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PERSONAL JURISDICTION IN A GLOBAL WORLD: THE IMPACT OF THE SUPREME COURT'S DECISIONS IN *GOODYEAR DUNLOP TIRES* AND *NICASTRO*

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ABSTRACT

In June 2011 the Supreme Court decided two momentous personal jurisdiction cases: one, Goodyear Dunlop Tires Operations v. Brown, limited general jurisdiction to its rightful narrow role as a way to establish state court jurisdiction, while the other, J. McIntyre Machinery, Ltd. v. Nicastro, barely staved off a second attempt to narrow “stream of commerce” as a vehicle for jurisdiction. Although both cases made those valuable contributions to doctrine, they also denied a United States court to U.S. citizens who sued foreign defendants for torts, effectively leaving the plaintiffs without remedies for the allegedly negligent acts of the defendants. Goodyear Dunlop Tires involved an accident outside the United States, while Nicastro arose from an injury in New Jersey. With globalization bringing increased international business and travel, there is sure to be a significant increase in injuries suffered by U.S. citizens as a result of the negligent activities of foreign businesses and a resultant increase in the type of litigation involved in the two new cases. This Article critiques both cases and then examines whether non-citizens are protected by constitutional personal jurisdiction rights. Outside the context of personal jurisdiction, the Supreme Court has held since the nineteenth century that the scope of constitutional protections varies depending on two factors: whether a party is a citizen of the United States or a foreign national and whether a non-citizen resides in the United States or abroad. Without any real consideration, the Supreme Court in Goodyear Dunlop Tires and Nicastro applied the same personal jurisdiction law to non-citizen, non-resident defendants as it applies to defendants who are U.S. citizens. This Article argues that non-resident, non-citizen defendants are not protected by the constitutional personal

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jurisdiction law developed in domestic litigation. Freed from constitutional constraints, the Supreme Court has the ability to fashion a new law of personal jurisdiction for foreign defendants better suited for the tort claims of U.S. citizens, taking into account the interests of the U.S. plaintiffs. The Article provides a foundation for developing a new law of personal jurisdiction for foreign defendants.

INTRODUCTION

In June 2011 the Supreme Court decided two momentous personal jurisdiction cases: one wisely limited general jurisdiction to its rightful, narrow role as a way to establish state court jurisdiction, while the other barely staved off a second attempt to narrow “stream of commerce” as a vehicle for jurisdiction. Although both cases made those valuable contributions to doctrine, they also denied a United States court to U.S. citizens who sued foreign defendants for torts, effectively leaving the plaintiffs without remedies for the allegedly negligent acts of the defendants. The general jurisdiction case, *Goodyear Dunlop Tires Operations v. Brown*,¹ involved an accident outside the United States, while the stream of commerce case, *J. McIntyre Machinery, Ltd. v. Nicastro*,² arose from an injury in New Jersey. With globalization bringing increased international business and travel, there is sure to be a significant increase in injuries suffered by U.S. citizens as a result of the negligent activities of foreign businesses and a resultant increase in the type of litigation involved in the two new cases. Not only do the cases close off a forum in the United States, they also make it virtually impossible for these kinds of disputes to be resolved under U.S. tort law since the plaintiffs must sue in foreign courts. Effectively, *Goodyear Dunlop Tires* and *Nicastro* make it impossible for injured citizens to assert their tort rights, thereby violating the underlying purpose of procedural law to further, and not hinder, the application of substantive law.

This Article proceeds as follows: After explaining the *Goodyear Dunlop Tires* case, it discusses the general/specific jurisdiction model devised by Arthur von Mehren and Donald Trautman,³ shows how subsequent cases departed from their original meaning of general jurisdiction, and then applauds *Goodyear Dunlop Tires* for clarifying the

1. 131 S. Ct. 2846 (2011).

2. 131 S. Ct. 2780 (2011).

3. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

law and returning general jurisdiction to its intended limited form of jurisdiction. In Part II, the Article examines the two muddled opinions in *Nicastro* that led to the finding of a lack of jurisdiction and shows how the six Justices on those opinions misapplied precedent. Part III examines jurisdiction over foreign defendants by returning to the fundamental question of whether non-citizens are protected by constitutional rights. Outside the context of personal jurisdiction, the Supreme Court has held since the nineteenth century that the scope of constitutional protections varies depending on two factors: whether a party is a citizen of the United States or a foreign national and whether a non-citizen resides in the United States or abroad.⁴ Without any real consideration, the Supreme Court in *Goodyear Dunlop Tires* and *Nicastro* applied the same personal jurisdiction law to non-citizen, non-resident defendants as it applies to defendants who are U.S. citizens. This essay argues that non-resident, non-citizen defendants are not protected by the constitutional personal jurisdiction law developed in domestic litigation. Freed from the constitutional constraints, the Supreme Court has the ability to fashion a new law of personal jurisdiction for foreign defendants better suited for the tort claims of U.S. citizens. Rather than concentrating solely on the defendant's activities and rights, this new law should incorporate a concern for U.S. workers and consumers who are injured by foreign businesses. It is one thing to require a New York resident to sue in a California court for a tort claim stemming from a defective product made in California. Regardless of a New York or California forum, the litigation will still be governed by some state's version of U.S. tort law. It is quite another to require the New York resident to sue in China for injuries suffered as a result of a defective good made in China, where the dispute would be governed by Chinese law. This Article attempts to provide a foundation for a new personal jurisdiction law that will be fairer to citizens of the United States.

I. GENERAL JURISDICTION AND *GOODYEAR DUNLOP TIRES OPERATIONS V. BROWN*

Goodyear Dunlop Tires grew out of a bus accident outside Paris. The bus overturned on its way to Charles de Gaulle airport as it was carrying youth soccer players on their trip home to North Carolina.⁵ The parents of two thirteen-year-old boys who died brought a wrongful death action in

4. See *infra* notes 143–44.

5. 131 S. Ct. at 2851.

state court in North Carolina against Goodyear USA and three foreign subsidiaries, which operated respectively in Turkey, France, and Luxemburg.⁶ The complaint alleged that a defective tire manufactured in Turkey by Goodyear's Turkish subsidiary caused the accident.⁷ In response to the motion by the three foreign subsidiaries to dismiss for a lack of personal jurisdiction, the North Carolina Court of Appeals ruled that jurisdiction existed under the theory of general jurisdiction.⁸ The court recognized that specific jurisdiction was lacking because the accident occurred in France and the tire was allegedly designed and manufactured negligently in Turkey.⁹

The facts showed minimal connections between the three foreign subsidiaries and North Carolina. "They [had] no place of business, employees, or bank accounts in North Carolina."¹⁰ Nor were they registered to do business there.¹¹ "[T]hey [did] not solicit business in North Carolina . . . or ship tires to North Carolina customers."¹² The Supreme Court described their only connection to North Carolina as follows:

Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident . . . was never distributed in North Carolina.¹³

Personal jurisdiction had to stand or fall on the subsidiary's connections, not on Goodyear USA's connections, because the parents had belatedly raised the argument that Goodyear USA's connections to North Carolina were relevant to the personal jurisdiction issue. As the Court said, the parents "forfeited" the contention that the subsidiaries were part of a "single enterprise" with Goodyear USA by raising it for the first time on

6. *Id.* at 2850.

7. *Id.*

8. *Id.* at 2851.

9. *Id.*

10. *Id.* at 2852.

11. *Id.*

12. *Id.*

13. *Id.*

argument to the Court.¹⁴ Given the meager connections between the subsidiaries and North Carolina, it was to be expected that a unanimous Court would hold that general jurisdiction was lacking. However, more important than the holding, the explanation of the general jurisdiction doctrine offered by Justice Ginsburg in her opinion for the Court and her analysis of the way the doctrine is to apply demonstrate a much narrower reach of general jurisdiction than many have thought.

A. *The General/Specific Jurisdiction Model of von Mehren and Trautman*

Arthur von Mehren and Donald Trautman devised a model of personal jurisdiction in 1966 that divided all assertions of jurisdiction into two categories they named general and specific jurisdiction. They explained their model as follows:

In American thinking, affiliations between the forum and the underlying controversy normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate. This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.¹⁵

The category of general jurisdiction includes a broad variety of traditional bases for jurisdiction: consent, presence (service of process), “domicile or habitual residence” (citizenship), and presence of assets in the forum (both in rem and quasi in rem).¹⁶ Specific jurisdiction includes all the other bases for jurisdiction, which we would say today, arise out of the minimum contacts test of *International Shoe*.¹⁷

Von Mehren and Trautman proposed their model of specific/general jurisdiction as a better categorization of jurisdiction than the classification of in rem, quasi in rem, and in personam jurisdiction.¹⁸ They were not proposing a new basis for determining personal jurisdiction. Nonetheless, their classification scheme took on a life of its own in a few Supreme

14. *Id.* at 2857.

15. von Mehren & Trautman, *supra* note 3, at 1136.

16. *Id.* at 1136–41.

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

18. von Mehren & Trautman, *supra* note 3, at 1164–65; *see also* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611 (1988).

Court opinions, in lower court cases, and in the commentary about personal jurisdiction.¹⁹ At times, the model became a requirement for the exercise of personal jurisdiction: if there was no general or specific jurisdiction, there could not be any personal jurisdiction. There are a number of reasons this happened. The two-part classification is a useful shorthand way to describe some types of lawsuits, which is essential for reasoning by analogy.²⁰ In addition, the “continuous and systematic” business standard of *Perkins v. Benguet Consolidated Mining Co.*,²¹ the foundational general jurisdiction case, was malleable enough to enable courts to establish jurisdiction easily, without needing to examine the factors relevant to specific jurisdiction.²² The use of a broad conception of general jurisdiction was a convenient way to simplify the analysis.²³ As a result, judges, parties, and commentators argue over the meaning of specific and general jurisdiction as a way to decide if jurisdiction exists. That is why the model has become so important to the case law.

The Supreme Court and commentators have used the von Mehren and Trautman model to give more breadth to the concept of general jurisdiction than the authors intended. Most people seem to view general jurisdiction as a species of jurisdiction based on minimum contacts. That is understandable since *International Shoe* held that the due process clause requires that a defendant have “minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²⁴ The connections between the defendant and the forum that constitute general jurisdiction must satisfy the due process clause. However, there really is no need to label all forms of personal jurisdiction as constituting minimum contacts. Citizenship, presence, and consent were all constitutional bases for jurisdiction before

19. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408, 414 nn.8 & 9 (1984); *infra* text accompanying notes 69–72.

20. Rocky Rhodes has noted that many courts rely on the relationship between the cause of action and the forum in general jurisdiction cases. This infuses “a doctrinal impurity into the jurisdictional analysis. The harm is not limited to the particular decision, since a common methodology for resolving general jurisdiction queries is to compare the quantity and quality of contacts to those contacts found sufficient in prior cases.” Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 822 (2004).

21. 342 U.S. 437, 438 (1952).

22. See, e.g., Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 182, 190.

23. See *infra* text accompanying notes 71–72.

24. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

the Court decided *International Shoe*.²⁵ We could say that citizenship provides the minimum contacts required by *International Shoe*, but it makes no sense conceptually to say that.²⁶ Citizens owe duties to their state, including the obligation to appear in its courts. The Supreme Court did rule in *Shaffer v. Heitner*²⁷ that jurisdiction historically based on the presence of property in the forum (in rem and quasi in rem) had to satisfy the *International Shoe* test, essentially making that kind of jurisdiction a species of minimum contacts jurisdiction. However, the Justices could not agree in *Burnham v. Superior Court*²⁸ whether service of process on a transient defendant in the forum state was a different type of jurisdiction than minimum contacts jurisdiction or another species of that. Finally, we all should agree that jurisdiction based upon the defendant's consent is not a species of minimum contacts jurisdiction but rather a waiver of the due process right.²⁹

General jurisdiction is straightforward and noncontroversial when applied to explain jurisdiction over natural persons. It is the application to corporations that has generated uncertainty and disagreement. To better understand the scope of general jurisdiction over corporations, it is helpful to return to the explanation given by von Mehren and Trautman. They do not include general jurisdiction in their discussions about the variability of contacts leading to different results; that is their discussion of specific jurisdiction. Rather, they view general jurisdiction over a corporation as having the same certainty as jurisdiction based on the domicile of a natural person. As they explain:

25. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 462–64 (1940) (citizenship and domicile); *Pennoyer v. Neff*, 95 U.S. 714, 724–25 (1877) (presence and consent).

26. The Supreme Court created the minimum contacts test in *International Shoe* as a way to analyze jurisdiction over non-residents, not citizens. As the Court wrote, “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,” minimum contacts are necessary. 326 U.S. at 316 (emphasis added).

27. 433 U.S. 186 (1977).

28. 495 U.S. 604 (1990).

29. Consent is not as simple a concept as often described by the Supreme Court. The Court has said that the due process clause is the only source of the constitutional personal jurisdiction protection, that due process creates a personal right, and that the right may therefore be waived. See, e.g., *Ins. Corp. of Ir. v. Compagnie de Bauxites de Guinee*, 456 U.S. 694 (1982). The statement of due process as the sole source of the right was made in the context of explaining consent. Non-resident defendants were protected by personal jurisdiction limitations long before the Fourteenth Amendment was enacted. Those protections emanated from the full faith and credit clause and historical geographic limitations on the reach of courts. See John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1020–22 (1983). Consent and waiver make sense in our national system of courts, even if due process is not the only source of personal jurisdiction limitations.

[G]eneral adjudicatory jurisdiction over corporations and other legal persons could be exercised by the community with which the legal person had its closest and most continuing legal and factual connections. The community that chartered the corporation and in which it has its head office occupies a position somewhat analogous to that of the community of a natural person's domicile and habitual residence. If a corporation's managerial and administrative center is in a state other than its state of incorporation, presumably general jurisdiction should exist in either community.³⁰

This is a simple rule for corporations, like the two bases of citizenship of a corporation for diversity purposes in federal court subject matter jurisdiction.³¹

Why did the concept of general jurisdiction expand and become so uncertain when applied to corporations? The answer lies in *International Shoe* and in *Perkins v. Benguet Consolidated Mining Co.*³² (the only case in which the Supreme Court has upheld general jurisdiction over a corporation), and in the analysis of commentators who picked up on certain language in those cases.

B. General Jurisdiction in the Supreme Court

In discussing the “presence” test for establishing personal jurisdiction over corporations, which it replaced with the minimum contacts test, the Court in *International Shoe* noted that in some cases, “the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”³³ This was a statement about early cases; it was neither a blessing of them nor a recognition that the same result would hold under the minimum contacts test. In discussing the application of the minimum contacts test, the Court did recognize what we label specific jurisdiction today:

30. von Mehren & Trautman, *supra* note 3, at 1141–42; *see also* Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735 (1988) (“Domicile, place of incorporation, and principal place of business are paradigms of bases for general jurisdiction.”); Twitchell, *supra* note 18, at 667 (“[G]eneral jurisdiction should be retained solely at a defendant’s home base”).

31. *See* 28 U.S.C. § 1332(c) (2006).

32. 342 U.S. 437 (1952).

33. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

The exercise of [the privilege of conducting activities in a state] may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.³⁴

Today we would classify *International Shoe* as an application of specific jurisdiction since the suit arose from a claim of nonpayment of unemployment contributions owed as a result of International Shoe having employees in the state.³⁵ In evaluating the connections between the defendant and the forum, the Court did categorize International Shoe's in-state activities as "systematic and continuous throughout the years in question."³⁶ However, the Court did not use the term "systematic and continuous" as it came to be used later in the general jurisdiction cases. No one could view the limited "systematic and continuous" activities in *International Shoe* as coming anywhere near to justifying what we would label general jurisdiction today.³⁷ Consequently, *International Shoe* does little to help us understand the proper scope of general jurisdiction.

Perkins v. Benguet Consolidated Mining Co. involved a suit in Ohio state court against a Philippine corporation that was carrying on all of its corporate and managerial activities in Ohio while the Philippines were occupied during World War II.³⁸ The plaintiff alleged that the defendant failed to issue her stock certificates and pay her dividends. Because the cause of action did not arise in Ohio, the Supreme Court of Ohio concluded that it would violate due process under the *International Shoe* standards if it asserted jurisdiction in the case. The Ohio court wrote that the Supreme Court in *International Shoe* "apparently has distinguished [*Tauza v. Susquehanna Coal Co.*, a well known decision by the New York Court of Appeals allowing jurisdiction when the cause of action did not arise in New York,] and indicated that it would not go to the extent which the New York Court of Appeals went in sustaining the service of process

34. *Id.* at 319.

35. As the Court said, "The obligation which is here sued upon arose out of those very [in-state] activities." *Id.* at 320.

36. *Id.* at 320.

37. As any first-year law student knows, International Shoe's "systematic and continuous" activities in Washington State consisted of eleven to thirteen salesmen who lived and worked in Washington, displaying shoe samples, sometimes in rental display rooms and facilities, and soliciting orders. *Id.* at 313-14.

38. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952).

in that case.”³⁹ In its opinion in *Perkins*, the United States Supreme Court focused on the facts that demonstrated that the mining company had been managing all its business out of the president’s home in Ohio since the war began in the Philippines.⁴⁰ Although the plaintiff sued in April 1947, nearly two years after the war had ended in the Pacific, the president was still supervising affairs from Ohio.⁴¹ This suit against the mining company was the latest in a succession of lawsuits brought by Perkins beginning in the 1930s to obtain the stock and dividends, the ownership of which was contested by Perkins’s ex-husband since their divorce.⁴²

The Supreme Court identified the lawsuit as involving a cause of action that “did not arise in Ohio and does not relate to the corporation’s activities there.”⁴³ This conclusion seems correct as the plaintiff’s claim to the stock and dividends arose upon her divorce in the 1930s in the Philippines when the defendant was operating in the Philippines and before it opened the Ohio office. Although the cause of action did not arise out of Ohio activities, it was related to Ohio in this sense: According to the plaintiff, the obligation to issue her share certificates and pay dividends continued during the time the defendant maintained its Ohio office. The defendant could have fulfilled its obligations to the plaintiff from its Ohio office. Furthermore, her claim was a corporate law claim, and all the

39. *Perkins v. Benguet Consol. Mining Co.*, 98 N.E.2d 33, 36 (Ohio 1951). The Court of Appeals in *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917), based jurisdiction on these activities: “In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistance, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York.” *Id.* at 917.

40. 342 U.S. at 447–48.

41. In May 1946 the company began to rebuild its mining operations in the Philippines. The Chief of Staff was organizing these activities from Manila, while the company’s purchasing agent was arranging the purchases of new equipment from San Francisco. The president continued to supervise all activities from Ohio until he returned to the Philippines in August 1947. *Perkins v. Benguet Consol. Mining Co.*, 95 N.E.2d 5, 7–8 (Ohio Ct. App. 1950).

42. Perkins had sued in the Philippines and in state courts in New York, California, and Ohio prior to the lawsuit in question. *Perkins*, 342 U.S. at 438 & n.1. When she brought her suit against the mining company in Ohio state court, the courts of the Philippines had reopened. Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 602 (1958). Perkins was living in Connecticut when she sued. Brief for the Respondent at 3, *Perkins*, 342 U.S. 437 (1952) (No. 85), 1951 WL 81988. As a result, she would have found a U.S. forum much more convenient than a Philippine court. Some commentators explained *Perkins* as a case of “jurisdiction by necessity,” in which the availability of only a foreign court plays a factor in favor of jurisdiction in a U.S. court. See Twitchell, *supra* note 18, at 626 n.75; Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 940; Kurland, *supra*, at 602. The Supreme Court did not use that factor in its analysis, however, and *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408 (1984), seems to have foreclosed any notion of jurisdiction by necessity. See *infra* text accompanying notes 171–73.

43. *Perkins*, 342 U.S. at 438.

corporate activities of the defendant were being carried out in Ohio during and in the aftermath of the Japanese occupation of the Philippines. Nonetheless, the Court characterized the cause of action as not relating to the defendant's activities in Ohio,⁴⁴ so *Perkins* became the only post-*International Shoe* case in which the Court upheld jurisdiction based on the theory of general jurisdiction.

The use of general jurisdiction in *Perkins* is consistent with von Mehren and Trautman's notion that the "community" of the corporate defendant is the appropriate forum for general jurisdiction.⁴⁵ The corporate offices of the mining company were located in Ohio; all the managerial and corporate activities were carried out or supervised from that office. As von Mehren and Trautman write:

Ohio appears to have been, among the forums open to the plaintiff, the one with which the defendant corporation at the time had the most sustained and significant contacts. Given the facts of the case, the decision can be regarded as approving the forum utilized as a surrogate for the place of incorporation or head office.⁴⁶

If the Court in *Perkins* had just analyzed the issue as a determination of the mining company's headquarters for purposes of establishing jurisdiction, the case would not have supported an expansive view of general jurisdiction. However, the apparent broad scope of general jurisdiction and the uncertainty over its limits stem from the analysis used by the Court in *Perkins*. The Court framed its question as follows:

whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.⁴⁷

To answer that question, the Court turned to the historical summary in *International Shoe* of the earlier cases that applied the presence test. The court in *Perkins* said that allowing jurisdiction for an unrelated cause of

44. *See id.*

45. *See supra* text accompanying note 30.

46. von Mehren & Trautman, *supra* note 3, at 1144. The Supreme Court in a case decided thirty years later, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), explained the holding in *Perkins* the same way: general jurisdiction was upheld because "Ohio was the corporation's principal, if temporary, place of business . . ." *Id.* at 780 n.11.

47. *Perkins*, 342 U.S. at 447.

action “conforms to the realistic reasoning in *International Shoe Co.*: ‘there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.’”⁴⁸ The “instances” of jurisdiction over unrelated causes of actions included *Tauza v. Susquehanna Coal Co.*,⁴⁹ which the Supreme Court of Ohio thought had been distinguished by the Court in *International Shoe*.⁵⁰ Although the Court in *International Shoe* only used *Tauza* and other cases to illustrate the state of the law under the presence test, the Court in *Perkins* viewed *International Shoe* as endorsing that result. Rather than limiting jurisdiction over unrelated claims to the states of incorporation and headquarters, the Court focused on the need for “continuous corporate operations” in the forum state and developed what has become the test for general jurisdiction: the need for “continuous and systematic” corporate activities.⁵¹ In upholding the constitutionality of jurisdiction in *Perkins*, the Court concluded that the president of the mining company “carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.”⁵² After the Court decided *Perkins*, courts and commentators recognized general jurisdiction as triggered by the continuous and systematic activities requirement when the cause of action did not arise in the forum.⁵³

The minimum contacts test, although uncertain and malleable, is a sensible combination of two factors in order to assess personal jurisdiction: the defendant’s connections to the forum state and the relationship between the cause of action and the forum. More of one factor helps make up for less of the other.⁵⁴ General jurisdiction can be invoked when the relationship between the cause of action and the forum is at its lowest point—when it does not “arise” out of or “relate to” the forum

48. *Id.* at 446 (citation omitted) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

49. 115 N.E. 915 (N.Y. 1917).

50. *Perkins v. Benguet Consol. Mining Co.*, 98 N.E.2d 33, 36 (Ohio 1951).

51. *Perkins*, 342 U.S. at 445–46.

52. *Id.* at 448.

53. For example, the *Restatement Second, Conflict of Laws*, states that “[a] state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business . . . if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (1971).

54. See William M. Richman, *Review Essay*, 72 CALIF. L. REV. 1328, 1345 (1984) (book review).

activities, according to the Court in *Perkins*.⁵⁵ One would think that when the relationship between the cause of action and the forum was at its lowest, the connections between the defendant and the forum would have to be at its highest. That is what von Mehren and Trautman's requirement of either state of incorporation or state of headquarters would do. It is hard to conceive of another state having a closer relationship with a corporation than the state that created the legal existence of the corporation (and that continues to govern it) and the state from which the corporation conducts its activities. By requiring "continuous and systematic" business as a condition for personal jurisdiction, the Court in *Perkins* created an ill-defined standard that left open the possibility of jurisdiction in states that are not places of incorporation or headquarters. In effect, the Court in *Perkins* returned to the corporate presence test as the test for general jurisdiction. Asking whether a corporation's business is continuous and systematic enough to permit a state to litigate an unrelated cause of action is very close to asking whether the corporation's activities are sufficient enough for a court to declare that a corporation is present in the forum and so amenable to suit on an unrelated cause of action. Yet, the Court crafted the minimum contacts test in *International Shoe* to replace the presence test. *Perkins* brought presence, under a new name, back into the doctrine.

The requirement of continuous and systematic business for general jurisdiction leads to too much uncertainty. Is Dell subject to suit in every state for out-of-state causes of action because its sales of computers in every state are so great as to constitute continuous and systematic business? Same for Anheuser-Busch InBev because it sells so much beer in every state? If the answer is yes, the need for minimum contacts would disappear in suits against most or at least many modern corporations that serve a national market. This would effectively make personal jurisdiction meaningless as a due process protection for national corporations. Furthermore, general jurisdiction permits a forum to litigate any unrelated cause of action.⁵⁶ Does this mean that a Russian brewery could sue Anheuser-Busch InBev in a state court in Maine for slander based on a comment the president made in a speech at a trade fair in Moscow, so long as the corporation's sales of beer in Maine constituted continuous and

55. See *Perkins*, 342 U.S. at 438.

56. Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 156 (2005) ("The essential distinction between general and specific jurisdiction, then, is the extent of the state's authority over the defendant, *i.e.*, whether the defendant is amenable to all claims in the forum or whether the forum's adjudicative power is limited to those claims related to the defendant's forum activities.").

systematic business? These kinds of questions illustrate the uncertainty over the scope of general jurisdiction under the *Perkins* approach.

The only two general jurisdiction cases decided by the Supreme Court after *Perkins* go a long way toward limiting general jurisdiction to what von Mehren and Trautman envisioned. In *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*,⁵⁷ the Court rejected a claim of general jurisdiction in a suit brought in Texas state court against a Colombian corporation stemming from a helicopter crash in Peru. The defendant's helicopter had crashed in Peru killing United States citizens, whose representatives brought the wrongful death action.⁵⁸ Most of the defendant's contacts stemmed from its dealings with Bell Helicopter. In a seven year period, leading up to the filing of the lawsuit, the defendant purchased about 80 percent of its fleet of helicopters, parts, and accessories for more than \$4 million from Bell. It sent pilots to Texas for training by Bell and some management staff for familiarization and technical consulting.⁵⁹ Finally, the chief executive officer of the defendant flew to Texas to negotiate a contract to provide helicopter services for the employer of the workers who died in the crash.⁶⁰ In ruling against jurisdiction, the Supreme Court explained that the defendant's dealings in Texas were not the kind of continuous and systematic contacts that *Perkins* required for general jurisdiction. As part of its analysis, the Court focused on the relevance of the defendant's purchases of goods and services in Texas: "we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."⁶¹

One could interpret "mere" purchases to mean "small or slight," meaning that the amount spent by Helicol in Texas was insufficient to trigger general jurisdiction and that considerably greater purchases could lead to jurisdiction. Would the result be different if the "mere" purchases

57. 466 U.S. 408 (1984).

58. *Id.* at 410.

59. *Id.* at 411.

60. *Id.* at 410–11.

61. *Id.* at 418. The Court cited a pre-*International Shoe* case for this proposition, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923). Like *Tauza*, *Rosenberg Bros.* was cited in *International Shoe* as part of the Court's explanation of jurisdiction over corporations under the presence test. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). However, just as the Court in *Perkins* took the reference to *Tauza* to mean approval of that precedent, the Court in *Helicol* took the reference to *Rosenberg Bros.* to be at least tacit approval. The *Helicol* Court explained that the "Court in *International Shoe* acknowledged and did not repudiate its holding in *Rosenberg*." *Helicol*, 466 U.S. at 418.

were \$100,000 or \$1 million per month? If the word mere means a small amount, that should be the result. However, a better interpretation is that purchases alone, no matter how large in amount, will never support general jurisdiction.⁶² If the general jurisdiction test requires looking for continuous and systematic business activity in the forum, it is difficult to understand why purchases cannot be business activity while sales presumably can. A sale and a purchase are two sides of a business transaction, and they often involve other components, like negotiation, performance, warranties, and payment. The case did involve a foreign defendant buying equipment and services from a company in Texas, prompting the solicitor general to argue against jurisdiction out of a desire to not discourage foreign companies from buying United States products for fear of suit in our courts.⁶³ However, the majority opinion did not mention a balance of payments concern nor limit their discussion of “mere purchases” to purchases by foreign defendants. The holding in *Helicol* was a sensible limitation of the continuous and systematic activities standard, but the strange differentiation between purchases and sales was troublesome. The opinion in *Goodyear Dunlop Tires* helps resolve that problem.

The opinion in *Goodyear Dunlop Tires* ended the inconsistency between purchases and sales in the forum. After quoting *Helicol* for the proposition that mere purchases are not enough to create general jurisdiction, the Court wrote:

We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in

62. The Court also wrote that *Rosenberg Bros.* “makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State’s assertion of jurisdiction.” 466 U.S. at 417 (emphasis added).

63. *Id.* at 425 n.3; see also Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 929 (1985).

no sense at home in North Carolina. Their attenuated connections to the State fall far short of . . . “the continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.⁶⁴

This section of the opinion equates sales with purchases as an insufficient basis for general jurisdiction. One could argue that although the meager sales “sporadically made in North Carolina” do not support general jurisdiction, a record of much greater sales in a state could establish general jurisdiction. That argument would also be consistent with the Court’s continued use of the amorphous continuous and systematic requirement. However, the Court’s intention appears to disqualify sales as a basis for general jurisdiction, in harmony with its disqualification of purchases in *Helicol*. This conclusion is reinforced by the Court’s standard in *Goodyear* of looking at whether the forum is the defendant’s “home.”⁶⁵ In the companion personal jurisdiction opinion released the same day, *J. McIntyre Machinery, Ltd. v. Nicastro*,⁶⁶ two opinions explained general jurisdiction, one by stating that it exists in the state where a defendant is incorporated or has its principle place of business, and the other, that it exists at the “home” of a corporate defendant.⁶⁷ None of the opinions in *Nicastro* referred to general jurisdiction as requiring continuous and systematic business. It is fair to conclude after *Goodyear* and *Nicastro* that there must be more than sales or purchases in the forum state in order to create general jurisdiction, regardless of the amount of sales and purchases. It took the Supreme Court over sixty years from the decision in *Perkins* to limit the broad interpretations that arose from the ill-defined

64. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856–57 (2011) (citations omitted).

65. Some commentators have focused on the Court’s use of the phrase “essentially at home” when it first mentioned this limitation, on page 2851. See, e.g., Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527 (2012). Later in the opinion the Court used the phrase “fairly regarded as at home,” 131 S. Ct. at 2854, and then “in no sense at home,” *id.* at 2857. In *Nicastro*, the plurality did not use the word “home” in describing general jurisdiction over a corporation, but rather referred to general jurisdiction arising in the states of incorporation and of the location of the principle place of business. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011). The dissent (written by Justice Ginsburg, the author of the opinion in *Goodyear Dunlop Tires*) used the term “at home.” *Id.* at 2797. Regardless of the terminology one wishes to focus on, the “home” of a corporation surely includes the state of incorporation and the state where its principle place of business is located. Later cases will have to flesh out whether other corporate activities will qualify additional states as the home. See, e.g., Stein, *supra*, at 533, 545–48.

66. 131 S. Ct. 2780 (2011).

67. See *supra* note 65.

standard of continuous and systematic conduct and to espouse the limited meaning of general jurisdiction advanced by von Mehren and Trautman.⁶⁸

This clarification of the use of the term general jurisdiction in the case law is a welcome simplification of how we describe one form of personal jurisdiction. Determining whether general jurisdiction exists over a corporation is an easier task after the doctrinal change in *Goodyear Dunlop Tires* from “continuous and systematic business” to “at home.” However, the change in the standard also limited the reach of general jurisdiction. The unanswered question is whether the doctrinal improvement has made it harder to get jurisdiction in deserving cases that would have been decided under the “continuous and systematic business” standard. I suspect that courts will continue to find jurisdiction to exist but will expand the use of the specific jurisdiction label. Von Mehren and Trautman expected personal jurisdiction to continue to expand when they wrote their article, and they saw the expansion to come in the specific jurisdiction cases: “[S]pecific jurisdiction will come into sharper relief and form a considerably more significant part of the scene. At the same time, the contours of present forms of specific jurisdiction will be modified substantially and entirely new forms may emerge.”⁶⁹

It is important to remember that von Mehren and Trautman’s division of all instances of personal jurisdiction into two categories of specific and general jurisdiction was only a model designed to help with the understanding of personal jurisdiction. Whether a court can assert personal jurisdiction over a non-resident depends on the application of *International Shoe* and the case law that followed, not on the model. Once a court determines that personal jurisdiction exists, the model classifies it as general jurisdiction if the cause of action was completely unrelated to the forum. Otherwise it would be classified as specific jurisdiction. We could create different models of personal jurisdiction to replace von Mehren and Trautman’s if that were more helpful, which would not change the law but only the classification scheme.⁷⁰ However, the model’s

68. This limitation on general jurisdiction brings the law of the United States closer to the European Union Regulations that limit general jurisdiction to the state of domicile of the defendant. See Council Regulation 44/2001, 2001 O.J. (L 12/3–4) art. 2 (EC).

69. von Mehren & Trautman, *supra* note 3, at 1164; see also *id.* at 1166 (predicting that specific jurisdiction will “prosper and mature” and “be extended and refined”); *id.* at 1141 n.47 (“With the emergence of specific jurisdiction, limited general jurisdiction has become increasingly less palatable; its legitimate functions are more appropriately performed by some form of specific jurisdiction.”).

70. For example, Linda Simard has proposed a model with a third form of jurisdiction, which she labeled “hybrid” jurisdiction. Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998). I find a three-part classification scheme more useful, albeit a different one. A category as broad as

adoption into the case law makes the definitions of the two forms of jurisdiction crucial. If one believes that all legal assertions of personal jurisdiction must be either general or specific and at the same time has a narrow perception of either or both of those types of jurisdiction, it would be possible to conclude that jurisdiction is lacking even though the case law would support it.

Many cases that courts have labeled as general jurisdiction could just as well be classified as specific jurisdiction. Mary Twitchell's examination of reported cases brought against non-American defendants between 1995 and 2000 showed the significance of the cause of action in cases labeled as general jurisdiction:

In almost half of the cases finding general jurisdiction based on the defendant's forum business activities, the claim was directly related to those forum contacts. In several additional cases the claim bore some relationship to the defendant's forum contacts, but the courts found general jurisdiction and did not resolve the possibly more difficult specific jurisdiction question. In very few cases, the claim was fairly distant from the defendant's forum contacts, and in only two cases was it totally unrelated. Because related-claim situations are so common, they may indeed play a significant role in broadening the circumstances in which courts find doing-business jurisdiction.⁷¹

My examination of the general jurisdiction cases between August 2003 and August 2008 is consistent with Twitchell's findings: only a small percentage of general jurisdiction cases actually involve causes of action that are completely unrelated to the forum.⁷²

specific jurisdiction has become fails to provide the analytical assistance that should come from a model. I prefer a model in which specific jurisdiction is not used to identify all forms of jurisdiction that are not general jurisdiction. A more useful definition of specific jurisdiction would limit it to instances when the relationship between the cause of action and the forum is at its highest (as when a non-forum resident has had an auto accident in the state) and when the connections between the defendant and the forum are at their lowest (as when that non-resident had no connection to the forum other than the trip when the accident occurred). *See, e.g., Hess v. Pawloski*, 274 U.S. 352 (1927). This would result in general and specific jurisdiction describing extremes at which it was easy to obtain jurisdiction, with the rest of the universe of personal jurisdiction following somewhere between those extremes. These cases between the easy extremes, in which there was some relationship between the defendant, the cause of action, and the state are the interesting and debatable ones.

71. Twitchell, *supra* note 22, at 191-93 (footnotes omitted).

72. Two research assistants of mine used Westlaw to look at all the opinions between August 2003 and August 2008 in which courts used the term general jurisdiction. Of the approximately two thousand lower court decisions, only about twenty involved a cause of action with no connections to

The real answer to the effect of *Goodyear Dunlop Tires* lies in the breadth of specific jurisdiction. As all the Justices in *Helicol* recognized, specific jurisdiction encompasses cases in which the cause of action arises out of or is related to activities in the forum.⁷³ Von Mehren and Trautman defined specific jurisdiction to permit litigation “with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.”⁷⁴ The concepts of “related to” and “connected with” can be quite broad. Thus, a defendant’s business in the forum that is connected in some way with the cause of action will in appropriate cases sustain jurisdiction. This kind of approach follows from the combination of the defendant’s connections and the cause of action’s connections in the minimum contacts test. When the cause of action does not “arise out of or relate to” the forum activities, the connections between the defendant and the forum have to be at their highest—hence the “at home” requirement of *Goodyear Dunlop Tires*. Likewise, when the cause of action is somehow related to the forum, the defendant’s connection to the forum can be something less than having its “home” there. As a result, the extent and type of business conducted by the defendant in the forum state remains an important factor. The need for some connection between the cause of action and the forum eliminates the extreme applications of doing business jurisdiction.⁷⁵ It also allows jurisdiction in cases in which a cause of action occurring outside the forum has some connection to that state, even an attenuated connection, in the context of the defendant’s in-state business. For example, when an accident occurs outside the forum state, there will sometimes be solicitation in or other reaching out to the forum, directly by the defendant itself or through an unrelated agent that will suffice for the “related to” requirement.⁷⁶

the forum. See also Rhodes, *supra* note 20, at 820–28 (discussing numerous lower court general jurisdiction opinions that also intermingle concepts of specific jurisdiction).

73. *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408, 409, 420 (1984).

74. von Mehren, *supra* note 3, at 1136.

75. For example, a suit against a corporation in California for a tort that occurred in Albania cannot be based on the corporation’s continuous and systematic business in California, although that might have been possible before. See *supra* text accompanying note 56.

76. *Lemke v. St. Margaret Hosp.*, 552 F. Supp. 833 (N.D. Ill. 1982), is a case that nicely illustrates how what seems to be jurisdiction based on continuous and systematic business may actually hinge on the cause of action’s connection to the forum through in-state business. That case found jurisdiction over a doctor who allegedly committed malpractice in a surgery outside the forum state because the hospital, acting as the doctor’s agent, advertised for surgical services in the forum. *Id.* at 835–36. (*Lemke* is the case Linda Simard chose to start her proposal for a third type of jurisdiction in *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, *supra* note 70.) For another example, but one involving a tort occurring outside the United States, see *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357 (11th

I think that the greatest risk of undesirable results from the shrinkage of general jurisdiction involves suits stemming from torts and other injuries occurring outside the United States. In the past, many courts have used general jurisdiction as the basis for adjudicating these types of claims. If the “related to” requirement is interpreted narrowly, injured citizens will have to sue abroad, losing the benefits of United States tort law, the contingency fee system, and the other unique aspects of our legal system. Those are much harsher consequences than having to litigate in one state over a tort occurring in another. However, the obstacles that United States citizens may face as a result of *Goodyear Dunlop Tires* pale in comparison to the impediments created by *Nicastro* for citizens injured in the United States by foreign tortfeasors.

II. STREAM OF COMMERCE

Unlike *Goodyear Dunlop Tires*, the opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*⁷⁷ did not clarify an uncertainty over the limits of personal jurisdiction. Rather they reinforced disagreements over the validity of “stream of commerce” as a way to get jurisdiction and made it harder for victims of torts to sue where they were injured.

A. *The Three Opinions in Nicastro*

In *Nicastro*, the Supreme Court ruled that New Jersey could not assert jurisdiction over a British corporation that manufactured a large metal-shearing machine that cut off Robert Nicastro’s fingers as he was using it in New Jersey while working for a metal recycler.⁷⁸ Nicastro’s employer had purchased the three-ton machine for \$24,900 in 1995 from the Ohio distributor for the defendant.⁷⁹ J. McIntyre did not sell its machines in New Jersey or in any state except for Ohio, for that matter. It sold its machines to its Ohio distributor, which in turn marketed the machines throughout the United States. The Ohio distributor, the sole distributor of J. McIntyre products in the United States, was a corporation separate and

Cir. 2006) finding jurisdiction in Florida over a Bahamian corporation as a result of the defendant’s use of a Florida agent for booking and advertising for their Bahamian resort, among other contacts. *See infra* text accompanying notes 166–67 for support for specific jurisdiction in Ohio over J. McIntyre.

77. 131 S. Ct. 2780 (2011).

78. *Id.*

79. *Id.* at 2795–96 (Ginsburg, J., dissenting).

independent from the British corporation.⁸⁰ J. McIntyre engaged the distributor to sell to customers throughout the United States.⁸¹ As part of its U.S. marketing efforts, J. McIntyre's president regularly attended and exhibited products at the annual United States scrap metal industry trade show, which had been taking place from 1990 through 2005.⁸² It was at an annual convention in Las Vegas that Nicastro's employer learned of McIntyre's metal-shearing machine.⁸³ Although J. McIntyre tried to sell its products to any customer anywhere in the United States by using its Ohio distributor, the personal jurisdiction issue arose from the absence of J. McIntyre's sales in and marketing efforts directed specifically toward New Jersey. Six Justices, writing two opinions, ruled against Nicastro on the personal jurisdiction issue. Because the Ohio distributor was bankrupt,⁸⁴ Nicastro's only option left after the Supreme Court opinion was to bring his products liability action against J. McIntyre in the British courts.

A plurality of four Justices in an opinion written by Justice Kennedy supported the modification of the "stream of commerce" theory that was initially proposed by four Justices in 1987 in *Asahi Metal Industry Co. v. Superior Court*.⁸⁵ The plurality in *Asahi* concluded that a nonresident defendant's putting a product into the stream of commerce was not sufficient to create personal jurisdiction in the state where the product was sold at retail and subsequently caused injury.⁸⁶ Concerned about the need for a nonresident defendant to "purposefully avail" itself of the forum state, the *Asahi* plurality advanced a stream of commerce "plus" rule in which the defendant would need to have taken some additional act directed toward the forum, such as special product design for use in the forum or advertising in the forum.⁸⁷ Likewise the plurality in *Nicastro*

80. The Ohio distributor was named McIntyre Machinery America, Ltd. even though it was a separate legal entity. It advertised itself as J. McIntyre's "national distributor [and] 'America's Link' to 'Quality Metal Processing Equipment' from England." *Id.* at 2796.

81. To achieve McIntyre UK's objective, *i.e.*, "to sell [its] machines to customers throughout the United States, the two companies [were acting] closely in concert with each other." McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just noted, the manufacturer engaged McIntyre America to attract customers "from anywhere in the United States." *Id.* at 2797 (alteration in original) (citations omitted). The plurality said that the "facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market." *Id.* at 2790.

82. *Id.* at 2796 (Ginsburg, J., dissenting).

83. *Id.* at 2795.

84. *Id.* at 2796 n.2.

85. 480 U.S. 102 (1987). The plurality in *Nicastro* was composed of Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas. Chief Justice Rehnquist and Justices Powell, O'Connor, and Scalia made up the plurality in *Asahi*.

86. *Id.* at 112.

87. *Id.*

emphasized the need “to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”⁸⁸ The plurality focused on the intent of the defendant as the crucial factor in its analysis.⁸⁹ After reviewing the defendant’s connections with the United States and its lack of activities in New Jersey, the plurality wrote:

[T]he trial court found that the “defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.” These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.⁹⁰

Like the plurality, the opinion of Justices Breyer and Alito concluded that the evidence did not show “that the British Manufacturer ‘purposefully avail[ed] itself of the privilege of conducting activities’ within New Jersey.”⁹¹ However, unlike the plurality, Justice Breyer’s opinion focused on the “single isolated sale” in New Jersey being ineffective in creating jurisdiction. Justice Breyer wrote:

[T]he [Supreme] Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.⁹²

Because the concurrence saw nothing in the record beyond the single sale in New Jersey, it reached the same conclusion as the plurality of an absence of jurisdiction. Both the plurality and the concurrence expressed a fear that upholding jurisdiction in this case would open up jurisdiction over small manufacturers, both domestic and foreign, when their products caused injury in distant states.⁹³ Justices Breyer and Alito differed from the plurality in two important aspects. First, they viewed their decision as

88. *Nicastro*, 131 S. Ct. at 2788.

89. *See id.* (“The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of the sovereign.”); *id.* at 2791 (“At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws.”).

90. *Id.* at 2790 (citation omitted).

91. *Id.* at 2792 (Breyer, J., concurring) (alteration in original).

92. *Id.*

93. *See id.* at 2790; *id.* at 2793.

breaking no new ground. The result was the product of “no more than adhering to . . . precedents.”⁹⁴ Second, they were concerned that the “strict rules” of the plurality might be inappropriate when new technology provides ways to conduct activities in the forum through world-wide computer sales and advertising on the Web, something that was not part of the case.⁹⁵

The dissent, written by Justice Ginsburg and joined by Justices Kagan and Sotomayor, reflects Justice Ginsburg’s earlier career as an outstanding procedure scholar and displays a better understanding of the precedents than the other two opinions. Like the plurality, the dissent recognized that “McIntyre UK dealt with the United States as a single market.”⁹⁶ Unlike the plurality, the dissent found the defendant’s conduct to satisfy the “purposeful availment” requirement because the defendant targeted New Jersey sales when it tried to sell to customers throughout the United States. The dissent asked, “How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?”⁹⁷ To show how the result in *Nicastro* was out of step with the prevailing approach to personal jurisdiction analysis in products liability cases involving foreign defendants, the dissent included an appendix of federal and state cases in which jurisdiction was held to exist over defendants that targeted a national market.⁹⁸

B. Critique of the Opinions

The finding of a lack of personal jurisdiction in *Nicastro* is the worst result in any personal jurisdiction case decided by the Supreme Court in the modern era. It is absurd to think that a worker at a scrap yard in New Jersey has to bring a products liability suit in the United Kingdom when he loses fingers on his hand from an allegedly defective machine. Not only did the six Justices order an unfair result; they also showed a failure to understand the personal jurisdiction precedent.

The central question in any personal jurisdiction case is whether the court has the authority to require people to appear in its courts. In assessing the limits placed on that jurisdiction by the due process clause,

94. *Id.* at 2792.

95. *Id.* at 2793.

96. *Id.* at 2801 (Ginsburg, J., dissenting).

97. *Id.*

98. *Id.* at 2802 n.14, 2804–06.

the current law requires a determination of whether the minimum contacts standard is satisfied. Whether a defendant purposefully availed itself of the forum state is only one aspect of the process of examining the relationship between the defendant and the forum and between the cause of action and the forum in order to conclude whether minimum contacts exist.⁹⁹ Purposeful availment has not replaced minimum contacts as the due process standard. Nonetheless, the four Justices in *Asahi* and the four Justices in *Nicastro* raised the purposeful availment requirement to a prominence it does not deserve under the precedents. It is important to remember that the Court first articulated the purposeful availment requirement in *Hanson v. Denckla*,¹⁰⁰ an unusual case in which the Court faced two conflicting state supreme court opinions. The Florida Supreme Court invalidated a Delaware trust using Florida law, while the Delaware Supreme Court upheld the trust under Delaware law.¹⁰¹ Most scholars believe that the Florida court used a contorted interpretation of its own choice-of-law rules to reach a result erroneous under trust law principles.¹⁰² Reviewing that aspect of the case would have involved thorny full faith and credit issues. Rather than reversing the Florida Supreme Court on the choice-of-law issue, the United States Supreme Court turned to personal jurisdiction as a way to resolve the problem. The Court gave effect to the Delaware court's ruling by finding a lack of personal jurisdiction in the Florida court over an indispensable party, the Delaware bank trustee.¹⁰³ Although commentators thought the outcome to be fair, most were troubled by the Court's personal jurisdiction analysis.¹⁰⁴

99. See Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 190 (1998) (“[T]he Court has regularly added new factors in a process of gradual accumulation, each addition aggravating the test’s ambiguity and complexity.”). For example, another factor is whether an out-of-state defendant caused an “effect” in the forum. See, e.g., *Calder v. Jones*, 465 U.S. 783, 789 (1984).

100. 357 U.S. 235 (1958).

101. *Id.* at 235.

102. See, e.g., Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 142–50 (1976) (explaining the choice of law and full faith and credit issues); von Mehren, *supra* note 3, at 1175 (calling the Florida court’s use of trust law “extreme and virtually unsupportable”).

103. *Denckla*, 357 U.S. at 250–54.

104. See, e.g., Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 244 (“In a 5 to 4 decision, Mr. Chief Justice Warren reached the fair result . . . , but by a line of analysis that in all charity and after mature reflection is impossible to follow, no less to relate.”); Kirgis, *supra* note 102, at 144 (“In so holding, the Court opened itself up to considerable scholarly criticism . . .”).

The Delaware judgment seemed fairer than the Florida one because it not only upheld the settlor’s intentions, it also resulted in an approximate equal division of the estate among her three daughters. The Florida decision would have effectively written one daughter out of the estate. See Allan Erbsen,

It was in this unusual case, with its controversial analysis of personal jurisdiction law used to get a fair result and to avoid a troublesome issue, that the purposeful availment requirement was born.¹⁰⁵ Nonetheless, purposeful availment has become an accepted and important consideration in personal jurisdiction law. It is not, however, a difficult standard to meet in general. As the dissent in *Nicastro* pointed out by quoting from *Burger King*, the purposeful availment requirement “simply ‘ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.’”¹⁰⁶

There are some types of cases in which there would be jurisdiction over a non-resident who did not purposefully avail himself of the forum. The classic hypothetical of a shooting across a state line is one example.¹⁰⁷ Suppose two people are hiking in a state near the border of another state, and one shoots the other after the victim has crossed into the other state. Even if the shooter does not know that his victim has entered another state, the shooter could be haled into the courts of the state where the victim was shot for both criminal and civil proceedings. Likewise, if someone mails a letter bomb to an address in one state, but the letter is forwarded to an address in a second state, unbeknownst to the sender, the sender can be haled to the courts of the second state. In neither instance did the defendant purposefully avail himself of the forum state, because the defendant did not even know that the bullet or the bomb entered another state. Even though the mental element is lacking, there is nonetheless personal jurisdiction. The plurality in *Nicastro* recognized an exception for intentional torts from the purposeful availment requirement, but viewed that as irrelevant to a products liability lawsuit.¹⁰⁸

Impersonal Jurisdiction, 60 EMORY L.J. 1, 16 n.61 (2010) (“The unstated motive for the Court’s debatable jurisdictional analysis arguably may have been a sense that the Delaware judgment reached a better result than the Florida judgment, and thus the jurisdictional inquiry yielded to an equitable comparison of the states’ conflicting substantive laws.”).

105. See *Denckla*, 357 U.S. at 253.

106. *J. McIntyre, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2801 (2011) (Ginsburg, J., dissenting) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)); see also Weinberg, *supra* note 63, at 930 (*Denckla* is one of the “cases where the Court used minimum contacts limitations on state jurisdiction to serve the covert purpose of preventing application of forum law.”).

107. See, e.g., Erbsen, *supra* note 104, at 39–40.

108. See *Nicastro*, 131 S. Ct. at 2785 (“There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called ‘stream-of-commerce’ doctrine cannot displace it.”) The need for purposeful availment is unique to U.S. law. For example, the EU Regulations on personal jurisdiction do not include that element. They allow jurisdiction in tort cases “in the courts for the place where the harmful event occurred or may occur.” Council Regulation 44/2001, 2001 O.J. (L 12/4) art. 5(3) (EC).

Even when the purposeful availment test is applied to the facts of *Nicastro*, it is impossible to understand how J. McIntyre fails to satisfy that requirement. The British defendant engaged an American firm to sell to customers throughout the United States; it repeatedly reached potential customers from every state when it exhibited its machines at annual trade shows.¹⁰⁹ The plurality distinguishes “an intent to serve the U.S. market” from an intent to avail itself of the New Jersey market.¹¹⁰ If the defendant had told its distributor to sell to customers in all fifty states, would the plurality have found the requisite intention to target New Jersey? What if the defendant had told the distributor to sell to customers in Alabama and then listed the other forty-nine states by name? There is absolutely no difference between telling a distributor to serve the U.S. market and the two examples just mentioned. It is to focus on words and not meaning to see any difference in the three alternatives. The plurality would have been truer to the facts if it concluded that J. McIntyre had tried to reach customers in New Jersey, but then concluded that its attempts were insufficient to justify jurisdiction there. I would disagree with that conclusion, but at least it would be part of the usual debate over whether the connections with a forum in a lawsuit constitute minimum contacts.

It is also troubling that both the plurality and concurrence justified their conclusion with examples of how small, local manufacturers would be haled across the country through expansive personal jurisdiction if *Nicastro* had come out differently. The plurality was concerned about the “owner of a small Florida farm [selling] crops to a large nearby distributor, for example, who might then distribute them to grocers across the country.”¹¹¹ The concurrence worried about a small Appalachian potter who sold his cups to a large distributor who resold one coffee mug to a buyer in Hawaii,¹¹² and, on an international scale, a small Egyptian shirt maker whose products ended up in a distant state market.¹¹³

I do not understand why these Justices were not concerned about the people injured by these manufacturers. People in business should buy liability insurance; that is just part of doing business. Their insurance companies can defend suits more easily than injured victims can sue at the home of the defendant. If a small organic farmer in Colorado sells her cantaloupes to a grocery store in St. Louis, through an intermediary food

109. See *supra* text accompanying notes 79–83.

110. *Nicastro*, 131 S. Ct. at 2790.

111. *Id.*

112. *Id.* at 2793 (Breyer, J., concurring).

113. *Id.* at 2794.

distributor, and a customer becomes infected with E. coli from the cantaloupe, I would expect that the customer could sue in St. Louis rather than needing to travel to Colorado. Likewise, if a small Egyptian shirt manufacturer sells a shirt that does not meet federal safety standards to the parents of a young boy in California, again through a national distributor, I would hope that the boy could sue in California for burns caused by the shirt catching fire rather than needing to go to Egypt. It is true that in many cases like this, there would be no reason to sue the manufacturer because the victim can sue the retailer and the distributor. But sometimes, as with the bankruptcy of J. McIntyre's Ohio distributor, the manufacturer is the only feasible defendant.

The proper way to deal with small manufacturers who should not be forced to travel to distant states is to create an exception, not to change the entire rule out of a concern for the exceptional situation. The Supreme Court did that in *Burger King*, when it upheld jurisdiction but recognized that some types of similar cases should nonetheless come out differently.¹¹⁴ The best way to understand how to deal with the problem of the small manufacturer is to return to von Mehren and Trautman's famous article.

In discussing the future of jurisdiction from their vantage point in 1966, von Mehren and Trautman emphasized certain characteristics of jurisdictional issues that are relevant to the concerns of the Justices in *Nicastro*. Von Mehren and Trautman thought the national or local character of activities was relevant to the design of jurisdictional rules:

We suggest that the explanation [for a rule that favors jurisdiction where a tort occurred] lies in the multistate character of the defendant's activity giving rise to the underlying controversy, as compared with the localized nature of the plaintiff's. In addition, the defendant's activity foreseeably involved the risk of serious harm to individuals in communities other than his own. These two elements, taken together, and quite apart from considerations of litigational convenience, justify requiring the defendant to come to the plaintiff.¹¹⁵

114. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485–86 (1985) (“[T]he Court of Appeals apparently believed that it was necessary to reject jurisdiction in this case as a prophylactic measure We share the Court of Appeals’ broader concerns and therefore reject any talismanic jurisdictional formulas; ‘the facts of each case must [always] be weighed’ in determining whether personal jurisdiction would comport with ‘fair play and substantial justice.’”).

115. von Mehren & Trautman, *supra* note 3, at 1167.

The authors wrote this to justify the result in *Hess v. Pawloski*,¹¹⁶ where the “multistate character” of the defendant’s conduct was driving from Massachusetts to Pennsylvania, something much more limited than the activities of companies who try to sell throughout the United States.

Von Mehren and Trautman also recognized the problem of the small seller:

Rather far-reaching bases for specific jurisdiction would then appear supportable with respect to certain classes of defendants, for example corporations whose economic activities and legal involvement were pervasively multistate, while the situations in which specific jurisdiction could appropriately be exercised would be far fewer when the defendant was a natural or legal person whose economic activities and legal involvements were essentially local. With respect to this latter class of defendants, additional litigational considerations of the kind present in *Hess v. Pawloski* should be required before specific jurisdiction is asserted.¹¹⁷

J. McIntyre was a British corporation selling to the United States market, not someone whose activities were local. Under the model of von Mehren and Trautman, no special considerations are needed to sustain personal jurisdiction in New Jersey. Likewise, J. McIntyre is not at all like the small Florida farmer, the Appalachian potter, or even the Egyptian shirt maker, the kind of small firms that troubled the six Justices.¹¹⁸

The opinion of Justices Breyer and Alito expressed concern over allowing jurisdiction when the defendant’s first product to enter a state also causes injury in the state.¹¹⁹ That view leads to the uncertainty over how many machines the defendant must sell to customers in the forum state before jurisdiction would be permissible. Will three machines suffice? Five? Does it matter that J. McIntyre sells large machines that each cost \$20,000 to \$30,000, rather than vegetables, pottery, or shirts? There have been cases in which a single sale in the state supports jurisdiction, like *McGee*.¹²⁰ It is true that there is something unsettling about allowing jurisdiction for a single, isolated sale. That is probably the

116. 274 U.S. 352 (1927).

117. von Mehren & Trautman, *supra* note 3, at 1168.

118. See *supra* text accompanying notes 111–13.

119. See *J. McIntyre, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring). The plurality noted that four machines may have been used in New Jersey, although “the record suggests only one.” *Id.* at 2786.

120. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957). *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), involved one contract (although it had a twenty-year term).

reason the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*—the source of the stream of commerce theory— noted that, although the record did not disclose Titan Valve’s Illinois sales volume, “it is a reasonable inference that [Titan Valve’s] commercial transactions, like those of other manufacturers, result in substantial use and consumption in [the] State.”¹²¹ However, the way to deal with a concern over an isolated sale is to use the limitation contained in the Uniform Long Arm Statute and many state long arms: if an injury arises in a state from an isolated sale, jurisdiction is proper if the defendant derives substantial revenue from interstate or international commerce.¹²² This requirement, that the defendant carry on a multistate business, is an application of the approach suggested by von Mehren and Trautman. It is also a much better way to handle the isolated sale issue than the approach of the concurrence.

Perhaps the most unusual aspect of the opinions in *Nicastro* is the claim by the concurrence that they are doing “no more than adhering to . . . precedents.”¹²³ As the dissent so ably points out, that is not correct.¹²⁴ In addition, to reconcile this outcome with those of the earlier cases, the concurrence often contorted the cases to fit the rule they wanted. For example, they disregard *McGee* when they say that “[n]one of our precedents finds . . . a single isolated sale . . . sufficient” for jurisdiction.¹²⁵ They find support in *World-Wide Volkswagen*’s rejection of the notion “that a defendant’s amenability to suit ‘travel[s] with the chattel.’”¹²⁶ However, *World-Wide Volkswagen* essentially held that the stream of commerce ended with the retail sale and that a purchaser could not obtain jurisdiction in a state where the purchaser took the good.¹²⁷ That case did not view Audi’s sale of the car to the U.S. distributor as ending the stream of commerce, nor the sale by the national distributor to the three-state distributor. The stream ended when the New York car dealer sold the car to the plaintiff in New York. Likewise, the stream of commerce in *Nicastro* ended in New Jersey when the Ohio distributor sold the machine to Nicastro’s employer. There was no “travel[ing] [of] the chattel” in

121. 176 N.E.2d 761, 766 (Ill. 1961).

122. See *Nicastro*, 131 S. Ct. at 2800. See, e.g., New York Civil Practice Law and Rules 302(a).

123. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

124. *Id.* at 2799 (Ginsburg, J., dissenting).

125. *Id.* at 2792 (Breyer, J., concurring); see also *Burger King*, 471 U.S. 462 (one contract).

126. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)).

127. See *World-Wide Volkswagen*, 444 U.S. at 295–99.

Nicastro. Perhaps the most glaring example is the concurrence's use of *Asahi*. The opinion states that

the Court, in separate opinions [in *Asahi*], has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.¹²⁸

The concurrence uses *Asahi* as if it more than “suggests”; they use it as if it compels the result in *Nicastro*. Furthermore, it is an exaggeration to describe a statement to this effect in *Asahi* as “strongly” suggesting. All nine Justices rejected jurisdiction in *Asahi* over a Japanese tire valve manufacturer sued for indemnity by a Taiwanese tire manufacturer. After the Taiwanese corporation settled with the plaintiff, all that was left in the lawsuit was the third-party claim involving two foreign corporations who engaged in their business transactions in Asia.¹²⁹ Eight Justices applied the “fair play and substantial justice” part of the minimum contacts test to disallow jurisdiction. The language in *Asahi* relied on by the concurrence in *Nicastro* came from three opinions debating whether a plus factor should be grafted onto the stream of commerce test, all dicta in *Asahi*. Or, to put it the way the dissent in *Nicastro* did, “the dueling opinions of Justice Brennan and Justice O’Connor were hardly necessary” in *Asahi*.¹³⁰ I am also in complete agreement with the dissent’s assessment of the concurrence’s reliance on *Asahi*: “To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.”¹³¹

How is it possible that Justice Breyer’s opinion in *Nicastro* is so poorly grounded in the precedent he claims to follow? I have two hypotheses about the structure of the concurring opinion. First, it seems from the opinion that Justice Breyer is unsure of how personal jurisdiction should adapt to the world of the Web, where advertising and sales are global and intermediaries like Amazon.com play a major role.¹³² Perhaps some of the

128. *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

129. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106 (1987).

130. *Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting).

131. *Id.*

132. He expressed his concern as follows:

The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘inten[d] . . . to have targeted the forum.’ But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary

Justices thought these issues were part of the case when they granted certiorari. It seems fair to say that Justice Breyer is hesitant to modify existing personal jurisdiction law until the effects of global communications are clearer, a cautious approach to change at this time. One way to accomplish that is to say that the result in *Nicastro* is compelled by precedent, that the decision is not novel, and that the current law is not changed at all.

A second possibility, not mutually exclusive with my first hypothesis, is that Justice Breyer worked hard to keep Justice Alito off the plurality opinion. If Justice Alito would have joined Justice Kennedy's opinion, the stream of commerce theory would have been limited greatly. The dicta of the four Justices in *Asahi* would have become the law in *Nicastro*. If it took a contorted, confusing opinion to hold Justice Alito, all of us believers in the stream of commerce theory owe deep gratitude to Justice Breyer.

III. JURISDICTION IN A GLOBAL WORLD

A. *Constitutional Personal Jurisdiction Rights Are Not Applicable to Foreign Defendants*

With increasing global business and travel, there is sure to be a significant increase in tort litigation brought by United States citizens against non-citizens. The Court's application of the personal jurisdiction law in tort suits against foreign defendants has stacked the deck against citizen plaintiffs. In addition to the holding in *Nicastro*, the doctrine inherently favors foreign defendants because the plaintiff's interests may not be considered in determining if there are sufficient contacts. Only the connections between the forum and both the defendant and the cause of action are relevant.¹³³ It is not until a court must decide if the contacts satisfy "traditional notions of fair play and substantial justice" that the interest of the plaintiff becomes relevant. The defendants had such minimal connections to the forum state in *Goodyear Dunlop Tires*, *Nicastro*, and *Helicol* that the Court never reached the stage of considering the plaintiffs' interest in those cases. As long as the Court continues to

(say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

Id. at 2793 (Breyer, J., concurring).

133. Stein, *supra* note 65, at 541.

apply the current personal jurisdiction doctrine in cases involving foreign defendants, more and more citizen plaintiffs will be barred from the courts in the United States.

In the cases involving personal jurisdiction over foreign parties,¹³⁴ the Court has not analyzed whether the Constitution compels it to treat foreign defendants as it does domestic parties. It just took that to be appropriate. Similarly, it appears that no party has argued for different jurisdictional rules for foreign parties. Now is the time for the Court to determine if the Constitution obligates it to give the same rights to foreign defendants as it does to domestic parties.

There are two constitutional provisions that limit the reach of state courts over defendants: full faith and credit and due process.¹³⁵ Although the Supreme Court occasionally quotes *Insurance Corp. of Ireland*¹³⁶ for the proposition that the due process clause is the only source of personal jurisdiction limitations, nothing has read out of the Constitution the limitations on state court jurisdiction that existed before the enactment of the Fourteenth Amendment.¹³⁷ A concern for the sovereignty of the states and for their equal role in our federal governance structure is carried out in full faith and credit. As every first-year law student knows from studying *Pennoyer v. Neff*,¹³⁸ full faith and credit must be granted only to judgments rendered by courts with jurisdiction over the parties. As the Court in *Insurance Corp. of Ireland* made clear, state sovereignty does not play a direct role as a factor to be considered by the courts in analyzing personal

134. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Nicastro*, 131 S. Ct. 2780; *Asahi*, 480 U.S. 102; *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408 (1984); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Until June 2011, only one Supreme Court case, *Helicol*, had denied U.S. plaintiffs a U.S. forum. The disputes in *Asahi* and *Insurance Co. of Ireland* were between foreign companies. *Perkins*, involving a foreign business being run out of Ohio, was like a lawsuit involving a resident non-citizen. See *infra* text accompanying note 148.

135. Cf. Erbsen, *supra* note 104, at 3–4 (“[C]ommentators cannot agree on the constitutional source of limits on state judicial authority, which in various contexts could be the Due Process Clause, the Full Faith and Credit Clause, the Commerce Clause, a constellation of clauses regulating federalism, or no clause.”).

136. 456 U.S. 694.

137.

The text of the Due Process Clause thus apparently did not alter the basic jurisdictional standard that existed prior to its adoption. Instead, as the *Pennoyer* Court admitted, the Clause codified prior “rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”

Erbsen, *supra* note 104, at 59 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)); see also Wendy Collins Perdue, *What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 741 (2012) (emphasizing the importance of full faith and credit).

138. 95 U.S. 714 (1877).

jurisdictional issues.¹³⁹ Rather, state sovereignty concerns are advanced as a byproduct of the application of the minimum contacts test. As I have explained elsewhere, state sovereignty requires that there be some connection between the defendant and the forum state or between the cause of action and the forum as a matter of constitutional law.¹⁴⁰ That is why the Supreme Court requires minimum contacts and why personal jurisdiction cannot turn into something like interstate venue. However, notwithstanding the important role state sovereignty plays in personal jurisdiction, it has no bearing on cases brought against foreign defendants.¹⁴¹ When a Virginia resident dies in an auto accident in Paris, there is no issue of one state infringing another state's authority; only the sovereignty of Virginia and France are relevant. Likewise, when a British-made good injures someone in New Jersey, the only relevant sovereigns are New Jersey and Great Britain. As a result, the Supreme Court should craft a version of personal jurisdiction rights for non-citizens free of sovereignty concerns, which would vary the protections of non-citizens in a number of different ways. For example, the concept of purposeful availment rests on state sovereignty underpinnings. It is part of the needed connections with the forum state that make personal jurisdiction constitutional. To the extent that those connections are unnecessary in suits against non-citizens, purposeful availment would no longer be constitutionally compelled by sovereignty concerns.

This leads to the question of whether the due process clause would still compel the same doctrine for non-citizens, with factors like purposeful availment retaining their importance. The Supreme Court has ruled on numerous occasions that people who are not citizens do not have the same constitutional rights as citizens.¹⁴² The status of citizenship brings constitutional protections unavailable to outsiders. Just as citizens have more rights than non-citizens, resident aliens have more rights than non-resident foreign nationals. In terms of the protections afforded by the due process clause, the Court has ruled that citizens and resident aliens are

139. *Ins. Corp. of Ir.*, 456 U.S. at 702.

140. Drobak, *supra* note 29, at 1015.

141. Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669, 688–89 (“Obviously, states are under no constitutional obligation to preserve the sovereign status of foreign nations; therefore, the considerations of federalism raised in *World-Wide Volkswagen* are irrelevant to the relationship between a state and a foreign citizen. Thus, if federalism-based concerns were an important part of the justification for jurisdictional limitations, one would expect that aliens would receive *less* protection from the due process clause. *Asahi* is clearly inconsistent with this conclusion.”).

142. *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001).

treated the same, while non-resident aliens have no due process protections.¹⁴³ The Supreme Court has explained the variability of constitutional protections with the degree of affiliation with the United States as follows:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment.¹⁴⁴

The defendants in both *Goodyear Dunlop Tires* and *Nicastro* were both non-resident and non-citizen. They are alien corporations, not people. It should follow from the case law dealing with the due process rights of people that the same rules would apply to non-citizen, non-resident corporations. In fact, it would be astonishing to think that non-citizen corporations had greater constitutional rights than people from other countries.¹⁴⁵ Although most courts routinely apply personal jurisdiction

143. See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 28–32 (2006). The degree of protections accorded non-residents varies for different constitutional rights. For example, the Second Amendment does not apply even to resident non-citizens. See, e.g., *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011). Many rights “intimately related to the process of democratic self-government,” *Bernal v. Fainter*, 467 U.S. 216, 220 (1984), are excluded from resident non-citizens. E.g., *Bluman v. FEC*, 800 F. Supp. 2d 281, 282–83 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012) (refusing to extend the First Amendment and *Citizens United v. FEC*, 558 U.S. 310 (2010), to the campaign contributions of temporary resident non-citizens). Except for that type of limitation, “[f]reedom of speech and of press is accorded aliens residing in this country.” *Bridges v. Wixon*, 326 U.S. 135, 148 (1945). Most other constitutional protections arise when non-citizens enter the country and develop “substantial connections with [the] country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). See generally David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003).

144. *Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) (citations omitted); see also *United States v. Verdugo-Urquidez*, 494 U.S. at 271.

145. See Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C.

law to foreign parties without recognition of the inconsistency of the conflict with the procedural due process cases dealing with natural persons, there have been a few courts that have applied a lesser personal jurisdiction standard to foreign defendants.¹⁴⁶ Given the due process cases that decline to give protections to non-resident non-citizens, it seems to me that the due process clause provides absolutely no protection to defendants like the ones in *Goodyear Dunlop Tires* and *Nicastro*.¹⁴⁷

The three foreign defendants in *Goodyear Dunlop Tires* were organized under and operated in, respectively, Turkey, France, and Luxembourg.¹⁴⁸ They did no business whatsoever in the United States. As a result, they must be considered to be both non-citizen and non-resident foreign nationals, having no due process rights under case law. One could argue that J. McIntyre's connections to the United States are great enough to classify it as a resident alien, with due process protections under current law.¹⁴⁹ J. McIntyre did business in the U.S. for over a decade, with an annual presence at the trade show.¹⁵⁰ However, I do not think that this limited business is anywhere near the level of activities that justifies giving due process protections to resident aliens. People who are allowed permanent residence in the United States, even though they do not become

L. REV. 617, 633 (2012) (“[T]he idea that foreign nationals acting in foreign countries can claim U.S. constitutional rights is both highly controversial and contrary to other Supreme Court precedent.”); Parrish, *supra* note 143, at 37 (“[T]he Court’s current due process formulations in the jurisdictional context are incoherent with its approach to U.S. constitutionalism in other contexts.”); *id.* at 56 (The Court should “decouple the personal jurisdiction analysis [for foreign defendants] from the Constitution altogether.”).

146. For opinions in which the court has applied a lesser standard to foreign defendants, see Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 8 (1987).

American courts . . . have assumed that the constitutional principles developed in suits against [non-resident U.S. corporations] also govern jurisdiction over aliens. However, the question has not yet been definitively resolved whether the constitutional restraints that curb the exercise of personal jurisdiction over [non-resident U.S. corporations] apply with congruent force in all contexts in which an alien is a defendant. Case law indicates that the same constraints of due process—namely, satisfaction of the minimum contacts standard—apply fully to jurisdiction over aliens.

Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116 (1983).

147. Rather than argue that due process does not apply, which is admittedly a bold proposition, one could argue for a constitutional due process doctrine tailored for alien corporations in which the interests of U.S. plaintiffs are taken into account. That would satisfy my concern. However, I think that that modification of personal jurisdiction law would require overruling the four cases that concern foreign defendants. My proposal does not require any overruling of precedent because the Court has not considered the position I am expressing.

148. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

149. The foreign defendants in *Goodyear Dunlop Tires* were not present in the U.S. in any way, so this argument cannot be made for them.

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

citizens, have much greater ties to our country than a business like J. McIntyre. J. McIntyre was more like an annual visitor as a result of its presence at the trade shows. In addition, making sales to the United States market from another country is far from the permanent residence that confers the full array of due process rights. Even if one were to conclude that J. McIntyre's connections to the United States are great enough to justify giving it some due process protections, it does not follow that it should be given personal jurisdiction protections.

The cases that gave resident aliens due process protections were considering procedural due process, such as rights to notice and opportunity to be heard by impartial decision-makers. There is little cost to giving non-citizens procedural due process rights. The only cost is to the government, which must bear the time and expense of providing notice and impartial hearings.¹⁵¹ However, giving personal jurisdiction rights to foreign defendants in the manner done by the Supreme Court in *Goodyear Dunlop Tires* and *Nicastro* imposes tremendous costs on citizens who lose their right to litigate in U.S. courts under U.S. tort law. That difference is reason enough to deny foreign defendants personal jurisdiction rights even if they are allowed procedural protections. Even more importantly, personal jurisdiction, although affecting the process of bringing someone into court, is much closer to substantive due process than procedural due process. The personal jurisdiction rules advance state sovereign rights and "Our Federalism,"¹⁵² in addition to allowing a defendant to avoid distant litigation. Being free of a sovereign's power is more than a procedural right. If personal jurisdiction were merely one of a number of procedural rights guaranteed by due process, the Supreme Court in *Phillips Petroleum Co. v. Shutts*¹⁵³ would not have gone out its way to require some version of consent to jurisdiction by members of a plaintiff's class.¹⁵⁴ In *Shutts*, the Court emphasized all the procedural protections given to members of a

151. This is true for other constitutional rights, like free speech and freedom from illegal searches and seizures. *See supra* note 143.

152. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

153. 472 U.S. 797 (1985).

154. In *Shutts*, a class of about 33,000 leaseholders sued Phillips Petroleum for interest on late royalty payments in Kansas state court. Most class members had no contacts whatsoever with Kansas. They were not Kansas citizens, nor were their leases for Kansas land. *Id.* at 797. With an absence of the traditional bases for personal jurisdiction and with a lack of minimum contacts, the Supreme Court had to find another way to establish jurisdiction over the class members. After all, a loss in state court in the class action would bar later litigation by the leaseholders. The Court ruled that personal jurisdiction was established by consent, which class members manifested by choosing not to opt out of the class. *Id.* at 812.

class,¹⁵⁵ but those protections did not justify the elimination of some basis for the court's jurisdiction over the members of the class. That is why the Supreme Court required a finding of consent by the class members to jurisdiction. Granted, the opt-out process provided only a weak version of consent, tolerable as a result of all the procedural protections in a class action, but it still was consent nonetheless. Contrast this with the class action rule that adequacy of representation can make up for a lack of notice in some instances. Here, one procedural requirement, adequacy of representation, means that another one, notice, is unnecessary. That the procedural protections in a class action do not eliminate the need for personal jurisdiction shows the different nature of personal jurisdiction rights.

One could argue that personal jurisdiction protections should extend to foreign businesses as a way to help the economy. After all, many foreign firms may fear the tort system in the United States, which deters them from trading in the United States. The solicitor general made an argument similar to this in *Helicol*, when he claimed that jurisdiction premised on purchases in the U.S. would hurt our balance of trade.¹⁵⁶ That is a logical argument, but no one knows if it is a realistic prediction. Even if the purchases would lead to jurisdiction, would Helicol still have purchased Bell helicopters because they were the best helicopters on the market? Or because they were less expensive than others? Or because Bell would reduce the price to account for Helicol's insurance costs? Too many variables go into a decision to choose between competing sellers of a product. Even if that argument makes sense for foreign purchasers of American products, it has no bearing on foreign sellers. Exports can help an economy by attracting foreign money to the United States; imports send dollars overseas. Even worse for our economic interests, the Court has disadvantaged firms that manufacture products in the United States.¹⁵⁷ They must answer to tort suits in U.S. forums, in which their liability is adjudicated under U.S. tort law. Their foreign competitors have a great advantage since their liability will be governed by the tort laws of their own country, which is sure to provide for miniscule damages when compared to what is available under U.S. tort law.¹⁵⁸ In addition, the

155. *Id.* at 809–10.

156. *See supra* text accompanying note 63.

157. Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 640 (2012) (“[T]he Court’s decision gives a competitive advantage to foreign firms seeking to sell their machines in the United States.”).

158. In a famous quotation, Lord Denning said: “As a moth is drawn to the light, so is a litigant drawn to the United States.” *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (Eng.

Supreme Court has created the perverse incentive of encouraging American manufacturers to outsource production overseas through an independent entity in order to take advantage of the *Nicastro* holding. These issues of foreign trade are not within the expertise of judges. It would be better for foreign trade experts in the Commerce Department, the Executive, and Congress to study the issue rather than for the Court to make assumptions that result in the closing of U.S. courts for citizens. As Chief Justice Roberts recently wrote: “Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them.”¹⁵⁹ This governance structural issue counsels against the Supreme Court making pronouncements that may have harmful economic effects.

B. Jurisdiction in Tort Suits Against Foreign Manufacturers

The freedom from the constraints of due process, as well as from the constraints of federalism, means that the Supreme Court is not obligated to apply the constitutional personal jurisdiction doctrine to foreign defendants.¹⁶⁰ With the Constitution no longer the source of personal jurisdiction rights, the Court could still use its common law powers to craft special rules of jurisdiction applicable only to non-resident, alien defendants. Even if the Court were to conclude that the sliding scale of due process rights of foreign parties, dependent upon the degree of connections with the United States, mandated some constitutional protections for defendants like *J. McIntyre*, it should not be the entire

C.A.) at 733. “[C]ommentators generally believe that ‘compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery.’” Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 487 (2011) (quoting Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 323 (1994)); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251–52 (1981) (U.S. courts are “extremely attractive to foreign plaintiffs . . .”); *id.* at 252 n.18 (noting reasons for the preference for U.S. courts); Stephen C. McCaffrey & Thomas O. Main, *TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE: THEORY AND APPLICATION* ch. 3 (2010); Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 606–15 (2012).

159. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

160. There are no treaties, conventions, or international laws that govern personal jurisdiction in civil lawsuits in the United States. Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT’L L. 327, 329 (2004) (“The United States is not a party to any treaty . . . and thus the jurisdictional rules in the United States are the product of domestic law alone.”); see also Parrish, *supra* note 143, at 50 & n.246.

panoply of rights granted to citizens.¹⁶¹ This would be an important change in the law because lessening personal jurisdiction rights would open up U.S. courts to injured citizens. For example, if the Court had applied a relaxed version of purposeful availment to *Nicastro*, the plurality more likely would have found personal jurisdiction from the targeting of the entire U.S. market. Similarly, weakened protections should have led the concurrence to find jurisdiction even with only one sale in New Jersey. This type of outcome is consistent with the personal jurisdiction rules of the European Union, which allows a tort suit to be brought in the state where the harm occurred.¹⁶²

Lesser personal jurisdiction protections for foreign defendants would ameliorate the harm done to workers and consumers under the current law. It is inconceivable to me that someone like *Nicastro* cannot sue in the United States but must go to Great Britain to sue and have his tort claims and damages resolved under English, and not American, law.¹⁶³ I would be surprised if *Nicastro* even knew that he was operating a machine made in the United Kingdom. I am sure that he was shocked to learn that he cannot sue in New Jersey, even though he was injured there. With the movement of more and more manufacturing to other countries, there are sure to be more workers who are injured in the United States by products manufactured overseas. It is hard to believe that personal jurisdiction law should send U.S. workers to China to have their claims resolved in Chinese courts under Chinese law. If workers knew this result, they should refuse to operate foreign-made machinery, at least until their employers insured them against their tort losses. In addition, this limitation on jurisdiction does not just affect workers. It limits the ability of consumers to sue in the United States when they are injured by a foreign-made product. Given the rarity of contingency fee arrangements in foreign countries,¹⁶⁴ coupled with the difficulty of finding a foreign lawyer, the

161. Weinberg, *supra* note 63, at 932 (“It must come down to saying, ‘Because it would be harder on the plaintiff in this case to sue elsewhere, it is proper to offer a little less due process protection to this defendant than we might have done in another case.’”); *see also* Silberman, *supra* note 158, at 595–96 (noting different considerations when suit involves foreign defendant). The principal way that commentators have suggested a different treatment of alien defendants is to examine contacts with the U.S. rather than just with the forum state. *See, e.g.*, Peter Hay, *Judicial Jurisdiction over Foreign-Country Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 433–35 (1984); Maltz, *supra* note 141, at 674 n.43.

162. Council Regulation 44/2001, 2001 O.J. (L 12/4) art. 5(3) (EC). In addition the EU has special jurisdictional rules making it easier for consumers to sue in contract disputes. *See id.* arts. 15–17.

163. *See* Carrington, *supra* note 157, at 639 (“The protection of workers in New Jersey is a concern, indeed a duty, of the New Jersey government.”).

164. *See* Virginia G. Maurer, Robert E. Thomas & Pamela A. DeBooth, *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT’L L. & BUS. 272 (1999).

expense of litigating overseas, and the low probability of obtaining a substantial damage award, it is almost inevitable that tort suits will not be brought against foreign manufacturers, advantaging them even more over their U.S. competitors.¹⁶⁵

One other avenue may be open to someone like Nicastro, even under the current status of personal jurisdiction. Knowing that New Jersey, the site of the accident, is not an appropriate forum, jurisdiction could very well exist in Ohio. J. McIntyre reached out to Ohio and maintained relations with its Ohio distributor,¹⁶⁶ so it is fair to conclude that the firm purposefully availed itself of the privilege of conducting activities in Ohio. It “targeted” Ohio. In addition, its activities in Ohio were related to the cause of action because the Ohio distributor was the seller of the machine for Nicastro’s employer.¹⁶⁷ It is strange that the doctrine would allow jurisdiction in the state of distribution but not in the state of injury, but at least it would give a forum in the United States to Nicastro for the application of our tort law.¹⁶⁸

C. Jurisdiction for Torts Occurring in Other Countries

It is easier to understand the absence of jurisdiction in *Goodyear Dunlop Tires* than in *Nicastro*. After all, the litigation in *Goodyear Dunlop Tires* involved the death of two boys in France allegedly as a result of the negligence of companies having no connections with the United States.¹⁶⁹ Similarly, *Helicol* involved U.S. citizens working in Peru where they died in a helicopter crash.¹⁷⁰ These accidents occurred on the soil of other sovereigns, and we could say that citizens traveling abroad should expect to litigate disputes in the countries where they arose. Nonetheless, I believe that personal jurisdiction law should permit people injured overseas to sue foreign tortfeasors in United States courts. Before the Court decided *Helicol* in 1984, a few decisions by other courts had led to the concept of “jurisdiction by necessity,” under which a U.S. citizen

165. For a description of the difficulties of suing overseas, see Weinberg, *supra* note 63, at 933–34.

166. *See supra* text accompanying notes 80–82.

167. *See supra* text accompanying note 79.

168. One could also argue that foreign sellers need to have a “home” in the United States sufficient to trigger general jurisdiction and that Ohio should suffice for J. McIntyre. After all, it is the state with the greatest connections to the firm. However, I think that this is too much of a stretch of the Court’s reasoning in *Goodyear Dunlop Tires*.

169. *See supra* text accompanying notes 5–6.

170. *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408, 410 (1984).

would be able to sue for injuries sustained in other countries.¹⁷¹ This kind of jurisdiction arose from the belief that U.S. citizens were entitled to a U.S. forum. It is fair to say that *Perkins* bears some attributes of jurisdiction by necessity because the courts had reopened in the Philippines when the suit was brought in Ohio.¹⁷² However, the decision in *Helicol* is inconsistent with any notion of jurisdiction by necessity.¹⁷³ Nevertheless, if the constitutional limitations on personal jurisdiction did not apply to foreign defendants, the Supreme Court would be free to fashion this type of jurisdiction. It would be a major change for the Court to allow jurisdiction based solely on the residence of the plaintiff, when neither the defendant nor the cause of action has any connections with the forum. However, other countries base jurisdiction on the residence of the plaintiff, so the Court would be acting consistently with accepted international practices.¹⁷⁴

If the Court were to allow this type of jurisdiction over foreign defendants, the litigation would still be subject to other legal, as well as practical, constraints. The question of whether a court in the United States should be able to assert jurisdiction over a foreign defendant in connection with an accident that happened outside the United States raises political and international relations dimensions that are not present in domestic litigation. One could view this type of expansive jurisdiction as violating the sovereignty of the defendant's country. Since the issue is not strictly legal, there is no reason for the judiciary to be the only branch of government to resolve these kinds of problems. The executive and legislative branches should be able to help determine the proper way to handle liability for injuries suffered by U.S. citizens abroad. If problems

171. *E.g.*, *Bryant v. Finnish Nat'l Airline*, 208 N.E.2d 439 (N.Y. 1965).

172. *See supra* note 42.

173. The Court briefly rejected an alternative argument for jurisdiction by necessity in a footnote in *Helicol*:

As an alternative to traditional minimum-contacts analysis, respondents suggest that the Court hold that the State of Texas had personal jurisdiction over *Helicol* under a doctrine of 'jurisdiction by necessity.' We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.

466 U.S. at 419 n.13 (citation omitted). To me, the need for complete joinder is a less compelling reason for jurisdiction by necessity than a desire to provide U.S. plaintiffs with access to the U.S. tort system.

174. Three countries that base jurisdiction on the plaintiff's residence are France, Luxembourg, and the Netherlands. Born, *supra* note 146, at 14; von Mehren & Trautman, *supra* note 3, at 1137.

arise in other countries with United States tort judgments against their citizens, any concerned country can negotiate a treaty to limit this type of jurisdiction. Existing treaties concerning the enforceability of civil judgments can be modified if necessary.¹⁷⁵ Treaty negotiations would reflect the public policy and political issues at stake in these foreign controversies, a much better basis for analyzing the problem rather than personal jurisdiction rules. Further, negotiating treaties on a country-by-country basis would permit tailoring the jurisdictional rules to reflect our different political and economic relations with different countries. In addition to the State Department playing a role in treaty negotiations, Congress could help by enacting a jurisdictional statute.¹⁷⁶ Congressional hearings and deliberations would provide a fuller understanding of the scope of the foreign tort problem and the consequences of the various jurisdictional alternatives. Finally, suits in the United States against foreign defendants raise enforcement problems that will limit the use of this expansive procedure. Just because a U.S. citizen has a judgment against a foreign defendant does not mean that the judgment will be enforced in the defendant's country or that the defendant will have sufficient assets in this country to pay the judgment.¹⁷⁷ Nonetheless, it seems to me that allowing this type of jurisdiction by necessity is a better system than closing off the courts entirely to citizens injured in other countries.

There is one other possible way for a U.S. citizen to recover: attachment of the foreign defendant's assets in a state as a way to provide quasi in rem jurisdiction. The opinion in *Shaffer v. Heitner* clearly indicates that all types of quasi in rem jurisdiction must satisfy the minimum contacts test.¹⁷⁸ But that rule follows from the Court's due process analysis. With no or lessened due process protection for foreign

175. See Parrish, *supra* note 143, at 57 ("The deconstitutionalizing of jurisdiction would, therefore, presumably refresh the need to reach agreement on a multilateral judgments treaty.").

176. In a not unusual statement, the plurality in *Nicastro* pointed out that Congress could provide a forum in the United States for plaintiffs like *Nicastro*, even if current personal jurisdiction law did not. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011). There is a problem with this approach: Congress seldom has the interest to improve jurisdictional rules, both because legislators have more pressing problems to resolve and because better jurisdictional rules do not get someone re-elected. When Congress does tackle jurisdiction, broad statutes sometimes bring unforeseen consequences, as was the case with the enactment of the new supplemental jurisdiction statute, 28 U.S.C. § 1367 (2006). Nonetheless, Congress sometimes does act. My proposal for broad jurisdictional rules helps U.S. plaintiffs, with Congress then having the ability to narrow jurisdiction, unlike the Court's narrow rule that disadvantages U.S. citizens.

177. See Parrish, *supra* note 143, at 50 (noting that "most countries resist enforcing U.S. judgments" even under current jurisdictional law).

178. See *supra* text accompanying note 27.

defendants, the Court is free to fashion quasi in rem jurisdiction by necessity for foreign torts, consistent with its opinion in *Shaffer*. This result would be consistent with the jurisdictional practices of some European courts.¹⁷⁹ Even if one were to conclude that foreign defendants should have the same due process protections as a U.S. citizen, one can distinguish the narrow holding of *Shaffer* from the foreign tort problem. *Shaffer* dealt with an intangible asset, while bank funds are tangible.¹⁸⁰ Further, there were other states in which the plaintiff in *Shaffer* could have brought the litigation, unlike the U.S. citizen injured abroad. A few courts and commentators have viewed quasi in rem jurisdiction as surviving the *Shaffer* opinion when attachment was the only way for a U.S. citizen to obtain jurisdiction over a foreign defendant.¹⁸¹ As I described above, I believe that the best option is to allow in personam jurisdiction in the courts of a plaintiff's state when the only alternative is to sue in a foreign country. However, quasi in rem necessity jurisdiction would at least assure that the foreign defendant had some small connection to the forum state.

CONCLUSION

The two personal jurisdiction decisions decided in June 2011 should settle any disputes over the limited meaning of general jurisdiction. The opinions in *Nicastro*, however, leave unresolved the debate over the scope of the stream of commerce doctrine, first raised in the Supreme Court by the four Justices in *Asahi*. Questions over the necessity for a "plus" factor and the meaning of the purposeful availment standard are sure to arise again in litigation before the Court. Although the Court has applied the same personal jurisdictional rules to non-resident foreign nationals as it does to U.S. citizens, and no parties have argued otherwise, it is time for the Court to consider on the merits whether that constitutional protection should be accorded to non-resident, non-citizen corporations. If the court

179. Germany, Denmark, Switzerland, and Sweden provide for what we label in personam jurisdiction just by the attachment of assets in the country. Born, *supra* note 146, at 14–15.

180. Justice Powell in his concurrence in *Shaffer* believed that quasi in rem jurisdiction should remain when land served as the basis for the suit. *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Powell, J., concurring). He contrasted the permanent location of land from the uncertain location of intangible assets. *Id.*

181. *E.g.*, *Excel Shipping v. Seatrain Int'l S.A.*, 584 F. Supp. 734 (E.D.N.Y. 1984); *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977); *see also* Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 74–76 (1978) (discussing jurisdiction by necessity and attachment of bank account); *cf.* *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 655 (2d Cir. 1979) (admiralty); *Lea Brilmayer et al.*, *supra* note 30, at 655 (The *Shaffer* opinion "does not determine whether a defendant's ownership of unrelated property in the forum might sometimes constitute a countable contact, or even a sufficient contact by itself.").

were to rule that foreign businesses are not entitled to the same jurisdictional rules available to citizens, it could then begin the process of fashioning a new law of personal jurisdiction more appropriate for the increased global nature of the world today. My hope is that the Court will be much more protective of United States citizens who are injured by foreign businesses, whether here or in other countries. Even if the Justices (and my readers) are not convinced by my arguments, at least this aspect of jurisdiction should be reconsidered without the baggage of rules that were designed for a smaller world made up of fifty co-equal sovereigns.