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Sayonara to Fair Play and Substantial Justice

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SAYONARA TO FAIR PLAY AND SUBSTANTIAL JUSTICE?

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I. INTRODUCTION

After hiatuses of twenty-four[1] and twenty-seven years,[2] the United States Supreme Court returned to specific and general jurisdiction in cases raising products liability claims against foreign manufacturers.[3]

On June 27, 2011, the last day of its 2010 Term, the Supreme Court decided *J. McIntyre Machinery, Ltd. v. Nicastro*[4] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[5] There were four opinions between the two cases—three in *J. McIntyre*[6] and one in *Goodyear Dunlop*. None of the four opinions

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1. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (stream of commerce specific jurisdiction).

2. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (general jurisdiction).

3. The Court decided one other personal jurisdiction case between *Asahi* and June 27, 2011. Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (Scalia, J., plurality opinion) (holding that forum state service of process on an individual authorizes a state court to exercise general personal jurisdiction).

4. 131 S. Ct. 2780 (2011).

5. 131 S. Ct. 2846 (2011).

6. 131 S. Ct. at 2785 (Kennedy, J., plurality opinion), 2791 (Breyer, J., concurring), 2794 (Ginsburg, J., dissenting).

directly invoked the two-branch jurisdictional due process test employed by the Court for over thirty years.[7]

Neither the *J. McIntyre* plurality opinion by Justice Kennedy nor the concurring opinion of Justice Breyer had any reason to evaluate second-branch factors because both concluded that Nicastro failed to satisfy the first-branch threshold requirement of minimum contacts.[8]

Justice Ginsburg invoked several second-branch factors to support her conclusion that jurisdiction over J. McIntyre Machinery, Ltd.[9] in New Jersey was "fair and reasonable"[10] and comported with "notions of fair play and substantial justice."[11] Nevertheless, she failed to utilize the framework for the two-branch analysis articulated by the Court in *Burger King Corp. v. Rudzewicz*,[12] and followed in *Asahi Metal Industry Co. v. Superior Court*.[13]

Under this framework, a positive first-branch finding of minimum contacts only raises a presumption of proper jurisdiction under the Due Process Clause.[14] The presumption can either be enhanced or overcome by evaluation of the second-branch factors.[15]

The case for jurisdiction in *J. McIntyre* would have been substantially strengthened by stricter adherence to the *Burger King* framework. Other commentators assert that the hypotheticals posed by Justices Kennedy and Breyer concerning "mom and pop" farmers and craftsmen to show unfairness of jurisdiction based on activity by agents and distributors could easily have been

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7. In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the Supreme Court first expressly divided the jurisdictional due process inquiry into two branches:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Id. at 291–92.

8. *See J. McIntyre*, 131 S. Ct. at 2790 (Kennedy, J., plurality opinion) (showing that McIntyre-U.K. did not "purposefully avail[] itself of the New Jersey market"); *id.* at 2791–92 (Breyer, J., concurring) (citing *World-Wide Volkswagen*, 444 U.S. at 297–98) (finding that Nicastro "failed to meet his burden" that New Jersey could constitutionally assert jurisdiction absent a showing of purposeful availment).

9. Hereinafter "McIntyre-UK" when referred to as the party and not the case.

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

11. *See id.* at 2804 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted) (plurality "opinion would take a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*").

12. 471 U.S. 462, 474–78 (1985) (citations omitted).

13. 480 U.S. 102, 108–10, 113–16 (1987).

14. *See Burger King*, 471 U.S. at 476 (stating that purposeful availment of "the benefits and protections" of the forum's laws renders it "presumptively not unreasonable to require [defendant] to submit" to jurisdiction).

15. *See id.* (stating that minimum contacts are considered in view of other factors to determine if an assertion of personal jurisdiction comports with "fair play and substantial justice." (quoting *Int'l Shoe*, 326 U.S. at 320) (internal quotation marks omitted)).

accommodated by the second-branch fairness factors.[16] Nevertheless, Justice Ginsburg's failure to adhere to the specific framework of the two-branch test, and the complete omission of the test from the other opinions, raises a question about the continuing validity of the two-branch due process test for personal jurisdiction.

This Article will examine the status of the two-branch test after *J. McIntyre* and *Goodyear Dunlop*. Part II briefly reviews the origin of the two-branch test in Supreme Court case law and how it was treated by the lower federal and state courts prior to June 27, 2011. Part III reviews how these courts have reacted to *J. McIntyre* and *Goodyear Dunlop*. Part IV outlines problems with, and proposes a modification of, the jurisdictional due process test. Adoption of the modified test proposed here will enable courts to make sound personal jurisdiction decisions on whether a chosen forum will provide all parties and the forum state with "fair play and substantial justice."

II. ORIGIN OF THE TWO-BRANCH TEST: A BRIEF OVERVIEW

A. *Specific Jurisdiction*

The two-branch due process test for personal jurisdiction emerged over the forty-year period from *International Shoe Co. v. Washington*[17] to *Burger King*. Although almost seventy years old, *International Shoe* remains the seminal case of the modern era. It announced a new approach to personal jurisdiction:

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16. *See generally* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1256 & n.89 (2011) (noting that the "plurality completely ignored Brennan's endorsement of the reasonableness [second branch] check on jurisdiction, which likely would have voided an exercise of jurisdiction on the hypothetical facts posited by the plurality"); Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 235 (2011) (stating that any "procedural unfairness can be adequately remedied by enforcing the fairness factors that compose the second part of the due process test for personal jurisdiction"); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 506, 514 (2012) (stating that values of fairness and reasonableness in Justice Ginsburg's dissent resonate "more with the second prong of the standard jurisdictional analysis" and that Justice Breyer's appropriate concern for smaller manufacturers can be vindicated "by using the reasonableness prong"). *See also* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 583 (2012) ("Because the fairness factors support jurisdiction, the Brennan sliding scale would uphold jurisdiction based upon a single contact."); Case Comment, *Leading Cases—Personal Jurisdiction:* J. McIntyre Mach., Ltd. v. Nicastro, 125 HARV. L. REV. 311, 316 (2011) (suggesting that the plurality opinion in *Nicastro* signals a shift away from reasonableness).

17. 326 U.S. 310 (1945). For a more complete evolution of modern jurisdictional due process, *see* Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 731–83 (1988) [hereinafter Stravitz, *Sayonara to Minimum Contacts*]; *see also* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925 (1998) (analysis of personal jurisdiction based on internet contacts).

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain *minimum contacts* with it *such that* the maintenance of the suit does not offend "*traditional notions of fair play and substantial justice*."[18]

Due process does not permit a state to enter a binding judgment against an "individual or corporate defendant" who has "no contacts, ties or relations" to the forum.[19] Rather, to comport with due process, "the quality and nature" of a defendant's "activity" in the forum state must be assessed "in relation to the fair and orderly administration of the laws which . . . was the purpose of the due process clause to insure."[20]

The focus is exclusively on a defendant's contact and connection to the forum state. The juxtaposition of "minimum contacts" with "fair play and substantial justice" by the intervening term "such that" demonstrates that minimum contacts was thought to be a surrogate for fairness.[21] There was only a single test. If a defendant established minimum contacts, due process was satisfied, and no independent assessment of fairness or reasonableness was required.[22]

In addition to articulating the minimum contacts test, *International Shoe* provided two significant guiding principles. First, the test was not "simply mechanical or quantitative."[23] Minimum contacts instead was *qualitative*. Even single acts, "because of their nature and quality and the circumstances of their

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18. *Int'l Shoe*, 326 U.S. at 316 (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940)) (second and third emphasis added).

19. *Id.* at 319.

20. *Id.*

21. This is still the view of some scholars. *See, e.g.*, Alan B. Morrison, *The Impacts of* McIntyre *on Minimum Contacts*, 80 GEO. WASH. L. REV. ARGUENDO 1, 9 & n.36 (2011), *available at* http://groups.law.gwu.edu/LR/Pages/Article.aspx?ArticleID=332 (minimum contacts is "a proxy for fairness and not . . . an independent requirement"). Other scholars disagree. *Id.* ("fairness . . . must be satisfied in addition to minimum contacts").

22. The use of the terms "fair play and substantial justice" and "fair and orderly administration of laws" suggested that due process was not exclusively concerned with defendants, but was vitally concerned with interests such as those of other parties, the forum state, and perhaps the systemic interests of the judicial system. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–78 (1985). *But see* David A. Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction over the Person*, 59 TEMP. L.Q. 47, 48 (1986) ("every word in *International Shoe* refers only to defendants' concerns").

23. *Int'l Shoe*, 326 U.S. at 319. Unfortunately, despite this admonition, courts continue to emphasize the quantitative nature of the test. *See, e.g.*, J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (Kennedy, J., plurality opinion) ("A court may subject a defendant to judgment only when the defendant has *sufficient contacts* with the sovereign . . . ." (citing *Int'l Shoe*, 326 U.S. at 316)) (emphasis added); *id.* at 2791 (Breyer, J., concurring) (stating that "these facts do not provide *contacts* . . . constitutionally *sufficient* to support . . . jurisdiction") (emphasis added).

commission, may be . . . sufficient" to establish minimum contacts.[24] Second, the Court articulated a conceptual basis to assess its new test:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[25]

Defendant activity invoking the "benefits and protections" of forum state law has been the touchstone to minimum contacts analysis in the post-*International Shoe* era.[26] Fairness and justice were cornerstone concerns, but in general only from the defendant's perspective.

The next significant case in the developmental line,[27] *McGee v. International Life Insurance Co.*,[28] focused on several non-defendant interests, and many scholars viewed it as the progenitor of the multi-interest balancing analysis,[29] or as the foreshadowing of the two-branch test of jurisdictional due

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24. *Int'l Shoe*, 326 U.S. at 318. Justice Breyer inexplicably asserted that "[n]one of our precedents finds that a single isolated sale . . . is sufficient." *J. McIntyre*, 131 S. Ct. at 2792. Not only did he forget *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), which found a "single sale" of one insurance policy in California sufficient for California to assert jurisdiction over the policy issuer, *id.* at 223, but he ignored *International Shoe*'s general admonition to evaluate the nature and quality of even single acts.

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

26. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987) (O'Connor, J., plurality opinion) ("[M]inimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (quoting *Burger King*, 471 U.S. at 475)); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (same). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (finding that petitioners "avail themselves of none of the privileges and benefits of Oklahoma law").

27. Between *International Shoe* and *McGee*, the Court decided two other jurisdictional cases: *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), and *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950). *Travelers Health* did not break any new ground, but it did express concern for small policyholders. *See Travelers*, 339 U.S. at 648–49. *Perkins* traditionally is considered a general jurisdiction case. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). *But see* John T. McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1, 11 n.47 (1985) ("*Perkins* may actually be a specific or limited jurisdiction case.").

28. 355 U.S. 220 (1957).

29. *See, e.g.*, Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 418 (1981) (footnotes omitted) ("The opinion indicated that courts should decide . . . jurisdictional issues by balancing the interests of the public, the plaintiff, and the defendant."); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 593–94 (1986). Professor Perschbacher uses the phrase "multi-interest balancing approach" to describe

process from *World-Wide Volkswagen* and *Burger King*.[30] Justice Black's opinion concentrated on forum state interest, plaintiff's interest, and general considerations of litigational convenience.[31] It also considered defendant's interest to avoid an inconvenient forum.[32] Although *McGee* looked at jurisdiction from an entirely different perspective than *International Shoe*, Justice Black failed to explain how the various new elements are to be evaluated in the jurisdictional calculus.[33]

Six months after deciding *McGee*, the Court reversed direction in *Hanson v. Denckla*,[34] focusing exclusively on the nonresident defendant's relationship to the forum state, and excluding from consideration any non-defendant contacts. The Court explained:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.*[35]

After the 1957–1958 Term, when it decided *McGee* and *Hanson*, the Court failed to reconcile the two fundamentally different theories of jurisdictional due process until the 1980s.[36]

The Court expressly divided due process into two distinct branches in *World-Wide Volkswagen Corp. v. Woodson*.[37] The two branches were described

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McGee's contribution to jurisdictional analysis. *Id.* at 593. Professor Freer coined the term "mélange approach" for *McGee*'s multifactor analysis. Freer, *supra* note 16, at 552.

30. *See* Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 90–91 (1983) (Professor Lilly reads *McGee* as foreshadowing the two-branch balancing approach of *Burger King*). Unlike Professors Clermont and Perschbacher, who view *McGee* as a pure balancing case, *see supra* note 29, Professor Lilly views *McGee* as continuing to emphasize, consistent with *International Shoe*, the contacts of a defendant with the forum state. Lilly, *supra*.

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

32. *Id.* at 224.

33. *Cf.* Perschbacher, *supra* note 29, at 594 ("Plaintiff's convenience, defendant's convenience, and the forum state's interest in providing a forum all receive roughly equal weight.").

34. 357 U.S. 235 (1958).

35. *Id.* at 253 (emphasis added) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

36. The Court decided two cases in the late 1970s that continued significant reliance on the defendant orientation of *International Shoe* and *Hanson* with little, if any, concern for *McGee*'s multiple-interest balancing approach. *See* Kulko v. Superior Court, 436 U.S. 84, 91 (1978) (stating that there must be a sufficient connection to the forum by defendant to rule it fair to require a defense in the forum (citing Milliken v. Meyer, 311 U.S. 457, 463–64 (1940))); Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (stating that contacts of defendant is a proxy for fairness). In *Kulko*, however, the Court gave more attention to plaintiff and forum interests, perhaps because of the domestic relations context of the case. *See Kulko*, 436 U.S. at 92, 98, 100.

as sovereignty and convenience.[38] Justice White's description of the sovereignty function, apparently elevating it to the dominant role, caused much consternation in the legal academy,[39] and the Court clarified what it meant by sovereignty two years later in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*.[40] Repudiating his prior connection of sovereignty and federalism to due process,[41] Justice White's opinion concluded:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.[42]

Although casting off its links to sovereignty and federalism, the Court's reference to "individual liberty interest" pointed primarily to defendant concerns about being forced to defend in plaintiff's chosen forum.

After two years of uncertainty regarding jurisdictional due process,[43] the Supreme Court finally articulated a modified two-branch due process test that was judicially unquestioned for twenty-six years.[44] Justice Brennan, the great dissenter in personal jurisdiction cases,[45] forged the modern two-branch due

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37. 444 U.S. 286, 291–92 (1980).

38. *See supra* note 7.

39. *See* Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 763 & n.190. For the most extensive critique of sovereignty as an aspect of jurisdictional due process, see Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

40. 456 U.S. 694 (1982).

41. *See* Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 763–65 & nn.192–97 (describing the retreat from sovereignty/federalism).

42. *Ins. Corp. of Ireland*, 456 U.S. at 702–03 n.10.

43. During its 1983–1984 Term, the Court decided three personal jurisdiction cases: Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), Calder v. Jones, 465 U.S. 783 (1984), and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). Although the Court did not utilize a two-branch test, forum state interest was a significant factor in *Keeton*, 465 U.S. at 776, and both plaintiff and forum state interests were important in *Calder*, 465 U.S. at 788–89 (finding that plaintiffs' manifest connections to the forum are significant).

44. *See* Burger King Corp. v. Rudzewicz, 41 U.S. 462, 471–78 (1985) (citations omitted). After the two-branch test was reformulated in *Burger King*, it was reiterated and applied in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108–16 (1987) (O'Connor, J., plurality opinion). *J. McIntyre* was the first products liability case since *World-Wide Volkswagen* in 1980 in which some form of a two-branch due process test was not expressly invoked.

45. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 419–28 (Brennan, J., dissenting); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299–313 (1960) (Brennan, J., dissenting) (dissent also applies to Rush v. Savchuk, 444 U.S. 320, 333 (1980)); Kulko v. Superior Court, 436 U.S. 84, 101–02 (1978) (Brennan, J., dissenting); Shaffer v. Heitner, 433 U.S. 186, 219–28 (1977) (Brennan, J., dissenting). *See generally* Freer, *supra* note 16, at 558 (discussing the influence of Justice Brennan on personal jurisdiction since *McGee*). Professor Freer advances a unique and perceptive view that Justice Brennan's attempt to focus analysis on second-branch

process test from the Court's inconsistent prior case law. Relying heavily on *International Shoe* and *Hanson*,[46] the first branch focused almost exclusively on defendant considerations[47]—"the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."[48] The Court explained that beyond the requirement of minimum contacts, due process requires evaluation of other factors to test whether an assertion of jurisdiction comports with "fair play and substantial justice."[49]

The Court has developed several tests to determine traditional minimum contacts: (1) whether the defendant "'purposefully direct[s]' his activities at residents of the forum and [whether] the litigation results from alleged injuries that 'arise out of or relate to' those activities";[50] (2) whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws";[51] and (3) whether "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[52] It is not necessary that each test be satisfied separately to find that a defendant has purposefully established minimum contacts.[53]

If a defendant purposefully directs activities toward forum state residents, *Burger King* further states that "it is presumptively not unreasonable to require [the defendant] to submit to the burdens of litigation in that forum as well."[54] The presumption may be either enhanced or overcome by evaluation of other factors to determine whether the assertion of jurisdiction comports with "fair play and substantial justice."[55] The other factors are: (1) "the burden on the defendant"; (2) the adjudicative interest of the forum state; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) the systemic interest of the national judicial system in obtaining the most efficient resolution of the litigation; and (5) the systemic interest in "furthering . . . substantive social

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factors ironically resulted in the Supreme Court taking a very rigid, high threshold view of minimum contacts under the first branch. *See id.* at 553–54.

46. *Burger King*, 471 U.S. at 474–76 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

47. *Id.* at 474, 476 (citing *Int'l Shoe*, 326 U.S. at 316).

48. *Id.* at 474 (quoting *Int'l Shoe*, 326 U.S. at 316).

49. *Id.* at 476 (quoting *Int'l Shoe*, 326 U.S. at 320) (internal quotation marks omitted).

50. *Id.* at 472–73 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); *Helicopteros*, 466 U.S. at 414).

51. *Id.* at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted).

52. *Id.* at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)) (internal quotation marks omitted).

53. *E.g.*, Calder v. Jones, 465 U.S. 783, 787 & n.6, 789 (1984) (upholding jurisdiction over an author and editor based exclusively on the forum effects test).

54. *Burger King*, 471 U.S. at 476.

55. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)) (internal quotation marks omitted).

policies."[56] Consequently, *Burger King* plainly contemplated a positive threshold finding of traditional minimum contacts before a court proceeds to the fairness branch.

Justice Brennan, who could not muster a majority in *World-Wide Volkswagen* to abandon *International Shoe*'s exclusive focus on defendant interests,[57] or to adopt a multiple-interest balancing approach to due process,[58] did not contemplate a high threshold to establish minimum contacts.[59] Plainly, he wanted to make the second-branch factors the key to establishing jurisdiction.[60]

Asahi, decided only two years later, gave full effect to Justice Brennan's view that the "fair play and substantial justice" branch predominate.[61] Divided into conflicting four-justice pluralities,[62] the Court was unable to decide whether a Japanese component part manufacturer established minimum contacts with California.[63] All members of the Court except Justice Scalia,[64] however, concluded that California's assertion of jurisdiction was "unreasonable and unfair."[65] Justice Brennan agreed that *Asahi* was "one of those rare cases" in which the fair play and substantial justice factors trump minimum contacts.[66]

Justice O'Connor pragmatically invoked the second branch, after failing to find minimum contacts, only to avoid upholding jurisdiction in California over the Japanese component part manufacturer by an equally divided court on first-branch minimum contacts.[67]

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56. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

57. *See World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting) (*International Shoe*'s "focus on the rights of defendants, may be outdated").

58. *See id.* at 300 (Brennan, J., dissenting) ("Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations.").

59. *See Burger King*, 471 U.S. at 476 (no need for physical presence within the forum state).

60. *See id.* at 476–78 (adopting a balancing approach).

61. *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113–16 (1987) (majority opinion).

62. *Id.* at 105.

63. *Id.* at 116.

64. Justice Scalia joined Part II.A. (minimum contacts), but not Part II.B. (fair play and substantial justice) of Justice O'Connor's opinion. *Id.* at 105. Although I previously speculated that Justice Scalia joined only the O'Connor plurality only on minimum contacts because he agreed with the *Burger King* framework, Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 802–03, Professor Citron examined a memorandum from Justice Scalia in the Blackmun Papers that casts doubt on my earlier speculation. Apparently, Justice Scalia was not sure he agreed with the fairness factors as an alternative holding. Rodger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in* J. McIntyre Machinery, Ltd. v. Nicastro?, 63 S.C. L. REV. 643, 657 (2012) (suggesting Justice Scalia was uncertain about the viability of the second-branch).

65. *Asahi*, 480 U.S. at 116.

66. *Id.* (Brennan, J., concurring).

67. *Id.* at 114 (majority opinion).

For twenty-four years, lower federal and state courts struggled to make sense of the *Asahi* split on minimum contacts in stream of commerce cases.[68]

After *Asahi*, lower federal and state courts were confused regarding the proper elements to evaluate.[69] Justice Stevens, concurring in the *Asahi* judgment, but refusing to break the tie between Justices O'Connor and Brennan on the first branch, flatly stated that "[a]n examination of *minimum contacts is not always necessary* to determine whether a state court's assertion of personal jurisdiction is constitutional."[70] Minimum contacts had been the lynchpin of personal jurisdiction analysis for over four decades, and Justice Stevens' statement was contrary to *Burger King*'s command that second-branch factors are only examined "once it has been decided" that the defendant established minimum contacts under the first branch.[71] What *Asahi* may have contributed to jurisdictional analysis, apart from confusion, is that a court may dismiss for lack of jurisdiction under either branch independently. Nevertheless, it is understandable that lower courts were perplexed.

Some courts strictly adhered to the *Burger King* framework by requiring a threshold finding of minimum contacts under the first branch, before undertaking a second-branch analysis.[72] Other courts, perhaps because of the confusion generated by the *Asahi* split and Justice Stevens' concurrence, evaluated both branches, even if minimum contacts were not found.[73]

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68. *See, e.g.*, Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993) (stating that "the current state of the law regarding personal jurisdiction is unsettled"); Felix v. Kommanditgesellschaft, 241 Cal. Rptr. 670, 674 (Ct. App. 1987) (stating that there is not an "authoritative answer").

69. *See Vermeulen*, 985 F.2d at 1548; *Felix*, 241 Cal. Rptr. at 674–75.

70. *Asahi*, 480 U.S. at 121 (Stevens, J. concurring) (emphasis added).

71. *Burger King*, 471 U.S. at 476 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 326 (1945)).

72. The First Circuit adhered to this view, expressly labeling the "reasonableness" factors "secondary rather than primary" and stating that "[a] reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the *constitutionally necessary first-tier minimum is lacking, the inquiry ends.*" Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990) (emphasis added) (citing *Burger King*, 471 U.S. at 477–78) (general jurisdiction); *accord* Chung v. NANA Dev. Corp., 783 F.2d 1124, 1129–30 (4th Cir. 1986) (quoting *Burger King*, 471 U.S. at 476); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 817 & n.10 (9th Cir. 1988) (citing Raffaele v. Compagnie Generale Mar., 707 F.2d 395, 397 (9th Cir. 1983)); Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2, 5–6 n.1 (Ariz. 1987) ("Because we find that Tennessee Farmers has not purposefully engaged in forum activities . . . we do not address [the] additional factors."); *Felix*, 241 Cal. Rptr. at 676–77 ("Having determined that defendant's contacts with California are insufficient to justify jurisdiction, we need not undertake the additional process of balancing the inconvenience of defending the action in this state against the interests of plaintiff in suing locally and of the state in assuming jurisdiction."); Missouri *ex rel.* Wichita Falls Gen. Hosp. v. Adolf, 728 S.W.2d 604, 609 (Mo. Ct. App. 1987) ("We do not find that sufficient minimum contacts are present here to require exploration of additional factors.").

73. *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125 (9th Cir. 2002) (citing *Asahi*, 480 U.S. at 113; Doe v. Unocal Corp., 248 F.3d 915, 925 (9th Cir. 2001)) (concluding that a court must analyze reasonableness); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 374 (8th Cir. 1990) (citing *Asahi*, 480 U.S. at 113) (expressly

Although exceedingly rare, some courts, led by the Ninth Circuit, occasionally found, similar to Justice Brennan in *Asahi*, that second-branch factors overrode a positive finding of minimum contacts.[74] Consistent with Justice Stevens's concurrence, some even found that an assertion of jurisdiction was unfair and unreasonable under the second branch without evaluating minimum contacts.[75]

The twenty-four year interregnum between *Asahi* and *J. McIntyre* proved that the *Asahi* split and resulting confusion did not prevent lower courts from dealing effectively with personal jurisdiction issues. It did, however, undermine the rigid *Burger King* framework and allowed lower courts to develop their own tests.[76]

Although none of the three opinions in *J. McIntyre* expressly invokes the *Burger King* framework,[77] all three make mention of second-branch factors.

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interpreting Asahi as mandating analysis of the "reasonableness" factors even in the absence of minimum contacts). In *Federal Insurance Co. v. Lake Shore Inc.*, the Fourth Circuit, after a finding of no minimum contacts, concluded in dicta that reasonableness factors were an independent ground for dismissal under FED. R. CIV. P. 12(b)(2). 886 F.2d 654, 661 (4th Cir. 1989).

74. *See* Rippey v. Smith, 16 Fed. App'x 596, 598–600 (9th Cir. 2001) (using Calder effects test to satisfy purposeful availment and thus minimum contacts but affirming dismissal based on reasonableness factors); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487–90 (9th Cir. 1993) (same); *see also* TH Agric. & Nutrition, LLC v. ACE European Grp., Ltd., 488 F.3d 1282, 1291–98 (10th Cir. 2007) (finding minimum contacts, but dismissing on second-branch analysis).

The second branch established the unreasonableness of jurisdiction in *Asahi* because there was only an indemnity claim by a Taiwanese company against a Japanese company. *Asahi*, 480 U.S. at 115. In these circumstances, the second-branch factors tipped decidedly against jurisdiction. When the plaintiff is a forum state citizen, the fairness factors almost always point to jurisdiction, and rarely, if ever, operate as a check on the minimum contacts branch. *But see* Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 851 (9th Cir. 1993) (relying on the second branch).

75. *See, e.g.*, *Amoco Egypt Oil*, 1 F.3d at 851 ("Because we conclude that the exercise of personal jurisdiction . . . would be unreasonable, we need not address the issue of contacts.").

76. Most lower federal courts utilized a three-part test for specific jurisdiction. The three parts are: (1) minimum contacts based on purposeful availment of the privileges and benefits of forum state law; (2) whether the cause of action arises out of defendant's forum state activity; and (3) the exercise of jurisdiction must be reasonable. *See, e.g.*, Phillips v. Prairie Eye Ctr., 530 F.3d 22, 27 (1st Cir. 2008) (three parts); Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 484 (5th Cir. 2008) (quoting Nuovo Pignone, Spa v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002)) (same); City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 665 (6th Cir. 2005) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & n.8 (1984)) (same); Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002) (same). Some courts used a multi-part test combining elements of both branches. *See, e.g.*, *Core-Vent Corp.*, 11 F.3d at 1487–88 (citing Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058, 1065 (9th Cir. 1985)) (seven part test); Colite Indus. v. G.W. Murphy Constr. Co., 297 S.C. 426, 429, 377 S.E.2d 321, 322 (1989) (citing Atl. Soft Drink Co. of Columbia, Inc. v. S.C. Nat'l Bank, 287 S.C. 228, 231, 336 S.E.2d 876, 878 (1985)) (four part test).

77. The plurality and concurring opinions had no reason to reach the second branch because they both found that McIntyre-UK had not established minimum contacts with New Jersey. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Kennedy, J., plurality opinion); *id.* at 2791–92 (Breyer, J., concurring). But by not stating why they failed to reach the second branch, these opinions leave the vitality of the fairness factors in doubt.

Justice Kennedy only acknowledges that New Jersey had a strong interest to prevent harm to its citizens from defective products.[78] Despite this concession, he concluded that "the Constitution commands restraint before discarding liberty in the name of expediency."[79] It is unclear what Justice Kennedy meant by the quoted language. He could have meant that a strong state interest does not make up for weak or nonexistent contacts, or that without minimum contacts, even a strong state interest is irrelevant to the jurisdictional decision.

Justice Breyer makes no explicit mention of second-branch factors. He suggests, however, that "larger firm" defendants can neutralize the effect of burdensome litigation by procuring insurance, passing on costs to customers, or avoiding certain jurisdictions.[80] He then provides his "mom and pop" defendant hypotheticals,[81] but seems unaware that undue burden on a defendant is always the primary concern of second-branch fairness analysis.[82] Evaluation of the fairness branch might well have tipped the scale against jurisdiction over an "Appalachian potter" or "a small Egyptian shirt vendor, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer"[83] whose products were distributed by others.

Although it is unclear why Justice Ginsburg did not structure her dissent to mirror the framework established in *Burger King*, she, unlike the plurality and concurring opinions, found that McIntyre-UK had established minimum contacts with New Jersey.[84] Had she invoked the second-branch reasonableness factors as articulated in *World-Wide Volkswagen*,[85] and reiterated verbatim in *Burger King*[86] and *Asahi*,[87] her dissenting opinion would have been even more powerful.[88] More significantly, had she done that, she would have signaled the continuing relevance of the second branch for jurisdictional due process.

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78. *J. McIntyre*, 131 S. Ct. at 2791 (Kennedy, J., plurality opinion).

79. *Id.*

80. *Id.* at 2794 (Breyer, J., concurring) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

81. *See id.*

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

83. *J. McIntyre*, 131 S. Ct. at 2793–94 (Breyer, J., concurring). Justice Breyer used small scale manufacturers to illustrate the unfairness of the New Jersey Supreme Court's stream of commerce view.

84. *See id.* at 2797, 2801 (Ginsburg, J., dissenting) (noting that McIntyre-UK should not escape jurisdiction when its product causes injury in a forum state when McIntyre-UK purposefully availed itself of the market in any state its machines were sold by its U.S. distributor).

85. 444 U.S. at 292.

86. 471 U.S. 462, 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

87. 480 U.S. 102, 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

88. When an in-state plaintiff sues a nonresident defendant, the second-branch factors of plaintiff and forum state interest almost always tip the balance in favor of jurisdiction. *See id.* at 114. The systemic interest in substantive social policy (*i.e.*, does the forum state have a right to regulate the defendant's conduct and apply its own law to the litigation) also decidedly favors jurisdiction. *Id.* at 114–15.

Justice Ginsburg did, however, extensively invoke second-branch values in her dissent. She posed several trenchant questions to demonstrate why jurisdiction over McIntyre-UK in New Jersey was fair and reasonable:

> The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?[89]

These pointed, albeit loaded, questions indicate that (1) defendant burden, (2) forum state interest, (3) plaintiff interest, and (4) systemic interests in substantive social policy all weigh heavily in favor of jurisdiction in New Jersey.

In Part V of her dissent, Justice Ginsburg suggests that "litigational convenience and the respective situations of the parties" should determine whether a defendant should be haled into a plaintiff's home forum.[90] The ease of determining governing law and the convenience of witnesses are the important factors of litigational convenience.[91] Justice Ginsburg contrasts two situations in which these factors would likely influence the outcome of the jurisdictional inquiry, as follows:

> (1) [C]ases involving a substantially local plaintiff, like Nicastro, injured by the activity of a defendant engaged in interstate or international trade; and (2) cases in which the defendant is a natural or legal person whose economic activities and legal involvements are

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Though defendant burden may conflict with those values, in this day and age with scanning, faxing, and electronic transmissions, transporting a defense is not nearly as burdensome as in earlier eras.

89. *J. McIntyre*, 131 S. Ct. at 2800–01 (Ginsburg, J., dissenting) (footnotes omitted).

90. *Id.* at 2804.

91. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1168–69 (1966).

> largely home-based, *i.e.*, entities without designs to gain substantial revenue from sales in distant markets.[92]

She supplies an appendix of eleven cases in which courts presented with "a local plaintiff injured by the activity of a manufacturer seeking to exploit a multistate or global market—have repeatedly confirmed that jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury."[93]

Professor Steinman suggests that these considerations "might be vindicated under either of the two prongs"[94] because a home-focused defendant who does not seek to gain substantial revenue from a distant market, and does not seek to serve those markets cannot be said to have established minimum contacts.[95]

B. General Jurisdiction

Since *International Shoe*, the Supreme Court has only decided three general jurisdiction cases—*Perkins v. Benguet Consolidated Mining Co.*,[96] in 1952; *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[97] in 1984; and *Goodyear Dunlop Tires Operations, S.A. v. Brown*[98] last term. None of these cases considered or even mentioned the fairness-branch factors. Notwithstanding this omission, lower courts have found the second branch, which they generally transport verbatim from the Court's specific jurisdiction jurisprudence,[99] useful as a limiting principle in cases asserting general jurisdiction.[100]

Until *Goodyear Dunlop*, a defendant could only be sued on a cause of action unconnected to the forum state (*i.e.*, in general jurisdiction) if that defendant had "substantially"[101] "systematic and continuous"[102] contacts with the forum. As

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92. *J. McIntyre*, 131 S. Ct. at 2804.

93. *Id.*

94. Steinman, *supra* note 16, at 506 (citing *J. McIntyre*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting)).

95. *Id.*

96. 342 U.S. 437 (1952). *Perkins* did not use the term general jurisdiction. It referred to jurisdiction over a cause of action arising from activities "entirely distinct" from defendant's forum state activities. *Id.* at 477. The term was first used by the Supreme Court in *Helicopteros*. 466 U.S. 408, 414 n.9 (1984) (citing Calder v. Jones, 465 U.S. 783, 786 (1984); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81 (1980); Mehren & Trautman, *supra* note 91, at 1136–44).

97. 466 U.S. 408 (1984).

98. 131 S. Ct. 2846 (2011).

99. *See, e.g.*, Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987) (citing Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 113 (1987)) (stating reasonableness factors directly from *Asahi*).

100. *See id.*; Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996).

101. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (stating that "there have been instances in which the continuous corporate operations within a state were thought *so substantial* and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities") (emphasis added) (citations omitted).

Meir Feder perceptively points out, what some courts qualified under this much criticized standard[103] might constitute systematic and continuous activity, but hardly was substantial from the perspective of a defendant's overall business.[104]

Justice Ginsburg's unanimous opinion for the Court in *Goodyear Dunlop* suggested that a defendant must be "essentially at home" in the forum to be subject to general jurisdiction.[105] If developed in subsequent case law, the "essentially at home" standard may serve as a limiting factor on the ambiguous substantially systematic and continuous standard.[106]

The fundamental problem with the *Shoe–Perkins* substantially systematic and continuous test is that many major business entities do substantially systematic and continuous business in many if not every state. Classic examples are Wal-Mart and Exxon-Mobil. Hypothetically, if a South Carolinian is injured by the negligence of an Exxon-Mobil employee in Alaska, a suit may be brought on this claim in a South Carolina court because Exxon-Mobil engages in substantially systematic and continuous business activity in South Carolina. This theoretical assertion of general jurisdiction may be fundamentally unfair. Witnesses, if any, public safety (police and fire department) official reports, if any, records of initial medical treatment by doctors and hospitals, if any, all are located in Alaska.[107] Additionally, Alaska may well have the strongest interest in applying its own tort law and other safety-standards to the case.

Prior to the *Goodyear Dunlop* essentially at home standard, lower federal courts had little if any guidance from the Supreme Court on how to resolve the conflict between the *Shoe–Perkins* standard permitting, and litigational convenience and state interest factors militating against, general jurisdiction.[108] Many lower federal courts, without guidance let alone direction from the Supreme Court, started to apply second-branch fairness factors to assertions of general jurisdiction.[109] As Professor Silberman aptly observed, "general

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102. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445–46 (1952) (adopting the "continuous and systematic corporate activities" test to a cause of action not arising from forum state activities).

103. *See* Brilmayer, *supra* note 96, 81–88; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 760–61 (1987); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 636, 645 (1988).

104. Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 674–75 & n.16 (2012).

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

106. *See generally* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 528 (2012) (asserting that the essentially at home standard "represents a sound and workable basis to assess the limits of general jurisdiction").

107. On the other hand, it may be unduly burdensome for the South Carolina plaintiff to return to Alaska to file suit.

108. *See, e.g.*, Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1172 (9th Cir. 2006) ("In evaluating general jurisdiction, we have not developed a precise checklist or articulated a definitive litany of factors.").

109. *See, e.g.*, Johnston v. Multidata Sys. Int'l Corp., 523 F.3d 602, 615 (5th Cir. 2008) (applying second-branch factors to an assertion of general jurisdiction (citing Bearry v. Beech

jurisdiction may present the strongest case for [second-branch] invocation."[110] A limiting principle was needed and the lower federal courts provided it.

III. LOWER COURTS' DECISIONS SINCE *J. MCINTYRE* AND *GOODYEAR DUNLOP*

The *Asahi* 4-to-4-to-1 split caused confusion and inconsistent decisions among the lower federal and state courts.[111] Unfortunately, *J. McIntyre* with its 4-to-2-to-3 split[112] did little to resolve the confusion. As in the interim period between *Asahi* and *J. McIntyre*, the lower courts have gone their own way in deciding personal jurisdiction cases under the Due Process Clause. Some courts, consistent with the *Burger King* framework, have dismissed cases on the first branch without analyzing the second branch.[113] Other courts dismiss after analyzing both branches,[114] which is technically unnecessary under the "once it has been decided"[115] language of *Burger King*. This language contemplates a positive finding of minimum contacts before proceeding to fairness.

Significantly, all located cases that have upheld specific personal jurisdiction since June 27, 2011, have analyzed both the first-branch traditional minimum contacts and the second-branch fair play and substantial justice factors.[116] These

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Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987)); Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996) (holding exercise of jurisdiction was unreasonable in view of "five-factor *Asahi* test"). *But see Metro. Life Ins.*, 84 F.3d at 576–78 (Walker, J., dissenting) (stating that the Supreme Court has not required invocation of the fairness factors to general jurisdiction and listing cases in the 1st, 5th, 6th, 8th, and 9th Circuits that applied the second branch to general jurisdiction without authority from the Supreme Court).

110. Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 595 (2012).

111. *See supra* notes 68–75 and accompanying text.

112. *See supra* note 6.

113. *See, e.g.*, Pangaea, Inc. v. Flying Burrito LLC, 647 F.3d 741, 745, 749 (8th Cir. 2011) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (denying on first branch based on lack of purposeful availment); Lindsey v. Cargotec USA, Inc., No. 4:09 CV-00071-JHM, 2011 WL 4587583, at *7 (W.D. Ky. Sept. 30, 2011) (denying on first branch for failure to show purposeful availment); Oticon, Inc. v. Sebotek Hearing Sys., LLC, No. 08-5489(FLW), 2011 WL 3702423, at *14, *16 (D.N.J. Aug. 22, 2011) (rejecting personal jurisdiction under the *Calder* effects test).

114. *See* RBC Bank USA v. Hedesh, No. 5:11-CV-19-BO, 2011 WL 6091083, at *4–*5 (E.D.N.C. Oct. 20, 2011); N. Ins. Co. of N.Y. v. Constr. Navale Bordeaux, No. 11-60462-CV, 2011 WL 2682950, at *5–*6 (S.D. Fla. July 11, 2011).

115. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citing *Int'l Shoe*, 326 U.S. at 320).

116. *See* Fiore v. Walden, 657 F.3d 838, 845–46 (9th Cir. 2011) (citing Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)); UTC Fire & Sec. Ams. Corp. v. NCS Power, Inc., No. 10 Civ. 6693(LTS)(THK), 2012 WL 423349, at *3 (S.D.N.Y. Feb. 10, 2012) (quoting Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996)); Smith v. Teledyne Cont'l Motors, Inc., No. 9:10CV2152, 2012 WL 10836, at *4–*6 (D.S.C. Jan. 3, 2012) (citing Lesnick v. Hollingsworth & Vose Co., 35 F. 3d 939, 945–46 (4th Cir. 1994)); Merced v. Gemstar Grp., Inc., No. 10-3054, 2011 WL 5865964, at *2 (E.D. Pa. Nov. 22, 2011); Original Creations, Inc. v. Ready Am., Inc., No. 11 C 3453, 2011 WL 4738268, at *1 (N.D. Ill. Oct. 5, 2011).

cases are consistent with the *Burger King* framework that a finding of minimum contacts only raises a presumption of proper jurisdiction under the Due Process Clause. The presumption is then tested by analysis of the second-branch fairness factors.[117]

Even though none of the three opinions in *J. McIntyre* specifically utilized the second branch, lower courts continue to analyze both, and are likely to do so until the Supreme Court instructs them otherwise. A habit of twenty-four years is difficult to break.

Some courts have even upheld jurisdiction on the first branch alone.[118] Still, other courts continue to use their own multi-part tests that combine the two branches.[119] Consistent with the practice of several circuits,[120] courts also continue to apply second-branch factors to assertions of general jurisdiction.[121] Until the Court converts its *Asahi* and *J. McIntyre* pluralities into majorities, the lower federal and state courts will continue to go their own way and reach inconsistent results applying their own formulations of jurisdictional due process.

IV. CRITICISM OF TWO-BRANCH ANALYSIS AND A PROPOSED MODIFICATION OF THE JURISDICTIONAL DUE PROCESS TEST

Three main criticisms of the two-branch test were expressed shortly after *Burger King* came down.[122] Professor Freer recently has articulated a fourth significant concern.[123] First, in repudiating the sovereignty/federalism function of due process in *Insurance Corp. of Ireland*, the Court acknowledged: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[124] Additionally, since a defendant may waive objection to, or be estopped from raising personal jurisdiction, the Court viewed jurisdictional due process as "a legal right

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117. *See Burger King*, 471 U.S. at 476 (citing *Int'l Shoe*, 326 U.S. at 320).

118. Saint Petersburg Invs. Co. v. Baldiga, No. 11-40063-RGS, 2011 U.S. Dist. LEXIS 88774, at *8–*14 (D. Mass. Aug. 10, 2011) (upholding on first branch alone); Harrelson v. Lee, 798 F. Supp. 2d 310, 317, 318 (D. Mass. 2011).

119. *See, e.g.*, Furminator, Inc. v. Wahba, No. 4:10CV01941 AGF, 2011 WL 3847390, at *3 (E.D. Mo. Aug. 29, 2011) (citing Steinbuch v. Cutler, 518 F.3d 580, 586 (8th Cir. 2008)) (using 8th Circuit test that mixes the branches).

120. *Metro. Life Ins. Co.*, 84 F.3d at 577–78 (Walker, J., dissenting) (disagreeing with the application of fairness factors to general jurisdiction and collecting cases from the 9th, 8th, 6th, 5th, and 1st Circuits applying the second branch to general jurisdiction).

121. Irving v. Revera, Inc., No: 2:10-cv-153, 2011 WL 5329726, at *3 (D. Vt. Nov. 4, 2011) (citing *Burger King*, 471 U.S. at 476–77); *Harrelson*, 798 F. Supp. 2d at 317 (citing *Burger King*, 471 U.S. at 477).

122. *See infra* notes 124–129 and accompanying text.

123. *See* Freer, *supra* note 16, at 570–71.

124. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxities de Guinee, 456 U.S. 694, 702 (1982).

protecting the individual."[125] Plainly, the liberty interest recognized was that of a defendant who is haled into a plaintiff's preferred forum. Consequently, commentators have criticized the second-branch factors, other than defendant burden, as being inconsistent with defendant liberty interests.[126]

Second, they also argue that the forum state's interest (second fairness factor), the interstate judicial system's interest in efficient resolution (fourth fairness factor), and the shared interest of the several states in furthering substantive social policy (fifth fairness factor) are all inconsistent in some respect with *Insurance Corp. of Ireland*'s repudiation of *World-Wide Volkswagen*'s sovereignty/federalism branch.[127]

Third, the commentators also deplore the complexity of the multi-factor two-branch test, which leads to dubious and inconsistent results.[128] Moreover, Professor Silberman cogently argues that "reasonableness is an indeterminate standard for a constitutional test" and that defendant burden concerns are more appropriately handled by a "nuanced doctrine of forum non conveniens that leaves the discretion to the trial court."[129]

Fourth, Professor Freer insightfully developed the theory that Justice Brennan's focus on the second-branch fairness factors ironically resulted in an inflexible and heightened view of minimum contacts by the Court in order to defeat jurisdiction in close cases.[130] This uncompromising position was necessary to preclude jurisdiction in these cases because the fairness factors almost always tip the balance in favor of a plaintiff's chosen forum when an in-state plaintiff brings suit.

Justice Brennan lost his battle to jettison the defendant orientation of *International Shoe* and *Hanson*, and impose the *McGee* multi-interest analysis in *World-Wide Volkswagen*.[131] He surreptitiously resurrected his powerful *World-*

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125. *Id.* at 704.

126. *See, e.g.*, Sonenshein, *supra* note 22, at 48, 58 (observing that *International Shoe* "refers only to defendant concerns" and that state and plaintiff interests "add nothing substantial to the due process analysis"); Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 806–07 & nn.423–24 ("[T]here are sound reasons why each of the fairness branch elements should not be factored separately into the due process jurisdictional analysis."); Mona A. Lee, Comment, Burger King's *Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry Impedes Judicial Economy and Threatens a Defendant's Due Process Rights*, 66 TEMP. L. REV. 945, 963–66 (1993) (arguing there is no constitutional basis to incorporate non-defendant interests into due process analysis and that *Burger King*'s two-branch balancing is inherently biased against defendants).

127. *See* Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 805–07; Lee, *supra* note 126, at 963 (citations omitted).

128. *See, e.g.*, Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 806 (arguing that "[t]he whole process seems unduly prolix and complicated").

129. Silberman, *supra* note 110, at 595. *See also* Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 808–09 (asserting that "the forum non conveniens doctrine seems a more appropriate vehicle than the two-branch approach of *Burger King* for taking account of defendant burden and other fairness factors").

130. *See* Freer, *supra* note 16, at 570–71.

131. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting).

Wide Volkswagen dissent in *Burger King*'s second branch, but ultimately compromised its effectiveness by making a defendant's minimum contacts the touchstone of jurisdictional due process.[132] Although he plainly contemplated a low threshold for minimum contacts, Justice O'Connor's *Asahi* plurality, Justice Kennedy's *J. McIntyre* plurality, and, to a lesser extent, Justice Breyer's *J. McIntyre* concurrence, all took a contrary view. They all require a high threshold finding based on a defendant's own purposefully created connection or submission,[133] in Justice Kennedy's expression, to the sovereign jurisdiction of the forum state.[134] Justices O'Connor and Kennedy reject Justice Brennan's view of minimum contacts, which can be created by an unadorned stream of commerce.[135] Justice Kennedy even rejects contacts of an exclusive agent of the defendant in *J. McIntyre*.[136]

These uncompromising views suggest that until there is a dramatic shift in the Court's makeup, a defendant's contact with the forum state will remain a touchstone of personal jurisdiction analysis. Consequently, any proposal must factor defendant interests into the jurisdictional calculus.

My modest proposal for a simplified approach to jurisdictional due process relies on *International Shoe* for the proposition that due process is not exclusively concerned with a defendant's liberty interests.[137] Defendants' interests are a necessary, but not a sufficient basis to assess whether an assertion of jurisdiction comports with due process. The Court in *Insurance Corp. of Ireland* focused exclusively on a defendant's liberty interest,[138] presumably to insure that a defendant is free from the coercive power of a sovereign state with which it has "no contacts, ties or relations."[139] I have no quarrel with the requirement that a defendant have some connection to the forum state. My disagreement with the *J. McIntyre* Court and Justice O'Connor's plurality in *Asahi* is over the nature of the required contact. A product delivered indirectly to a forum state, either by the deliberate commercial activity of an unbroken stream of commerce or through the commercial activity of an agent acting for its own and its principal's benefit, constitutes a "contact," "tie," or "relationship"[140]

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132. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

133. *See Asahi*, 480 U.S. at 108–09 (O'Connor, J., plurality opinion) (quoting *Burger King*, 471 U.S. at 474); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (Kennedy, J., plurality opinion) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)); *id.* at 2792 (Breyer, J., concurring) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980)).

134. *J. McIntyre*, 131 S. Ct. at 2787 (Kennedy, J., plurality opinion) (citing *Int'l Shoe*, 326 U.S. at 316).

135. *See Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion); *J. McIntyre*, 131 S. Ct. at 2788 (Kennedy, J., plurality opinion).

136. *See J. McIntyre*, 131 S. Ct. at 2790–91 (Kennedy, J., plurality opinion).

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

138. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxities de Guinee, 456 U.S. 694, 702–03 & n.10 (1982).

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

140. *Id.*

to a forum state. In either case, the defendant's product connects the defendant to the forum and that connection is not "random" "fortuitous" or "attenuated."[141] It may be indirect, but it is deliberate. It results in an economic benefit to the remote defendant, *i.e.*, Asahi or McIntyre-UK.

International Shoe further teaches that the "quality and nature" of a defendant's "activity" in, or connection to, the forum must be assessed "in relation to the fair and orderly administration of the laws which . . . [is] the purpose of the due process clause to insure."[142] The "fair and orderly administration of the laws" is what constitutes "traditional notions of fair play and substantial justice."[143] The concept of fair and orderly administration of the law is not solely limited to fairness to defendants. Consequently, the sovereign interest of a forum state in administering its laws, and fair play to all parties, including plaintiffs, must logically and inherently be considered if due process is to be accorded.[144] The concept that due process encompasses more than defendant interests was also mandated when the Court observed that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that *a party* unfairly is at a 'severe disadvantage' in comparison to his opponent."[145] Just as a defendant may be unfairly disadvantaged by litigating in a plaintiff's chosen forum, a plaintiff may also be unfairly disadvantaged if required to pursue a defendant in the defendant's home forum.

As Justice Brennan so aptly observed in *World-Wide Volkswagen*, the "constitutionally significant 'burden' to be analyzed relates to the mobility of the defendant's defense."[146] The same consideration applies to a plaintiff. If forced

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141. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980)) (internal quotation marks omitted).

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

143. *Id.* at 319–20.

144. *Cf.* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (observing under the Equal Protection Clause that racial discriminations in jury selection not only harms the accused and the excluded juror, but the entire community); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (applying *Batson* to gender-based preemptories); Georgia v. McCollum, 505 U.S. 42, 49 (1992) (describing the constitutional interest as extending beyond the protection of the defendant to the integrity of the system and appearance of fair process); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (applying *Batson* to civil cases) (citing *Batson*, 476 U.S. at 96–97).

145. *Burger King*, 471 U.S. at 478 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972) (forum selection provisions); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223–24 (1957)) (emphasis added).

146. *World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting). *World-Wide Volkswagen* further explained:

> For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

to pursue a defendant in a forum far from where the plaintiff was injured, the lack of transportability of its case may gravely disadvantage a plaintiff.

Accordingly, a court should determine whether an assertion of personal jurisdiction comports with due process by undertaking evaluation of three factors. First, there must be some connection of the defendant to the forum state, but that connection must be viewed liberally. At a minimum, it should include indirect contacts through ordinary and regular commercial activity as long as the defendant benefits economically from the contact.

The second factor a court must evaluate is whether the defendant can mount a defense in the plaintiff's forum based on accessibility of evidence, witnesses, and the potential to implead third-party defendants. If the defendant cannot, without undue expense and burden, mount a defense, the case should be dismissed. The plaintiff has the burden of showing the connection to the forum state, and the defendant then has the initial burden of demonstrating unfairness.

Third, in responding to the defendant's burden argument, the plaintiff is required to demonstrate that a dismissal would work an unfair hardship so that the plaintiff will, in essence, be without a remedy. The trial court must assess the relative hardships and choose the lesser burden.

A simplified approach to jurisdictional due process is also desirable because most challenges to personal jurisdiction occur at the pre-answer stage of a litigation.[147] At this stage, a court typically resolves the jurisdictional issue only on the pleadings, affidavits, and limited jurisdictional discovery, if any.[148] When jurisdiction is tested at this preliminary stage, courts apply the light threshold prima facie standard to the plaintiff's proof supporting jurisdiction.[149] When deciding the typical 12(b)(2) motion, a court's task is more manageable if it has fewer factors to consider. Under the due process test that emerged from *Burger King*, a court has three potential minimum contacts elements to evaluate and five fairness branch factors to analyze.[150] Under the suggested approach, only three elements need be considered. Fewer factors are likely to produce simpler, faster, and more consistent results.

V. CONCLUSION

My three-element proposal—to find some defendant connection or tie to the forum state, and then for a court to assess the relative litigational burden on all

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Id.

147. *See* FED. R. CIV. P. 12(b)(2) (providing for a pre-answer motion to dismiss for lack of personal jurisdiction).

148. *See, e.g.*, Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196–98 & nn.2–3 (2d. Cir. 1990) (deciding jurisdiction on summary judgment, but extensively discussing procedure and standard under FED. R. CIV. P. 12(b)(2)); Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1284–86 (9th Cir. 1977) (discussing various stages of a litigation when jurisdiction is tested and corresponding evidentiary burdens).

149. *See id.*

150. *See supra* text accompanying notes 50–56.

parties—is not a perfect solution to the conundrum of personal jurisdiction. As is often the case in law, when parties battle for litigational advantage, there is no perfect solution. Any decision will be lamented by the losing party. Adoption of the modified due process test proposed here, however, will enable courts to achieve "the fair and orderly administration of the laws which . . . [is] the purpose of due process to insure."[151] It will also comport with "traditional notions of fair play and substantial justice" for all interested parties.[152]

Twenty-four years ago, *Asahi* raised the spector that minimum contacts was not necessary to jurisdictional analysis.[153] The distressingly fragmented *Asahi* Court's reliance on the second branch was only necessary because the Court could not agree on minimum contacts. Nevertheless, *Asahi* taught that assertions of personal jurisdiction can be denied under either branch.

The *J. McIntyre* opinion, bereft of *Burger King*'s two-branch framework, logically questions the continued authority of the fairness branch to due process analysis. Like *Asahi*, *J. McIntyre* "is only another, albeit unfortunate, way station in the evolution of jurisdictional due process."[154] Although it does not sound the death knell for fair play and substantial justice, the continued constitutional significance of the second-branch must await future developments.

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

152. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

153. *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 121 (1987) (Stevens, J., concurring) ("An examination of minimum contacts is not always necessary to determine whether [an] . . . assertion of personal jurisdiction is constitutional.").

154. Stravitz, *Sayonara to Minimum Contacts*, *supra* note 17, at 813.