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PERSONAL JURISDICTION IN THE TWENTY-FIRST CENTURY: THE IRONIC LEGACY OF JUSTICE BRENNAN

Richard D. Freer*

The two cases on which this symposium focuses—*J. McIntyre Machinery, Ltd. v. Nicastro*[1] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*[2]—are the Supreme Court's first efforts at applying *International Shoe Co. v. Washington*[3] since the *Burnham v. Superior Court*[4] decision in 1990. Remarkably, they are the first cases since the Eisenhower Administration in which the Court has applied *International Shoe* without the participation of Justice William J. Brennan. From *McGee v. International Life Insurance Co.*[5] in 1957 through *Burnham*, Brennan was there.[6] And no Justice wrote more personal jurisdiction opinions than he. During that span, the Court applied *International Shoe* to determine the constitutionality of personal jurisdiction over

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*Robert Howell Hall Professor of Law, Emory University. I am indebted to Tom Arthur, Collin Freer, Peter Hay, and Rocky Rhodes for comments on an earlier draft. I also thank Arthur Miller, Wendy Perdue, Allan Stein, Adam Steinman, and Howard Stravitz for helpful discussion. And I am very grateful to Professor Stravitz and the *South Carolina Law Review* for inviting me to participate in this Symposium.

1. 131 S. Ct. 2780 (2011).
2. 131 S. Ct. 2846 (2011).
3. 326 U.S. 310 (1945).
4. 495 U.S. 604 (1990).
5. 355 U.S. 220 (1957).
6. President Eisenhower appointed Brennan on October 15, 1956, and *McGee* was argued on November 20, 1957. *Id.*; *see* Rodney A. Grunes & Jon Veen, *Justice Brennan, Catholicism, and the Establishment Clause*, 35 U.S.F. L. REV. 527, 538 (2001). Brennan retired on July 20, 1990, and *Burnham* had been decided on May 29, 1990. *Burnham*, 495 U.S. at 604; Grunes & Veen, *supra*, at 539.

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a non-consenting nonresident in twelve cases.[7] In that dozen, Brennan wrote nine opinions.[8] Yet, for all his efforts to explain his position and persuade his colleagues, he commanded a majority only once, in *Burger King*.[9]

Brennan waged two major battles with his colleagues about *International Shoe*. The first, through 1984, concerned methodology. Brennan espoused what can be called a "mélange" approach, under which all factors relevant to an *International Shoe* analysis—contact, state's interest, burden on the defendant, etc.—are considered together ad hoc to assess jurisdiction under a general rubric of fairness.[10] Ultimately, Brennan lost this battle. The Court adopted a rigid, defendant-centric, two-step model in which the issue of contact between the defendant and the forum is primary.[11] Only if a defendant-initiated contact is established will a court consider the fairness and reasonableness of jurisdiction.[12] In other words, if the defendant does not create a contact with the forum, there

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7. *Burnham*, 495 U.S. at 604; Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); *McGee*, 355 U.S. at 220.

I do not include *Phillips Petroleum Co. v. Shutts*, because it upheld personal jurisdiction over plaintiff class members on the basis of consent, and not through the application of *International Shoe*. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814 (1985). Similarly, I do not include *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, which upheld jurisdiction based upon waiver. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982).

Of the twelve, ten cases involved the exercise of in personam jurisdiction and two, *Rush* and *Shaffer*, involved the attempted invocation of quasi in rem jurisdiction. *Burnham*, 495 U.S. at 607–28; *Asahi*, 480 U.S. at 106; *Burger King*, 471 U.S. at 463–64; *Helicopteros*, 466 U.S. at 413; *Calder*, 465 U.S. at 784–85; *Keeton*, 465 U.S. at 772; *World-Wide Volkswagen*, 444 U.S. at 287; *Rush*, 444 U.S. at 322; *Kulko*, 436 U.S. at 86; *Shaffer*, 433 U.S. at 196; *Hanson*, 357 U.S. at 250–51; *McGee*, 355 U.S. at 220.

8. *Burnham*, 495 U.S. at 628–40 (Brennan, J., concurring); *Asahi*, 480 U.S. at 116–21 (Brennan, J., concurring); *Burger King*, 471 U.S. at 463–87 (majority opinion); *Helicopteros*, 466 U.S. at 419–28 (Brennan, J., dissenting); *Keeton*, 465 U.S. at 782 (Brennan, J., concurring); *World-Wide Volkswagen*, 444 U.S. at 299–313 (Brennan, J., dissenting); *Rush*, 444 U.S. at 299–313, 333 (Brennan, J., dissenting); *Kulko*, 436 U.S. at 101–02 (Brennan, J., dissenting); *Shaffer*, 433 U.S. at 219–28 (Brennan, J., concurring in part and dissenting in part).

The Court may be particularly fractious in addressing personal jurisdiction. Of the twelve cases, only two (*McGee* and *Calder*) were unanimous. *Calder*, 465 U.S. at 784; *McGee*, 355 U.S. at 224. In *McGee*, Justice Black wrote for eight Justices—Chief Justice Warren did not participate in the case. *McGee*, 355 U.S. at 220, 224. Brennan's independence is shown by the fact that he joined another Justice's majority opinion only twice—in *McGee*, unanimous opinion by Justice Black, and *Calder*, unanimous opinion by Justice Rehnquist—and joined another Justice's dissent only once, Justice Black's dissent in *Hanson*. *Calder*, 465 U.S. at 784; *Hanson*, 357 U.S. at 256 (Black, J., dissenting); *McGee*, 355 U.S. at 221.

9. 471 U.S. at 463.

10. *See infra* Part I.

11. *See infra* text accompanying notes 124–125.

12. *See infra* text accompanying notes 128–131.

cannot be jurisdiction, no matter how convenient the forum or compelling the forum state's interest or the plaintiff's need.

Brennan acceded to the two-step approach in 1985.[13] Doing so allowed him to write the majority opinion in *Burger King*.[14] With that case, Brennan began his second battle, over how to apply the two-step approach.[15] Brennan cleverly imported into his *Burger King* opinion ideas from his dissents, in an effort to moderate the defendant-centered thrust of the now-regnant methodology.[16] The impact of that effort is difficult to assess, though, because the remaining personal jurisdiction cases of Brennan's career, *Asahi* and *Burnham*, resulted in frustrating 4-to-4 splits, with Brennan espousing one of two equally adopted views.[17]

Now we have a new century and two new cases. Brennan has not been forgotten. All three opinions in *J. McIntyre* quote or discuss aspects of his personal jurisdiction jurisprudence,[18] as does the unanimous opinion in *Goodyear*.[19] But, has Brennan been influential? My goal is to trace Brennan's personal jurisdiction jurisprudence and assess its imprint, if any, in the new decisions. The scorecard will say no: *J. McIntyre* and *Goodyear* reject much of what Brennan advocated.[20] Brennan would be especially displeased with the parsimonious views of Justice Kennedy and Justice Breyer, speaking for six Justices in *J. McIntyre*, concerning what constitutes a relevant contact under *International Shoe*.[21] Brennan's views on general jurisdiction are largely rejected in *Goodyear,* which he would undoubtedly view as too limiting.[22]

I will argue that Brennan, through a part of *Burger King* that is often overlooked, has had an influence and indeed is responsible for the parsimony seen in the new cases, particularly *J. McIntyre*. In *Burger King*, Brennan created a presumption that jurisdiction will be proper when the defendant has relevant contacts with the forum.[23] He placed an inordinately high burden on the defendant to overcome that burden.[24] As a result, a defendant will find it virtually impossible to escape jurisdiction by appealing to fairness factors. Accordingly, the only realistic option for a court wishing to reject personal jurisdiction is to find that the defendant has not forged relevant contacts with the

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13. *See infra* text accompanying note 158.
14. 471 U.S. at 463.
15. *See infra* Part II.
16. *See infra* Part II.
17. Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).
18. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788–89 (2011) (plurality opinion of Kennedy, J.); *id.* at 2792 (Breyer, J., concurring); *id.* at 2803 (Ginsburg, J., dissenting).
19. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011).
20. *See infra* Part III.
21. *See infra* Part III.A.
22. *See infra* Part III.B.
23. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).
24. *See id.*

forum. This explains why Justices Kennedy and Breyer do not even discuss whether the exercise of jurisdiction over J. McIntyre in New Jersey would be fair. They place all their eggs in the contact basket and strain to conclude that there was none. Thus, the Brennan legacy is ironic and unintended: the leading advocate of a flexible, fairness-based assessment of personal jurisdiction forced the Court not only to focus on contact, but to adopt a cramped and unaccommodating view of it.

I. BRENNAN'S FIRST BATTLE: THE MÉLANGE APPROACH

A. The Influence of Justice Black

International Shoe put a variety of topics on the table for assessing the constitutionality of personal jurisdiction. The iconic quotation from the opinion is that the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[25] The Court noted that "[a]n 'estimate of the inconveniences' which would result to the [defendant] from a trial away from its 'home'"[26] is relevant, as are considerations of the "quality and nature of the activity in relation to the fair and orderly administration of the laws" and whether a defendant "exercise[d] the privilege of conducting activities within a state."[27] Subsequent cases add factors such as purposeful availment[28] and foreseeability.[29] Nowhere, however, did *International Shoe* prescribe an order in which such things should be addressed. Brennan long advocated that the *International Shoe* factors should be approached in a gestalt manner—that all relevant issues be considered at once, guided by overall principles of fairness.[30]

Brennan learned this mélange approach from Justice Black. Brennan came to the Supreme Court[31] just as Black was taking the lead in shaping the

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25. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

26. *Id.* at 317 (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

27. *Id.* at 319.

28. *See infra* text accompanying notes 76–81.

29. *See infra* text accompanying notes 130–131 and accompanying text.

30. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (Justice Kennedy characterizing Brennan's approach in the *Asahi* cases as "advocating a rule based on general notions of fairness and foreseeability"); *see also infra* note 242.

31. Before President Eisenhower appointed him to the Supreme Court, Brennan had served on all three levels of the New Jersey judiciary. Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME LAW. 321, 323 (1958). He was appointed to the trial bench on the Law Division of the Superior Court in January 1949. *Id.* After twenty-one months, he was elevated to the Appellate Division of the Superior Court. *Id.* He served there only eighteen months before going to the New Jersey Supreme Court in 1952. *Id.* Four and a half years later, he was appointed to the Supreme Court. *Id.* at 324.

interpretation of *International Shoe*.[32] Black appears to have been a reluctant convert. His separate opinion in *International Shoe* asked, in essence: why re-characterize jurisdictional doctrine in an easy case—one for which there was no doubt under existing case law about "doing business"?[33] He criticized the injection of "uncertain elements" and imprecise terms such as "fair play" and "substantial justice"—theretofore used only as "additional reasons" for holdings—as the constitutional standard.[34] His caution was born of fear that the Court would use these open-ended concepts to restrict state-court jurisdiction.[35]

To avoid that possibility, Black seized the reins to mold a broad interpretation. By the time Brennan got to Washington, the Court had cited *International Shoe* in twelve cases. Of those, only two were honest-to-goodness personal jurisdiction cases.[36] One of these was the general jurisdiction decision

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32. Though I found no record of decisions by Brennan on the New Jersey trial court or Appellate Division, the New Jersey Supreme Court cited *International Shoe* in four personal jurisdiction cases during Brennan's tenure there. Farone v. Habel, 123 A.2d 506, 509 (N.J. 1956); Korff v. G & G Corp., 122 A.2d 889, 896 (N.J. 1956); Whalen v. Young, 104 A.2d 678, 682 (N.J. 1954); A & M Trading Corp. v. Pa. R. Co., 100 A.2d 513, 516 (N.J. 1953). Brennan wrote no opinions in these cases, but his record was the same as it would be on the Supreme Court. When the New Jersey court upheld jurisdiction, he joined the majority. *Farone*, 123 A.2d at 511; *Korff*, 122 A.2d at 897; *A & M Trading Corp.*, 100 A.2d at 518. When it rejected jurisdiction, he dissented. *Whalen*, 104 A.2d at 684.

Whalen was a wrongful death case brought by the estate of a New Jersey man killed in a collision with a vehicle operated by a nonresident and owned by another nonresident. *Id.* at 679. In a 4-to-3 decision, the court rejected jurisdiction over the owner concerning an indemnity claim. *Id.* at 683–84. The court cited *International Shoe* twice, but based its constitutional decision on implied consent; the case was more about *Hess v. Pawloski*, 274 U.S. 352 (1927), than about *International Shoe*. *Whalen*, 104 A.2d at 682–83. Brennan is recorded as one of the three justices who would have upheld jurisdiction. *Id.* at 684. Frustratingly, however, the state practice was to list justices for and against reversal of the lower court and not to publish dissenting opinions. Nowhere, then, do we find a discussion by Brennan or others as to why they would have upheld jurisdiction.

33. *See Int'l Shoe*, 326 U.S. at 322–26 (Black, J.).

34. *Id.* at 323–25 ("There is a strong emotional appeal in the words 'fair play,' 'justice,' and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives.").

35. *Id.* at 325 ("Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for the corporation to be sued somewhere else.").

36. In ten of the twelve cases, Black did not write the majority opinion. Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953) (discussed *infra* at note 65); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574–75 (1949) (Jackson, J.) (state ad valorem tax violates corporation's equal protection right and citing *International Shoe* as not affecting the notion that corporations are entitled to Fourteenth Amendment equal protection); United States v. Scophony Corp., 333 U.S. 795, 818 (1948) (British corporation exploiting inventions in United States subject to Clayton Act, and service where agent "transacting business" constituted a proper venue, and citing *International Shoe* for proposition that service of process on agent in district was not unfair); Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 551 (1948) (upholding escheat to New York of unclaimed insurance funds, and citing *International Shoe* that it is "reasonable and just" to enforce insurance contract obligations in New York); Adamson v. California, 332 U.S. 46, 77–78, 91 (1947) (Black, J.,

of *Perkins v. Benguet Consolidated Mining Co.*, in which Black concurred in the judgment without opinion.[37] The other was *Travelers Health Ass'n v. Virginia*, in which Black wrote for the Court.[38] The year after Brennan joined the Court, Black authored the unanimous opinion in *McGee*.[39] Thus, Black wrote for the Court in the first two specific jurisdiction cases applying *International Shoe*. Both *Travelers Health* and *McGee* were suits against out-of-state insurers.[40] In each, Black employed an unstructured mélange approach.

Travelers Health upheld a Virginia blue sky law that required out-of-state companies to obtain a license before offering to sell securities, including certificates of insurance, in the Commonwealth; such businesses were required to appoint a state officer to receive process.[41] Travelers was a nonprofit health insurance association, formed and operating in Nebraska.[42] Members paid an initiation fee and periodic assessment to the office in Omaha.[43] The association had no paid agents and relied on recommendations from existing members.[44] When a member recommended someone, the Omaha office would solicit him by mail.[45] Travelers had done such business in Virginia for four decades and had about 800 members there.[46]

The Virginia Corporation Commission filed a cease and desist proceeding against the association and an officer.[47] The defendants appeared specially and moved to quash.[48] After the Virginia courts upheld jurisdiction, the Supreme

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dissenting) (referencing *International Shoe* regarding the Bill of Rights and noting that Black disagrees with the majority's test: whether the absence of the right is contrary to "natural justice"); W. Publ'g Co. v. McColgan, 328 U.S. 823 (1946) (per curiam) (providing a one sentence affirmation of the lower court where *International Shoe* is included in a string citation without discussion); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 411–12 n.4, 416 n.14, 433 n.43, 436 (1946) (state tax on insurance company upheld in light of the McCarran Act, and *International Shoe* is cited in three footnotes without discussion); Griffin v. Griffin, 327 U.S. 220, 228, 233–34 (1946) (New York judgment regarding alimony arrearage void for lack of notice, though notice was given in earlier related suit, and *International Shoe* is cited as a case in which notice was proper); *id.* at 237–38, 248 (Rutledge, J., dissenting) (Black joins Rutledge's dissent, which cites *Pennoyer* three times and never cites *International Shoe*); Nippert v. City of Richmond, 327 U.S. 416, 422, 434–35 (1946) (local ordinance on drummers violates commerce clause, and citing *International Shoe* as part of an argument that it expanded the notion of what constituted "doing business," to which Black dissented without opinion); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946) (upholding service of process on designated corporate agent, and *International Shoe* is cited for the proposition that service of process renders the corporation "'present' there for purposes of service").

37. 342 U.S. 437, 449 (1952).
38. 339 U.S. 643, 644 (1950).
39. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957).
40. *Id.*; *Travelers Health*, 339 U.S. at 645.
41. *Travelers Health*, 339 U.S. at 646–47.
42. *Id.* at 645.
43. *Id.* 645–46.
44. *Id.* at 646.
45. *Id.*
46. *Id.*
47. *Id.* at 645.
48. *Id.*

Court rejected defendants' due process objections.[49] It held that, "the state has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth."[50]

Black's opinion on the personal jurisdiction point, the Court's first application of *International Shoe*, comprises three paragraphs.[51] It mixes aspects of contact and state's interest in the very first sentence: "[T]he contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings . . . ."[52] In terms that presage *McGee*, he spoke of solicitation, and raised the notion of a social contract, a quid pro quo:

> [The association's] insurance certificates, systematically and widely delivered in Virginia following solicitation based on recommendations of Virginians, create continuing obligations between the Association and each of the many certificate holders in the state. Appellants have caused claims for losses to be investigated and the Virginia courts were available to them in seeking to enforce obligations created by the group of certificates.[53]

The next paragraph focuses on the unfairness that would result if Virginia lacked jurisdiction: "[C]laims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit."[54] Moreover, Virginia is the center of gravity, "where witnesses would most likely live and where claims for losses would presumably be investigated."[55] Black notes that "such factors have been given great weight in applying the doctrine of *forum non conveniens*," and that it is often unfair to require plaintiffs to "seek redress only in some distant state where the insurer is incorporated."[56] Then the state's interest reappears: "The Due Process Clause does not forbid a state to protect its citizens from such injustice."[57] Finally, Black appeals broadly: "Metaphysical concepts of 'implied consent' and 'presence' in a state should not be solidified into a constitutional barrier against Virginia's simple, direct and fair plan for service of process on the Secretary of the Commonwealth."[58]

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49. *Id.* at 647.
50. *Id.*
51. *Id.* at 648–49.
52. *Id.* at 648.
53. *Id.*
54. *Id.* at 649.
55. *Id.*
56. *Id.* (citations omitted) (analogizing this point to *International Shoe*).
57. *Id.* at 649.
58. *Id.* The Court then addressed and rejected the argument that the Virginia statute impermissibly impaired the right to make contracts. *Id.* at 650. Black's opinion was signed by five other Justices. *See id.* at 651, 655. Justice Douglas concurred separately. *Id.* at 651. Interestingly,

Seven years later, then with Brennan onboard, Black wrote the majority opinion in *McGee*.[59] Again, he adopted the mélange approach, in one paragraph going from contact, to state's interest, to burden on plaintiffs, to forum non conveniens factors:

> [W]e think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality.[60]

Two aspects of Black's effort in *McGee* deserve note because they would resonate in Brennan opinions for decades. First, Black's view of contact is quite broad. He did not focus on contacts between the defendant and the forum. Rather, he concluded that due process was provided because "the suit was based on a contract which had substantial connection with [the forum] State."[61] In other words, the relationship between the parties—the contract and the litigation—might be sufficiently related to satisfy any requirement of a contact between defendant and the forum.

Second, though the holding required the insurance company to defend in California, the burden was not of constitutional significance.[62] Black focused on the "fundamental transformation of our national economy."[63] Because interstate business was increasingly routine, so were opportunities that defendants would

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Justice Minton, joined by Justice Jackson, dissented. *Id.* at 655. They distinguished *International Shoe* as involving agents operating in the forum, on whom service was effected. *Id.* at 658–59. Citing *Pennoyer*, they said: "An *in personam* judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia." *Id.* at 658 (citing Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 22–23 (1907); Pennoyer v. Neff, 95 U.S. 714 (1878)).

59. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957).

60. *Id.* at 223 (citations omitted).

61. *Id.*

62. *Id.* at 224.

63. *Id.* at 222.

be sued in multiple states.[64] Thus, to Black, "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[65] Moreover, "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[66]

Through 1957, then, the Court had applied *International Shoe* twice in specific jurisdiction cases. Black wrote for the Court in both cases and firmly established a mélange approach aimed at an overall determination of whether jurisdiction would be fair on the facts of a case. Another case reflecting this common sense approach was *Mullane v. Central Hanover Bank & Trust Co.*,[67] which upheld New York's authority to bind thousands of beneficiaries of small pooled trusts to an accounting by the fiduciary.[68] Though Justice Jackson's opinion for the majority of the Court did not cite *International Shoe*, it undertook the same flexible, practical analysis Black used in *Travelers Health* and *McGee*.[69] Thus, the state's interest in "providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident."[70]

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64. *Id.* at 222–23.

65. *Id.* at 222. In light of this transformation, the "Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power." *Id.*

Another case is noteworthy. In *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 664 (1953), the defendant removed a defamation case to federal court. The lower courts dismissed for improper venue, holding that the general venue statute as then written, which permitted venue where the defendant was "doing business," was not met. *Id.* at 664–65. The Supreme Court reversed, holding that the venue statute did not apply in cases removed from state court. *Id.* at 666. In a spirited dissent, Black criticized the majority for ducking the "doing business" question. *Id.* at 668–70 (Black, J., dissenting). He noted as follows:

> There may have been some reason for snarling up lawsuits against foreign corporations a hundred years ago . . . . But there is no such excuse now. A large part of the business in each and every state is done today by corporations created under the laws of other states. To adjust the practical administration of law to this situation the Court in recent years has refused to be bound by old rigid concepts about "doing business." Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness.

Id. at 669–70.

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

67. 339 U.S. 306 (1950).

68. *See id.* at 307–08, 320. The case is best known for establishing the constitutional standard for notice. *See, e.g., id.* at 307 ("This controversy questions the constitutional sufficiency of notice . . . ."). I am grateful to Arthur Miller for pointing out in discussion at the Symposium the relevance of the personal jurisdiction holding of *Mullane*.

69. *See* Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 936 (1995) (noting that Justice Jackson's analysis in *Mullane* "reflected the hard-nosed, commonsense pragmatism traditionally associated with the procedural due process inquiry").

70. *Mullane*, 339 U.S. at 313.

Surprisingly—especially in view of the fact that *McGee* was a unanimous opinion[71]—the mélange approach was not to last. Only eight Justices participated in *McGee*, because Chief Justice Warren recused.[72] Somehow, less than seven months later, Warren seized the majority in the 5-to-4 decision in *Hanson*,[73] and took the Court in a decidedly different direction.[74]

Hanson held that Florida did not have personal jurisdiction over a Delaware trustee in a case concerning the validity of a power of appointment.[75] The majority rejected jurisdiction in terms foreign to *Travelers Health* and *McGee*. In *Hanson*, we see no concern for the state's interest or relative conveniences of the parties. The Court does not look at whether the *relationship* among the parties was connected to the forum. Instead, the focus is narrowly on whether the *defendant itself* had created sufficient ties with that state. Warren asserted that "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[76] Accordingly, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[77]

Florida lacked personal jurisdiction over the Delaware trustee because that trustee had not purposefully availed itself of Florida.[78] True, it had engaged in transactions over eight years with the settlor in Florida, but only because the settlor had moved to that state.[79] Because the trustee was an indispensable party

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71. *See McGee*, 355 U.S. at 224.

72. *Id.*

73. Hanson v. Denckla, 357 U.S. 235, 238, 256, 262 (1958).

74. *See* Redish & Beste, *supra* note 69, at 919 ("At some point in the late 1950s, the Supreme Court took a wrong turn. It was at that time that the Court abandoned the pragmatic balancing analysis traditionally associated with procedural due process and replaced it with a somewhat streamlined—but ultimately equally rigid—brand of abstract formalism in its jurisdictional analysis." (citing *Hanson*, 357 U.S. 235)); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 402 (2012) [hereinafter Rhodes, *Nineteenth Century*] ("*Hanson* was a dramatic jurisprudential shift from the Court's other decisions since *International Shoe*, which predominantly relied upon balancing state interests and litigation burdens to evaluate the propriety of jurisdiction." (citations omitted)); Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 740 (1988) ("Ignoring *McGee*'s multiple-interest, fairness analysis, the Court focused sharply on the nonresident defendant's relationship with the forum state.").

75. *Hanson*, 357 U.S. at 254–55. I have always wondered if the majority was swayed by its view of the merits. The Court seems bent on ensuring that one branch of the family not recover from the estate of the decedent at the expense of another branch. *See id.* at 240. The finding that Florida lacked personal jurisdiction accomplished that. *See id.* ("Residuary legatees Denckla and Stewart, already the recipients of over $500,000 each, urge that the power of appointment over the $400,000 appointed to sister Elizabeth's children was not 'effectively exercised' and that the property should accordingly pass to them.").

76. *Id.* at 253 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

77. *Id.*

78. *Id.* at 254.

79. *Id.* at 239.

in the case, which was a dispute among potential takers from a Florida settlor in an estate being probated in Florida, Florida's judgment could not be upheld.[80] To Warren, the acts of the defendant, rather than the location of the controversy, was the predominant factor:

> [The state] does not acquire . . . jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[81]

In other words, if there is no contact caused by purposeful availment, there can be no jurisdiction.

Black dissented, joined by Justices Brennan and Burton.[82] The dissent sounded two familiar themes: (1) the Court should adopt a broader view of contact, and (2) general principles of fairness, including forum non conveniens factors, should be part of the calculus.[83] Black's view of contact—looking at the relationship as a whole—reflects his unanimous opinion in *McGee* just months earlier:

> [W]here a *transaction* has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."[84]

And there was no such unfairness, Black argued, because the "principal contenders for Mrs. Donner's largess" were citizens of Florida, and the Delaware trustee "chose to maintain business relations with Mrs. Donner in that State for eight years."[85]

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80. *Id.* at 254. The majority's holding that there was no personal jurisdiction over the trustee allowed the Court to dismiss the case under Florida law of indispensability. *Id.* at 254–55. Black argued that the question of whether the trustee was indispensable should have been decided in the first instance by the Florida courts. *Id.* at 261–62 (Black, J., dissenting).

81. *Id.* at 254 (majority opinion).

82. *Id.* at 256 (Black, J., dissenting). Justice Douglas dissented separately. *Id.* at 262 (Douglas, J., dissenting).

83. *Id.* at 256–62 (Black, J., dissenting).

84. *Id.* at 258–59 (emphasis added) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Later, he reiterated: "[W]e are dealing with litigation arising from a *transaction* that had an abundance of close and substantial connections with the State of Florida." *Id.* at 260 (emphasis added). Further, Black decried the majority's obsession with contact through purposeful availment, noting that "the old jurisdictional landmarks have been left far behind," and that "further relaxation seems certain." *Id.*

85. *Id.* at 259.

Hanson was Black's last personal jurisdiction case.[86] In fact, the Court left the area for nineteen years.[87] When it returned, in a flurry of cases from 1977 through 1985, *Hanson's* focus on a defendant-initiated contact with the forum came to dominate. In the ten remaining personal jurisdiction cases of the twentieth century—after *Hanson* and through 1990—the Court would reject jurisdiction in seven. In six of those, the holding would be that there was no relevant contact. Eventually, in *World-Wide Volkswagen*, the Court adopted a rigid two-step methodology which expressly relegated considerations of fairness to secondary status. Through 1984, Brennan doggedly resisted this move.

B. Brennan in the Wilderness

From 1977 through 1984, the Court rejected jurisdiction on lack of contact grounds in five cases: *Shaffer*, *Kulko*, *World-Wide Volkswagen*, *Rush*, and *Helicopteros*.[88] Brennan dissented in each.[89] In the other two, *Keeton* and *Calder*, it upheld jurisdiction and Brennan agreed; even here, though, he concurred separately in one.[90] A review of the cases shows Brennan continually advocating the two central points made by Black in his dissent in *Hanson*: a broad concept of contact and consideration of general factors of center-of-gravity and fairness. Along the way, Brennan would develop two ideas—one concerning claims that "relate to" rather than "arise from" defendant's contact with the forum and a sliding scale approach—that he would use when he finally got his chance to write a majority opinion.

In *Shaffer v. Heitner,* the Court held that *International Shoe* applies to assess the validity of quasi-in-rem jurisdiction, but, on the facts of the case, rejected jurisdiction in Delaware over directors and officers in a derivative suit.[91]

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86. *See* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 850–51 (1995) (providing a timeline of personal jurisdiction cases); John P. Frank, Address, *The Shelf Life of Justice Hugo L. Black*, 1997 WIS. L. REV. 1, 1 (1997) (Justice Black was "a justice of the Court from 1937 to 1971.").

87. *See* Cameron & Johnson, *supra* note 86, at 850–51.

88. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418–19 (1984); Rush v. Savchuk, 444 U.S. 320, 332–33 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980); Kulko v. Superior Court, 436 U.S. 84, 101 (1978); Shaffer v. Heitner, 433 U.S. 186, 216–17 (1977).

89. *Helicopteros*, 466 U.S. at 419 (Brennan, J., dissenting); *Rush*, 444 U.S. at 333 (Brennan's dissent in *World-Wide Volkswagen* also applies to this case); *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting); *Kulko*, 436 U.S. at 101 (Brennan, J., dissenting); *Shaffer*, 433 U.S. at 219 (Brennan, J., concurring in part and dissenting in part).

90. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 782 (1984) (Brennan, J., concurring); Calder v. Jones, 465 U.S. 783, 791 (1984).

91. 433 U.S. at 212, 216–17. Justice Marshall wrote the majority opinion. *Id.* at 189. Justice Powell concurred but offered cautionary language about the application of the holding in realty cases. *See id.* at 217 (Powell, J., concurring). Justice Stevens concurred in the judgment. *Id.* (Stevens, J., concurring). Justice Rehnquist did not participate in the case. *Id.* at 217 (majority opinion).

Brennan agreed that *International Shoe* should govern, but dissented from the majority's application of that case to reject jurisdiction.[92] Interestingly, Justice Marshall's opinion for the Court started with a broad statement of the contact component, one that echoed Black's opinions in *Travelers Health* and *McGee*. It described the "central concern" of the analysis under *International Shoe* to be "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States."[93] This phrase seems less focused on defendant-initiated contact than *Hanson*.

In application, however, the majority opinion was narrowly defendant-centered; indeed, it was *Pennoyer*-like in focusing on traditional personal jurisdiction factors.[94] The Court noted that the defendants had never set foot in the forum.[95] It rejected the plaintiff's contention that accepting employment as fiduciaries of a Delaware corporation constituted a relevant contact.[96] It did so by transforming it into traditional terms of consent, and concluded that Delaware's failure to legislate that fiduciaries consent to jurisdiction undercut any state's interest.[97] The majority concluded that the defendants had no relevant contact with Delaware.[98]

Brennan took the majority to task in terms reminiscent of Black's dissent in *Hanson*, principally arguing that modern doctrine engages more than a concern for the defendant.[99] To Brennan, the forum state had a "powerful interest in insuring the availability of a convenient forum" in derivative litigation and "valid substantive interests."[100] Regarding contact, he again looked to the broader relationship among the defendants, the forum, and the litigation. By voluntarily accepting a fiduciary office in a Delaware corporation, each defendant had "invoke[d] the benefits and protections of its laws."[101] And nothing in the record convinced Brennan that jurisdiction would be unfair.[102]

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92. *See id.* at 219–20 (Brennan, J., dissenting).

93. *Id.* at 203–04 (majority opinion).

94. *See id.* at 213–17; Pennoyer v. Neff, 95 U.S. 714 (1878) (setting forth traditional power-based predicates of personal jurisdiction).

95. *Shaffer*, 433 U.S. at 213.

96. *See id.* at 214.

97. *Id.* at 216.

98. *Id.* at 216–17.

99. *Id.* at 222–28 (Brennan, J., dissenting).

100. *Id.* at 222–23. These interests included: (1) restitution for local corporations allegedly victimized by fiduciary misconduct, (2) a "manifest regulatory interest" in corporate governance and responsibility, and (3) a convenient forum for overseeing the affairs of a business it chartered. *Id.* at 223.

101. *Id.* at 227–28 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

102. *Id.* at 228. The record was meager because the Delaware court did not undertake an *International Shoe* analysis. *See id.* at 196 (majority opinion). Brennan criticized the majority for undertaking such an analysis and urged remand for the state court to do so in the first instance. *Id.* at 221 (Brennan, J., dissenting). By ruling on whether *International Shoe* was satisfied, the Court was guilty, in Brennan's view, of issuing an advisory opinion. *Id.* at 220 ("[A] purer example of an advisory opinion is not to be found.").

The following year, the Court decided *Kulko*.[103] The majority concluded that a father's purchasing a one-way ticket for one of his children to move from New York to California to live with their mother (his ex-wife) could not sustain personal jurisdiction in California for a child-support claim.[104] Here, curiously, the Court stated the basic contact test more narrowly than it had in *Shaffer*. Instead of looking for contact among the defendant, the forum, and the litigation, the focus was defendant-centric again: "[A] sufficient connection between the defendant and the forum State . . . ."[105] The majority found no such connection.[106] Interestingly, the Court suggested that jurisdiction also would not be fair, in part because of substantive social policies; specifically, upholding jurisdiction would dissuade divorced parents from acquiescing in a child's desire to live with the other parent.[107] This consideration of fairness seems odd in light of the conclusion that there was no relevant contact.[108] Any thought that this might signal a return to the mélange approach, however, would be rebuffed two years later in *World-Wide Volkswagen*.

Brennan's dissent in *Kulko*, joined by two others, consisted of a single paragraph in which he acknowledged that the issue was close and agreed that the Court faced the "single narrow question" of how the facts should be weighed.[109] He simply disagreed with the way the majority weighed those facts.[110] His independent assessment led him to conclude that the father's "connection with the State of California was not too attenuated" to require him to defend there.[111]

Two years later, the Court decided companion cases, *World-Wide Volkswagen*[112] and *Rush v. Savchuk*.[113] In the former, it rejected in personam jurisdiction in Oklahoma over the New York retailer and regional distributor of an automobile involved in a wreck near Tulsa.[114] In *Rush*, the Court rejected quasi in rem jurisdiction over an Indiana driver in Minnesota, based upon

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103. Kulko v. Superior Court, 436 U.S. 84 (1978).

104. *Id.* at 101.

105. *Id.* at 91 (citing Milliken v. Meyer, 311 U.S. 457, 463–64 (1940)).

106. *Id.* at 92.

107. *See id.* at 93, 98–101. In *World-Wide Volkswagen*, the Court cited this aspect of *Kulko* as relevant to "the shared interest of the several States in furthering fundamental substantive social policies." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citing *Kulko*, 436 U.S. at 93, 98).

108. *See* Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 602 (1998) ("[T]he Court in *Calder* mystifyingly ignored its purposeful availment standard, albeit without acknowledging that it was doing so. Instead . . . it employed the very center-of-gravity 'focal point' jurisdictional analysis that it had expressly rejected on previous occasions.").

109. *Kulko*, 436 U.S. at 101 (Brennan, J., dissenting) (quoting *id.* at 92).

110. *Id.* at 102.

111. *Id.*

112. 444 U.S. 286.

113. Rush v. Savchuk, 444 U.S. 320 (1980).

114. *World-Wide Volkswagen*, 444 U.S. at 288–89, 295.

garnishment of the contractual obligation of an insurance company to defend and indemnify the driver.[115]

The majority opinion in *World-Wide Volkswagen* embraced the strongest defendant-centric focus yet. There is no talk of connections "among the defendant[s], the forum, and the litigation," as in *Shaffer*.[116] Instead, as in *Kulko*, there must be minimum contacts "between the defendant and the forum State."[117] The focus is on the "defendant's conduct and connection with the forum State."[118]

Whatever one thinks of the result and the methodology, Justice White's majority opinion in *World-Wide Volkswagen* at least brought clarity on four fronts. First, the *International Shoe* test consists of two parts: contact and fairness.[119] The two prongs are animated by different concerns; contact reflects interstate federalism, while fairness reflects the defendant's due process liberty interest.[120] Two years afterward, the Court changed its mind in *Insurance Corp. of Ireland*, and held that due process protects only the defendant's liberty interest.[121] One would think the repudiation of the interstate federalism justification of personal jurisdiction doctrine would cause the Court to reconsider its two-pronged approach.[122] It did not do so, however. Even Brennan himself—in *Burger King*, decided three years after *Insurance Corp. of Ireland*—paid obeisance to the two analytical prongs.[123]

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115. *Rush*, 444 U.S. at 322–23, 333. This practice had become known as "*Seider* jurisdiction." *Id.* at 325 (citing Seider v. Roth, 216 N.E.2d 312 (N.Y. 1966)).

116. *World-Wide Volkswagen*, 444 U.S. at 313 (Brennan, J., dissenting) (alteration in original) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (internal quotation marks omitted).

117. *Id.* at 291 (majority opinion) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

118. *Id.* at 297.

119. *See id.* at 291–92.

120. *Id.* at 292. In *Hanson*, the Court said that due process restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." Hanson v. Denckla, 357 U.S. 235, 251 (1958).

121. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

122. *See* Redish & Beste, *supra* note 69, at 940 (noting that the Court failed to acknowledge the "unambiguous departure from the theoretical model underlying *World-Wide*'s purposeful availment test or (more importantly) even consider the possibility that *World-Wide*'s doctrinal standard should be altered in light of the apparent rejection of that standard's underlying theoretical structure"). Just one year after *World-Wide Volkswagen*, and before *Insurance Corp. of Ireland*, Professor Redish argued that nothing in the language or history of the Due Process Clause of the Fourteenth Amendment "would lead one to believe that interstate sovereignty concerns would play any role in its interpretation." Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1120 (1981). *See also* Stravitz, *supra* note 74, at 779 (suggesting that *Insurance Corp.* should have led to rethinking of contact as a due process requirement for personal jurisdiction).

123. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). Professor Stein has demonstrated that personal jurisdiction, while embracing a liberty interest, "reflect[s] the general limits on state sovereignty inherent in a federal system." Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 689 (1987).

Second, the majority makes clear, as the Court strongly implied in *Hanson*, that a court must assess contact first.[124] Without a relevant contact, there simply can be no jurisdiction, even if the forum would not be unfair.[125] Thus, once the majority in *World-Wide Volkswagen* found "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction,"[126] it engaged in no analysis of whether jurisdiction in Oklahoma would have been fair or reasonable.[127]

Third, in assessing contact, the court is to look to purposeful availment and foreseeability.[128] The former, of course, was injected by *Hanson*, and focuses on the defendant's acts; the unilateral activity of someone other than the defendant—such as the plaintiffs driving a car from New York to Oklahoma—cannot create a relevant contact between the defendant and the forum.[129] Foreseeability is new—but it is not foreseeability of the product getting to the forum. Rather, it must be foreseeable that the defendant "should reasonably anticipate being haled into court" in the forum state.[130] This requirement, that "defendant's conduct and connection with the forum State" render suit there foreseeable, permits "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[131]

Fourth, the Court collected in one place five non-exclusive factors that are relevant to assessing whether litigation in the forum is fair: (1) "burden on the defendant," (2) "forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution," and (5) "the shared interest of the several States in furthering fundamental substantive social policies."[132] This discussion was dictum because, again, the Court held there was no relevant contact. But clearly, the factors high on Black and Brennan's

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124. *World-Wide Volkswagen*, 444 U.S. at 294 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)) (citing *Hanson*, 357 U.S. at 251, 254).

125. *Id.* ("[E]ven if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (citing *Hanson*, 357 U.S. at 251, 254)).

126. *Id.* at 295.

127. *See id.* at 295–99. The Court's holding was plainly based on its finding of "no 'contacts, ties, or relations' with the State of Oklahoma." *Id.* at 299 (quoting *Int'l Shoe*, 326 U.S. at 319); *see also id.* at 297–98 (discussing *Hanson* and its requirement of purposeful availment but concluding that "there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case").

128. *See id.* at 297–98.

129. *Id.* at 297 (quoting *Hanson*, 357 U.S. at 253).

130. *Id.*

131. *Id.*

132. *Id.* at 292; *see also* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 539 (1995) ("Thus concepts usually associated with the discretionary doctrine of *forum non conveniens* were elevated to constitutional status."). Black had expressly recognized forum non conveniens factors as relevant to the assessment of personal jurisdiction in *McGee*. *See supra* text accompanying note 56.

list—state's interest, plaintiff's interest, and burden on defendant—are relegated to secondary status. They are not relevant to an assessment of contact. They relate to fairness, which is not even addressed in the absence of a relevant contact.

This rigid two-step analysis, in which fairness cannot trump a lack of contact, declared the death of the mélange approach. Brennan dissented, again arguing that the Court made too much of contact and defined contact too narrowly.[133] Quoting Black from *McGee,* Brennan asserted that *International Shoe* inherited from *Pennoyer* a "defendant focus" which was no longer appropriate given the way in which "the structure of our society has changed" since 1945.[134] The increase in interstate commerce and ease of travel meant that "the interests of the forum State and other parties" are "entitled to as much weight" as the defendant's interest.[135] The majority "focus[es] tightly on the existence of contacts between the forum and the defendant," and thus "accord[s] too little weight to the strength of the forum State's interest in the case [while] fail[ing] to explore whether there would be any actual inconvenience to the defendant."[136] Its new focus on foreseeability of suit in the forum, to Brennan, gives the defendant a "veto power" over jurisdiction, which is inappropriate in an era in which jurisdiction is no longer based upon notions of implied consent.[137]

Interestingly, Brennan here conceded that there must be a relevant contact. But his concept is broader than the majority's. For Brennan, contact may be "among the parties, the forum, and the litigation" so as to make the forum reasonable.[138] "The contacts between any two of these should not be determinative."[139] In other words, "contact" need not be limited to a tie between the defendant and the forum. Indeed, Brennan suggests that the plaintiff must show *either* "that his chosen forum State has a sufficient interest in the litigation . . . *or* sufficient contacts with the defendant."[140] This will suffice unless the forum is unfairly burdensome.[141] Brennan would uphold jurisdiction in *World-Wide Volkswagen* because "the forum State has an interest in permitting the litigation to go forward, the *litigation* is connected to the forum, the defendant is *linked* to the forum, and the burden of defending is not unreasonable."[142] Again reflecting themes from Black's opinions in the 1950s,

133. *See World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting).

134. *Id.* at 308. "The conclusion I draw is that constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary." *Id.* at 309.

135. *Id.* at 309.

136. *Id.* at 299–300.

137. *See id.* at 312.

138. *Id.*

139. *Id.* at 310.

140. *Id.* at 312 (emphasis added).

141. *See id.*

142. *Id.* at 302 (emphasis added).

Brennan asserts "that a State should have jurisdiction over a case growing out of a transaction significantly related to that State."[143]

Brennan also suggested for the first time a sliding scale: the significance of contacts should diminish if other considerations establish that jurisdiction would be fair and reasonable.[144]

Four years later, the Court upheld jurisdiction in defamation claims in *Keeton*[145] and *Calder*.[146] Justice Rehnquist wrote the majority opinions in each. *Calder* was for a unanimous Court. In *Keeton*, Brennan issued a one-paragraph opinion concurring in the judgment.[147] Here, oddly in light of *World-Wide Volkswagen*, the Court did not say that the contact assessment is focused narrowly on the defendant's ties with the forum. Instead, it quoted the broader language from *Shaffer v. Heitner*, that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'"[148]

Note the subtle distinction between this statement and Brennan's dissent in *World-Wide Volkswagen*. Both speak of the relationship among three things, two of which (the forum and the litigation) are the same in each. But the third is different. The Court speaks of "the defendant," while Brennan considers "the parties."[149] Brennan's statement is broader and opens the door to consideration of the *plaintiff's* interest. This also is reminiscent of *Travelers Health* and *McGee*, in which Black expressed concern for the impecunious or small-claim plaintiff who, without jurisdiction at home, would have to travel to a distant state to sue.[150] Beyond this, Brennan, we can assume, was pleased with the holding in *Calder*, that a defendant can be sued in a forum by causing effects there, even without physical presence.[151]

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143. *Id.* at 310; *see also id.* at 305 ("[T]he interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else." (citation omitted)).

144. *See id.* at 300.

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

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

147. 465 U.S. at 782 (Brennan, J., concurring).

148. *Calder*, 465 U.S. at 788 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)); *Keeton*, 465 U.S. at 775 (quoting *Shaffer*, 433 U.S. at 204).

149. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 312 (1980) (Brennan, J., dissenting).

150. *See supra* text accompanying notes 54–56, 59–60.

151. *See Calder*, 465 U.S. at 791. I find Brennan's concurrence in *Keeton* vexing. It consists of four sentences of original text and a quotation from *Insurance Corp. of Ireland*. *Keeton*, 465 U.S. at 782 (Brennan, J., concurring). He focuses on contact, saying the contacts between the defendants and the forum "are sufficiently important and sufficiently related to the underlying cause of action to foreclose any concern that the constitutional limits of the Due Process Clause are being violated." *Id.* "This is so," he says, "irrespective of the State's interest," which "should be relevant only to the extent that they bear upon the liberty interests of the [defendant] that are protected by the

In 1984, the Court also decided *Helicopteros*, in which the Court rejected general jurisdiction over a Colombian corporation that provided transportation services.[152] Brennan criticized the majority for ignoring the possibility that Texas had specific jurisdiction for the wrongful death case concerning a crash in Peru.[153] Brennan argued that even if the claim did not arise from the defendant's activities in the forum—which included purchasing helicopters, pilot training, technical consultation, and receiving checks drawn from a Texas bank[154]—it was sufficiently related to those activities to support jurisdiction.[155] For Brennan, the contacts were "directly and significantly *related to* the underlying claim" by the plaintiff, and thus, could support specific jurisdiction.[156]

In *Helicopteros*, Brennan continued to argue for the mélange. He continued to downplay contact, seeing the "principal focus" of *International Shoe* to be "fairness and reasonableness to the defendant."[157] By now though, he was the lone dissenter. He had lost the first battle and knew it. The following year, with *Burger King*, Brennan adopted the two-step approach from *World-Wide Volkswagen*.[158] Finally working from the inside, he attempted to moderate the harshness of the regnant methodology.

II. BRENNAN'S SECOND BATTLE: APPLYING THE TWO-STEP APPROACH

A. Burger King *and the Burden on the Defendant*

In *Burger King*, it is difficult to believe that one is reading a Brennan opinion. Gone is the language about contact being broadly gauged as the relationship "among the parties, the forum, and the litigation."[159] Instead, the defendant must have minimum contacts with the forum.[160] And, consistent with *World-Wide Volkswagen*, such contacts must result from purposeful availment

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Fourteenth Amendment." *Id.* (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982)). Is Brennan saying that the state's interest is not part of the calculus for contacts? Is he saying that the *Insurance Corp of Ireland* case, by limiting due process to protection of a liberty interest, affected what *World-Wide Volkswagen* saw as two prongs of personal jurisdiction analysis?

152. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 409, 418–19 (1984).

153. *Id.* at 419–20, 425 (Brennan, J., dissenting).

154. *See id.* at 416 (majority opinion).

155. *Id.* at 426 (Brennan, J., dissenting).

156. *Id.* (emphasis added).

157. *See id.* at 427. This is similar to *World-Wide Volkswagen* where he saw the "essential inquiry" as "whether the particular exercise of jurisdiction offends 'traditional notions of fair play and substantial justice.'" World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

158. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985) (quoting *World-Wide Volkswagen*, 444 U.S. at 292; *Int'l Shoe*, 326 U.S. at 320); Stravitz, *supra* note 74, at 777–83 (providing a detailed analysis of Brennan's opinion).

159. *World-Wide Volkswagen*, 444 U.S. at 312 (Brennan, J., dissenting).

160. *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316).

that renders it foreseeable that the defendant could get sued in the forum.[161] Brennan shows the zeal of a convert, spending several paragraphs on these points. Absent consent, one can be sued only where he "has 'purposefully directed' his activities at residents of the forum."[162] He says bluntly that "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[163] The defendant's "efforts [must be] 'purposefully directed' toward residents of another State."[164] Twice, Brennan reminds us that the unilateral act of someone other than the defendant cannot satisfy the contact requirement.[165] Rather, the contact must "proximately result from actions by the defendant himself."[166]

Of course, Brennan was not a convert. Undoubtedly, the idea that lack of purposeful contact between the defendant and the forum would obviate any consideration of state's interest and fairness was anathema. He stated fealty to the notion[167] and then tried to undo it. Specifically, he attempted to collapse the two prongs of analysis into one by importing the sliding-scale concept from his dissent in *World-Wide Volkswagen*.[168] After listing the five fairness factors from the majority opinion in that case, Brennan said: "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[169] The Court had never said this before; in this way, a notion floated in a single dissenting opinion become part of the constitutional calculus.

Brilliantly, this "forced linkage"[170] of the two prongs of analysis should make it impossible to dismiss a case without at least glancing at the fairness factors. If there is any semblance of a contact, a court must assess whether jurisdiction would be reasonable. And if the fairness factors strongly support jurisdiction—for example, if the forum state has a strong interest and the burden

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161. *Id.* at 475 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299).

162. *Id.* at 472 (quoting *Keeton*, 465 U.S. at 774). Professor Stravitz suggests that "directed," as used here, is "more inclusive" than "availed" in that "[i]t includes out-of-state actors causing in-state effects." Stravitz, *supra* note 74, at 778.

163. *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316).

164. *Id.* at 476 (quoting *Keeton*, 465 U.S. at 774).

165. *Id.* at 474–75 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984); Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

166. *Id.* at 475.

167. *See id.* at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting *Int'l Shoe*, 326 U.S. at 320)).

168. *See id.* at 476–77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)) (listing considerations to lower the minimum contacts required for jurisdiction); *see also World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting) ("[T]he significance of the contacts necessary to support jurisdiction [should] diminish if some other consideration helped establish . . . jurisdiction . . . .").

169. *Burger King*, 471 U.S. at 477.

170. Stravitz, *supra* note 74, at 775.

on defendant would be relatively slight—jurisdiction can be upheld based upon a lesser contact.

Brennan was not through. In cases of specific jurisdiction, he noted the need for purposeful availment and that "the litigation results from alleged injuries that 'arise out of or relate to' those activities."[171] Here, he alleviates his concern, expressed in *Helicopteros*, that the Court had de facto limited specific jurisdiction to cases arising *directly* from a defendant's contact with the forum.[172] This makes the relatedness assessment look more like a consideration of the broader relationship "among the parties, the forum, and the litigation" Brennan had long advocated.[173]

Brennan's attempted transformation of the *World-Wide Volkswagen* approach was clever. It is not clear, however, that it has had much impact. For instance, though two subsequent cases, *Asahi Metal Industry Co. v. Superior Court*[174] and *J. McIntyre Machinery, Ltd. v. Nicastro*,[175] seem to cry out for application of the sliding-scale methodology, no Justice, not even Brennan himself in *Asahi*, mentioned it. Moreover, nothing has come of the "related to" notion[176] for assessing whether there is specific jurisdiction. Instead, it is a different part of the *Burger King* opinion—one which is rarely commented upon, dealing with the burden of proof[177]—that may prove influential.

Under the mélange approach, the Court did not say much about which party should bear the burden; all relevant factors were thrown into the mix at once. With the advent of the two-step model, however, the question of burden may have been pushed to the fore. Everyone seems to agree that, initially, the plaintiff must show a relevant contact between the defendant and the forum. On the facts of *Burger King*, this was easy. The defendants reached out to Florida to

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171. *Burger King*, 471 U.S. at 472 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)). For this proposition, Brennan quoted the definition of general jurisdiction proffered by *Helicopteros*—a case in which the claim did not "aris[e] out of or relate[] to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.9. Here, in *Burger King*, Brennan defines specific jurisdiction in mirror-image terms—a case involving a claim arising from "or related to" defendant's contacts. *Burger King*, 471 U.S. at 473 n.15 (quoting *Helicopteros*, 466 U.S. at 414 n.9). In *Helicopteros*, as noted above, the Court was unwilling to consider specific jurisdiction. 466 U.S. at 426 (Brennan, J., dissenting).

172. *See Helicopteros*, 466 U.S. at 426–27 (Brennan, J., dissenting).

173. Brennan quoted the majority opinion in *Helicopteros* on this point. *Burger King*, 471 U.S. at 472 (quoting *Helicopteros*, 466 U.S. at 414). Professor Stravitz argues that "the reference in the opinion to litigation that 'relates to' defendant's forum state activity is misleading. It is not clear that the Court [in *Helicopteros*] intended any distinction between the two concepts." Stravitz, *supra* note 74, at 778 n.229. Though in *Helicopteros*, Brennan drew a distinction between claims that "arise out of" and claims that "relate to" defendant's contact with the forum, "the majority refused to consider whether there was any jurisdictional significance to the distinction because it was not raised by the parties." *Id.* (citing *Helicopteros*, 466 U.S. at 415 & n.10).

174. 480 U.S. 102 (1987).

175. 131 S. Ct. 2780 (2011).

176. *Burger King*, 471 U.S. at 472 (quoting *Helicopteros*, 466 U.S. at 414).

177. *See id.* at 477–78.

enter a twenty-year relationship with a Florida business, to be overseen from Florida, and which Florida law governed.[178]

Once contact is established, Brennan leaves no doubt that the burden shifts to the defendant.[179] And it is a strikingly onerous burden. To defeat jurisdiction on the grounds of unfairness, the defendant "must present a compelling case"[180] that jurisdiction is "'so gravely difficult and inconvenient' that [he] . . . is at a 'severe disadvantage' in comparison to his opponent."[181] *Burger King* thus imposes a presumption: once there is a contact, jurisdiction is presumed reasonable unless the defendant can make this showing.

Not only that, but the defendant "may not defeat jurisdiction there simply because of his adversary's greater net wealth."[182] Thus, an individual franchisee in Michigan can be made to defend suit in the Florida backyard of a multinational corporation.[183] Granted, the defendant, Mr. Rudzewicz, was not the typical "little guy." He was a partner in an accounting firm, versed in the ways of business, and able to afford to litigate the personal jurisdiction question to the Supreme Court.[184] But Brennan's lack of consideration of the economic disparity between the parties is surprising. Instead of comparing the relative hardships, as Black did for the Court in *Travelers Health* and *McGee,* here the defendant is largely on his own.[185]

The defendant's situation is even worse because of Brennan's ideas about ease of travel and distant litigation. In *Burger King,* the defendant argued that it would be difficult for him to call witnesses from Michigan in Florida.[186] To

178. *Id.* at 465–66, 480.

179. *Id.* at 477.

180. *Id.*

181. *Id.* at 478 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)). Brennan pointed out that "considerations" that might render litigation inconvenient "usually may be accommodated through means short of finding jurisdiction unconstitutional." *Id.* at 477. He noted the possibility of adopting the forum's choice of law rules or a transfer of venue. *Id.*

182. *Id.* at 483 n.25.

183. *See id.* at 479–80.

184. *See id.* at 484–85.

185. In *Travelers Health* and *McGee,* Black weighed the relative burdens, including the wherewithal of the parties. *See McGee*, 355 U.S. at 223; Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–49 (1950). He did so, however, in a way that helped plaintiffs. It would be difficult for a small-claim Virginia plaintiff to sue the insurance company in Nebraska. *See Travelers Health*, 339 U.S. at 648–49. It would be difficult for the aged California woman to travel to Texas to sue to collect on a life insurance policy after her son's death. *See McGee*, 355 U.S. at 223. It is hard not to notice that at every turn, Brennan (and Black) considered factors that were likely to uphold the plaintiff's choice of forum and that they were not terribly concerned about—indeed Brennan was dismissive of—burdens on defendants, at least in the domestic context. *See infra* text accompanying notes 186–195.

186. 471 U.S. at 483 (quoting Burger King Corp. v. Macshara, 724 F.2d 1505, 1512–13 (11th Cir. 1984)).

Brennan, this concern could be accommodated by a change of venue.[187] Of course, changes of venue are hardly routine. Moreover, *Burger King* was filed in federal court, so a transfer to federal court in Michigan was at least possible; state-court litigation cannot be transferred across state lines. At best, a state-court defendant would have to rely on dismissal under forum non conveniens,[188] which, as Dean Hay reminds us, "is an uncertain and unreliable corrective mechanism."[189]

Brennan's dismissiveness was even more pronounced in *Burnham.* There, asked to consider the plight of Dennis Burnham, who was sued in California for a claim that arose in New Jersey, Brennan, speaking for himself and three others, simply pointed out that travel is easier today than in earlier times,[190] and that "any burdens that do arise can be ameliorated by a variety of procedural devices."[191] This response is flippant. The procedural devices he lists—like telephonic depositions and motions for summary judgment[192]—"will not always be available or helpful."[193] Moreover, because of the domestic relations exception to diversity jurisdiction,[194] Mr. Burnham would not have been able to remove the case to federal court and seek transfer to a district in New Jersey. And because California courts generally do not dismiss under forum non

187. *Id.* at 483–84. He also noted that Rudzewicz had failed to establish the claimed difficulty in the record. *Id.* at 483 (describing Rudzewicz's supposedly impaired ability to call witnesses as "wholly without support in the record").

188. Burnham v. Superior Court, 495 U.S. 604, 639 n.13 (1990) (Brennan, J., concurring).

189. Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 603 n.76 (1990) [hereinafter Hay, Burnham]. Some states do not recognize the doctrine and, at best, it is a greater longshot than a motion to transfer. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–51 (1990).

190. "'[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself' in a State outside his place of residence." *Burnham*, 495 U.S. at 638 (Brennan, J., concurring) (alteration in original) (quoting *Burger King*, 471 U.S. at 474). This statement echoes Black from *McGee*: "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 223. Of course, relative ease of travel might be used against the plaintiff, who, except in some personal injury cases, can travel as easily as the defendant. The plaintiff in *Kulko,* for example, must travel from California to New York to press her claim. *See* Kulko v. Superior Court, 436 U.S. 84, 87–88 (1978); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 111 (1980) [hereinafter Brilmayer, *Contacts*] ("If modern transportation makes it easy to defend suits in a distant forum, surely modern transportation is of equal utility to plaintiffs.").

191. *Burnham*, 495 U.S. at 639.

192. *Id.* at 639 n.13 (citing FED. R. CIV. P. 12(b)(6), 30(b)(7), 56).

193. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 540 n.63 (1991).

194. *See* Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992).

conveniens when the plaintiff is a resident,[195] Mr. Burnham was stuck in the Golden State.

After *Burger King*, it is nearly impossible for a defendant to avoid jurisdiction by appealing to considerations of fairness.[196] In almost all cases, the only realistic way for a court to reject jurisdiction is to find that the defendant lacks a relevant contact with the forum. In the remaining personal jurisdiction cases of the twentieth century, and of Brennan's career—*Asahi* and *Burnham*—Brennan argued in favor of setting the bar relatively low on the question of what constitutes a relevant contact under *International Shoe*. In each case, his position garnered four votes and ran headlong into a competing view of equal strength.

B. The Split Decisions: Asahi *and* Burnham

Asahi featured a classic stream of commerce fact pattern concerning a manufacturer of components. A Japanese company made tire valves and sold them to a Taiwanese company.[197] The Taiwanese company incorporated the valves into its tires, which it marketed throughout the world, including in California.[198] The case is notable for its treatment of two issues. First is the split over whether the component manufacturer had relevant contacts with California.[199] Second is the conclusion that jurisdiction in California would be unconstitutionally unfair.[200]

Justice O'Connor, joined by three others, found insufficient contact.[201] She capitalized on Brennan's language from *Burger King,* emphasizing that the "constitutional touchstone" for personal jurisdiction is "whether the defendant purposefully established 'minimum contacts' in the forum State."[202] She

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195. *See* 2 B. E. WITKIN, CALIFORNIA PROCEDURE § 377, at 1011 (5th ed. 2008) (stating that if the plaintiff is a resident, the forum is presumed convenient and "the state has a strong interest in giving its own residents an adequate forum for the redress of grievances" (citing Stangvik v. Shiley Inc., 819 P.2d 14, 20 (Cal. 1991))).

196. Indeed, in *Burger King,* Brennan opined that when there is purposeful availment, "it may well be unfair to allow [defendants] to escape [jurisdiction]." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–74 (1985). Once contact is established through purposeful availment, Brennan said, the forum state's interest would favor exercise of jurisdiction. *Id* at 477. Professor Rhodes asserts that the burden on the defendant is high because once he has "obtained the requisite forum benefits through purposeful conduct, then the defendant has a diminished liberty interest in avoiding the state's jurisdictional power." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 639 (2007) [hereinafter Rhodes, *Liberty*].

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

198. *Id.*

199. *Id.* at 112, 116. Much of the dueling is over purposeful availment, which, of course, is part of the contact analysis. *Id.* at 116 (Brennan, J., concurring in part) ("I do not agree with the interpretation in Part II-A of the stream-of-commerce theory, nor with the conclusion that Asahi did not 'purposely avail itself of the California market.'" (quoting *id.* at 112 (O'Connor, J.))).

200. *Id.* at 116 (majority opinion).

201. *Id.* at 112–13 (O'Connor, J.).

202. *Id.* at 108–09 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

characterized *Burger King* as having "reaffirmed the oft-quoted reasoning of *Hanson*," requiring purposeful availment, invocation of benefits, and protections of the forum's laws.[203] Thus, she concluded, "minimum contacts must come about by an action of the defendant."[204] She likened the stream of commerce to the unilateral activity of the consumer in *World-Wide Volkswagen*. As in that case, mere foreseeability that the product will get to, or even be marketed in, the forum is not enough. There must be additional conduct showing an "intent or purpose to serve the market in the forum State."[205] Because the record showed no such additional conduct, O'Connor reasoned, there was no relevant contact.[206]

Brennan concluded that there was a relevant contact.[207] For him, awareness that the component would be distributed in the forum sufficed: "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[208] Moreover, the defendant benefited economically from the sale of the finished product in the forum.[209] It also benefited indirectly from the forum's laws that "facilitate commercial activity."[210] Brennan emphasized that this case, unlike *World-Wide Volkswagen,* did not involve a consumer's taking the product to the forum, but a "system of distribution that carried its valve assemblies into California."[211]

Brennan relied upon *Gray v. American Radiator & Standard Sanitary Corp.*,[212] a 1961 Illinois Supreme Court decision upholding jurisdiction in the same basic fact pattern in the domestic context.[213] The majority opinion in *World-Wide Volkswagen* cited *Gray* for the dictum that jurisdiction is proper "over a corporation that delivers its products into the stream of commerce with

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203. *Id.* at 109 (quoting *Burger King*, 471 U.S. at 475).

204. *Id.* at 112 (citing *Burger King*, 471 U.S. at 476; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

205. *Id.* at 110–12. Justice O'Connor suggested that this might be done by advertising or providing customer service in the forum or by designing the product specially for use in the forum. *Id.* Professor Stravitz points out that "[i]t would be highly unusual for a nonreplacement component party manufacturer to engage in these types of consumer oriented activities." Stravitz, *supra* note 74, at 790.

206. *Asahi*, 480 U.S. at 113 (O'Connor, J.).

207. *Id.* at 121 (Brennan, J., concurring).

208. *Id.* at 117.

209. *Id.* I have always wondered why more is not made in such cases of the fact that the defendant makes money because of the market in the forum. That is, the valve manufacturer made more money because the tire manufacturer sold the finished product into California. The same was true in *Asahi* and in *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961). One could explain *World-Wide Volkswagen* in similar terms, by saying that the New York distributor and retailer did not sell more cars (and therefore make more money) because of Oklahoma. On the other hand, they might have sold more cars because Pennsylvania is there.

210. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring).

211. *Id.* at 121.

212. *Id.* at 120 (citing *Gray*, 176 N.E.2d 761).

213. *See Gray*, 176 N.E.2d at 762, 767.

the expectation that they will be purchased by consumers in the forum State."[214] The unanimous opinion in *Calder*, cited *Gray* in rejecting the defendants' argument that they should not be amenable to jurisdiction, because they, as writer and editor of a defamatory story, could not be likened to a manufacturer who put goods in the stream of commerce.[215] In view of this endorsement, the fact that only four Justices signed on to the theory in *Asahi* is surprising.

Of course, eight Justices, including O'Connor and Brennan, ultimately agreed in *Asahi* that California lacked jurisdiction based upon consideration of the fairness factors.[216] This is the only case in which the Court has rejected jurisdiction on that basis. But it was too easy. The sole remaining claim in the case was between a Taiwanese company and a Japanese company. It concerned indemnification under an agreement entered in Asia, and thus implicated no legitimate California interest.[217] The dismissal could be based upon forum non conveniens.[218] Because of the unusual facts and the international wrinkle, it is not clear that *Asahi* gives much, if any, solace to a defendant trying to defeat jurisdiction in the domestic context, especially in view of the presumption established by *Burger King*[219] and Brennan's dismissive views about ease of travel and distant litigation.[220]

Asahi is also noteworthy for what it did not discuss. None of the opinions discussed Brennan's sliding-scale notion from *Burger King*. It would have fit well in O'Connor's opinion. She could have said that the question of contact was very close, so she would assess the fairness factors to see whether jurisdiction could be upheld on a lesser showing of contact. She did not do so.[221]

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214. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (citing *Gray*, 176 N.E.2d 761).

215. Calder v. Jones, 465 U.S. 783, 789 (1984). In addition, Brennan cited *Gray* twice in his dissent in *Shaffer*, both times for the proposition that jurisdiction is proper over an out-of-state defendant who causes foreseeable harm in the forum. Shaffer v. Heitner, 433 U.S. 186, 223, 226 (1977) (Brennan, J., dissenting).

216. *Asahi*, 480 U.S. at 105, 113–16 (majority opinion).

217. *Id.* at 114. The California courts upheld jurisdiction in part because of the state's interest in road safety. *Id.* (citing Asahi Metal Indus. Co. v. Superior Court, 702 P.2d 543, 553 (Cal. 1985), *rev'd*, 480 U.S. 102 (1987)). The Court rejected this notion, since the remaining dispute concerned only indemnification, the plaintiff's claims had been settled, and any question about road safety dissipated. *Id.* at 114–15. Professor Rhodes notes that the Court's refusal to defer to California's stated interest demonstrates that it does not review personal jurisdiction cases under rational basis scrutiny, but employs a more searching inquiry. *See* Rhodes, *Liberty*, *supra* note 196, at 612 ("Thus, instead of deferring to the government, the Court undertook its own analysis of the strength of the state's asserted interest in light of the individual interests at stake.").

218. *See* Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 19 (1988) [hereinafter Hay, *Judicial Jurisdiction*] (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

219. *See supra* text accompanying notes 179–181.

220. *See supra* text accompanying note 190.

221. Similarly, Brennan could have used the method to make his point about contact while ultimately rejecting jurisdiction. Perhaps he did not want to admit that the facts presented a close

This raises the question of whether her opinion is consistent with the two-step *World-Wide Volkswagen* method. Having found no contact, it is not clear why she should have addressed fairness.[222]

The last personal jurisdiction case of Brennan's career was *Burnham*,[223] which also produced a 4-to-4 split, this time between a faction led by Brennan and one led by Justice Scalia. The issue was more fundamental than that in *Asahi*: did service of process in California support general jurisdiction in that state, independent of *International Shoe*?[224] Scalia concluded that it did, while Brennan insisted on application of *International Shoe*.[225]

Though he did not lay out the two-step test, Brennan's opinion was consistent with it. He started with contacts, and here set the bar stunningly low.[226] The defendant, by visiting California for a handful of days, availed himself of benefits because his health and safety were protected, he was free to use the roads, and he "likely enjoy[ed] the fruits of the State's economy."[227] Then Brennan discussed fairness, saying that "[t]he potential burdens on a transient defendant are slight" because of convenient modern modes of travel and state procedural provisions.[228] So, "as a rule the exercise of personal jurisdiction over a defendant based upon his voluntary presence in the forum will satisfy the requirements of due process."[229]

There are significant problems with Brennan's analysis in *Burnham*. First, the benefits he notes are undoubtedly important to maintaining civil society. But

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case, or a "lesser" contact. Similarly, perhaps O'Connor did not want to admit that contact presented a close question.

222. Justice Scalia did not participate in that part of the opinion holding jurisdiction to be unfair. *Asahi*, 480 U.S. at 105. Presumably, this is because of his adherence to the rigid two-step analysis: once he determined that there was no relevant contact between Asahi and California, there could be no jurisdiction; assessment of fairness factors was irrelevant. *See* Donald L. Doernberg, *What's Wrong with This Picture?: Rule Interpleader, The Anti-Injunction Act,* In Personam *Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 592 n.155 (1996) (citing *Asahi*, 480 U.S. at 105).

The only Justice who seemed to have overtly rejected the approach was Stevens, joined by White and Blackmun, who said: "An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Asahi*, 480 U.S. at 121 (Stevens, J., concurring). *See also* Stravitz, *supra* note 74, at 792 (noting that Stevens's statement was "inconsistent with the jurisdictional framework adopted in *Burger King*").

223. Burnham v. Superior Court, 495 U.S. 604 (1990); Grunes & Veen, *supra* note 6, at 539.

224. *Burnham*, 495 U.S. at 607.

225. *Id.* at 628 (Scalia, J.); *id.* at 629 (Brennan, J., concurring).

226. *See id.* at 637–38 (Brennan, J., concurring) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)). The combination of a low requirement of contact and the extremely high burden on the defendant to show that the exercise of jurisdiction would be unfair, reflected Brennan's overarching pro-plaintiff position on personal jurisdiction. *See supra* text accompanying notes 179–181.

227. *Burnham*, 495 U.S. at 637–38 (Brennan, J., concurring) (quoting *Burger King*, 471 U.S. at 476).

228. *Id.* at 638–39.

229. *Id.* at 639.

they accrue automatically to everyone who sets foot in the state.[230] Indeed, police and fire protection accrue to absentee landowners who never set foot in the state. If the state's unilateral provision of such public services constitutes purposeful availment, that requirement will have no independent significance.[231] Such bootstrapping raises significant questions about the legitimacy of the power asserted by the state. In the words of Dean Perdue, "[I]t is deeply disturbing to suggest that as long as the government provides you with something of objective value (that you might not want), it can legitimately extract something from you (that you do not want to give up)."[232]

Second, the case involved the exercise of *general* jurisdiction.[233] Obviously, it strains credulity to conclude that a few days' presence in the forum constitutes the kind of continuous and systematic tie that can support jurisdiction for a claim unrelated to forum activity. The assertion of general jurisdiction based upon such limited contact would not have passed muster under *Perkins* or *Helicopteros*. It certainly cannot stand under the new *Goodyear* decision, as we will see below.

Brennan could have passed the straight-face test in arguing for personal jurisdiction in *Burnham* by dusting off his "related to" notion from *Helicopteros*, which he inserted into his opinion in *Burger King*.[234] While the claim for child support in *Burnham* may have arisen in New Jersey, where the couple had been domiciled and raised their children, it was arguably related to California, since the ex-wife had moved there and lack of support would have caused hardship in that state.[235] Brennan did not raise the issue, however.[236]

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230. As Scalia pointed out, this is true even if the person is not served with process in the state. *Id.* at 624 (Scalia, J.).

231. Hay, Burnham, *supra* note 189, at 597 (citing *Burham*, 495 U.S. at 623 (Scalia, J.)). Scalia argued that exchanging three days' worth of public benefits in California for general jurisdiction there "would not survive the 'unconscionability' provision of the Uniform Commercial Code." *Burnham*, 495 U.S. at 623.

232. Perdue, *supra* note 193, at 541; *see also* Hay, Burnham, *supra* note 189, at 597 (citing *Burnham*, 495 U.S. at 623) ("Justice Scalia is surely right in discounting Justice Brennan's propositions as they are presented: expectation, based on a known (perhaps quite unilateral) practice of the forum state, is not enough . . . ."). Provision of benefits does not necessarily result in acceptance of benefits. Mr. Burnham's position in California (as a potential user of emergency services) seems quite different from that of Mr. Hess in *Hess v. Pawloski,* who sought out and used the public highways provided by Massachusetts. 274 U.S. 352, 353 (1927).

233. *See Burnham*, 495 U.S. at 607 ("The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.").

234. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

235. Dean Hay has made this argument. Hay, Burnham, *supra* note 189, at 594 n.14 ("*Burnham* could have been decided as a specific jurisdiction case, because Mr. Burnham's presence in California and relationship there with his children at least 'relate' to claims for support and custody.").

At the end of the century, then, the two-step approach from *World-Wide Volkswagen* seemed to be in place. Brennan had modified it in *Burger King* to ameliorate its harshness. But no Justice had seen fit to address any of his modifications. And while the Court rejected jurisdiction on fairness grounds in *Asahi*, the facts were quite unusual. Brennan's presumption in *Burger King*, along with his dismissiveness of the burdens of distant litigation, meant that a domestic defendant's best bet is to argue that he lacked contact with the forum. One of the most important contact issues, of course, is the stream of commerce. And on that, the Court was equally split. Going into the new century, observers assumed that the Court would break the Brennan–O'Connor tie.

III. THE NEW CENTURY: SEARCHING FOR A BRENNAN LEGACY

A. J. McIntyre

In *J. McIntyre*, the Court, 6-to-3, rejected New Jersey's invocation of a stream of commerce rationale to exercise specific jurisdiction over a British manufacturer of heavy machinery that injured the plaintiff in the forum.[237] The facts differ from *Asahi* (and *Gray*) in that the defendant was not a maker of components. McIntyre made the finished product, and sold them to a distributor in Ohio, which then sold them to users in various states.[238] Justice Kennedy's opinion for the Court speaks for a plurality of four.[239] Justice Breyer's concurring opinion is joined by Justice Alito.[240] And Justice Ginsburg's dissent speaks for three Justices.[241] Thus, while Asahi gave us a 4-to-4 split, McIntyre manages a 4-to-2-to-3 configuration.

Others in this Symposium analyze the opinions expertly. My purpose is to assess any Brennan influence. Clearly, Brennan would find nothing to like about the Kennedy opinion.[242] First, the plurality expressly sides with O'Connor over

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236. Perhaps the parties did not assert it. On the other hand, Brennan did not hesitate to raise specific jurisdiction when the parties failed to do so in *Helicopteros*. *See Helicopteros*, 466 U.S. at 419–20 (Brennan, J., dissenting).

237. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785–86 (2011) (plurality opinion); *id.* at 2791 (Breyer, J., concurring).

238. *See id.* at 2786 (plurality opinion).

239. *Id.* at 2785.

240. *Id.* at 2791 (Breyer, J., concurring).

241. *Id.* at 2794 (Ginsburg, J., dissenting).

242. In addition to the points discussed in text, Kennedy mischaracterizes Brennan. He characterizes Brennan's *Asahi* opinion as "advocating a rule based on general notions of fairness and foreseeability," as opposed to the defendant's actions, and further suggests that Brennan would find jurisdiction without purposeful availment. *Id.* at 2789 (plurality opinion). In *Asahi*, however, Brennan argued that the Japanese valve manufacturer had purposefully availed itself of the California market. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (Brennan, J., concurring). It did so directly by benefiting economically from the California market for tires and indirectly from state laws facilitating economic activity. *Id.* at 117. One may argue about whether those should constitute relevant contacts, but nowhere in *Asahi* did Brennan appear to

Brennan in the *Asahi* split.[243] Sending goods into the stream of commerce "permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum."[244] Thus, "it is not enough that the defendant might have predicted that its goods will reach the forum State."[245]

Second, on a more fundamental level, Brennan would have rejected Kennedy's statement that the improper assertion of jurisdiction by one state "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."[246] This statement seems to signal a return to the assertion in *World-Wide Volkswagen* that personal jurisdiction operates to guard interstate federalism.[247] The Court rejected this notion in *Insurance Corp. of Ireland*, where it affirmed that personal jurisdiction doctrine protects a liberty interest of the defendant.[248] This does not mean that contacts are irrelevant. The liberty interest is more than a right to be free from litigation in an onerous venue. As Professor Brilmayer has written, it is the right to be free from the imposition of authority by a sovereign with which the defendant lacks sufficient ties.[249] Limitations on personal jurisdiction reflect not a matter of transgressing other states' authority, but of political legitimacy.[250]

Kennedy addresses political legitimacy, saying that the lawfulness of a judgment "depends on whether the sovereign has authority to render it."[251] To Kennedy, this authority—not "considerations of fairness and foreseeability"—is

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assert that there could be jurisdiction without relevant contact. *Id.* at 116–21 (disagreeing with conclusion that regular and extensive sales to a manufacturer known to be marketing finished product in forum did not constitute "minimum contacts with California"). Similarly, in *Burnham*, Brennan asserted that the defendant had availed, and therefore had a relevant contact with California. Burnham v. Superior Court, 495 U.S. 604, 637 (1990) (Brennan, J., concurring). Again, reasonable people may disagree about whether the contacts should "count," but Brennan did require them. Kennedy says that Brennan "discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability." *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion). As we have seen, however, foreseeability in this sense is part of the consideration of whether the defendant has forged a relevant contact with the forum. *See supra* text accompanying notes 130–131.

243. *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion) ("[T]he authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi* . . . .").

244. *Id.* at 2788.

245. *Id.*

246. *Id.* at 2789.

247. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

248. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

249. *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1296 (1989) (referring to persons' "rights to be left alone").

250. *Id.* at 1295–97. Professor Brilmayer addressed choice of law doctrine, but recognized personal jurisdiction as analogous. *Id.* at 1296. Others have also discussed political legitimacy in personal jurisdiction jurisprudence. *See, e.g.*, Perdue, *supra* note 193, at 534–46 ("Commentators have begun to . . . argu[e] that personal jurisdiction is a concrete manifestation of the problem of political obligation and legitimacy."); Stein, *supra* note 123, at 690 ("[D]ue process limits on personal jurisdiction . . . allocate political authority between sovereigns.").

251. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion).

the "central concept" in personal jurisdiction doctrine.[252] And sovereign authority depends, in turn, upon *submission* by the defendant.[253] Kennedy uses some form of the word "submit" eight times in his opinion.[254] But, as Professor Rhodes points out, the Court had never employed that term for personal jurisdiction under *International Shoe*, and has limited it to cases of consent to jurisdiction.[255] The Court, including Brennan in *Burger King*, has long adopted a social-contract notion that if one gets a benefit from availing himself of the forum, he may have to "pay" by submitting to jurisdiction there.[256] But Kennedy's focus on the need for the defendant to submit to the state's authority seems to require a new degree of intentionality.[257] It reflects a narrow theory of what creates legitimate government authority. Presumably, Brennan would say that the state's legitimate interest in regulating affairs justifies jurisdiction over nonresidents, so long as there is some contact, even short of "submission."

Though Kennedy never mentions it, his opinion is consistent with the rigid two-step analysis of *World-Wide Volkswagen*. Because he found no contact, Kennedy did not assess the fairness of jurisdiction. Indeed, he was willing to concede that New Jersey's interest in protecting its citizens from defective products is "doubtless strong."[258] The issue was irrelevant because the defendant had not "reveal[ed] an intent to invoke or benefit from the protection of [New Jersey's] laws."[259]

Justice Breyer, joined by Justice Alito, also concluded that "these facts do not provide [sufficient] contacts between the British firm and the State of New Jersey."[260] To Breyer, the case did not satisfy the Brennan stream-of-commerce test because there was no regular flow of sales into New Jersey.[261] Rather, based upon the record, there seemed to be only a single sale from the defendant to New

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252. *Id.* at 2788–89. Similarly, "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.* at 2789.

253. *Id.*

254. *Id.* at 2785–91.

255. Rhodes, *Nineteenth Century*, *supra* note 74, at 415–17. As he notes, in *Burger King*, the Court, in passing, noted that commercial parties may stipulate "to submit" their cases for resolution in a particular forum with a forum selection clause. *Id.* at 417 n.171 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985)). In *Insurance Corp. of Ireland*, it noted that a litigant "may submit to the jurisdiction of the court by appearance." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982). And, in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964), the parties spoke of agreeing "in advance to submit to the jurisdiction of a given court."

256. *See Burger King*, 471 U.S. at 475–76 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).

257. *J. McIntyre*, 131 S. Ct. at 2788–89 (plurality opinion). Kennedy does not try to fit intentional torts within his "submission" theory, saying that in such cases "the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." *Id.* at 2787.

258. *Id.* at 2791.

259. *Id.*

260. *Id.* (Breyer, J., concurring).

261. *Id.* at 2792.

Jersey, and "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient."[262]

Breyer overlooked *McGee*. Black's opinion in that case upheld jurisdiction over the Texas insurance company based upon one contract of insurance.[263] True, that contract involved some back-and-forth between the plaintiff and defendant. But it was a single contract, which qualitatively provided sufficient contact with California.[264] Moreover, the Court has upheld jurisdiction in tort cases based upon a single contact at least three times: in *Hess v. Pawloski*, *Calder*, and *Keeton*.[265] Breyer's quantitative approach seems to give the defendant at least one free shot; if the first few machines one sells in the forum malfunction and injure people, there's no jurisdiction because there is no stream yet—only an eddy.[266]

Granted, the insurance company in *McGee* solicited the policy directly from a Californian,[267] while J. McIntyre sold the New Jersey machine through a distributor in Ohio.[268] Brennan would have pointed out, however, that J. McIntyre set up that distribution system.[269] Moreover, because J. McIntyre sold finished products, as opposed to components, it could exercise more effective control over distribution.[270] And it sold more machines to the Ohio distributor, and therefore made more money, because the Ohio distributor could sell into New Jersey.[271]

Breyer's opinion also does not state a methodology, but might be consistent with the rigid two-step model. Finding no contact, there was no need to discuss fairness factors. On the other hand, Breyer found the record unclear concerning contact,[272] which raises the question of who has the burden. Breyer seems unaware of the burden-shifting regime from *Burger King*, which placed the initial burden on the plaintiff to show contact, followed by a burden on the

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262. *Id.*

263. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

264. *Id.*

265. *See* Hess v. Pawloski, 274 U.S. 352, 353, 356–57 (1927); Hay, *Judicial Jurisdiction*, *supra* note 218, at 26 n.95. Obviously, *J. McIntyre* involves a tort claim. 131 S. Ct. at 2786 (plurality opinion).

266. *See id.* at 2792 (Breyer, J., concurring).

267. *See McGee*, 355 U.S. at 223.

268. *See J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion).

269. *See id.*

270. *See id.* at 2786. Brennan made this point in *Asahi*. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 121 (1987) (Brennan, J., concurring). Ginsburg made this point in her dissent in *J. McIntyre*. *See J. McIntyre*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting) (quoting *Asahi*, 480 U.S. at 115); *see also* Hay, *Judicial Jurisdiction*, *supra* note 218, at 25 n.92 ("[U]se of a distribution system, particularly an exclusive one, will more readily permit the conclusion that the requisite expectation [of jurisdiction] was there.").

271. *See* discussion *supra* note 209.

272. *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J. concurring).

defendant to show unfairness.[273] Breyer appears to put the entire burden on both parts of the inquiry—contact and fairness—on the plaintiff.[274]

Both Kennedy and Breyer seem unaware of the sliding-scale approach that Brennan set forth in *Burger King*. If the disagreements among the Justices in *Asahi* and *J. McIntyre* stand for anything, they must stand for the idea that these are close cases on whether there is a contact. That being so, *Burger King* counsels the court to assess the fairness factors to see whether jurisdiction might be reasonable based upon lesser contact. The fairness assessment in *J. McIntyre* would look like that in *McGee*.[275] First, the plaintiff is injured and would find it difficult to travel—especially to England—to sue. Second, New Jersey has an interest in regulating the conduct of foreign manufacturers whose machines are used there. Third, we know that Brennan would find no excessive burden on J. McIntyre to litigate in New Jersey.[276] A company that can send representatives to trade shows, hire a distributor, and instruct that distributor to exploit the entire continent can no doubt travel to one of the states to litigate.[277] Because the fairness factors support jurisdiction, the Brennan sliding scale would uphold jurisdiction based upon a single contact. But, as in *Asahi*, no one seems to have thought of this possibility.

The most remarkable thing about the opinions by Kennedy and Breyer is the lengths to which each Justice goes to conclude that there was no relevant contact. Each supports his conclusion with hypotheticals worthy of the classroom. Kennedy worries that a small Florida farmer, selling crops to a distributor for national distribution, "could be sued in Alaska or any number of other States' courts without ever leaving town."[278] Breyer fears jurisdiction in Hawaii over an Appalachian potter who sells to a distributor "who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii)."[279] In the international context, Breyer worries that "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors" might be sued "in virtually every State in the United States."[280]

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273. *See* Burger King Corp. v. Rudzewicz, 471 U.S 462, 477 (1985).

274. *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring) (plaintiff "failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner").

275. *See supra* text accompanying note 60.

276. *See supra* text accompanying notes 190–191. On the other hand, J. McIntyre is an alien. The burden imposed on aliens by litigation in the United States was at least relevant to eight Justices in *Asahi*. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105, 114 (1987). The facts here, of course, are much different. In *Asahi*, no American litigant remained in the case and there was no legitimate state interest. *Id.* at 114. In *J. McIntyre*, the plaintiff is an American, and New Jersey presumably has an interest in regulating safety for citizens such as Mr. Nicastro. *See* 131 S. Ct. at 2786 (plurality opinion).

277. *See J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion).

278. *Id.* at 2790.

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

280. *Id.* at 2794.

The answer to these hypotheticals is not to strain to find that there is no contact.[281] By finding no contact, the Justices rule out jurisdiction even in convenient venues. When Kennedy concludes that the Florida farmer selling through a distributor has no contact with Alaska, he must also conclude that the farmer has no contact with Alabama. And Breyer's Appalachian potter who has no contact with Hawaii also must have no contact with the state next door to his Appalachian home.

Rather, the answer is to find that there is relevant contact, and to assess whether jurisdiction would be fair. I suspect jurisdiction over the Florida farmer in Alabama would be fair, while jurisdiction in Alaska might not.[282] By focusing on contact, however, we never engage in the exercise. Outside the unique facts of *Asahi*, the Court has never used considerations of fairness to defeat jurisdiction. Here, then, we see what I consider the irony of Brennan's fairness analysis in *Burger King* and *Burnham*: by making it next to impossible to defeat jurisdiction as overburdensome, Brennan forces judges to dig in their heels at contact. Finding no contact is the only realistic way to defeat jurisdiction. Kennedy and Breyer's hypotheticals demonstrate the point.

Justice Ginsburg's dissent in *J. McIntyre* is consistent with Brennan's view. She concludes that the defendant availed itself of New Jersey—and apparently every other state.[283] She criticized the plurality's emphasis on submission to jurisdiction.[284] Part III of her opinion is striking for its application of what can only be called the mélange test.[285] Reminiscent of *Travelers Health* and *McGee*, she considers the burden on the plaintiff, burden on the defendant, state's interest, and other factors, giving "prime place to reason and fairness."[286]

Nonetheless, Ginsburg's dissent in one way may, surprisingly, reject Brennan. In contrasting *Asahi*, Ginsburg notes that J. McIntyre sold finished products, and not components. Accordingly, it can control where the machines end up. The component maker, in contrast, has little control over where the product ends up.[287] Thus, says Ginsburg, the holding in *Asahi* does not apply to the facts of *J. McIntyre*.[288] This might be a concession that there was no contact in *Asahi*, a conclusion with which Brennan obviously would disagree. Brennan

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281. It might not be a strain to find no contact in some of the hypotheticals since it is unlikely that the small Egyptian shirt maker would have an American distributor and attend trade shows in the United States. *See* Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 233–35 (2011).

282. This is especially true with Breyer's international examples, such as the Egyptian shirt-maker. There, considerations for the burden on the alien defendant, as addressed in *Asahi*, could prove relevant.

283. *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

284. *Id.* at 2799 n.5 (citing *id.* at 2786–89 (plurality opinion)). She characterizes the plurality's requirement of submission as a return to older practice. *Id.*

285. *See id.* at 2799–802.

286. *Id.* at 2800.

287. *See id.* at 2803 (quoting A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1361 (Ariz. 1995)).

288. *Id.* ("To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong." (footnote omitted)).

would have said that there was a relevant contact in *Asahi*, and that *J. McIntyre* is therefore especially easy. Not only does the British company sell finished products, but it sought out the American market and set up the distribution channel.

J. McIntyre raised other topics on which Brennan opined through the years, but which the Court did not have to address. For one, now that Mr. Nicastro cannot sue the British company in New Jersey, may he sue it in Ohio? The problem with specific jurisdiction is that the claim seems clearly to have arisen in New Jersey. Here, as in *Burnham*, one might use the Brennan idea from *Helicopteros* that specific jurisdiction be upheld if plaintiff's claims merely relate to the defendant's contacts with the forum.[289] The sale of the allegedly defective machine into Ohio, from which the order to New Jersey was filled, might satisfy the "relate to" standard.[290] But no Justice discussed the possibility.

If there were no specific jurisdiction, would Ohio have general jurisdiction over J. McIntyre? Without question, under *Goodyear*, the answer is no.[291] Even if we can characterize the English company's ties with that state as continuous and systematic, as we will see momentarily, *Goodyear* limits general jurisdiction to states in which a corporation can be considered "essentially at home."[292] It is unlikely that J. McIntyre has any decision-making apparatus in Ohio on which to base such a holding. Moreover, J. McIntyre's contacts with Ohio consist of sales of its goods into that state. And *Goodyear* apparently precludes a finding of general jurisdiction based upon sales into the forum.[293]

Beyond this, even if Mr. Nicastro can sue in Ohio, what law would apply? Why would it not be New Jersey law? After all, that is where the plaintiff suffered injury at the facility in which the J. McIntyre machine was shipped. But how can New Jersey law apply when that state lacks personal jurisdiction? Brennan long advocated that choice of law and personal jurisdiction be analyzed by a single standard.[294] But the Court has never adopted such a standard. The two inquiries engage different interests.[295] While personal jurisdiction requires "minimum" contacts, the Court has spoken of "significant" contacts for choice of law.[296] Nonetheless, in *Hanson*, the Court seemed to recognize that Florida law would govern the dispute notwithstanding lack of jurisdiction over the Delaware

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289. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting).

290. *See*, Hay, *Judicial Jurisdiction*, *supra* note 218, at 25–26 (contact in contract supporting specific jurisdiction in tort).

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

292. *Id.* at 2851.

293. *See infra* text accompanying note 316.

294. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 464, 482 (1985).

295. *See* Hay, *Judicial Jurisdiction*, *supra* note 218, at 9; *see also* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 82–83 (1978) ("The impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction . . . .").

296. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981)).

trustee.[297] One need not adopt the idea of a unitary standard to conclude that this proposition "defie[s] common sense."[298]

B. Goodyear

In *Goodyear*, the North Carolina Court of Appeals upheld general jurisdiction upon a stream of commerce theory.[299] It noted that the foreign manufacturers' tires were sold in some appreciable and consistent measure in North Carolina, that the defendants had made no effort to keep the products out of North Carolina, that the state had an interest in providing a forum for its citizens, and that suing in Europe would burden the plaintiffs unduly.[300] The Supreme Court rejected the use of stream of commerce to establish general jurisdiction, and limited use of stream of commerce theory to cases of specific jurisdiction.[301] Even if Brennan would have agreed on that point, *Goodyear* largely rejects Brennan's views on general jurisdiction.

First, in his dissent in *Helicopteros*, Brennan noted that *Perkins* had upheld general jurisdiction when the defendant had "continuous and systematic" ties with the forum.[302] But he suggested that nothing in that case *required* such a finding.[303] In other words, Brennan felt that general jurisdiction might be appropriate based upon something less than continuous and systematic contact. He did not elaborate, however, and the Court in *Goodyear* does not entertain the suggestion; without doubt, "continuous and systematic" ties are required.

Second, *Goodyear* allows general jurisdiction only to a narrow subset of defendants with continuous and systematic ties with the forum. General jurisdiction is appropriate only where the defendant is "essentially at home in the

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297. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). And in *Kulko*, "the Court noted that California law may apply in a New York action for child support, but that the California courts did not have jurisdiction to hear the case." Silberman, *supra* note 295, at 81 n.260 (citing Kulko v. Superior Court, 436 U.S. 84, 98 (1978)).

298. Weintraub, *supra* note 132, at 536 (citing *Hanson*, 357 U.S. at 253). Dean Hay suggests that the problem in *Hanson* was "not the fault of conflicts law but of the quirk in Florida law which made the nonresident trustee an indispensable party." Hay, *Judicial Jurisdiction*, *supra* note 218, at 27.

299. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (quoting Brown v. Meter, 681 S.E.2d 382, 394–95 (N.C. Ct. App. 2009), *rev'd sub nom. Goodyear*, 131 S. Ct. 2846 (2011)).

300. *Id.* at 2852–53 (quoting *Brown*, 681 S.E.2d at 392–94).

301. *Id.* at 2854–57. It is not clear that any court or commentator had previously attempted to base general jurisdiction on a stream of commerce theory.

302. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 421 (1984) (Brennan, J., dissenting) (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952)).

303. *Id.* at 421 ("Under the circumstances of that case, we held that such contacts were constitutionally sufficient 'to make it reasonable and just to subject the corporation to the jurisdiction' of that State. Nothing in *Perkins* suggests, however, that such 'continuous and systematic' contacts are a necessary minimum before a State may constitutionally assert general jurisdiction over a foreign corporation." (quoting *Perkins*, 342 U.S. at 445)).

forum State."[304] For a human, the Court says, the "paradigm forum" for general jurisdiction is the person's domicile.[305] "[F]or a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[306] Parenthetically, Ginsburg notes that a corporation's state of incorporation and its principal place of business would be paradigmatic.[307] Though paradigmatic does not mean exclusive,[308] it is not at all clear how far "essentially at home" reaches. And though the Court has recently defined principal place of business for purposes of diversity of citizenship to be the "nerve center,"[309] can a "muscle center" make a business essentially at home? What about a regional headquarters? What about a corporation that has outlets in every state, such as McDonald's, or Wal-Mart, or Ford Motor? The uncertainty opens the door for significant restriction from the current practice of exercising general jurisdiction over corporations "doing business" in a state.[310]

Third, any parsimoniousness of the essentially at home notion is compounded by the Court's embrace of the 1923 case *Rosenberg Brothers & Co. v. Curtis Brown Co.*[311] In his dissent in *Helicopteros*, Brennan harshly criticized the majority for relying on *Rosenberg* without considering whether that case survived *International Shoe*.[312] In *Rosenberg*, the Court held that an Oklahoma corporation was not subject to general jurisdiction in New York.[313] Its ties there consisted of purchases of "a large part of the merchandise" it sold in Oklahoma.[314] The Court concluded that purchases of goods and visits by

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304. *Goodyear*, 131 S. Ct. at 2851, 2857 (noting that the defendants "are in no sense at home in North Carolina").

305. *Id.* at 2853.

306. *Id.* at 2853–54.

307. *Id.* at 2854 (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

308. *See* Brilmayer, *supra* note 307, at 735–43 (discussing general jurisdiction over corporations based upon activities); *see also* Brilmayer, *Contacts*, *supra* note 190, at 87 ("Systematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an 'insider' that he may safely be relegated to the State's political processes.").

309. Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010).

310. Any narrowing of the concept of general jurisdiction over businesses will affect venue under 28 U.S.C. § 1391(C), which defines an entity's residence for venue purposes as districts in which the entity is subject to personal jurisdiction when the case is commenced. 28 U.S.C. § 1391(c) (2006).

311. 260 U.S. 516 (1923). The Court in *Goodyear* does not cite *Rosenberg* by name, but its quote from *Helicopteros* is from a description of that case. *Goodyear*, 131 S. Ct. at 2856 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417–18 (1984)).

312. *Helicopteros*, 466 U.S. at 420–21 (Brennan, J., dissenting) ("[T]he Court relies on a 1923 decision in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), without considering whether that case retains any validity after our more recent pronouncements concerning the permissible reach of a State's jurisdiction. . . . The Court therefore looks for guidance to our 1923 decision in *Rosenberg*, which until today was of dubious validity given the subsequent expansion of personal jurisdiction that began with *International Shoe* in 1945." (internal citations omitted)).

313. *Rosenberg*, 260 U.S. at 518.

314. *Id.*

officers, "even if occurring at regular intervals, would not warrant the inference that the corporation was present" in New York.[315]

Goodyear actually extends *Rosenberg* to cases involving *sales into* the forum state.[316] Thus, businesses like L.L. Bean, which sell potentially enormous quantities of goods into various states, cannot be subject to general jurisdiction there on the basis of such sales. The extension of *Rosenberg* to sales into a forum seems wrong-headed. It is one thing to say that general jurisdiction should not be based upon purchases in the forum. After all, *purchases* simply send money into the forum states. Money cannot explode or malfunction or hurt anyone. But *sales* into a state are quite another matter, because the products sold may explode or malfunction and hurt people. Nonetheless, *Goodyear* appears to have ruled out general jurisdiction based upon sales. Brennan, having championed general jurisdiction in *Helicopteros* and chided the Court about citing *Rosenberg* in the same case, would surely dissent.

C. A Scorecard

All three opinions in *J. McIntyre* and the unanimous opinion in *Goodyear* discuss or cite Brennan positions. Perhaps this is not surprising given Brennan's well-known efforts to delineate personal jurisdiction doctrine. But the scorecard shows that Brennan has had little actual influence on doctrine.

- First, despite opportunities in *Burnham* and *J. McIntyre*, the Court has never engaged his idea that specific jurisdiction may involve claims that "relate to"—rather than "arise from"—contacts with the forum.
- Second, despite opportunities in *Asahi* and *J. McIntyre,* the Court has never engaged Brennan's sliding-scale approach from *Burger King.*
- Third, the Court has never adopted his suggestion for a unitary personal jurisdiction/choice-of-law standard.
- Fourth, Brennan's stream of commerce theory from *Asahi* may have gone from having four adherents on the Court to having three.[317]
- Fifth, Brennan's views on general jurisdiction appear soundly rejected.

315. *Id.*

316. *Goodyear*, 131 S. Ct. at 2856–57.

317. Certainly, the four Justices in the plurality reject it. Breyer and Alito did not reject it, but read it quite narrowly. *See supra* text accompanying notes 260–266.

IV. CONCLUSION

Brennan's personal jurisdiction journey was long. Steeped in Black's early efforts to read *International Shoe* broadly, Brennan continued the battle for Black's mélange approach to personal jurisdiction. Converting to the two-step approach, he finally wrote a majority opinion in *Burger King*. There, where he attempted to curb the rigidity of *World-Wide Volkswagen* to ensure that the courts weigh general considerations of fairness in every case. The opinions in *J. McIntyre* suggest that Brennan's effort in that regard bore no fruit. The Justices remain riveted on the issue of contact between the defendant and the forum.

Ironically, this obsession may be Brennan's fault. It is Brennan's opinion in *Burger King*—with its nearly impossible burden on the defendant to defeat jurisdiction by appealing to considerations of reasonableness and Brennan's dismissiveness about concerns with distant litigation—that puts the premium on contact. Finding a lack of contact is the only realistic way most defendants will have to defeat jurisdiction. Thus, we see six Justices straining with bizarre hypotheticals to reject a finding of contact. It seems that Justice Black's fear that *International Shoe* would be used to stifle state's exercise of personal jurisdiction[318] is being realized. And at the end of the day, Black's disciple Brennan—the leading proponent of an open-ended fairness analysis—may have forced the Court exactly where he did not want it to go: to an entrenched and cramped view of what constitutes a relevant contact under *International Shoe*.

318. *See supra* text accompanying note 35.

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