and options belonging to another 2 defendants. These seizures were accomplished by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corp. So far as the record shows, none of the certificates representing the seized property was physically present in Delaware. The stock was considered to be in Delaware, and so subject to seizure, by virtue of Del. Code Ann., Tit. 8, § 169 (1975), which makes Delaware the situs of ownership of all stock in Delaware corporations.⁶⁷

Even under a system strongly supportive of quasi-in-rem jurisdiction, this effort to bring nonresident directors under the authority of Delaware courts would raise the eyebrows of most observers in view of the nonexistent physical connection between the tangible property at issue and the forum state. There was a connection between the defendants and their property rights of stock ownership, but it was quite attenuated. Although a shareholder's derivative action often examines corporate conduct (and Delaware was the state in which the corporation in question was domiciled), it is not a corporate governance action per se that would make a strong case for forcing nonresident director and officer defendants to face litigation in Delaware absent other contacts with the state.⁶⁸

⁶⁵ *Shaffer v. Heitner*, 433 U.S. 186, 189–90 (1977) ("In essence, Heitner alleged that the individual defendants had violated their duties to Greyhound by causing it and its subsidiary to engage in actions that resulted in the corporations being held liable for substantial damages in a private antitrust suit and a large fine in a criminal contempt action." (footnote omitted)).

⁶⁶ *Id.* at 190 nn.2–3 (A judgment of more than \$13 million was entered against Greyhound in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977); Greyhound and Greyhound Lines were fined \$100,000 and \$500,00 respectively in *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974)).

⁶⁷ *Shaffer*, 433 U.S. at 191–92 (footnotes omitted).

⁶⁸ In the wake of *Shaffer*'s invalidation of the stock sequestration mode of quasi-in-rem jurisdiction, the Delaware legislature amended the statute to provide that anyone agreeing to be a director or officer of a Delaware-charted corporation consents to personal jurisdiction in Delaware courts. Thus, although the instant defendants won an important battle in *Shaffer v. Heitner*, they arguably lost the larger war of trying to avoid personal jurisdiction in a compa-

Thus, the stage was set for re-examination of the quasi-in-rem concept and perhaps an attempt to harmonize this method of obtaining personal jurisdiction with the post-*International Shoe* world of minimum contacts jurisdiction. The Court seized the opportunity and not only struck down the use of legally fictitious stock sequestration but also declared quasi-in-rem jurisdiction—and all forms of obtaining personal jurisdiction—subject to the minimum contacts analysis set forth in *International Shoe*. In barring the exercise of personal jurisdiction over nonresidents on the basis of the attached shares of stock alone, the Court made statements that, even if read narrowly, would seem to command that a fairness or reasonableness inquiry accompany any exercise of personal jurisdiction by any means if the exercise is to comport with due process.

The Delaware courts rejected appellants' jurisdictional challenge by noting that this suit was brought as a *quasi in rem* proceeding. Since *quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State, the courts considered appellants' claimed lack of contacts with Delaware to be unimportant. This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*.⁶⁹

* * *

The *Pennoyer* rules [that the state was all-powerful over persons or property within its borders but had no power outside those borders] generally favored nonresident defendants by making them harder to sue. This advantage was reduced, however, by the ability of a resident plaintiff to satisfy a claim against a nonresident defendant by bringing into court any property of the defendant located in the plaintiff's State.⁷⁰

* * *

[In *International Shoe*,] the Court began its analysis of [the jurisdictional] question by noting that the historical basis of *in personam* jurisdiction was a court's power over the defendant's person. That power, however, was no longer the central concern:

“But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain mini-

ny's state of incorporation. This result, although based on arguably coercive consent obtained as a condition of being a director or officer, squares well with the Court's more recent general jurisdiction decisions in *Goodyear* and *Daimler*, discussed *infra* notes 158–65 & 171–82, which focused on a company's state of incorporation and state of principal place of business as logically fair locations for litigation against a company. Notwithstanding some arguable elements of coercion, it also meets a standard of fairness and reasonableness. Directors and officers are ordinarily well compensated for their service, are usually already persons of wealth and means, and can easily refuse to accept any managerial post or directorship if they dislike being subject to personal jurisdiction in the state of the corporation with which they are affiliated. Of course, this same reasonableness makes the exercise of quasi-in-rem jurisdiction invalidated in *Shaffer v. Heitner* far fairer and more reasonable than many instances of tag jurisdiction by service of process.

⁶⁹ *Shaffer*, 433 U.S. at 196.

⁷⁰ *Id.* at 200.

num contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was "present" but on whether there have been "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."⁷¹

Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

"Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."⁷²

As the *Shaffer* Court observed, the "immediate effect of" *International Shoe*'s "departure from *Pennoyer*'s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants" but "[n]o equally dramatic change has occurred in the law governing jurisdiction *in rem*. There have, however, been intimations that the collapse of the *in personam* wing of *Pennoyer* has not left that decision unweakened as a foundation for *in rem* jurisdiction."

The Court noted, "Well-reasoned lower court opinions have questioned the proposition that the presence of property in a State gives that State jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum."⁷³ The Court further observed, "The overwhelming majority of commentators have also rejected *Pennoyer*'s premise that a proceeding 'against' property is not a proceeding against the owners of that property. Accordingly, they urge" that *International Shoe*'s fairness and reasonableness criteria "also govern [state] power to adjudicate personal rights to property located in the State."⁷⁴

⁷¹ *Id.* at 203 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁷² *Id.* at 203-04 (citations omitted) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). The *Shaffer* Court also observed that "[a]s the language quoted indicates, the *International Shoe* Court believed that the standard it was setting forth governed actions against natural persons as well as corporations, and we see no reason to disagree" although "[t]he differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." *Id.* at 204 n.19.

⁷³ *Id.* at 205 (citing cases).

⁷⁴ *Id.* at 205 (citing (in this order) Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Roger Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Ehrenzweig, *supra* note 40; *Developments in the Law*, *supra* note 46; and Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965)). This aspect of the *Shaffer* Court's opinion is something more than a court string-citing favorable authority aligning with a conclusion the court has already reached. The articles cited are by frequency of citation and stat-

Having so set the stage, the *Shaffer* Court made clear that it was, depending on one's view, either changing the law of in rem and quasi-in-rem personal jurisdiction or (perhaps belatedly) expressly recognizing that it had been implicitly changed by *International Shoe*.⁷⁵ The Court explained that jurisdiction over property is in effect jurisdiction over the property's owner as well and that "[t]his recognition leads to the conclusion" that exercises of in rem jurisdiction must still satisfy "the minimum-contacts standard elucidated in *International Shoe*."⁷⁶

Applying the minimum contacts test and its necessary inquiry into the fairness and reasonableness of asserting jurisdiction over a nonresident, non-domiciliary defendant, the Court struck down the Delaware courts' exercise of jurisdiction over the Greyhound officers and directors with no ties to the state other than their intangibly sequestered company stock.⁷⁷ Although predicting that its decision would not affect most litigation because of the variety of ties defendants have to a forum state, the Court made clear that quasi-in-rem jurisdiction was no longer permissible solely because of its historically accepted status.⁷⁸

Concluding with a bit of a flourish after an extensive refutation of arguments supporting jurisdiction in the case, the *Shaffer* Court provided a rather clear declaration in support of applying the minimum contacts fairness/reasonableness template to not only quasi-in-rem jurisdiction but to tag transient jurisdiction as well.

ure among the most important personal jurisdiction articles of the 1950s and 1960s and were largely written by the leading legal scholars in the area, including one (former Cal-Berkeley law professor and California Chief Justice Roger Traynor) who was widely regarded as the finest state court judge of the era.

⁷⁵ *Id.* at 206 ("It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*." (footnote omitted)) (citing to, *inter alia*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68, cmt. c (noting that the exercise of quasi-in-rem jurisdiction in *Harris v. Balk*, 198 U.S. 215 (1905) "might be thought inconsistent with the basic principle of reasonableness")).

⁷⁶ *Id.* at 207.

⁷⁷ *Id.* at 208–09, 216–17.

⁷⁸ *See id.* at 208–09.

It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

Id. (footnote omitted); *see also id.* at 209–16 (considering and rejecting prudential, public policy, or practicality arguments in favor of retaining traditional approach to quasi-in-rem jurisdiction).

The Due Process Clause “does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.”

Delaware’s assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on state power. The judgment of the Delaware Supreme Court must, therefore, be reversed.⁷⁹

Earlier in the opinion, the *Shaffer* Court had summarized its assessment in the now oft-quoted passage stating that the Court concluded, “[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”⁸⁰ Regarding quasi-in-rem jurisdiction, the Court emphasized, “The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.”⁸¹

Although *Shaffer v. Heitner* does not expressly require that tag jurisdiction be eliminated or measured according to a minimum contacts yardstick, this is the most reasonable reading of *Shaffer*.⁸² If a state cannot exert jurisdiction by taking control over property within the state, how logically can it acquire personal jurisdiction (and general personal jurisdiction at that) over a nonresident defendant—over any claim at all against the defendant—merely because the defendant was served with process while passing through the state, however briefly or trivially?

To ask the question (albeit a rhetorical one) is to answer it. Logically, to be consistent with *International Shoe* and *Shaffer*, transient jurisdiction must involve service on a defendant that has sufficient minimum contacts with the fo-

⁷⁹ *Id.* at 216–17 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

⁸⁰ *Id.* at 212.

⁸¹ *Id.*

⁸² See David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U. L.Q. 273, 303 (1978) (arguing that tag jurisdiction could not satisfy due process under analysis used by the Court in *Shaffer v. Heitner*); see also Linda J. Silberman, *Shaffer v. Heitner: The End of An Era*, 53 N.Y.U. L. REV. 33 (1978) (same). Accord Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (1980) (sovereignty rationale of personal jurisdiction inconsistent with due process analysis focused on fairness to defendant); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981) (same); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 842–44 (1995) (reading *Shaffer* as undermining any assertion of jurisdiction premised solely on state power and suggesting that exercise of “status” or in rem-like jurisdiction over divorce is unconstitutional if defendant lacks sufficient minimum contacts with forum state); see also Brilmayer et al., *supra* note 52, at 748, 752–55 (due process implications of tag jurisdiction are “an unresolved question” and application of *Shaffer* is “not at all clear”). Nearly twenty years prior to *Shaffer*, the *Harvard Law Review* staff working on a *Developments in the Law* project concluded that tag jurisdiction was inconsistent with *International Shoe* and likely violated due process. See *Developments in the Law*, *supra* note 46, at 937–40; see also *supra* note 73, cited in *Shaffer*, 433 U.S. at 205.

rum. Perhaps that contact need not be as weighty, sustained, or volitional as the contacts used to support long-arm jurisdiction. Perhaps service alone is a reasonably significant contact. But after *International Shoe* and *Shaffer*, service alone would seem by itself not to be conclusive of the existence of personal jurisdiction if the jurisdictional rules are to be consistent.

Further, *Shaffer*'s expression of this sentiment was nearly unanimous. No Justices dissented from the result (Justice Rehnquist did not participate) and although Justices Powell and Stevens concurred, their opinions were not inconsistent with a view that tag jurisdiction is subject to the fairness/reasonableness inquiry of *International Shoe*. Neither was Justice Brennan's partial dissent regarding some of the majority's reasoning nonetheless "fully agree[d] that the minimum-contacts analysis developed in [*International Shoe*] represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from [*Pennoyer*]." ⁸³

Justice Powell in fact agreed with the extension of "the principles of *International Shoe Co. v. Washington*" to assertions of in rem jurisdiction, as well as to the *Shaffer* result. He wrote to "explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary" to support exercise over personal jurisdiction and enforcement of any resulting judgment "to the extent of the value of the property."⁸⁴ He observed that with real property in particular, there were almost inherently sufficient contacts with the forum to make exercise of personal jurisdiction fair so long as the defendant's liability did not exceed the value of the attached real property in the forum state.⁸⁵

Justice Stevens concurred, focusing on issues of notice and the degree to which a defendant's contacts with the forum state might be said to give rise to

⁸³ *Shaffer*, 433 U.S. at 219 (Brennan, J., dissenting). Perhaps presaging his concurrence in *Burnham*, Justice Brennan expressed a very broad view of what constituted sufficient minimum contacts with the forum to satisfy the fairness/reasonableness test of *International Shoe*. In his view, purchase of stock in a Delaware-chartered company was a sufficient contact with the forum state in view of the benefits derived from such ownership such as investment income and application of forum law to corporate governance disputes, often enforced by forum state courts. *See id.* at 222–28. In light of the attractiveness of Delaware as a situs for incorporation, his position is defensible, albeit beyond most understandings of sufficient contact with a forum state. Justice Brennan also objected to the majority opinion as deciding more than was necessary to resolve the case and hence constituting an impermissible advisory opinion. *See id.* at 220–21. Importantly, however, Justice Brennan was completely in accord with the view that tag transient jurisdiction must be assessed according to a minimum contacts standard. Although Justice Brennan frequently took a charitable view of what constituted sufficient minimum contacts, one can also reasonably posit that even these broad notions of sufficient fairness and reasonableness would not support effective tag jurisdiction over persons stopping for gas, changing planes or trains, or flying over a state, although his *Burnham* opinion can be read in that manner.

⁸⁴ *Id.* at 217 (Powell, J., concurring).

⁸⁵ *Id.* at 219.

“predictable risks” of being sued in the state. He found that the purchase of stock did not adequately apprise a purchaser of such risks.⁸⁶ In an important passage that is sometimes misread as suggesting a continued allegiance to tag jurisdiction, he wrote, “I would also not read [the Court’s decision] as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit.”⁸⁷

This passage can be hurriedly read as a view that because *Shaffer* involved only quasi-in-rem jurisdiction, *Shaffer* did not also invalidate in personem jurisdiction by service alone. But it is important to note that in this passage, Justice Stevens was emphasizing his view that for other traditional methods of acquiring jurisdiction to be valid, they must both provide adequate notice and involve defendants who could fairly and reasonably believe that they had engaged in sufficient forum state activity to be subject to suit in the forum state. Although this passage may indicate that Justice Stevens was amenable to tag jurisdiction in cases where there was also sufficient defendant contact with the forum, the passage also clearly suggests that he would have opposed the exercise of tag jurisdiction upon defendants driving briefly on state roads, stopping for gas, changing planes at an airport, or flying over the state.

C. *Up in the Air: Testing the Limits of Tag Jurisdiction in the Post-International Shoe and Post-Shaffer Era*

1. *Service on the Move*

International Shoe did not address service of process and its relationship to what came to be known as specific personal jurisdiction. Neither did *Perkins v. Benguet Consol. Mining*,⁸⁸ the Court’s leading (indeed, then the only) general personal jurisdiction case of the time. Judicial concern with service of process focused primarily upon whether the defendant was provided with adequate notice of the action rather than whether service within state territory was a sufficient basis for the exercise of personal jurisdiction. Even though *International Shoe* conceptualized the due process inquiry as one focusing on the relationship between forum contact and fairness, there appears to have been no significant

⁸⁶ *Id.* at 217–19 (Stevens, J., concurring).

One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. . . . For unless the purchaser ascertains both the State of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation. I therefore agree with the Court that on the record before us no adequate basis for jurisdiction exists and that *the Delaware statute is unconstitutional on its face.*

Id. (emphasis added). But in making this observation, Justice Stevens perhaps unduly glosses over the degree to which the defendants were not run-of-the-mill stock buyers but were officers and directors of the company.

⁸⁷ *Id.* at 219.

⁸⁸ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

questioning of the continuing vitality of tag jurisdiction (or quasi-in-rem jurisdiction, which was subsequently curtailed in *Shaffer v. Heitner*).

In *Mullane v. Central Hanover Bank & Trust Co.*,⁸⁹ the Court's most extensive discussion of the due process concerns surrounding service and notice, the Court did little to shed light on whether the *International Shoe* approach, which had obviously displaced *Pennoyer* regarding extraterritorial jurisdiction, had also displaced other portions of the *Pennoyer* paradigm.

In the wake of *International Shoe*, the legal profession focused on the aspects of *Pennoyer* that expanded jurisdiction beyond the physical boundaries of the forum state; however, everyone appeared to have paid relatively little attention to the aspects of *International Shoe* that logically called into question traditional state exercises of personal jurisdiction based on physical power that might not be consistent with *International Shoe*'s concern over fairness and reasonable expectation of being subject to suit in the forum state. As a result, it appears that lawyers continued to consider tag jurisdiction and (until *Shaffer v. Heitner*) quasi-in-rem jurisdiction as legitimate and courts did not block such moves. These methods for obtaining personal jurisdiction probably have been used much less now that *International Shoe* and state long-arm statutes permitted rather expansive assertions of personal jurisdiction where a defendant was regularly conducting activity in the forum state that reasonably related to a particular lawsuit or the subject matter of the lawsuit.

2. *Grace v. MacArthur: The Trial Court Case as an Illustrative and Misleading Icon That Presages the Burnham Plurality Opinion*

Grace v. MacArthur is probably the most outlandish example of the exercise of tag service being used to establish personal jurisdiction notwithstanding the new jurisdictional paradigm of fairness and reasonable expectation.⁹⁰ The case involved a business dispute, with the plaintiff seeking specific performance of a purported sales contract with Bankers Life and Casualty and its prominent head, insurance tycoon and posthumous philanthropist John D. MacArthur.⁹¹ As one might expect, in the post-*International Shoe* world, ob-

⁸⁹ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁹⁰ Less outlandish examples such as that of *Whitney v. Madden*, 79 N.E.2d 593 (Ill. 1948) were probably common even if not frequently resulting in reported opinions. In *Whitney*, an Ohio resident was served on behalf of a Minnesota plaintiff asserting a defamation claim while the defendant was "spending the night as a guest in a Chicago hotel and while in transit from one part of the United States to another." 79 N.E.2d at 594. All judges hearing the case appear to have regarded the service-while-traveling as effective to establish personal jurisdiction over the defendant in Illinois, but these same judges also readily agreed that the case should be dismissed on *forum non conveniens* grounds.

⁹¹ John D. MacArthur owned, controlled, and operated not only Bankers Life but a number of insurers and had something of a robber baron's reputation in that during his time at the helm his companies were known as being a difficult employer who established a corporate culture of undue resistance to or slow payment of policyholder claims. See generally NANCY KRIPLEN, *THE ECCENTRIC BILLIONAIRE: JOHN D. MACARTHUR—EMPIRE BUILDER*,

taining long-arm jurisdiction over a large insurance company, even in relatively small, agrarian Arkansas, was not difficult under a theory of “doing business” jurisdiction⁹² that may no longer be viable in the wake of *Goodyear* and *Daimler*, discussed below.⁹³ Plaintiff set forth allegations of business contact between MacArthur and the forum state that were not resolved in the opinion but were arguably sufficient to satisfy the state long-arm statute and due process. But suing MacArthur’s co-defendant Ronnie Smith in Arkansas proved more of a challenge in that Smith apparently had no physical connection to the state and no financial or real estate holdings tied to the state.

Undeterred, plaintiff Grace arranged to have defendant Smith served while his non-stop flight on Braniff Airlines Flight 337 from Memphis to Dallas was over Pine Bluff, Arkansas, in the Eastern District of Arkansas. Smith challenged the service and the court’s jurisdiction over him. The trial court (and apparently counsel) appear to have explicitly accepted that transient jurisdiction satisfied due process. The harder question for the court was whether service on an airplane at twenty thousand feet was sufficiently inside Arkansas to qualify for tag jurisdiction.⁹⁴

In their briefs in connection with Smith’s motion[,] counsel on both sides state that they have been unable to find any case dealing with the specific problem in hand. The Court likewise has been unable to find such a case. Nonetheless, the Court is persuaded that a person moving in interstate commerce across the State of Arkansas in a regular commercial aircraft, flying in the regular navigable airspace above the State, is within the “territorial limits” of the State and is amenable to service⁹⁵

RELUCTANT PHILANTHROPIST, RELENTLESS ADVERSARY (2008). After his death, MacArthur’s name became more prominently associated with philanthropy, particularly the “genius” awards distributed by the John D. & Catherine T. MacArthur Foundation, a regular sponsor of public television programs. The awards are famous because of their size (a quarter-million dollars or more) and the Foundation’s secretive selection method. One cannot apply for the award; it just comes to those who emerge from the secretive selective process (former UNLV Professor David Hickey is a recipient). The recipients can use the funds for anything they wish and the criteria, such as it is known, is simply that the recipient have demonstrated great talent, hence the “genius” award name. *See id.*

⁹² *See* Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001); Twitchell, *supra* note 52, at 635 (viewing exercises of jurisdiction based on defendant business activity in state a form of general jurisdiction but finding that many such cases also involve connection between the forum and the subject matter or other parties of the dispute).

⁹³ *See supra* notes 158–65 and accompanying text; *see also supra* notes 171–82 and accompanying text.

⁹⁴ *See* *Grace v. MacArthur*, 170 F. Supp. 442, 444 (E.D. Ark. 1959) (“The narrow question for us to decide is whether for service purposes, the passengers on a commercial aircraft are within the territorial limits of the State over which the plane happens to be flying at a particular time.”).

⁹⁵ *Id.*

The *MacArthur* court based its ruling on federal aviation statutes governing airspace.⁹⁶ Citing regulatory precedent, the trial court noted that “[t]he sovereign power and jurisdiction of a state is not limited to the ground”⁹⁷ and “assertions of [state regulatory] jurisdiction are valid where they do not conflict with controlling federal legislation.”⁹⁸ Judge Jesse Smith Henley, the trial judge in *MacArthur*,⁹⁹ focused on issues of state sovereignty and drew heavily on state-federal division of regulatory authority and state policy power authority,¹⁰⁰ rather than examining whether the exercise of jurisdiction based on slap service at twenty thousand feet comported sufficiently with standards of fair play and substantive justice.

One reads *MacArthur* and begins to wonder whether the opinion might even have predated *International Shoe* because of the former’s relentless but unreflective view that in-state service alone justifies the exercise of personal jurisdiction in the forum state.¹⁰¹ The opinion, issued eighty-five years after

⁹⁶ *See id.* (“[I]t is clear that an aircraft flying over a State is within that State and is subject to its jurisdiction” for purposes of regulating air travel.).

⁹⁷ *Id.* (quoting *State v. Nw. Airlines*, 7 N.W.2d 691, 694 (Minn. 1942) and citing other cases, relying particularly on *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930), a leading case of the time regarding state-federal boundaries in air traffic regulation).

⁹⁸ *Id.* at 445 (citing *Braniff Airlines v. Neb. Bd. of Equalization & Assessment*, 347 U.S. 590 (1954), which involved the scope of taxing authority among the various states where commerce took place).

⁹⁹ As is apparent to the reader, I am highly critical of *Grace v. MacArthur* and its reasoning. My initial trial hypothesis was that the district judge rendering the decision might simply have not been very good. Much to my surprise, Judge Henley (1917–1997), had a most impressive resume and list of accomplishments. *See* Morris S. Arnold, *A Tribute to Judge J. Smith Henley*, 52 ARK. L. REV. 297 (1999). An Eisenhower appointee at a time when the Administration was looking for judges sufficiently independent and courageous to enforce *Brown v. Board* and Justice Department desegregation orders, Judge Henley served for more than fifteen years as a district judge and another seven as an Eighth Circuit judge. The federal building and courthouse in Fort Smith is named after him. His strong reputation prompts greater mystery. How could a good judge have written such a bad opinion? *Grace v. MacArthur* was one of Judge Henley’s very first opinions, issued while he was an interim appointee to the Eastern District of Arkansas during several months in 1959. The Senate did not approve his nomination, which was resubmitted by the White House but for a vacancy in the Western District of Arkansas, where he then sat for fifteen years. It may not be all that speculative to think that a more experienced Judge Henley (and certainly one writing after *Shaffer v. Heitner*) would not so slavishly applied tag transient jurisdiction.

¹⁰⁰ *See MacArthur*, 170 F. Supp. at 445–46. For example, the *MacArthur* court relied on one case involving seizure of contraband liquor on a flight from Canada by state authorities (*United States v. One Pitcairn Bi-plane*, 11 F. Supp. 24, 25 (W.D.N.Y. 1935)) and upon Commerce Clause and state riparian rights precedents. *See id.*

¹⁰¹ The *MacArthur* court’s only concern seems to involve the distance of defendant’s travel from the ground. *See id.* at 447 (“It may be conceded, perhaps, that a time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of the United States or of any particular State while fling at such altitudes. But no such situation is here presented. We have an ordinary commercial aircraft, flying on an ordinary commercial flight in the ordinary navigable and navigated airspace of 1958.”). Presumably, then, the *MacArthur* court would have found service sufficient to confer personal jurisdiction in any state along the route of an

Pennoyer, reads as though the jurisprudence of personal jurisdiction had remained static during all that time. “[A]t the time the Marshal served the summons on the defendant, Smith, the plane and its passengers were within the ‘territorial limits’ of the State of Arkansas, as that term is used in [Rule 4]. Hence, Smith’s motion to quash will be denied.”¹⁰²

The court gives a nod to fairness concerns, but only after framing the issue in a most bizarre way. In what, to me, is an amazing part of the opinion, the court states:

The result here reached seems to be just, equitable and practical. It cannot seriously be contended that a person moving in interstate commerce is on that account exempt from service of process while in transit, and we [the royal “we” in that this was a single judge district court decision] think it makes no practical difference whether he is traveling at the time on a plane, or on a bus or train, or in his own car. True, if he is going by plane the duration of his presence in the State will probably be much shorter than if he were availing himself of some other means of transportation, but that is a difference of degree only, not of principle.¹⁰³

Apart from the service-in-flight problem, the *MacArthur* court arguably erred in that the court takes as a given that service of process on state soil gives the state in personam jurisdiction over the defendant (over any matter, not just those related to defendant contacts with the forum state), even in situations such as the defendant briefly stepping over a state line once in his life to purchase an ice cream cone. So long as the brief sojourn for ice cream was voluntary and not procured by fraud, a state in which the defendant has spent perhaps ninety seconds can be sued over disputes relating not only to the ice cream cone but to disputes that any prospective plaintiff may have with the defendant (provided that the plaintiff has a process server on hand when the ice cream “trip” takes place).

Once *MacArthur* accepts this assumption, it is then no more unfair to serve the defendant while in an airplane rather than when making an isolated purchase, even though both involve only unique or episodic as well as trivial contact unrelated to the underlying dispute, any injury inflicted in the state, and any real state interest in the matter or the parties. Although this may technically satisfy some strained strand of formal logic, it seems inherently nonsensical and unfair.¹⁰⁴

airline flight. Thus, on a typical Boston to Los Angeles flight, a defendant who was only on Massachusetts or California soil could, depending on the flight path of the airplane, be sued—over anything—in as many as a dozen states (New Hampshire, Vermont, New York, Indiana, Ohio, Illinois, Iowa, Nebraska, Kansas, Colorado, Utah, Nevada) that are in the potential flight path even though the defendant had never had any contact with any of these states.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Brilmayer et al., *supra* note 52, at 753–54 (“Suppose, for example, a state adopts a long-arm statute predicated jurisdiction upon the defendant’s prior presence in the state at any time and directing notice by registered mail. This statute probably would violate due

To be sure, the most absurd aspects of such situations can be mitigated by motions to dismiss due to improper venue,¹⁰⁵ to transfer to a more convenient venue (where the transferee court is within the federal system),¹⁰⁶ or by a motion to dismiss on *forum non conveniens* grounds (where a possible alternative court with proper venue or better venue lies within another judicial system).¹⁰⁷ But even if instances of truly absurd unfairness can be avoided through use of these other doctrines, the defendant trapped by tag service is, unless permitted to argue *International Shoe* fairness as a basis for Rule 12(b)(2) dismissal, subjected to the risk of deprivation of property by a forum with essentially no connection to the defendant. At a minimum, the defendant is burdened by the significant imposition of being forced to fight this subjugation on venue grounds, an area where courts have wider discretion than in matters of personal jurisdiction.¹⁰⁸ Further, if such a case miraculously stays in the forum state of tag jurisdiction, the presiding court will have vast discretion regarding choice of applicable law.¹⁰⁹

In short, *Grace v. MacArthur* seems like a bizarre hypothetical dreamed up by a faculty member to torment first-year students; nevertheless, it actually held that merely getting on a plane in Memphis (with a process server lurking on the flight) could subject a defendant to suit in Pine Bluff, Arkansas. With this conclusion, the court used reasoning that would support the exercise of general personal jurisdiction over the defendant in Alaska, Hawaii, or anywhere in the United States, had the flight been sufficiently long. In reaching this astonishing result, the district court applied only the mechanical, territorial thinking of *Pennoyer* and essentially ignored the fairness and reasonableness due process analysis of *International Shoe*.

process, but its underlying notice rationale differs little from that for transient jurisdiction.”); *Developments in the Law*, *supra* note 46, at 939 (“To assert jurisdiction on the basis of a brief physical appearance within a state, however,—perhaps during an airplane flight across its territory—seems totally inconsistent with an analysis of the relevant interests and appears to impose unjustifiable hardship on the defendant.”).

¹⁰⁵ See 28 U.S.C. § 1406 (2012).

¹⁰⁶ See *id.* § 1404.

¹⁰⁷ *Forum non conveniens* dismissal is well established in the federal system. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). It is also available in most states. See, e.g., *Whitney v. Madden*, 79 N.E.2d 593, 595–96 (Ill. 1948) (tag service conferred personal jurisdiction but case dismissed on *forum non conveniens* grounds).

¹⁰⁸ See 28 U.S.C. § 1404 (even where venue is proper, court may transfer action to another court where venue is more convenient); *HAZARD ET AL.*, *supra* note 30, §§ 3.13–3.16.

¹⁰⁹ See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981); see also *Rush v. Savchuk*, 444 U.S. 320, 328–29 (1979) (striking down state’s attempt to assert in rem jurisdiction over insurance policy) (another case suggesting due process limits on personal jurisdiction that is in tension with *MacArthur* and the Scalia opinion in *Burnham*). Regarding the malleability of choice of law analysis and the Supreme Court’s reluctance to police lower court exercises of discretion, see Thomas O. Main, *On Teaching Conflicts and Why I Dislike Allstate Insurance Co. v. Hague*, 12 NEV. L.J. 600 (2012).

Although exerting authority over defendant Smith, the trial court reserved decision on defendant MacArthur's motion to quash (which was apparently made without an alternative motion to dismiss for lack of personal jurisdiction). The ground was that a separate examination of the Arkansas long-arm statute and MacArthur's contacts with the jurisdiction were in order and that further abstention might be required until the issue of Smith's status as a purported agent of MacArthur was resolved.¹¹⁰ There are no further reported decisions in the case, which presumably settled, so there is no record of any resolution of the personal jurisdiction question surrounding defendant MacArthur.

3. *The Odd Treatment of Grace v. MacArthur as Authoritative*

In light of its problematic holding and reasoning, one might have expected *Grace v. MacArthur* to have faded into relative obscurity. Instead, it escaped that fate and became something of a poster child of resistance to the logical consequences of the new fairness/reasonableness approach of *International Shoe*. In fact, as discussed below, it provided support for Justice Scalia's opinion in *Burnham*, even if *MacArthur* was not cited. *MacArthur* also subsequently provided support for the mythology of *Burnham* (that the Scalia opinion represents the definitive "law" regarding transient jurisdiction).

Grace v. MacArthur was not only memorable on its facts, but also became enshrined as an illustration of the continued availability of tag jurisdiction. Although only cited in ten subsequent judicial decisions during the ensuing sixty-five years, the subsequent cases all largely embraced the reasoning of the decision.¹¹¹ For example, in *Moore v. Lindsay*, a trial court (writing only a year before *Burnham*) denied a Rule 12(b)(2) motion by a defendant "personally served with the summons in this case when she was visiting friends or relatives in Danville, Virginia."¹¹² The claim was based on the defendant having furnished an allegedly defective ladder to a workman performing repairs at defendant's Oregon home.¹¹³ Defendant Bonnie Lindsey, who had been served while on the Virginia trip (her husband had not been served and his motion to dismiss was consequently granted by the trial court),¹¹⁴ argued that being sued in Virginia, a state in which she did no business and owned no property, violat-

¹¹⁰ See *Grace v. MacArthur*, 170 F. Supp. 442, 447-48 (E.D. Ark. 1959).

¹¹¹ See, e.g., *Leab v. Streit*, 584 F. Supp. 748, 755-56 (S.D.N.Y. 1984) (although law of personal jurisdiction has changed since *Pennoyer*, "[p]resence within a state, even temporary or transitory presence, is still a common law basis instilling competence in the courts of that state to adjudicate claims against a person") (citing *MacArthur* and *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); see also *id.* at 756 (citing *Milliken v. Meyer*, 311 U.S. 457 (1940) for the proposition that domicile is sufficient for assertion of personal jurisdiction even if domiciliary not in forum state at time of lawsuit or activity giving rise to lawsuit).

¹¹² *Moore v. Lindsay*, No. 89-0008-D, 1989 U.S. Dist. LEXIS 18042, at *1 (W.D. Va. July 7, 1989).

¹¹³ *Id.* at *1.

¹¹⁴ *Id.* at *6-7.

ed her due process rights when the lawsuit had no connection to her visit to Virginia.¹¹⁵

The *Moore v. Lindsay* trial court, although appreciating defendant's argument based on *International Shoe* and *Shaffer v. Heitner*, was unsympathetic but addressed the issue at length in an arguably deeper and more nuanced manner than would the *Burnham* Court a year later.

The apparently sweeping language of *Shaffer* has caused several commentators to speculate that the Supreme Court had brushed aside the old cases such as [*Pennoyer*], that had approved jurisdiction based simply on the defendant's "presence" in the forum, no matter how brief. Some courts in the past had carried the notion of presence quite far, to the extent of approving personal service of the defendant on an airplane flying over the forum state. Since *Shaffer*, a few courts have decided that personal service on a defendant who is only a transient in the forum state may *not* be sufficient to establish personal jurisdiction. Several other courts have held, however, that a defendant's transient presence in the forum state *is* a sufficient basis for jurisdiction.

In light of the general modern trend to expand the possible bases of courts' jurisdiction, I believe the better-reasoned decisions are those upholding transient presence as a basis for jurisdiction. . . .

I do not believe that the Supreme Court intended in *Shaffer v. Heitner* to sweep away the most traditional basis for a court's exercise of jurisdiction: the defendant's presence in the forum state. . . .

. . . .

In the case before me, the defendant Bonnie Lindsay voluntarily came into the forum state, Virginia. Since a previous action against her had been dismissed because the plaintiff had not properly served the defendants, Lindsay was probably aware that she was in danger of being served with process. Once Lindsay physically entered Virginia, she took the risk that the state would exercise its power over her person or her property. [Therefore,] personal service on Bonnie Lindsay while she was in Virginia is a sufficient basis for this Court to exercise personal jurisdiction over her.¹¹⁶

¹¹⁵ *Id.* at *1–2.

¹¹⁶ *Id.* at *3–6 (citations omitted). Compare *Nehemiah v. Athletics Cong. of U.S.A.*, 765 F.2d 42 (3d Cir. 1985) (service on transient defendant alone not enough to establish personal jurisdiction); *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305 (N.D. Ill. 1986) (same) with *Aluminal Indus., Inc. v. Newtown Commercial Assocs.*, 89 F.R.D. 326, 328–29 (S.D.N.Y. 1980) (service within forum confers personal jurisdiction over served defendant for all matters); *Lockert v. Breedlove*, 361 S.E.2d 581, 585 (N.C. 1987) (same); *Cariaga v. Dist. Court*, 762 P.2d 886, 887 (Nev. 1988) (same); *Nutri-W. v. Gibson*, 764 P.2d 693, 695–96 (Wyo. 1988) (same). *Moore v. Lindsay* also approvingly quoted *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 270 (5th Cir. 1985) for the view that “[i]f there is anything that characterizes sovereignty, it is the state’s dominion over its territory and those within it.” 1989 U.S. Dist. LEXIS 18042, at *5–6. As the *Lindsay* court also noted, *Mordelt* found that “there was a sufficient basis for a Louisiana court’s exercise of jurisdiction over a West German company when the company’s general manager was personally served while attending a New Orleans trade show.” *Id.* at *5. What the *Lindsay* court appeared not to appreciate was that service on a mere agent of a corporation is generally not enough, standing alone, to subject the corporate entity to personal jurisdiction in the forum state but that the agent’s attendance at the trade show may have been (at the time the *Mordelt* Court rendered

In addition to service of process as an anti-tourism argument for Virginia (and every other state in the Union), *Moore v. Lindsay* engages in selective reading of both *International Shoe* and *Shaffer v. Heitner*. The *Lindsay* Court cleaved to the portion of *International Shoe* that supported extensive extra-territorial jurisdiction based on a nonresident defendant's volitional contacts with the state related to the dispute; however, it essentially shrugged off the equally or more important portion of *International Shoe* that emphasized fairness and reasonableness rather than territoriality and physical power alone.

Similarly, the *Lindsay* Court's reading of *Shaffer v. Heitner* focused not on Justice Marshall's majority opinion, but rather the concurrence of Justice Stevens, which cautioned that *Shaffer* should not be construed "as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit."¹¹⁷ Despite agreeing with the majority that Delaware's assertion of quasi-in-rem personal jurisdiction based upon a nonresident's ownership of stock in a Delaware-chartered corporation violated due process, Justice Stevens added:

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks.¹¹⁸

The Stevens concurrence is hardly an endorsement of broad tag jurisdiction. Most obviously, Justice Stevens is writing for himself and was not a vote necessary to the majority holding. Like Justice Powell, who also wrote a solo concurrence, Justice Stevens expresses an important view that bespeaks some caution before rejecting tag jurisdiction; however, this is a far cry from the *Shaffer* Court as a whole reaffirming tag jurisdiction when it has become so inconsistent with the Court's personal jurisdiction jurisprudence as a whole. A more reasonable reading of the Stevens concurrence is that even a brief visitor may be stopped by police or required to pay tolls, but it hardly follows that the state one is temporarily visiting can "exercise its power" over the visitor to adjudicate claims against the visitor that have nothing to do with the state.

Perhaps most disturbing about *Moore v. Lindsay* and other modern cases supporting tag jurisdiction (including the various opinions in *Burnham* dis-

its decision) sufficient business in the forum state or may have been sufficiently related to the underlying law suit to satisfy the minimum contacts test. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (holding in 5–4 decision that English manufacturer had insufficient contact with New Jersey to satisfy due process despite defendant's attendance at trade show in Las Vegas and contact with other U.S. States).

¹¹⁷ *Shaffer v. Heitner*, 433 U.S. 186, 219 (Stevens, J., concurring), *quoted in Lindsay*, 1989 U.S. Dist. LEXIS 18042, at *6.

¹¹⁸ *Id.* at 218 (Stevens, J., concurring), *quoted in Lindsay*, 1989 U.S. Dist. LEXIS 18042, at *5.

cussed below) is that there is no serious effort to compare the functional differences between tag jurisdiction and quasi-in-rem jurisdiction. Such a comparison, if done fairly and logically, leads inexorably to the conclusion that if quasi-in-rem jurisdiction is only valid upon passing a minimum contacts fairness/reasonableness analysis, the same must be true of tag jurisdiction.

Under a regime of tag jurisdiction, a once-in-a-lifetime, two-second step over a state border can (if a process server is hovering about) subject the defendant to general personal jurisdiction far beyond anything imposed on even the largest, wealthiest corporations. By contrast, even the most aggressive use of quasi-in-rem jurisdiction subjects the defendant to a lawsuit only in a state in which the defendant has some property, with the defendant's financial exposure limited only to the value of the property. Further, owning property in a state seems inherently to constitute a closer connection to the forum than merely passing through (much less over state airspace).

If asked to choose between the two regimes, any sane defendant would prefer the more limited risks posed by quasi-in-rem jurisdiction to the vast risk posed by tag jurisdiction. In *Shaffer*, the Court realized that the inexorable logic of *International Shoe* required that its fairness/reasonableness analysis be applied to quasi-in-rem jurisdiction notwithstanding its historical pedigree and the general deference given to state territorial boundaries and state hegemony within those boundaries. But somehow *Moore v. Lindsay* and similar post-*Shaffer* cases failed to implement the logic of *Shaffer* to tag jurisdiction, instead continuing to treat *Grace v. MacArthur* as authoritative.¹¹⁹

After *Burnham*, *MacArthur* was less cited, undoubtedly because proponents of tag jurisdiction now could use the Scalia plurality in *Burnham*. Nevertheless, *MacArthur* was still occasionally used to provide further support for the view that Justice Scalia's ringing endorsement of service of process as a means

¹¹⁹ See, e.g., *Mordelt*, 779 F.2d at 265 (5th Cir. 1985) (service within forum confers personal jurisdiction over served defendant for all matters, citing *MacArthur*). *Mordelt* was cited in eighteen subsequent cases (including *Burnham*) and in thirty-four law review articles or notes. *Accord* *Certain British Underwriters at Lloyds v. Jet Charter Serv., Inc.*, 789 F.2d 1534, 1537 (11th Cir. 1986); *United States v. Fanello*, 662 F.2d 505, 509 (8th Cir. 1981); *Ruggieri v. Gen. Well Serv., Inc.*, 535 F. Supp. 525, 529 (D. Colo. 1982); *McReynolds v. Mun. Court of Ottumwa*, 207 N.W.2d 792, 799 (Iowa 1973); *Marsh v. State*, 620 P.2d 878, 879 (N.M. 1980); *State v. Marsh*, 1980 N.M. App. LEXIS 824 (N.M. Ct. App. Jan. 22, 1980) (cases approving use of tag jurisdiction and citing *MacArthur*); see also *Opert v. Schmid*, 535 F. Supp. 591, 593-94 (S.D.N.Y. 1982) (service within forum confers personal jurisdiction over served defendant for all matters) (citing other cases but not citing *MacArthur*); *Aluminal Indus., Inc.*, 89 F.R.D. at 329 (same); *Cariaga*, 762 P.2d at 887 (same); *Nutri-West*, 764 P.2d at 695-96 (same); *Lockert*, 361 S.E.2d at 585 (same); *Hutto v. Plagens*, 330 S.E.2d 341, 342 (Ga. 1985) (same); *In re Marriage of Pridemore*, 497 N.E.2d 818, 819-20 (Ill. App. Ct. 1986) (same). But see *Nehemiah*, 765 F.2d at 47 (service on transient defendant alone not enough to establish personal jurisdiction); *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985) (same); *Harold M. Pitman Co.*, 626 F. Supp. at 312 (same); *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404, 405-06 (Ky. Ct. App. 1984) (same).

of conferring personal jurisdiction constituted black letter law, notwithstanding *International Shoe* and *Shaffer v. Heitner*.¹²⁰

The rationale behind the cases finding *International Shoe* not to have abolished tag jurisdiction was the portion of Chief Justice Stone's decision in which he wrote:

[T]he *capias ad respondendum* has given way to personal service of summons or other form of notice, [and now] 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."¹²¹

By first focusing on the italicized language, courts wishing to retain broad tag jurisdiction then argued that where defendants were within the forum state at the time of service, such defendants remained subject to the traditional territorial power declared in *Pennoyer*. While such a reading is plausible (even if erroneously assuming that Justice Stone was envisioning brief, episodic, accidental presence in the forum unrelated to the litigation rather than substantial or long-standing presence in the forum), it became increasingly hard to justify after *Shaffer v. Heitner*. But the view remained entrenched, with *MacArthur* available both to cite as support and to use as an illustration of the outer limit of tag jurisdiction. If such assertions of jurisdiction could take place in mid-air, similar assertions on the ground looked less unreasonable.¹²²

Perhaps more significant has been the reception of *Grace v. MacArthur* in secondary literature. It has been cited in seventy legal periodicals. Although many of these citations are in articles spurred by *Burnham* rather than *MacArthur* or the topic of transient jurisdiction per se, and several are critical of *MacArthur*'s broad notion of transient jurisdiction, all appear to treat the decision as setting forth a correct statement of the law and the continuing vitality of transient jurisdiction.

Perhaps more important, *MacArthur* became a near-staple note case contained in civil procedure casebooks and treatises to illustrate the continued availability of tag jurisdiction. Casebooks often contain reference to *Grace v. MacArthur*, usually treating the case as a correct application of the law, albeit with unusual facts.¹²³ Similarly, major treatises cite *MacArthur* with approval as correctly reflecting the law.¹²⁴

¹²⁰ See, e.g., *Evello Invs., N.V. v. Printed Media Servs.*, 158 F.R.D. 172, 173 (D. Kan. 1994).

¹²¹ See, e.g., *Lockert*, 361 S.E.2d at 584 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (italics to *International Shoe* quotation added by the *Lockert* court).

¹²² For example, service on the defendant in *Aluminal Indus., Inc.*, 89 F.R.D. at 329 occurred during the defendant's brief stopover at an airport in the jurisdiction.

¹²³ See, e.g., CRUMP ET AL., *supra* note 1, at 55; SUBRIN ET AL., *supra* note 1; but see FREER & PERDUE, *supra* note 1 (no mention of *MacArthur*); FRIEDENTHAL ET AL., *supra* note 1 (same); but see MARCUS ET AL., *supra* note 1, at 688 (referring to *MacArthur* as "[t]he reduc-

Even casebooks that do a good job describing the nuances of *Burnham*¹²⁵ seem to fall prey to a disturbing tendency to accept the *Grace v. MacArthur* result and rationale. One recent textbook presents the following illustration and assessment:

Suppose [a] defendant is returning to his home in Oregon from a trip to Hawaii. As it approaches Oregon, his airplane passes through northern California, at which point an authorized process-server sitting next to him on the plane serves him with process—while in the airspace over California. May the California court assert personal jurisdiction? Was the defendant actually physically present while served?

Analysis: Yes. A defendant who is within the airspace of a state is nonetheless actually physically present in the state for personal jurisdiction purposes.¹²⁶

This textbook, like almost all others in the field, treats pure tag-style, transient jurisdiction as alive and well.¹²⁷ But as previously noted and explored in

tio ad absurdum” illustration of tag jurisdiction, commenting that the case “involved no elements of either convenience or submission by the defendant to the jurisdiction of the court” and rhetorically asking whether “there [is] any persuasive justification” for such an exercise of personal jurisdiction); see also STEMPER ET AL., *supra* note 1, at 85–88 (treating *MacArthur* as authoritative but questioning its continued vitality in light of *Shaffer v. Heitner* and the multiple Court opinions in *Burnham*).

¹²⁴ See KEVIN M. CLERMONT, CIVIL PROCEDURE 168–69 (7th ed. 2004) (through use of tag jurisdiction “even momentary presence of defendant creates power to adjudicate a claim totally unrelated to that presence”) (citing *Grace v. MacArthur* and summarizing it as finding “valid service on defendant flying over state”). One prominent treatise appears to alternate between (in my view) overreading *Burnham*, as continued endorsement of tag jurisdiction and recognizing its constitutional vulnerability, then back to viewing tag jurisdiction as nonetheless enduring because of inertia and status quo bias:

Shaffer v. Heitner appeared to open jurisdiction based on service within the state (called tag jurisdiction) to constitutional challenge: why should a defendant’s brief presence within a state warrant the assertion of jurisdiction on an entirely unrelated claim? However, the Court rejected such a challenge in *Burnham* Four Justices found the history of in-state service sufficient to support its constitutionality, apparently in all cases, and three were willing to construe out of existence *Shaffer*’s statements that all assertions of state court jurisdiction are subject to *International Shoe* standards. Four other Justices said only that service on a defendant voluntarily present in a state “as a rule” supports jurisdiction, while the ninth Justice committed himself to no general rule. It may be, therefore, that [based on the rationale of *Shaffer*] service based on personal service will yet be held unconstitutional in extreme cases, such as when the defendant is served while flying across a state. But don’t hold your breath.

HAZARD ET AL., *supra* note 30, § 3.6 at 124 (footnotes omitted).

¹²⁵ See STEMPER ET AL., *supra* note 1, at 85–88 describing discussion of *Burnham*. In that textbook, from which the ensuing citation of *Grace v. MacArthur* is derived, the book also alerts the student: “In *Burham v. Superior Court*, 495 U.S. 604 (1990), however, a majority of the Supreme Court left open the possibility that the assertion of personal jurisdiction based solely on fleeting presence might be so unfair in some circumstances as to raise constitutional concerns.” See *id.* at 87.

¹²⁶ *Id.* at 88 (citing *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) as an example).

¹²⁷ See *id.* at 86–87. One example used in the textbook is of a dancer in a studio on the California-Oregon border who is served while standing partially on the California side of the dance studio. According to this textbook, the service is effective because “[a] state generally may assert personal jurisdiction over a defendant who is actually physically present in the state as long as the defendant is present while served with process.” *Id.* at 87. But see *id.* at

more detail below regarding *Burnham*, this strong view of tag jurisdiction had the support of only four Justices. There was also the de facto opposition of five members of the Court, or at least the implicit requirement that there be some additional defendant contact with the forum state.

Of course, not all the blame for the continued judicial allegiance to tag jurisdiction can be placed upon *MacArthur*. For example, in a decision issued nearly twenty years after *MacArthur* and less than a year before *Shaffer v. Heitner*, the First Circuit stated without hesitation, “It has long been black letter law that personal service within its geographical area establishes a court’s personal jurisdiction over the defendant.”¹²⁸ In that case, defendant Davis and another resident of Vermont were each sued over an alleged contract breach, with Davis served while “in New Hampshire, concededly on business unconnected with the partnership [giving rise to the dispute].”¹²⁹ The trial court granted the Rule 12(b)(2) motions of both defendants, finding insufficient contact with New Hampshire. A First Circuit panel unanimously reversed.

Perhaps the appeals court was, as a practical matter, unmoved by the “plight” of a Vermont defendant having to suffer the “inconvenience” of defending a claim in New Hampshire brought by a company with whom the defendant concededly had business ties.¹³⁰ But the First Circuit did not expressly use such practical concerns in making its decision. In fact, the court appeared to reject any role for fairness and reasonableness analysis in assessing transient service. It also read *International Shoe* as a one-way street for plaintiffs seeking expansive jurisdiction.

The cases relied upon by defendant discussing “fairness,” etc., alleging contra, are directed either to the fairness of the basis for substituted service when an individual was *not* personally served or present within the area, or to the fairness of subjecting a foreign intangible entity, such as a corporation, to the jurisdiction of the court. The concern, in other words, was with expanding jurisdiction beyond traditional limits, not with contracting it.¹³¹

The First Circuit was dismissive of what, forty years later, still looks like a persuasive argument against the slavish embrace of tag jurisdiction and some symmetry of treatment between individual defendants and entity defendants.¹³² The *Davis* court continued,

85–88 (noting that this same textbook points out that *Burnham* does not necessarily support either the *Grace v. MacArthur* result or the interstate dance floor hypothetical).

¹²⁸ *Donald Manter Co. v. Davis*, 543 F.2d 419, 420 (1st Cir. 1976) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1969)).

¹²⁹ *Id.* at 419.

¹³⁰ *Cf. Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1976) (striking down New Hampshire’s requirement that bar admission applicants be state residents, noting that applicant Piper, a Vermont resident, lived only 400 yards from the New Hampshire border).

¹³¹ *Donald Manter Co.*, 543 F.2d at 420 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958), *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Seymour v. Parke, Davis & Co.*, 423 F.2d 584 (1st Cir. 1970)).

¹³² Commenting on the trial court’s dismissal, the First Circuit stated:

Nor will we adopt the suggestion, advanced by some commentators, but unsupported by any judicial authority, that an individual's mere presence within the jurisdiction is not enough to subject him to the court's process. As to this, we consider it particularly unacceptable to say that an action not in rem must be brought in the defendant's residence to the exclusion of the plaintiff's. Rather, even on the limited subject of venue, it is frequently said that, at least in the absence of a showing of harassment, the party who brings the suit should be the one to choose the forum.¹³³

The First Circuit's approach arguably presaged the Scalia approach in *Burnham* in that it is both hidebound regarding perceived tradition and a bit selective in its use of source materials. For example, the full text of Section 28 of the *Second Restatement of Conflict of Laws* states that tag jurisdiction (as of 1969, prior to *Shaffer v. Heitner*) was valid unless the exercise of jurisdiction would be unfair to the defendant.¹³⁴ For reasons never explained, the panel fails to quote the *Restatement* accurately and to grapple with its meaning. The appellate court's one nod to fairness (and it may in practice be a significant one) was to note the ready availability of venue transfer in apt cases.¹³⁵

II. BURNHAM

Thus, as of the later twentieth century, the judicial revolution in personal jurisdiction was incomplete. Minimum contacts analysis displaced territoriality as the primary concern in exercising personal jurisdiction over nonresident defendants in matters related to the substance of the litigation. Also, a modified

It is not clear from the district court's opinion which of these principles it relied on as making the black letter law [that service within the forum state is conclusive as to personal jurisdiction] outmoded. At one point it stated that an individual personally served within the jurisdiction is entitled to the same "fairness" treatment that would be accorded a foreign corporation not doing business within the state. At another point it spoke as if partnerships were legal entities, and thus subject to the corporation test. Neither position is correct.

Id. at 420. The appellate panel then went on to note that partnerships and corporations are treated differently under the law regarding amenability to suit. But it is hard to see how any error by the district court in this regard made its fairness analysis infirm. Corporations—unlike individuals who receive less judicial protection in this regard—cannot be sued by service within the jurisdiction upon even high-ranking corporate officials unless they are specifically designated as agents for purposes of receiving service.

¹³³ *Id.* (citations omitted). In addition to citing inconvenient venue precedent (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970)), the panel cited Albert Ehrenzweig's famous article and an almost equally prominent project examining jurisdiction. See Ehrenzweig, *supra* note 40, at 289; *Developments in the Law*, *supra* note 46, at 937–39. It is a bit harsh for the First Circuit to argue that the suggestion of subjecting tag jurisdiction to the fairness/reasonableness prong of minimum contacts analysis is "unsupported by any judicial authority" given *International Shoe*, which is easily susceptible to such a reading. The Court's *Shaffer v. Heitner* decision a year later, of course, is also substantial judicial authority that has not been overturned by *Burnham*.

¹³⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1969).

¹³⁵ *Donald Manter Co.*, 543 F.2d at 420 ("Any legitimate showing a defendant may make as to fairness in this regard is fully cognizable under the change of venue statute, 28 U.S.C. § 1404(a), without impinging on an established principle of jurisdiction. Dismissing the action altogether is overkill.").

form of minimum contacts became the touchstone for exercises of general personal jurisdiction as well. Along with this shift came a recognition that in rem and quasi-in-rem jurisdiction must also be assessed by the yardstick of due process. Except for issues of siting the location of intangible property, in rem jurisdiction almost tautologically met the test in that if property is in the forum state, there is logically sufficient contact to permit the forum state to adjudicate matters concerning the property (but not all legal rights affecting those interested in the property).

As the Court declared in *Shaffer v. Heitner*, quasi-in-rem jurisdiction, in which the property is not at issue save as a means of notifying and subjecting the defendant to state power, logically must satisfy the fairness/reasonableness inquiry demanded by *International Shoe*. Many commentators had also largely recognized that tag jurisdiction was similarly logically subject to minimum contacts analysis,¹³⁶ as had some courts,¹³⁷ although most courts had failed to examine the issue or had affirmed the vitality of tag jurisdiction since it had not been expressly forbidden in *Shaffer*.¹³⁸ This discrepancy set the stage for a clarifying pronouncement by the Supreme Court. Instead, it delivered a fragmented opinion that has frequently been misunderstood and, at least as widely construed, undermined the due process analysis of personal jurisdiction.

Dennis and Francie Burnham married in 1976 in West Virginia and moved to New Jersey in 1977, where their two children were born. The couple separated in July 1987 and agreed that Francie would have custody of the children and could move with them to California.¹³⁹ They had apparently agreed that Francie would file for divorce on grounds of irreconcilable differences. How-

¹³⁶ See, e.g., Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 18, 25 (1982); Daniel O. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 39–40 (1980); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 743–48 (1981); Vernon, *supra* note 82, at 302–03; see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1064 (3d ed. 2002) (leading treatise questions continued viability of transient jurisdiction after *Shaffer*).

¹³⁷ See, e.g., *Nehemiah v. Athletics Cong. of the U.S.A.*, 765 F.2d 42, 46–47 (3d Cir. 1985) (*Shaffer v. Heitner* “signaled [judicial] reexamination of some of the traditional underpinnings of jurisdiction. . . . If the mere presence of property cannot support quasi *in rem* jurisdiction, it is difficult to find a basis in logic and fairness to conclude that the more fleeting physical presence of a non-resident person can support personal jurisdiction.”); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 311–13 (N.D. Ill. 1986) (“[U]nder *Shaffer*, mere service of process upon a defendant transiently present in the jurisdiction does not vest a state with personal jurisdiction over the defendant.”); see also *id.* at 312: “Personal service within the jurisdiction is not the litmus test for proper in personam jurisdiction. Rather, the test is whether the defendant has had minimum contacts with the forum ‘such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

¹³⁸ See *supra* notes 111–35, citing cases affirming tag jurisdiction notwithstanding arguments that basing personal jurisdiction on service in the forum state alone violates *International Shoe* and *Shaffer v. Heitner*.

¹³⁹ *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990).

ever, in October 1987, Dennis filed for divorce in New Jersey on grounds of desertion. Francie objected to this new tactic by Dennis and sued for divorce in California state court in early 1988.¹⁴⁰ Later that month, Dennis visited southern California on business. He then visited his children in the San Francisco area, where Francie now resided, taking the older child into the city for the weekend. When he returned the child to Francie's home, Dennis was served with a California court summons and divorce petition.¹⁴¹

Notwithstanding the couple's earlier agreement about Francie and the children moving to California, Dennis objected to divorce in California and moved to have the case dismissed for lack of personal jurisdiction. His contacts with California consisted of several short business trips and trips to see his children.¹⁴² The California trial court denied his motion, and the state Court of Appeals denied his petition for mandamus relief, ruling that because Dennis was personally served in the state, he was subject to its jurisdiction.¹⁴³ The Supreme Court granted certiorari on the question of whether a state court could exercise personal jurisdiction over a defendant on the sole basis of in-state service of process alone.

In an opinion announcing the Court's holding, Justice Scalia (joined by Justices Rehnquist and Kennedy) issued an opinion taking the view that pure territorial exercise of transient jurisdiction had indeed survived both *International Shoe* and *Shaffer v. Heitner*.

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.¹⁴⁴

* * *

This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice . . . as far as we are aware [of] *all* the States and the Federal Government—if one disregards (as one must for this purpose) the few opinions since 1978 that have erroneously said, on grounds similar to those that petitioner presses here, that this Court's due process decisions render the practice unconstitutional. We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction. Many recent cases reaffirm it.¹⁴⁵

¹⁴⁰ *Id.* at 607–08.

¹⁴¹ *Id.* at 608.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 610–11.

¹⁴⁵ *Id.* at 615 (citations omitted). The Scalia opinion essentially assumes away the challenge to tag jurisdiction by largely taking the view that if most courts have not read *Shaffer v. Heitner* to require a due process analysis of tag jurisdiction just as for quasi-in-rem jurisdiction, this automatically makes any such argument unpersuasive. Justice Scalia then labels the

Although reading *Shaffer v. Heitner* more narrowly than many commentators as a means of avoiding a due process inquiry about tag jurisdiction, those joining the Scalia opinion took an approach to due process different from that of *Shaffer*, and for that matter *International Shoe*. The Court “conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase ‘*traditional notions of fair play and substantial justice*’ makes clear.”¹⁴⁶

Justice White joined in the Scalia opinion except as to Part III, which was largely a criticism of Justice Brennan and his approach to the issue, and further stated:

The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment. Although the Court has the authority under the Amendment to examine even traditionally accepted procedures and declare them invalid, there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case. . . . Here, personal service in California, without more, is enough, and I agree that the judgment should be affirmed.¹⁴⁷

A critic might respond that this same reasoning, if used in *Shaffer v. Heitner*, would have counseled against invalidating quasi-in-rem jurisdiction—but Justice White joined the majority opinion in *Shaffer* without qualification. A critic might also wonder whether he really meant to so broadly embrace tag jurisdiction. For example, if Francie Burnham had moved with the kids to Nevada, would personal jurisdiction based only on service upon Dennis while he was changing planes at McCarran Airport in Las Vegas have satisfied due process? The text of Justice White’s opinion literally supports this, but such a strained result is at odds with the Justice’s generally pragmatic approach and willingness to seek practical results even if it means some conflict with doctrine or precedent.¹⁴⁸

argument about due process applying to all exercises of personal jurisdiction as one that “rests on a thorough misunderstanding of our cases.” *Id.* at 616. But as this article’s earlier discussion of *Shaffer v. Heitner* suggests, it is at a minimum very hard to square *Shaffer* with the continued use of tag jurisdiction that is immune from any due process review. The Scalia opinion read *Shaffer* as preserving the distinction between “physically present defendants” and “absent” ones, stating that “our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction.” *Id.* at 621. Scholars criticizing *Burnham* questioned Justice Scalia’s reading of *Shaffer* and other due process/process precedents.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 628 (White, J., concurring) (citation omitted).

¹⁴⁸ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92–94 (1982) (White, J., dissenting) (taking view that formal niceties regarding different status of judges appointed pursuant to Article I of the Constitution rather than Article III should not prevent

Even assuming Justice White was this adamant about the immunity of tag jurisdiction from fairness analysis, and Justices Rehnquist and Kennedy were as adamant as the clearly committed, almost strident Justice Scalia, this still makes for only four votes in support of the view that tag jurisdiction need never be subject to a fairness/reasonableness inquiry. Looking at the remainder of the Court in *Burnham*, it appears that this strong view of tag jurisdiction could not command a fifth vote.

Justice Brennan, writing for himself and Justices Marshall, Blackmun, and O'Connor, rejected the view that service within the forum alone established personal jurisdiction.

I agree [that the Due Process Clause] generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State. . . . [However,] I would undertake an "independent inquiry into the . . . fairness of the prevailing in-state service rule." [citing to the Scalia opinion rejecting this obligation]. I therefore concur only in the judgment. [Further,] the approach adopted by Justice Scalia's opinion today—reliance solely on historical pedigree—is foreclosed by our decisions in [*International Shoe* and *Shaffer v. Heitner*].¹⁴⁹

Notwithstanding this reluctance to embrace an unquestioned deference to service in the forum as a basis for personal jurisdiction, the Brennan opinion concurred in the result. Specifically, Justice Brennan agreed that Dennis should be subject to California jurisdiction because his overall amount of contacts with the state was sufficient, particularly since visits with the children was contact related to the couple's marital issues.¹⁵⁰

Thus, on the issue of whether service alone could support personal jurisdiction, there appeared to be four votes solidly saying "yes" and four votes rather solidly saying "no" (but finding personal jurisdiction over Dennis nonetheless).

bankruptcy judges from being able to make determinations necessary to efficient administration of debtors' estates).

¹⁴⁹ *Burnham*, 495 U.S. at 628–29 (Brennan, J., concurring).

¹⁵⁰ *Id.* at 637–39. Critics of the Brennan concurrence tend to focus on this part of the opinion, as did Justice Scalia in attacking the Brennan concurrence in Part III of Scalia's own concurrence (the portion Justice White did not join). The critical perspective is that Justice Brennan strained to find sufficient minimum contacts by treating Burnham's use of state roads and enjoyment of the state infrastructure of police and fire protection or medical care if needed. Although the critics of course have a point about the relatively light benefits of the forum state enjoyed by Burnham on this short visit aimed primarily at visiting his children, these are contacts nonetheless—and unlike merely flying above a state's airspace—convey at least some benefits to a defendant. Dennis Burnham, in particular, was doing business in California, although apparently not a great quantity. But he likely derived economic benefit from his contact with California. And he was being sued over a divorce sought in California by a California resident and apparent domiciliary, who was raising Burnham's kids in California. Collectively, this is not a trivial set of contacts to combine with service, which should count as a contact even under a regime where it does automatically establish personal jurisdiction. Under the uniform, due process-centered model of personal jurisdiction suggested at the close of this article, these factors would logically support the *Burnham* Court's result, even if rejecting the four-member Scalia plurality.

Justice Stevens wrote separately, supporting the exercise of jurisdiction but wishing to avoid broad pronouncements.

[That] concern prevents me from joining either Justice Scalia's or Justice Brennan's opinion in this case. For me, it is sufficient to note that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case. Accordingly, I agree that the judgment [subjecting Dennis to personal jurisdiction in California] should be affirmed.¹⁵¹

Prophetically, in a footnote to his concurrence, Justice Stevens made the statement set forth at the beginning of this article: "Perhaps the adage about hard cases making bad law should be revised to cover easy cases."¹⁵² In the aftermath of *Burnham*, commentators and lower courts struggled a bit to discern exactly what the Court had said. Although four of nine justices were willing to support continued use of broad transient jurisdiction via service within the forum, it appeared that at least four and probably five justices saw this as insufficient standing alone. Nevertheless, despite the fragmentation of the *Burnham* Court, most lower courts appear to have treated *Burnham* as an affirmation of tag jurisdiction.¹⁵³

Many commentators were careful not to read *Burnham* too broadly and noted that exercise of personal jurisdiction probably would require something

¹⁵¹ *Id.* at 640 (Stevens, J., concurring) (footnote omitted).

¹⁵² *Id.* at 640 n.*.

¹⁵³ See, e.g., *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20–21 (2d Cir. 1998) (treating service alone as sufficient to confer jurisdiction because defendants "knew, or should have known, that by" going to meeting in New York, they were "risking exposure to personal jurisdiction" in the state (citing *Burnham*)); *Estate of Ungar v. Palestinian Auth.*, 400 F. Supp. 2d 541, 553 (S.D.N.Y. 2005) (tag jurisdiction or "personal service on an individual within the state" endures as "a valid method of acquiring personal jurisdiction over an individual") (although this may also be a case where extenuating circumstances would support use of tag jurisdiction in the absence of the practical availability of another forum where relief can be obtained); *In re Order Quashing Deposition Subpoenas*, No. 1:02CV00054, 2002 U.S. Dist. LEXIS 14928, at *7–8 (S.D.N.Y. 2002) (finding that pursuant to *Burnham*, "an individual may be subjected to liability by the exercise of so-called 'tag' jurisdiction far from home without the Due Process Clause being violated"); *In re Marriage of Vailas*, 939 N.E.2d 565, 570–71 (Ill. App. Ct. 2010) (although finding *Burnham* not controlling because state long-arm statute does not reach to full extent of constitutional due process, finds that "the U.S. Supreme Court noted in *Burnham*, '[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State'" (citing the Scalia opinion in *Burnham* but failing to note that it was joined by only two other Justices)); *Schinkel v. Maxi-Holding, Inc.*, 565 N.E.2d 1219, 1222 (Mass. App. Ct. 1991) (similar treatment of *Burnham*). See 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 108.51 (3d ed. 2014) ("In practice, however, [*Burnham*] makes clear that a challenge to jurisdiction based on due process grounds by a defendant who was personally served while physically present in the state will rarely, if ever, be successful" and citing post-*Burnham* cases are consistent with that view).

more than only service on a transient defendant.¹⁵⁴ Some commentators were highly critical of *Burnham*'s failure to follow *Shaffer*'s lead and to bring tag jurisdiction firmly under the umbrella of the minimum contacts considerations of fairness and reasonableness.¹⁵⁵ These same commentators were often particularly critical of the highly formalist, frozen-in-history Scalia opinion that treated pre-*International Shoe* understandings as determinative but gave short shrift to *International Shoe* and *Shaffer v. Heitner*.¹⁵⁶

But many commentators, and in particular law student study aids, overread *Burnham* as a ringing endorsement of tag jurisdiction by a majority of the Court or at least a widespread consensus to leave tag jurisdiction in place.¹⁵⁷

¹⁵⁴ Despite the judicial embrace of tag jurisdiction as unproblematic, many mainstream commentators have tried to advise bench and bar that the Scalia position in *Burnham* only enjoyed the support of 3–4 justices, with five arguably opposed. For example, *Moore's Federal Practice* (§ 108.51) offers a nuanced reading of the decision, but one that nonetheless is excessively slanted toward reading *Burnham* as endorsing tag jurisdiction.

In [*Burnham*], the Supreme Court unanimously upheld the constitutionality of jurisdiction based on personal service of process on a transient nonresident while that person is physically present in the state. However, the Court split 4-4 on whether jurisdiction based on service of process could be justified by its historical pedigree or required a minimum contacts and fairness analysis. Justice Stevens wrote a separate opinion, declining to agree with either side.

¹⁶ MOORE ET AL., *supra* note 153 (footnotes omitted). As noted above, my view is that a sounder reading of the Stevens concurrence is that he is not willing to uphold jurisdiction (over Dennis Burnham or anyone else) based solely on service of process within the forum state—otherwise, he would have joined the Scalia or White opinions. There was no reason to write separately, even briefly, unless he was unprepared to uphold California's exercise of personal jurisdiction in the absence of defendant's other contacts with the forum state. *See supra* note 151 and accompanying text; *see also* Christine M. Daleiden, Comment, *The Aftermath of Burnham v. Superior Court: A New Rule of Transient Jurisdiction?*, 32 SANTA CLARA L. REV. 989, 990–92 (1992) (reading *Burnham*'s multiple opinions in similar manner).

¹⁵⁵ *See, e.g.*, 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 (1990); Stanley E. Cox, *Would That Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497 (1991); Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593 (1990); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 RUTGERS L.J. 675 (1991); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611 (1991); Barbara Surtees Goto, Note, *International Shoe Gets the Boot: Burnham v. Superior Court Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851 (1991); Paul C. Wilson, Note, *A Pedigree for Due Process?*, 56 MO. L. REV. 353 (1991).

¹⁵⁶ *See, e.g.*, *supra* note 155.

¹⁵⁷ *See, e.g.*, STEVEN L. EMANUEL, CIVIL PROCEDURE 29–30 (5th ed. 2011) (on the authority of *Burnham*, personal jurisdiction “may be exercised over an individual by virtue of his presence within the forum state . . . even if the individual is an out-of-state resident who comes into the forum state only briefly . . . as long as service was made on him” while in the forum state) (using facts of *Burnham* as illustrative example); JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES & EXPLANATIONS 8 (7th ed. 2013) (personal “jurisdiction based on

service of process on the defendant within the state . . . was reaffirmed in *Burnham*"); *id.* at 16 ("[T]he Supreme Court concluded that such 'transient jurisdiction' is still a valid means of obtaining jurisdiction over an individual defendant, even if the defendant is in the state briefly or for reasons unrelated to the litigation.") (citing *Burnham* and using example of establishing jurisdiction by having process server anticipate prospective defendant's trip to state); LINDA S. MULLENIX, CIVIL PROCEDURE 254 (2d ed. 2014) ("The Supreme Court's decision in *Shaffer v. Heitner* has not modified the doctrine of transient jurisdiction. Assertions of transient jurisdiction . . . do not have to satisfy *International Shoe* minimum contacts jurisprudence.") (citing *Burnham* and referring to "Justice Scalia's Majority Opinion" in the case, although discussing other opinions); Cox, *supra* note 155, at 518 ("*Burnham* is most glaringly wrong, however, in its primary conclusion, shared by all the Justices, that transient presence jurisdiction is under most circumstances constitutional."); Goto, *supra* note 155, at 887 (In *Burnham*, "[t]he Court's clear message is that the physical power theory comports with due process—regardless of which due process analysis is applied."); Scott D. Irwin, Note, *Burnham v. Superior Court of California: The Final Word on Transient Personal Jurisdiction?*, 53 OHIO ST. L.J. 613, 628–30 (1992) (summarizing and assessing case with almost no mention of White and Stevens concurrences and characterizing *Burnham* as having endorsed classic pre-*International Shoe* use of tag jurisdiction); Douglas A. Mays, Note, *Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, but Not in Theory*, 69 N.C. L. REV. 1271 (1991) (similarly overbroad characterization of *Burnham*, treating divergent opinions as divided regarding analysis but not in basic support for tag jurisdiction). The Clermont *Civil Procedure* student hornbook appears to describe pure tag jurisdiction as good law even while suggesting some concern:

[E]ven momentary presence of defendant creates power to adjudicate a claim totally unrelated to that presence. See *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (valid service on defendant flying over state).

Example: D, a Minnesotan driving to Maine for a vacation, stops at a gas station in Vermont. While waiting in line there, D assaults P, who is a businessman from Ohio. P sues D in an Ohio state court, managing to serve D with process when D stops for the night in Ohio on a later trip to New York. (Result: such "transient jurisdiction" is constitutional.)

Burnham . . . seems to suggest that transient jurisdiction merely by its historical pedigree satisfies any reasonableness test. (Despite former attempts fictitiously to apply the "presence" concept to corporations, the view today is that this basis meaningfully refers only to jurisdiction over individuals, since only individuals can be physically present.)

KEVIN M. CLERMONT, CIVIL PROCEDURE 171 (9th ed. 2012); see also Deborah Maranville, *Sample Gold Standard Brief*, *Burnham v. Superior Court*, available at <http://courses.washington.edu/civpro04/BurnhamGoldStdBrief.doc> (law professor's sample exemplary case brief for students studying civil procedure describes *Burnham* as a case holding that it does not violate due process for a court to "assume personal jurisdiction over a [nonresident, non-domiciliary] defendant based on his physical presence in the State" even where the suit is "unrelated" to his activities in the state (although this summary arguably becomes a bit more nuanced in that it notes that the defendant was in the state for business and to visit with children rather than merely passing through)). But see SAMUEL ISSACHAROFF, CIVIL PROCEDURE 113–15 (3d ed. 2012) (reading *Burnham* as maintaining viability of tag jurisdiction but criticizing case as jurisprudential step backwards):

[In *Burnham*], the Court could have, and arguably should have, applied the *Asahi* due process balancing test to determine whether burdens outweighed interests or vice versa. . . . The case would have been difficult under the *Asahi* balancing test, but the balance likely would have tipped in favor of jurisdiction, on the ground that the state's interest in providing for the best interests of the children trumped all other considerations. But this was not the basis for decision. None of the Justices faithfully applied the balancing test set out in *Asahi*; they instead turned to formalistic analyses reminiscent either of the 1877 *Pennoyer* ruling that in-state service alone sufficed for a state to assert jurisdiction, or of *Burger King*'s mechanical application of the minimum contacts test.

The court fractured and there was no controlling opinion. [Going on to describe differing opinions in some detail].

Although it is hardly the greatest problem in modern jurisprudence or legal education, the ravages of reading *Burnham* as a broad endorsement of “pure” tag jurisdiction unaccompanied by any other defendant contact with the forum state are readily apparent at final exam time. Students routinely treat *Burnham* (at least at the three law schools where I have taught) as standing for the proposition that service in the forum alone without question confers personal jurisdiction over the defendant. They do this even in the total absence of any other connection to the forum state, which is a position that has yet to garner the support of five or more Supreme Court Justices in the post-*International Shoe* era.

Because so many tag jurisdiction cases also involve other defendant contacts with the forum state, lower courts were still normally able to make defensible and probably correct decisions exercising jurisdiction where service within the state was a key component. Outside of “poster child” cases of highly strained applications of tag jurisdiction, such as *MacArthur*, most exercises of tag jurisdiction would perhaps also satisfy a reasonable minimum contacts analysis. Nonetheless, the mere availability of pure tag jurisdiction stands in stark contrast to the regime of due process and fairness analysis that has otherwise dominated personal jurisdiction analysis for decades.

III. *GOODYEAR, NICASTRO, DAIMLER, AND WALDEN V. FIORE*

For twenty years after *Burnham*, the Supreme Court had a relatively heavy docket of personal jurisdiction cases during the 1977–1990 time period, but decided no significant personal jurisdiction cases. Due to misreading by lawyers, judges, and commentators (particularly study aid outlines), *Burnham* became known as the case that presented tag jurisdiction as “the law.” Although the truth was far more complicated and the decision widely disliked by academics, *Burnham* came to stand for the continuing solvency of transient jurisdiction. As such, it appeared to have avoided the fate of quasi-in-rem jurisdiction, which fell into relative disuse after *Shaffer v. Heitner*. When the Court returned to deciding personal jurisdiction cases, it did so in a manner that made the always troublesome prevailing view of *Burnham* even less defensible.

In 2011, personal jurisdiction returned with a vengeance, as the Court decided two prominent personal jurisdiction cases, one involving general jurisdiction and the other specific jurisdiction. Both decisions slanted in favor of restrictive jurisdiction. In doing so, they further undercut the argument that tag jurisdiction was so exceptional that it should be beyond the reach of the due process minimum contacts analysis governing the rest of the personal jurisdiction

After decades of developing a modern due process analysis for the problems of a mobile population, the Court’s retreat to formalism was quite troubling. Allowing tag jurisdiction to hold up, virtually regardless of the contacts with the forum, invites gamesmanship in litigation and dictates that parties exercise caution in where they travel for fear of being served in an inconvenient or inhospitable forum. This unfortunate outcome is another example of *Pennoyer’s* inapplicability in a mobile society, which every case from *International Shoe* to *Asahi* had attempted to resolve.

Id.

tion world. The Court continued in this vein in 2014, issuing another restrictive general personal jurisdiction decision, along with a specific personal jurisdiction decision that, although not particularly controversial, continued in the vein of refusing to expand specific jurisdiction beyond its current bounds.

A. *Goodyear*

*Goodyear*¹⁵⁸ began with when a North Carolina youth soccer club took a European trip in 2004. As a bus was taking the group to the Paris airport for a flight home, a tire blew out, causing an accident that killed two thirteen-year-old North Carolinians. Their bereaved parents, also North Carolinians, sought compensation in their home state courts. Named as defendants were Goodyear Tire & Rubber Co., and three subsidiaries of which parent Goodyear owned 100 percent of the stock. A Turkish subsidiary had manufactured the allegedly defective tire, and the other subsidiaries had been involved in the distribution of the tire.¹⁵⁹ All three subsidiaries contested North Carolina's exercise of personal jurisdiction over them (parent Goodyear did not) but were unsuccessful.¹⁶⁰

Because the bus accident, the alleged negligence in tire manufacturing, and the boys' deaths all occurred outside North Carolina, plaintiff asserted general personal jurisdiction. Under Court precedent, general personal jurisdiction required that a defendant have sufficiently "continuous and systematic" contacts with the forum state to make it apt for the defendant to be sued in the state over any claim, regardless of where the claim arose.¹⁶¹ The *Goodyear* Court, in a unanimous decision authored by Justice Ginsburg, held that the three subsidiaries lacked such sufficient contact with the forum state even though "tens of thousands" of the subsidiary's tires (out of "tens of millions" manufactured by the company) "were distributed within North Carolina by other Goodyear USA affiliates." The subsidiary's tires "were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers."¹⁶²

The Court reasoned that the exercise of general personal jurisdiction required more in the way of volitional, consistent conduct specifically directed at or associated with the forum state than mere sales or distribution of products. Noting that "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile" and that "for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home,"

¹⁵⁸ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

¹⁵⁹ *Id.* at 2850–52. For a more detailed presentation of the facts from one of plaintiffs' attorneys who emphasizes parent Goodyear's control over the subsidiaries and their products, see Collyn A. Peddie, *Mi Case Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 63 S.C. L. REV. 697, 699–702 (2012).

¹⁶⁰ *Goodyear*, 131 S. Ct. at 2852.

¹⁶¹ *Id.* at 2853–54.

¹⁶² *Id.* at 2852.

the Court found it improper for North Carolina to exercise general jurisdiction.¹⁶³

With its emphasis on the corporate “home,” *Goodyear* can be read as suggesting that a company’s state of incorporation and its state of corporate headquarters are likely to be the only forums where there is sufficiently weighty continuous and systematic contact to support general jurisdiction.¹⁶⁴ At a minimum, *Goodyear* rejected establishment of general jurisdiction merely based on the defendant’s participation in commerce touching upon or even directed at the forum state.¹⁶⁵

B. *Nicastro*

In *J. McIntyre Machinery, Ltd. v. Nicastro*,¹⁶⁶ the Court faced the issue of whether an English punch press manufacturer had sufficient contact with New Jersey to support specific personal jurisdiction. Plaintiff Nicastro, a New Jersey resident, lost four fingers while using a McIntyre punch press at work. Understandably, he sought to pursue legal relief in his convenient home state.¹⁶⁷ McIntyre had intentionally engaged in substantial marketing, sales, and distribution efforts in the United States, but none had specifically targeted New Jersey. As a result, the Court, in a 6–3 decision, ruled that New Jersey lacked per-

¹⁶³ *Id.* at 2853–54.

¹⁶⁴ *Id.* at 2856 (“A corporation’s ‘continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945))); *see also* Twitchell, *supra* note 52, at 667 (advocating similar approach to exercise of general jurisdiction).

¹⁶⁵ 131 S. Ct. at 2854–55.

¹⁶⁶ *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

¹⁶⁷ There is no hint of any forum shopping in the case (other than that the plaintiff wanted to sue in his home state, hardly a nefarious goal). Although New Jersey is not considered a pro-defendant state in terms of product liability law, neither is it considered a “judicial hellhole” by defendants. The term is taken from the manufacturer-supported lobby group the American Tort Reform Association and its sibling the American Tort Reform Foundation, which annually present a list of its perceived dozen worst locations to be tort defendant, labeling these alleged pro-plaintiff jurisdictions as “judicial hellholes.” *See* JUDICIAL HELLHOLES, <http://www.judicialhellholes.org> (last visited May 1, 2015) (a website maintained by the American Tort Reform Foundation that lists jurisdictions deemed excessively favorable to plaintiff tort claims). Examples of “Top Six” jurisdictions are California, Louisiana, New York City, West Virginia, Madison & St. Clair Counties in Illinois, and South Florida. *See* AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2013/2014, at 7–24 (2013), <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf>. Putting aside the obvious political slant of ATRA and ATRF in maintaining this list and the essentially misleading nature of labeling an entire state pro-plaintiff or pro-defendant (much variance in this regard is local based on trial judges and juries), it appears that in the roughly twenty years of this project that New Jersey sites have not incurred the wrath of the organization. *See, e.g., id.* at 47 (questioning New Jersey appellate court decision permitting lawsuit against phone texters allegedly contributing to auto accident); *id.* at 50 (praising New Jersey Supreme Court decision regarding minimum qualifications for medical expert witnesses).

sonal jurisdiction over McIntyre, even though the allegedly defective punch press's journey to the Garden State was not very attenuated and appeared to be reasonably foreseeable.¹⁶⁸

Nicastro can be viewed as consistent with the Court's pre-1990s personal jurisdiction cases such as *Asahi Metal* and *World-Wide Volkswagen*, which constricted perceived excesses of jurisdictional exercise in lower courts. Nevertheless, it is arguably a more restrictive view of specific personal jurisdiction and volitional commercial contacts than the "stream of commerce" and "tort out/harm in" approaches leading to findings of personal jurisdiction in the Court's 1980s cases of *Burger King v. Rudzewicz*, *Keeton v. Hustler*, *Calder v. Jones*, and many lower court cases.¹⁶⁹

Much has been written about *Nicastro*, most of it negative,¹⁷⁰ and *Nicastro* will not be analyzed at length here except to point out that, to the extent the reach of specific jurisdiction shrinks, this necessarily adds further fuel to the argument that tag jurisdiction based on service alone is inconsistent with personal jurisdiction doctrine as a whole. How, one might ask rhetorically, can the current Court have such misgivings about a state's exercise of specific jurisdiction over a commercial actor seeking to sell the product that allegedly caused injury to a state resident, and not harbor similar misgivings about subjecting a nonresident defendant to jurisdiction regarding any matter on the sole basis of service of process while the defendant was merely passing briefly through the state?

C. *Daimler*

In 2014, the Court again addressed general jurisdiction in *Daimler AG v. Bauman*.¹⁷¹ As in *Goodyear*, the case involved unusual facts and an arguable overreach by plaintiffs. This raised some question about whether the restrictive language in the Court's *Goodyear* opinion would be applied literally to more modest attempts to assert general jurisdiction over a defendant with substantial business operations in a state other than its managerial nerve center or place of

¹⁶⁸ *Nicastro*, 131 S. Ct. at 2785.

¹⁶⁹ See *supra* notes 7–16, 51–52, and accompanying text. See generally STEMPEL ET AL., LEARNING CIVIL PROCEDURE, *supra* note 1, at ch. 2 (reviewing evolution of Supreme Court personal jurisdiction doctrine and cases noted in above).

¹⁷⁰ See, e.g., Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245 (2011); Robin J. Effron, Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction, 16 LEWIS & CLARK L. REV. 867 (2012); Allan Ides, Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341 (2012); Howard B. Stravitz, Sayonara to Fair Play and Substantial Justice?, 63 S.C. L. REV. 745 (2012); Peter R. Bryce, Note, Whither Fairness? In Search of a Jurisdictional Test After J. McIntyre Machinery v. Nicastro, 80 FORDHAM L. REV. 2975 (2012); Kristianna L. Sciarra, Note, A Gap in Personal Jurisdiction Reasoning: An Analysis of J. McIntyre Machinery, Ltd. v. Nicastro, 31 QUINNIPIAC L. REV. 195 (2013).

¹⁷¹ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

incorporation. In tandem, *Goodyear* and *Daimler* provide defense counsel with powerful precedent for seeking to avoid the exercise of general personal jurisdiction over a corporation anywhere but in those two locales.

Daimler began as a claim brought by the representatives of labor activists who had been tortured and killed during Argentina's "Dirty War" from 1976–1983. The Argentine subsidiary of Daimler, maker of the Mercedes-Benz automobile, allegedly collaborated with state security forces in these human rights violations. Plaintiffs sued Daimler in California, with personal jurisdiction "predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey."¹⁷² MBUSA is Daimler's U.S. distributor and conducts substantial regular business activity in California.

Plaintiffs asserted that Daimler was subject to California jurisdiction because of its role as parent of MBUSA due to the subsidiary's substantial business presence in California. Additionally, plaintiffs claimed that Daimler was liable to plaintiffs pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 because of its status as parent of the Argentine subsidiary.¹⁷³ The trial court rejected plaintiffs' jurisdictional contentions, but a Ninth Circuit panel, after initially affirming, subsequently reversed, with rehearing en banc denied by a divided Appeals Court. The Ninth Circuit found the agency relationship between Daimler and its subsidiaries sufficient, and it did not require plaintiffs to break through the presumptive corporate veil of the different (but related) corporate entities.¹⁷⁴ Ordinarily, piercing the corporate veil requires demonstrating that Daimler dominated the subsidiaries sufficiently to constitute a situation in which the subsidiaries were alter egos of the parent company.

The Supreme Court granted certiorari and reversed, finding that general personal jurisdiction was not established by the substantial Mercedes-Benz presence in California.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*.¹⁷⁵

Repeating language used in *Goodyear*, the *Daimler* Court found that the traditional requirement of "continuous and systematic" presence in a forum

¹⁷² *Id.* at 751.

¹⁷³ *See id.* at 751–52.

¹⁷⁴ *See id.* at 753.

¹⁷⁵ *Id.* at 759–60.

state required that the defendant be “at home” in the forum state for general jurisdiction to be exercised. Further, according to the *Daimler* Court,

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” . . .

[However,] *Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation “engages in a substantial, continuous, and systematic course of business” [citing Plaintiffs’ brief]. That formulation, we hold, is unacceptably grasping.¹⁷⁶

The *Daimler* Court also stressed the importance of having clear and predictable standards for general personal jurisdiction to facilitate business planning. Further, the Court found that concerns of international comity arose when U.S. courts attempt to exercise general jurisdiction over foreign defendants. Other nations, including *Daimler*’s home country of Germany, simply do not have the broad notions of long-arm personal jurisdiction prevailing in the United States.¹⁷⁷ Without some significant defendant contact in the forum state related to the substantive claim, exercise of jurisdiction in a state other than the defendant’s corporate “home” was viewed as unfair and out of sync with prevailing international standards.

It may be that after *Goodyear* and *Daimler*, general jurisdiction is, as a practical matter, only available in a business’s state of incorporation and state of managerial headquarters. But because the issue of jurisdictional presence in the case was so intertwined with the agency question of whether a subsidiary’s activity was attributable to the *Daimler* parent company, it is a bit difficult to know the reach of *Daimler*. As a general rule, these two “homes” of the corporation are probably the exclusive sources of general jurisdiction. However, in more compelling cases, courts may be more inclined to exercise general jurisdiction.

For example, if a patron eats a tainted Big Mac at a McDonald’s on the last day of a Florida vacation before returning to Ohio and then is afflicted with food poisoning, would *Goodyear* and *Daimler* prevent the exercise of general jurisdiction over the parent company (assuming that there was a non-frivolous

¹⁷⁶ *Id.* at 760–61.

¹⁷⁷ *Id.* at 763. (“The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is ‘domiciled,’ a term defined to refer only to the location of the corporation’s ‘statutory seat,’ ‘central administration,’ or ‘principal place of business.’”). The Court also noted the U.S. Government’s brief in support of *Daimler* on these grounds.

claim of parent company liability for the food poisoning) in Ohio in spite of the many Golden Arches one sees throughout the state? But most every hypothetical one could conjure creates a colorable case for specific jurisdiction as well by involving some connection between the defendant, the action, and the forum state—or at least involving a plaintiff connected to the forum state.¹⁷⁸ For example, in the McDonald's food poisoning hypothetical, the plaintiff is from Ohio, the consequences of the food poisoning are felt in Ohio, and a company that has built a national brand can reasonably expect that consumers will buy their products in one state but consume (and certainly digest) them in other states. People have been known to grab burgers on the way to the airport or at the airport but not eat them (or suffer from them) until in another state's airspace (of course, waiting this long to eat the food might give rise to a comparative negligence defense). By contrast, in *Daimler*, the plaintiffs were Argentinians and one Chilean.

Had there been a California victim of abuse by a Daimler subsidiary in South America (or by Daimler itself), the victim plaintiff may have been permitted to use general jurisdiction based on substantial business activity to forum shop to avoid a hostile foreign jurisdiction. Similarly, if plaintiffs had sued Daimler in the MBUSA home states of Delaware or New Jersey, this may have reduced the perceived unfairness of the situation. But perhaps not. The Court clearly felt compelled to do some line drawing to prevent lower courts from permitting what it regarded as outrageous exercises of personal jurisdiction.

Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under [Plaintiffs'] proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.¹⁷⁹

Because of the unusual facts, foreign-centered allegations of wrongdoing, and agency issues posed in the case,¹⁸⁰ it is hard to be certain of *Daimler's*

¹⁷⁸ For example, consider a visiting American touring a facility in Germany who is negligently exposed to carcinogenic chemicals during the process. After returning to his home state (a home state other than Delaware, where the defendant was incorporated or New Jersey, where the defendant was headquartered), plaintiff might understandably wish to pursue his claim in his home state rather than traveling to Delaware or New Jersey (much less Germany). But pursuant to *Daimler*, the U.S. Supreme Court might well require this trip of plaintiff, even without the agency and parent-subsidary questions present in the actual *Daimler* case.

¹⁷⁹ *Daimler*, 134 S. Ct. at 751 (citation omitted).

¹⁸⁰ In essence, plaintiffs in *Daimler* were attempting, without first demonstrating alter ego status, that a German parent company was responsible for a foreign subsidiary's complicity with an authoritarian regime related to the subsidiary's suburban manufacturing facility (the "incidents recounted in [plaintiffs'] complaint center on MB Argentina's plant in Gonzalez Catan, [outside of Buenos Aires] Argentina." *Id.* at 751–52) on another continent, eight

long-term impact on questions of general jurisdiction. But *Goodyear* and *Daimler* in combination give defense counsel substantial ammunition for fighting assertions of general personal jurisdiction. Both cases also serve as a cautionary tale for counsel. By pushing too hard to expand the boundaries of general personal jurisdiction (to sue a European subsidiary of a U.S. company in North Carolina [*Goodyear*]¹⁸¹ and to sue a European parent company in the U.S. based on the American subsidiary for conduct by an Argentine subsidiary [*Daimler*]), counsel produced precedents that appear to contract the potential reach of general personal jurisdiction for litigants in the future.

The clear message of *Goodyear* and *Daimler* is that the Court (almost unanimously) is resistant to broad exercises of general personal jurisdiction, even as applied to some of the world's largest companies. Although obtaining general personal jurisdiction in the state of incorporation or managerial headquarters is certain, anything beyond that has become debatable in the wake of these two cases, perhaps even for a U.S.-based company operating scores of retail outlets in an adjacent state.¹⁸² Clearly the Court is concerned about sub-

thousand miles from Daimler's Stuttgart headquarters. One can understand the Court's resistance to the concept, but it is resistance based not only on concerns about overbroad assertions of personal jurisdiction but also upon plaintiffs' substantive theory of liability in the case, as well as plaintiffs' argument that a subsidiary's pervasive contacts with the forum state equated to the parent being vulnerable to suit in the forum state even over matters bearing no relation to the forum state. Because of the unusual posture of the case, Justice Sotomayor concurred in the result only. *See id.* at 763 (Sotomayor, J., concurring in the judgment). In particular, Justice Sotomayor found the majority opinion too sweeping as well as unwisely moving away from the Court's traditional "continuous and systematic" activity test for general jurisdiction to one of whether the forum state sufficiently counts as the defendant's "home." In this way, she argued, a defendant with even a large amount of regular and substantial activity in a state is not subject to general jurisdiction on the de facto ground that the defendant's base of operations is a more apt location. Daimler had conceded that MBUSA was subject to general jurisdiction at the trial court level, which resulted in no significant discovery regarding parent Daimler's general contact with California, which Justice Sotomayor viewed as a problem because the Court had decided "the issue without a developed record." *Id.* at 764-67.

¹⁸¹ But at least the *Goodyear* plaintiffs (parents of children killed in an accident occasioned by an alleged tire defect) were from North Carolina. *Daimler*, however well intentioned as a means of attacking human rights abuses, involved rather untethered forum shopping, perhaps in defiance of logic. If Mercedes-Benz Argentina personnel were collaborating with a murderous regime in order to facilitate business in that country, would they really expose their collaboration with an evil regime by reporting it to the parent company in Germany? And would top management really bless such activity? Or would a reasonable factfinder conclude that the German parent should have been aware of misconduct by the Argentine subsidiary, or at least some employees of the Argentine subsidiary? It seems unlikely, but stranger and more awful things have happened, which perhaps supports Justice Sotomayor's view that greater discovery was in order regarding Daimler's connections to its subsidiaries.

¹⁸² *Goodyear* and *Daimler* leave open the question of what location constitutes corporate headquarters, particularly in a world where technical legal status seems to diverge from reality regarding the locus of corporate activity. *See, e.g.,* Andrew Ross Sorkin, *Banks Cash In on Mergers Intended to Elude Taxes*, N.Y. TIMES, July 29, 2014, at B1, col. 1 (noting recent trend motivated by tax avoidance in which U.S. companies become "headquartered" abroad even though major operations generating profits are physically in the United States). This

jecting even these well-heeled defendants (who can offload defense and settlement to insurers and in-house counsel or firms on retainer) to suit in states more removed from core company operations or identity. Logically, then, the Court should be similarly concerned about equally broad assertions of general jurisdiction over an individual with only passing physical presence in a state with which the defendant has little or no contact.

D. *Walden v. Fiore*

In *Walden v. Fiore*,¹⁸³ the Court continued the prevailing approach to specific jurisdiction. Like in *Nicastro*, the Court indicated that although obtaining specific personal jurisdiction was easier than obtaining general jurisdiction, there remain substantial limits on the exercise of specific personal jurisdiction over a defendant who has not been physically present in the forum state. The case began when the eventual plaintiffs were stopped in the Atlanta airport and questioned about the large amount of cash they carried. Plaintiffs responded that they were professional gamblers returning from Puerto Rico with their recent winnings. Law enforcement officials were nonetheless sufficiently concerned about a possibly illegal source of the money, and they impounded the cash. Plaintiffs continued on their journey home to Nevada, where they eventually obtained the return of the funds but sued for injuries. In particular, they claimed that defendant Walden, a police officer from Covington, Georgia, deputized to work as a DEA agent at the airport, had made a knowingly false affidavit that had impeded and delayed the eventual return of the funds, causing injury to plaintiffs in the forum state of Nevada.¹⁸⁴

The Court found the asserted basis for specific personal jurisdiction to be insufficient in that the defendant had not done enough that was sufficiently directed toward the forum state. It held that the defendant must be the one to create contact with the forum state and that those contacts must be with the forum state itself, not merely with people who reside there.¹⁸⁵ In this way, the Court distinguished Officer Walden's situation from that of the *National Enquirer* reporter in *Calder v. Jones*,¹⁸⁶ who had worked on an allegedly defamatory article about a California-based actress from Florida but had made numerous telephone contacts to California as part of writing the article. In addition, the impact of the article in *Calder* was felt in California, where it was read by Californians, whereas the harm done to the *Fiore* plaintiffs was more confined in

and similar developments regarding corporate organizational form, many of which post-date Professor Twitchell's influential article (*Myth of General Jurisdiction*, *supra* note 52), suggest that it would be unwise to restrict general jurisdiction to only locations of incorporation or main headquarters and that general jurisdiction also should properly lie in any state where an entity defendant has nontrivial continuous and systematic presence.

¹⁸³ *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

¹⁸⁴ *Id.* at 1120.

¹⁸⁵ *Id.* at 1122.

¹⁸⁶ *Calder v. Jones*, 465 U.S. 783 (1984).

impact¹⁸⁷ (although clearly more acute to them than the impact on readers of a defamatory story). Viewed as a whole, the defendant simply lacked sufficient minimum contacts with Nevada to make a Nevada court's exercise of jurisdiction over him consistent with fair play and substantial justice.¹⁸⁸

Notwithstanding the parameters of *Nicastro* and *Fiore*, courts have upheld specific personal jurisdiction on the basis of the defendant injecting its goods into the "stream of commerce" with clear intent to serve markets in the forum state.¹⁸⁹ Courts have also allowed suit to proceed when the defendant was engaging in conduct that had distinctly targeted the forum state or had reasonably foreseeable effects in the forum state.¹⁹⁰ Similarly, where a defendant from another jurisdiction has intentionally hacked into a computer system in the forum state, personal jurisdiction has been found for an action arising out of misappropriation of trade secrets facilitated by the hacking.¹⁹¹ Thus, although litigators should take note of the trend of recent Supreme Court decisions arguably constricting specific personal jurisdiction, any such shift appears modest, with courts continuing to permit generally expansive exercises of personal jurisdiction over nonresident defendants causing injury to plaintiffs in the forum state.¹⁹² In contrast to *Goodyear*, *Nicastro*, and *Daimler*, *Fiore* appears to have been met with a collective yawn by commentators, with little criticism.¹⁹³

¹⁸⁷ *Walden*, 134 S. Ct. at 1123–25.

¹⁸⁸ *Id.* at 1126.

¹⁸⁹ *See, e.g.*, *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174 (5th Cir. 2013). *But see* *Kason Indus., Inc. v. Dent Design Hardware, Ltd.*, 952 F. Supp. 2d 1334 (N.D. Ga. 2013) (plaintiff's failure to aver any patent infringement by defendant in forum state; also no general jurisdiction because plaintiff averred no defendant incorporation, headquarters, or other substantial presence in forum state; mere sales, even if extensive, insufficient to confer general personal jurisdiction).

¹⁹⁰ *See, e.g.*, *Wash. Shoe Co. v. A–Z Sporting Goods Inc.*, 704 F.3d 668 (9th Cir. 2012) (Arkansas corporation could be sued for copyright infringement in Washington, where the state copyright holder was located, even when defendant had no other contact with Washington, because infringement had impact in Washington).

¹⁹¹ *See* *MacDermid, Inc. v. Deiter*, 702 F.3d 725 (2d Cir. 2012) (Canadian employee's use of Connecticut employer's computer system, which had server physically located in Connecticut, was sufficient minimum contacts to support specific personal jurisdiction). However, a Canadian broker who was providing services through the conventional means of telephone and mail and directing shipments of goods that entered the state but were not directly shipped and who had never visited Missouri was found not to be subject to personal jurisdiction there. *See* *Dairy Farmers of Am., Inc. v. Bassett & Walker Int'l, Inc.*, 702 F.3d 472 (8th Cir. 2012).

¹⁹² Regarding general jurisdiction, the combination of *Goodyear* and *Daimler* is likely to provide more support for dismissal motions that the more modest narrowing of the specific jurisdiction concept reflected in *Nicastro* and *Walden v. Fiore*. *Compare* *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014) (rejecting application of general jurisdiction over large Turkish conglomerate doing substantial business in the U.S. because defendant is not "essentially at home" in the U.S. within the meaning of *Goodyear* and *Daimler*) with *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014) (holding specific jurisdiction proper in Virginia over Chinese manufacturer of allegedly defective building materials; defendant purposefully availed itself of benefits of doing business in forum state by directly selling to builders); *Beverage v. Pullman & Com-*

CONCLUSION: TIME TO END TO THE MYTH AND CURRENT FRAGMENTED
PERSONAL JURISDICTION METHODOLOGY

To again invoke a Holmes aphorism, “a page of history is worth a volume of logic.”¹⁹⁴ Nonetheless, one would have thought that tag jurisdiction could not survive after *International Shoe* replaced territorial hegemony with a personal jurisdiction inquiry based on reasonable and fair connection between the defendants, the forum, and the action. One would have reasonably felt even more confident about this after *Shaffer v. Heitner* subjected quasi-in-rem jurisdiction to minimum contacts analysis and drastically reduced its availability, utility, and role in modern litigation.

But history, tradition, inertia, and confusion have combined to maintain tag jurisdiction long after it should have died. Like Holmes’ clavicle of the cat, tag jurisdiction, whatever its benefits in the pre-industrial world, survived without any significant evolution of its function and became unnecessary for legitimate exercises of personal jurisdiction but available for misuse. It remains largely a means for ambushing opponents in seeking to gain a tactical geographic or doctrinal advantage over a defendant who could not otherwise satisfy the minimum contacts requirement for suit in plaintiff’s chosen forum state.

Perhaps more troubling is that tag jurisdiction is a form of ambush that can be inflicted upon individual defendants—including those most likely to be harmed by facing litigation in a distant, inconvenient, or hostile forum—but not upon corporate entities, even though most such entities are in a far better position for defending claims.

Like something from a bad zombie movie, tag jurisdiction survives. It showed resilience in the lower courts after *International Shoe* and *Shaffer v. Heitner*, and then it received surprising support from nearly half the Supreme Court in *Burnham*.¹⁹⁵ An odd diffusion of legal misinformation then created a mythology that increased the precedential influence of *Burnham* far beyond the parameters of the Court’s opinion and in apparent defiance of weak argument favoring continued use of pure tag jurisdiction.¹⁹⁶

Although perhaps not as mythic as some cases or topics, the *Burnham* mythology has been equally or more irrepressible.¹⁹⁷ Ask the average lawyer or judge today (and perhaps even the average law professor) whether tag jurisdic-

ley, LLC, 316 P.3d 590 (Ariz. 2014) (upholding exercise of specific jurisdiction over Connecticut lawyer and law firm based on provision of opinion letter regarding tax-shelter to Arizona residents).

¹⁹³ For example, in the wake of the *Walden v. Fiore* decision, a string of emails on the AALS Civil Procedure listserv contained roughly forty comments about the case, none particularly negative and most characterizing the decision as consistent with prevailing precedent on specific personal jurisdiction. Academic commentary on *Walden v. Fiore* to date has been largely descriptive and not critical, in contrast to scholarly assessments of the other three cases.

¹⁹⁴ *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

¹⁹⁵ See *supra* notes 145–52 and accompanying text.

¹⁹⁶ See *supra* notes 153–57 and accompanying text.

¹⁹⁷ See *supra* note * (sources using “irrepressible” mythology analysis).

tion based on service alone—even for the defendant with no other contacts aside from merely passing through (or over) the forum state—is constitutional and almost all will agree, with most referencing the three-justice Scalia opinion in *Burnham*, even if they cannot remember the case by name. As discussed above, *Burnham*'s mythic status is undeserved and it cannot fairly be said to have validated tag jurisdiction. But even without benefit of an overbroad reading of *Burnham*, lower courts were already applying tag jurisdiction inappropriately in cases such as *Grace v. MacArthur*.¹⁹⁸

Tag jurisdiction and the *Burnham* Court's failure to invalidate or tame it in the manner that *Shaffer* tamed quasi-in-rem jurisdiction has long been a bit of an embarrassment to a legal system that prides itself on rationality, consistency, and even fairness—particularly fairness to absent defendants. The Court's latest decisions in *Goodyear*, *Nicastro*, *Daimler*, and *Walden v. Fiore*—all of which should cause great unease for fairness to the defendant, particularly concerning attempted exercise of general jurisdiction—have made pure tag jurisdiction and the Scalia position even more indefensible.¹⁹⁹

Some courts continue to uphold tag jurisdiction even though it is inconsistent with a defendant-centered due process emphasis on the ground that *International Shoe*, notwithstanding its shift from a territorial focus to a due process focus, was nonetheless an opinion that expanded jurisdiction as a practical matter. In particular, jurisdiction over nonresident, non-domiciliary corporations was expanded based on their business activity directed toward the state, at least if the claim had a sufficient connection to that business activity. Most of the post-*International Shoe* cases on jurisdiction (e.g., *McGee*, *Burger King*, *Calder v. Jones*, *Keeton v. Hustler*) can be fitted to this view.²⁰⁰

Although *World-Wide Volkswagen* and *Asahi Metal* constrict jurisdiction, the former can be explained as protecting local retailers from unfair exercises of personal jurisdiction in a distant forum based merely on the mobility of the products they sell locally. Moreover, the latter can be explained by the attenuated connection between the defendant and the forum state by the absence of any significant U.S. interest in the dispute once the American plaintiff's claim was resolved, leaving only an indemnity action between a Taiwanese tire company and a Japanese air valve maker.²⁰¹

But with *Nicastro*, the Court arguably took a significant step back from expansive exercises of jurisdiction over a nonresident company. Defendant McIntyre was voluntarily operating in the United States with the intent of putting its products in states like New Jersey, where the underlying claim arose, even if McIntyre's marketing had not specifically targeted New Jersey. The Court

¹⁹⁸ See *supra* Part I.C.3 (discussing the surprising notoriety of and support for *MacArthur*, despite being clearly erroneous under an *International Shoe* analysis and arguably incorrect under a *Pennoyer* territoriality analysis as well).

¹⁹⁹ See *supra* Part III (discussing recent Supreme Court cases and their inconsistency with continued use of tag jurisdiction).

²⁰⁰ See *supra* notes 7–16, 51–52 and accompanying text (reviewing modern personal jurisdiction precedent).

²⁰¹ See *supra* note 55 (discussing *World-Wide Volkswagen* and *Asahi Metal*).

nonetheless prevented the state's exercise of personal jurisdiction over this defendant clearly doing business in the United States and trying to reach states like New Jersey.²⁰²

Regarding the issue of defendant convenience, although New Jersey is a long way from England, it is considerably closer than Las Vegas and other parts of the United States where McIntyre had been happy to travel in search of sales. Further, the *Nicastro* Court appeared never to consider the practicalities of litigation by a domestic individual against a foreign corporation, especially one located some distance from the United States. If forced to defend on the merits in New Jersey, McIntyre would in all likelihood simply obtain a defense from its liability insurer, which would also provide coverage for any judgments against McIntyre. In all likelihood, McIntyre's challenge to personal jurisdiction was funded by its liability insurer. Under such circumstances, concerns about the "unfairness" of an insured corporate defendant facing suit outside its home state seem overwrought.

For a number of reasons, *Nicastro* provides rather substantial protection for businesses seeking to avoid specific personal jurisdiction. By contrast, an individual accosted via service of process while temporarily in a forum receives no judicial scrutiny of the fairness or reasonableness of such exercises of jurisdiction. Although the disconnect between the Court's modern specific jurisdiction cases and tag jurisdiction is bad enough, the Court's recent general jurisdiction cases of *Goodyear* and *Daimler* create an even more problematic gap between the Court's treatment of businesses best able to respond to suits away from home and the Court's lack of sympathy for the "tagged" transient defendant.²⁰³

Too often overlooked in discussions of transient jurisdiction is that it (1) operates in the nature of general jurisdiction but (2) only applies to natural persons. Once tagged, the transient defendant can be sued in the state of service for anything. But only individuals can be tagged.²⁰⁴ Efforts to establish personal jurisdiction over an entity by personal service upon even a high ranking officer, director, or employee of a company is almost universally held to be ineffective to establish personal jurisdiction over the entity, even if the claim arises out of entity activity in the forum state. In effect, the American legal system currently gives corporate and other entity defendants a universal right to argue fairness, reasonableness, and due process, but it denies that same right to individuals tagged with personal service while in transit.

²⁰² See *supra* notes 166–70 and accompanying text (discussing *Nicastro*).

²⁰³ See *supra* notes 158–65 and accompanying text (discussing *Goodyear*) and *supra* notes 171–82 and accompanying text (discussing *Daimler*).

²⁰⁴ In some cases natural persons with designated agency status can be served and this will be effective to establish jurisdiction over the entity. Many long-arm statutes, which provide that the company designates the Secretary of State or another government official to be the agent for service, could be construed in this way. But—importantly—even if the entity's agent is served in the forum state, the entity is normally permitted to contest jurisdiction pursuant to an *International Shoe* analysis. And *Shaffer v. Heitner* clearly protects entities against the possibility that they will be "held up" by plaintiffs attaching their forum state property as part of an exercise of quasi-in-rem jurisdiction.

Pursuant to *Goodyear* and *Daimler*, a business defendant with vast operations within a state can argue that it need only face lawsuits in that state related to those operations or related to the underlying lawsuit. Certainly, sales alone in the forum state are not sufficient to support an exercise of general personal jurisdiction. *Goodyear* and particularly *Daimler* were quite specific on that point.

Even if subsequent decisions treat other business operations (e.g., retail outlets, warehouses, distribution networks) as supporting general jurisdiction, when sales alone would not, the Supreme Court has now created a world in which the largest, wealthiest litigants, who are most readily able to defend themselves, receive substantial due process empathy from the Court, while transient individuals receive almost none. To the extent that subsequent decisions read *Daimler* and *Goodyear* as permitting general jurisdiction over a company only in the states of corporate domicile and company headquarters, the inequitable treatment of human beings and entities becomes so pronounced as to invite ridicule.

For roughly three decades, commentators have consistently criticized the Supreme Court's work in the area of personal jurisdiction as producing unhelpful, inconsistent, and unnecessary precedents.²⁰⁵ *Goodyear*, *Nicastro*, and *Daimler* have only given more support to the already well-supplied critics. In view of the profession's general dissatisfaction with the law in this area and the increasingly inequitable and anachronistic presence of transient jurisdiction, the time is ripe for reviving proposals for a more unitary approach to jurisdiction. Such an approach would likely not differentiate between modes of establishing the jurisdiction and whether it is deemed general or specific.

Over the past sixty years, scholars have suggested such a unitary approach—one in which fairness and reasonableness analysis was front-and-center in a due process/minimum contacts analysis applicable to all cases.²⁰⁶ A

²⁰⁵ For a particularly pithy summary written prior to the Court's most recent forays into the area (which in my view have exacerbated rather than alleviated the problems noted by the author) see Borchers, *supra* note 155:

The Court has held that a corporate trustee can get jurisdiction over the beneficiaries in the trustee's home state, but not vice versa. Child support claimants are not necessarily entitled to litigate the support issue in their own state, unless, of course, they manage to tag the defendant while she passes through the state. A shareholder wishing to sue a large corporation's directors for bad corporate management is not necessarily entitled to litigate in the state of incorporation, but a large corporation can drag one of its nickel-and-dime franchisees to the corporation's home state. Products liability suits almost always require more than one suit if the plaintiff wants to sue all of the defendants in the chain of distribution. American plaintiffs suing foreign defendants are not necessarily entitled to an American forum, even if the defendant purchases the instrument of injury in America. Plaintiffs in actions for defamation, a constitutionally regulated and supposedly disfavored tort, can pick and choose among forums, but other tort plaintiffs cannot. Purely fictional factors, such as whether the forum state has enacted a "special" jurisdictional statute, count heavily, but practical factors, such as the fact that the defense is being conducted by the insurer, count for nothing.

Id. at 101–02 (footnotes omitted) (concluding that this state of affairs suggests the Court has not been doing "serious adult effort" regarding personal jurisdiction).

²⁰⁶ See, e.g., Ehrenzweig, *supra* note 40 (focus of personal jurisdiction inquiry should be reasonable convenience for defendant and other parties in light of the litigation); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (arguing for determination of jurisdiction based on

full review of such proposals is beyond the scope of this article, but such an approach seems an obvious antidote to the increasing tension between restrictions upon personal jurisdiction over corporations but continued use of tag general personal jurisdiction over individuals. The reform proposals are largely consistent and generally devolve to the following concept that I propose be used in place of the current splintered approach to personal jurisdiction:

The exercise of personal jurisdiction over a defendant (individual or entity) should depend upon whether the defendant has adequate notice and opportunity to be heard in a forum that is fair and reasonable in light of the defendant's connection to the forum, with due consideration also given to the burdens on the defendant and the forum's connection to the plaintiff, the litigation, and other interested persons or entities, as well as the practicalities of litigation in the forum state and the availability of alternative forums.

To be sure, the outcomes of cases applying this standard will vary according to both the facts of the case and the sensibilities of the particular bench ruling on the personal jurisdiction dispute. But such variance already occurs under the supposedly more precise but operationally more confused structure that the Court has erected during the past thirty-five years. It is hard to imagine any more disjointed or disappointing results using the simplified and unified standard set forth above, or any of the similar variants suggested by wiser commentators over the years.

Adopting this type of unified approach to questions of personal jurisdiction would make the distinctions between general and specific jurisdiction unnecessary, provide greater uniformity in the treatment of individual and entity defendants, and reduce unfairness. This methodology would still take a broad approach to jurisdiction and even permit the use of expansive exercises of jurisdiction where warranted to provide a forum for resolving disputes and rendering relief.

Consistently taking this sort of unified and due process-centered approach would also likely have at least one very tangible benefit: it would almost certainly strike down the use of pure tag jurisdiction, save in special circumstances, and terminate the irrepressible myth of *Burnham*. Rather than accepting tag jurisdiction as a given, it would largely bar the practice except when thought necessary to prevent a defendant from escaping the reach of the rule of law.

defendant expectations and benefits received by defendant through forum state activity); Von Mehren & Trautman, *supra* note 74 (suggesting that personal jurisdiction be based on fairness, convenience, and efficiency); *see also* Brilmayer et al., *supra* note 52, at 782–83 (although continuing to preserve distinction between specific and general personal jurisdiction, emphasizing “legitimate exercise of power by sovereign states” over defendant as metric for assessing reasonableness of exercise of jurisdiction); Wasserman, *supra* note 82 (indirectly suggesting that all exercises of personal jurisdiction should be assessed according to defendant, fairness, and convenience in light of specific case).

