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"Arising From" Villanova Law Review: Villanova Law Review's Analysis of Personal Jurisdiction

Teressa E. Ravenell

"ARISING FROM" *VILLANOVA LAW REVIEW*: *VILLANOVA LAW REVIEW*'S ANALYSIS OF PERSONAL JURISDICTION

TERESSA E. RAVENELL*

INTRODUCTION

WHETHER a state may exercise personal jurisdiction over an absent non-resident defendant was a question confronting jurists long before the *Villanova Law Review* published its first edition.[1] The Supreme Court has revisited this issue no less than a dozen times in the last sixty years.[2] Accordingly, it seems appropriate that, since its own inception in 1955, the *Villanova Law Review* has dedicated hundreds of pages to scholarship discussing and criticizing personal jurisdiction jurisprudence.[3] Individually, the authors of these comments, notes, and articles have carefully analyzed personal jurisdiction jurisprudence, identified unanswered question in the law, and offered thoughtful and timely solutions to these issues. In so doing, they have enriched a broader scholarly discussion. Together,

* Professor of Law, Villanova University Charles Widger School of Law. J.D., 2002, Columbia University School of Law; B.A., 1998, University of Virginia. A special thanks to Professor Joy Sabino Mullane for her encouragement and many thoughtful comments and to the research assistants who worked on this piece, Sara Bogdnoff, Katherine Nugent, Joseph Kenney, Peter Adonizio, and Jason Kurtyka.

1. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877).

2. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Burnham v. Superior Court, 495 U.S. 604 (1990); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Calder v. Jones, 465 U.S. 783 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Hess v. Pawloski, 274 U.S. 352 (1927).

3. *See, e.g.*, Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of in Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1980); William D. Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1966); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Martin F. Noonan, *Civil Procedure—Personal Jurisdiction: Evolution and Current Interpretation of the Stream of Commerce Test in the Third Circuit*, 40 VILL. L. REV. 779 (1995); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996); David M. Fritch, Brief, *Beyond* Zippo*'s "Sliding Scale"—The Third Circuit Clarifies Internet-Based Personal Jurisdiction Analysis*, 49 VILL. L. REV. 931 (2004); Daniel V. Logue, Note, *If the* International Shoe *Fits, Wear It: Applying Traditional Personal Jurisdiction Analysis to Cyberspace in* CompuServe, Inc. v. Patterson, 42 VILL. L. REV. 1213 (1997); Elizabeth A. Malloy, Note, *Personal Jurisdiction over Publishers in Defamation Actions: A Current Assessment*, 30 VILL. L. REV. 193 (1985); Katherine Neikirk, Note, *Squeezing Cyberspace into* International Shoe*: When Should Courts Exercise Personal Jurisdiction over Noncommercial Online Speech*, 45 VILL. L. REV. 353 (2000).

these pieces demonstrate the evolution of the personal jurisdiction doctrine.

This Article honors the *Villanova Law Review*'s rich legacy of personal jurisdiction scholarship by surveying personal jurisdiction jurisprudence. As a general matter, this article reflects the principle that one can learn a great deal by studying the past. More specifically, the author argues that distinctions between specific and general jurisdiction, as well as the importance of the "arises from" inquiry, are better understood against the backdrop of *Pennoyer v. Neff*[4] and the cases immediately following it. Part I of this Article provides an overview of personal jurisdiction up until 1955, the year the *Villanova Law Review* published its first issue. Part II considers how the Court and *Villanova Law Review* analyzed and applied *International Shoe Co. v. Washington*[5] from 1955–2015. Part III argues that in recent years the policy bases Supreme Court Justices have used to explain specific and general jurisdiction may be traced back to *Pennoyer*. Finally, Part IV offers some general conclusions and observations.

I. PERSONAL JURISDICTION BEFORE 1955

A. Pennoyer*'s Evolution and the Birth of* International Shoe *(1877–1945)*

Pennoyer is often described as the "fountainhead" of personal jurisdiction.[6] As suggested herein, it is the case from which all current bases of jurisdiction flow. In *Pennoyer*, Justice Field concluded that personal jurisdiction requires that defendants be physically present in the state when they are served or that they explicitly consent to the forum state's jurisdiction by voluntarily appearing.[7]

Following *Pennoyer*, the Court struggled with how to apply the territorial presence requirement in cases involving corporate defendants.[8] Initially the Court held that a business was only present for purposes of in personam jurisdiction in states in which it was incorporated or had appointed an agent for service of process.[9] Eventually, however, the Court

4. 95 U.S. 714 (1878).

5. 326 U.S. 310 (1945).

6. *See* Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730 (2012).

7. *See Pennoyer*, 95 U.S. at 733 (holding defendant may "be brought within [the forum state's] jurisdiction by service of process within the [s]tate, or by his voluntary appearance").

8. *See Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919 (1960) ("Under the prevailing view that corporations were artificial persons existing only within the territorial confines of the sovereignty which created them, the presence theory of jurisdiction with its overtones of power to seize a person or thing did not seem to apply.").

9. *See id.* ("[T]here was never any dispute that a domestic corporation could be sued on any cause of action."); *see also* Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917) (noting in personam jurisdiction over nonresident corporate defendant was clear when defendant "had appointed an agent authorized in terms to receive service in such cases").

held that *Pennoyer*'s presence requirement is satisfied "when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state . . . ."[10] The Court gradually relaxed *Pennoyer*'s rigid requirements—consent became implied, rather than explicit, and physical presence gave way to a "doing business" standard for business entities.[11]

Nevertheless, as courts expanded their notions of consent and presence, they also developed new standards to limit defendants' exposure to liability.[12] For example, in *Hess v. Pawloski*,[13] the Court upheld Massachusetts's jurisdiction over an absent non-resident defendant who had been involved in a car accident while in the state although *Pennoyer's* strict personal jurisdiction requirements were not met.[14] Importantly, the Court noted the Massachusetts statute at issue limited the defendant's implied consent "to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved."[15] In short, the defendant could be subject to personal jurisdiction even though he was not personally present in the forum state when process was served, but the forum state's jurisdiction was limited to claims directly arising from his conduct in the state—the operation of a motor vehicle there—and nothing else.

Thus, in the 1920s and 1930s, there were essentially four bases for personal jurisdiction: (1) actual presence in the state at the time of service, (2) explicit consent to suit demonstrated through one's voluntary presence in the state, (3) constructive presence in the state by "doing business" in or being a resident of the state, or (4) implicit consent through some specific act. When jurisdiction was based on constructive or actual presence or explicit consent, courts were free to exercise jurisdiction over any claim, regardless of the relationship among the defendant, the forum, and

10. *See* Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914).

11. *See generally Developments in the Law: State-Court Jurisdiction, supra* note 8 (describing pre-*International Shoe* expansion of personal jurisdiction doctrine).

12. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

13. 274 U.S. 352 (1927).

14. *See id.* at 356 (holding motorist consented to appointing secretary of state as agent for purpose of accepting service of process when case arose from automobile accident by driving on state's roadways). The defendant was not personally in the state when he was served, and he did not voluntarily consent to jurisdiction by appearing in response to plaintiff's complaint. *See id.* at 353–54. Nevertheless, the Court held that jurisdiction was permissible because "the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served." *See id.* at 356–57. In other words, by driving in Massachusetts, the defendant had implicitly consented to the appointment of an agent and, because the agent was present in the state at the time of service, *Pennoyer*'s presence requirement was met. By combining notions of implicit consent and presence, Massachusetts was able to reach well beyond its borders to reach the absent defendant. *See* Edwin W. Scott & Michael R. Bradley, Note, *Civil Procedure—Nonresident Motorist Statutes—Extent to Which Jurisdiction May Be Acquired*, 7 VILL. L. REV. 472, 476 (1962) (discussing legal fiction upon which Court premised jurisdiction in *Hess*).

15. *See Hess*, 274 U.S. at 356.

the subject of the litigation. In contrast, when jurisdiction was premised on implied consent, the plaintiff's claim had to arise from the defendant's conduct in the forum state.

Understood against this backdrop, *International Shoe* hardly seems groundbreaking. Although the opinion offers a new standard for analyzing questions of personal jurisdiction, the case, in many respects, remains connected to *Pennoyer* and its progeny. In *International Shoe*, the Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[16] The Court then goes on to describe the bounds of jurisdiction as follows:

> [I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there . . . . [T]here 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.[17]

Although the Court clearly rejects the legal fictions of "presence" and "implied consent," this description of jurisdiction is consistent with precedent.[18] A court may exercise jurisdiction to hear claims unrelated to the defendant's relationship with the forum when the defendant has "substantial" contact with the forum state, i.e., when the defendant is "present" in the state.[19] Additionally, the Court seems to suggest that jurisdiction comports with due process when the defendant has limited or isolated contact with the forum state so long as the plaintiff's claim arises from the defendant's contact with the forum state, i.e., when the defendant has implicitly consented to jurisdiction for these limited purposes.[20]

Thus, it seems that *International Shoe*'s language requiring "certain minimum contacts" is, for all intents and purposes, simply a restatement of the legal rules in effect at the time. General jurisdiction seems an extension of *Pennoyer*'s physical presence requirement, and specific jurisdiction

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16. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

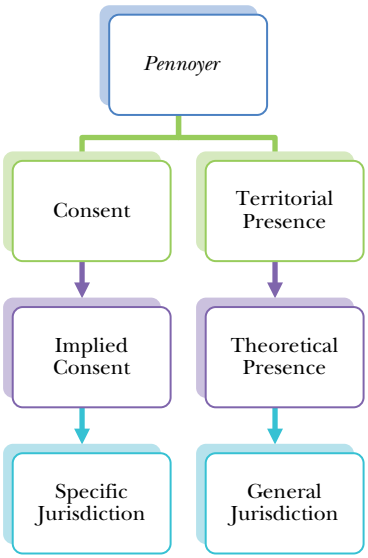
17. *Id.* at 317–18 (citations omitted).

18. *See id.* at 316–18.

19. *See id.* at 318.

20. *See id.* at 317; *see also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)); *Helicopteros*, 466 U.S. at 414 n.8.

may be seen as an outgrowth of implied consent. So understood, *Pennoyer*'s "family tree" may be depicted as such:



Clearly, *International Shoe* changed the way that courts were to talk about personal jurisdiction—the case explicitly rejects the idea of consent and presence and moves toward ideas of justice and fairness. But it is far less clear that this linguistic shift necessarily would change the outcome of courts' personal jurisdiction determinations. As one scholar argues, "[e]vidence from the conference discussion of *International Shoe* indicates that the Justices were primarily concerned with the justification of the *Pennoyer* system, not its practical shortcomings."[21] In other words, the Justices' (and legal realists') criticism of *Pennoyer*'s approach concerned the means, not the end.[22]

Furthermore, at least in terms of outcome, *International Shoe* is consistent with *Pennoyer*'s progeny.[23] Arguably, Washington's jurisdiction over the International Shoe Company was "fair" and "just" because the company was "doing business" in the state, and the State's claim was a direct consequence of that conduct.[24] As Justice Stone explains:

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21. Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to* International Shoe, 10 GEO. MASON L. REV. 59, 85 (2001).

22. *See Int'l Shoe*, 326 U.S. at 316 (noting "the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact").

23. For a further discussion of how *International Shoe* is consistent with *Pennoyer*, see *supra* notes 16–22 and accompanying text.

24. *See Int'l Shoe*, 326 U.S. at 316–17 ("[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

> [S]ome of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.[25]

In short, *International Shoe* is a junction point in personal jurisdiction jurisprudence—it merges formalist ideas of "presence" and "consent" with realist ideas of "fairness" and "justice." The case provides a general framework for personal jurisdiction determinations. The Court explains when personal jurisdiction is entirely impermissible: "single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there."[26] Similarly, the Court describes those circumstances in which jurisdiction is clearly permissible: "[when] the continuous corporate operations within a state [are] 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."[27] However, one of the problems with *International Shoe* is that the Court fails to provide much guidance regarding the vast circumstances separating these two extremes. Regardless, it seems fairly clear that the "arises from" and "relates to" inquiry is an integral part of this determination.[28]

B. *Interpreting* International Shoe: *The "Arises From" Factor in Theory*

How the "arises from" and "relates to" questions factor into *personal* jurisdiction determinations largely depends on one's interpretation or understanding of *International Shoe*'s proposed model for jurisdiction. There are at least two clear ways one might interpret *International Shoe*. First, one might view *International Shoe* as offering a "sliding scale" approach to jurisdiction. Several scholars have proposed such a model.[29] Under this

25. *Id.* at 318 (citations omitted).

26. *See id.* at 317.

27. *See id.* at 318.

28. *See id.* at 319 (noting "the privilege of conducting activities within a state . . . . may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue").

29. *See, e.g.*, Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (proposing uniform theory of personal jurisdiction based on defendant's expectations about place of suit and forum-derived benefit); Lawrence W. Moore, S.J., *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001) (suggesting sliding scale model is functionally consistent with reasons underlying general and specific jurisdiction distinction); *see also* William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS (1983)) (arguing excessive focus on claim-relatedness dichotomy subverts fairness).

model, courts consider both the quantity and quality of the defendant's contacts with the forum and the relatedness of those contacts with the claim.[30] Thus, where a defendant has only limited or isolated contact with the forum state, the court may nevertheless exercise jurisdiction if the plaintiff's claim arises directly from this contact. The opposite would also be true—where the defendant has extensive contacts with the forum state, the court could exercise jurisdiction over an unrelated claim. So far, this approach is entirely consistent with *International Shoe*, as well as the legal rules in effect in the years immediately preceding *International Shoe*.[31] However, the sliding scale approach takes the additional step of allowing for jurisdiction when the claim falls somewhere in the middle. For example, a defendant may have some contacts with the forum state, and the plaintiff's claim may indirectly arise from these contacts. Under the sliding scale approach, the defendant would still be subject to personal jurisdiction in the forum state.

Under the second interpretation of *International Shoe*, which I will refer to as the "distinct question approach," personal jurisdiction comports with due process in more limited circumstances. The plaintiff's claim must be a direct consequence of the defendant's contact with the forum state, *or* the defendant must have substantial contacts with the forum state, in which case the plaintiff's claim may be entirely unrelated to that contact. However, if the defendant's contacts are more than isolated, but less than substantial, the State may not exercise jurisdiction unless the plaintiff's claim arises from the defendant's contact with the forum state. In other words, this approach does not allow for jurisdiction over claims that fall within the middle zone.

The difference between these two approaches may be expressed in terms of the following mathematical formula wherein Y represents the relationship between plaintiff's claim and the defendant's contact with the forum state (the higher the quantity, the closer the relationship); X represents the defendant's contacts with the forum state (the higher the quantity, the greater the contacts); and jurisdiction requires a sum total of 100:

Sliding Scale Approach: $X + Y \geq 100$
Distinct Question Approach: $X \geq 100$ or $Y \geq 100$

Under the first approach, the quantity of the defendant's contacts in the forum state may compensate for the quality of the relationship between these contacts and the plaintiff's claim and vice versa. The distinct question approach evaluates these requirements separately. Either the re-

30. Richman, the leading supporter of the sliding scale approach, described it as such: "As the quantity and quality of the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible; as the quantity and quality of the defendant's forum contacts decrease, a stronger connection between the plaintiff's claim and those contacts is required." Richman, *supra* note 29, at 1345.

31. *See supra* notes 27–29 and accompanying text.

lationship between the plaintiff's claim and the defendant's contact with the forum state is sufficiently close to justify personal jurisdiction over the defendant ($X \geq 100$), or the defendant's contacts are so substantial as to justify jurisdiction ($Y \geq 100$).[32]

II. PERSONAL JURISDICTION 1955–2015: *INTERNATIONAL SHOE* IN PRACTICE

A. *The Early Years: 1950–1975*

In the years immediately following *International Shoe*, there remained a great deal of uncertainty regarding how courts were to interpret and apply the case, particularly in the cases involving non-resident defendants. As Malcolm J. Gross and Robert M. Schwartz noted in Volume 10, Issue 3 of the *Villanova Law Review*, which was published in 1964, "[t]he nonresident is a curious and troublesome figure in our American legal system. In a federal union such as ours, the problems inherent in acquiring and maintaining jurisdiction by one state, over the resident of another state, are immense."[33]

However, during this same time period courts and scholars seemed far less interested in whether the plaintiff's claim "arose from" or "related to" the defendant's contact with the forum state and, instead, tended to focus on whether the plaintiff had established "minimum contacts" with the state.[34] This silence may be explained by at least two possibilities. The first possibility is that, because most plaintiffs sued the defendant in the forum where the suit arose, courts and scholars did not have opportunity, reason, or incentive to consider whether the court could exercise personal jurisdiction over the defendant in other circumstances (i.e., when the plaintiff's claim did not arise directly from the defendant's contact with the forum state, and the defendant had more than isolated but less than substantial contacts with the state).[35] The second possibility is that judges,

32. A third approach also seems to have emerged wherein the "arises from" and "relates to" inquiry is omitted and jurisdiction depends entirely on the quality and quantity of the defendant's contacts with the forum state. This approach ignores the language in *International Shoe* that distinguishes between "unconnected" claims and those that "arise from" the defendant's contacts. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 636–40 (1990) (Brennan, J., concurring) (applying "minimum contacts" standard although plaintiff's claim did not arise from defendant's contact with California due to defendant's transient presence in state).

33. Malcolm J. Gross & Robert M. Schwartz, Comment, *Nonresidents and Jurisdiction: A Modern Dilemma in Civil and Criminal Procedure*, 10 VILL. L. REV. 518, 518 (1965).

34. *See, e.g.*, *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).

35. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 925, 131 (2011) (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988)) ("[I]n the wake of *International Shoe,* 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'"). *Perkins v. Benguet Consolidated Mining Co.* is the one Supreme Court case during this time period where the plaintiff's claim was unre-

lawyers, and scholars largely assumed that personal jurisdiction over a nonresident defendant was permissible only when the action arose from the defendant's minimum contacts with the forum or when the defendant had continuous, systematic contacts with the forum state.[36] In other words, no one recognized the sliding scale approach. The difficulty with the latter explanation is that there is at least some support among both courts and scholars for the sliding scale approach, at least from 1977–1984.[37]

B. *1977–1984: A Low Point for the Distinct Question Approach?*

1977 was a landmark year for personal jurisdiction jurisprudence. On June 24, 1977, the Supreme Court decided *Shaffer v. Heitner*.[38] In *Shaffer*, the plaintiff brought a shareholder action against twenty-seven officers and directors of Greyhound Corporation in Delaware.[39] The plaintiff premised jurisdiction on the presence of the defendants' property in the state.[40] In a somewhat surprising move, the Court not only held that Delaware lacked jurisdiction over the defendants, but also made the following bold statement: "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[41]

The *Villanova Law Review* published an article discussing *Shaffer* in 1979.[42] In his article titled Shaffer v. Heitner*: A Death Warrant of the Transient Rule of in Personam Jurisdiction?*, Daniel Bernstine describes *Shaffer* and asks the next logical question, "whether the standards applied in *Shaffer* to in rem and quasi in rem actions must now be extended to in personam jurisdiction."[43] Bernstine's question was dead on. A divided Court would eventually address this issue in 1990 in *Burnham v. Superior Court of California*.[44]

However, there is an important aspect of *Shaffer* that, to date, has been largely overlooked. In *Shaffer*, the Court seems to ignore the distinc-

lated to the defendant's contact with the forum state. However, the Court found that the defendant's conduct in Ohio was "sufficiently substantial" to permit jurisdiction "where the cause of action arose from activities entirely distinct from its activities in Ohio." *See Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 447–48 (1952).

36. *See, e.g.*, *Perkins*, 343 U.S. at 447 (noting distinction between causes of action relating to defendant's actions in forum state and those enforcing claim "entirely distinct" from corporation's activities in forum state).

37. *See supra* note 30 and accompanying text.

38. 433 U.S. 186 (1977).

39. *See id.* at 189.

40. *See id.* at 190–92. All but two of the defendants owned Greyhound stock or stock options, and, under Delaware law, stock and stock options for an entity created under Delaware law were located in Delaware. *See id.* at 192.

41. *See id.* at 212.

42. *See* Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of in Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979).

43. *See id.* at 40.

44. 495 U.S. 604 (1990).

tion between specific and general jurisdiction and, in so doing, implicitly rejects the distinct question approach.[45] As suggested in Part I, under the distinct question approach, what is required for a forum to exercise jurisdiction over an absent non-resident defendant depends upon whether the plaintiff's claim arises from the defendant's contact with the forum state. Jurisdiction in *Shaffer* was based on quasi in rem type II jurisdiction—"the property which . . . serves as the basis for state-court jurisdiction is completely *unrelated* to the plaintiff's cause of action."[46] Under the distinct question approach, courts should require "substantial" contacts when the plaintiff's claim is unconnected to the defendant's contact with the forum state. However, after concluding that all assertions of jurisdiction should be analyzed under the *International Shoe* standard, the Court goes on to apply a minimum contacts analysis.[47] Importantly, the Court does this without directly addressing whether the plaintiff's claim arises from or relates to the defendants' contact with the forum state. *If* the Court were treating the "arising from" and "relates to" issue as a distinct question inquiry, the Court should have analyzed the case as one of general jurisdiction after recognizing that the plaintiff's claim was unrelated to the defendant's contact with the forum state. In short, the Court claims to apply "*International Shoe* and its progeny" but then seems to ignore a key aspect of the case—whether the plaintiff's claim arises from the defendant's contact with the forum state. This seems more in line with the sliding scale approach to personal jurisdiction inquiries than it does the distinct question approach. Nevertheless, the majority in *Shaffer* never explicitly rejects the distinct question approach nor embraces the sliding scale model.

C. *1984: An End to the Sliding Scale Model?*

In the years that followed *Shaffer*, several legal scholars rallied around the sliding scale approach to personal jurisdiction.[48] Nevertheless, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[49] which was decided in 1984, cast serious doubt on the continued viability of a sliding scale approach to personal jurisdiction. In *Helicopteros*, the Justices engaged in their first clear discussion of specific and general jurisdiction.[50] This opin-

45. *See generally Shaffer v. Heitner*, 433 U.S. 186 (1977).

46. *See id.* at 208–09 (emphasis added).

47. *See id.* at 212–13 ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. . . . Appellants' holdings in *Greyhound* do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants.").

48. *See supra* note 30 and accompanying text.

49. 466 U.S. 408 (1984).

50. The Court used the term "general jurisdiction" in *Calder v. Jones*. *See Calder v. Jones*, 465 U.S. 783, 787 (1984). However, the phrases did not appear together in the same opinion until *Helicopteros*, where the Court stated:

> When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defen-

ion is especially noteworthy given the timing of the decision and the facts of the case. Had the Court wished to adopt a sliding scale model, this would have been the opportune moment to do so. Although earlier cases hinted at the distinction between specific and general jurisdiction, the Court had yet to expressly adopt a "distinct question approach."[51] More importantly, the facts of *Helicopteros* were particularly compelling circumstances for the Court to adopt a sliding scale approach—even if the plaintiff's claim did not arise directly from the defendant's contacts with the forum state, there was a clear relationship between the plaintiffs' claims and the defendant's contacts with the forum.[52] Nevertheless, rather than seizing this opportunity to expand circumstances in which a State might exercise jurisdiction over an absent non-resident defendant, the *Helicopteros* court implicitly rejected the sliding scale approach by explicitly distinguishing specific and general jurisdiction from one another for the first time.[53] The Court also refused to allow jurisdiction over the defendant, despite the relationship among the defendant, the litigation, and the forum.[54] *Helicopteros* offered the Court the perfect opportunity to adopt

> dant, the forum, and the litigation' is the essential foundation of in personam jurisdiction. Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation.

Helicopteros, 466 U.S. at 414 (footnote omitted) (citations omitted).

51. For a further discussion, see *supra* Parts I and II.

52. In *Helicopteros*, the plaintiff filed a wrongful-death action in a Texas state court against the defendant, a Colombian corporation with its principal place of business in Bogota, Colombia. *See Helicopteros*, 466 U.S. at 409–12. The plaintiff's suit stemmed from a helicopter crash in Peru that killed four U.S. citizens. *See id.* at 410. The plaintiffs alleged that Helicopteros was "legally responsible for its own negligence through its pilot employee." *See id.* at 426 (internal quotation marks omitted). The record indicates that (1) the defendant negotiated the contract for these helicopter services in Texas, (2) the helicopter that crashed was purchased from a Texas corporation, and (3) the pilot was trained in Texas. *See id.* at 423–24.

53. *See id.* at 414 ("Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction where there are sufficient contacts between the State and the foreign corporation." (footnote omitted)).

54. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 651 (1988). Twitchell explains:

> [T]he Court refused to recognize any factor other than the defendant's forum contacts as relevant to the general jurisdiction analysis . . . . [T]he Court implicitly reaffirmed the principle that it will not look to the nature of the dispute in considering the propriety of subjecting a defendant to general jurisdiction in the forum.

Id. In other words, the sliding scale approach depends upon courts' willingness to consider both the quality and quantity of the defendant's contacts with the forum state, as well as the relationship between the plaintiff's claim and the forum state. *See id.* at 659. By refusing to consider the latter, the Court implicitly rejected the sliding scale model. In his dissent, Justice Brennan offers the following observation about the Court's opinion in *Helicopteros*:

the sliding scale approach to in personam jurisdiction. The Court did not. Instead, for the first time (at least since 1954), it clearly articulated the distinction between specific and general jurisdiction. As the Court explained: "[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."[55] Alternatively, "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."[56]

D. *1984–2010: Specific Jurisdiction Reigns Supreme*

From 1985 until 2010, the Supreme Court was relatively silent about the extent of general jurisdiction.[57] In comparison, the Court continued to define the scope of specific jurisdiction. In 1985, the Supreme Court described the minimum contacts analysis as a two-part test.[58] First, the court must determine whether the defendant has established minimum contacts with the forum state.[59] Out-of-state defendants satisfy this requirement when they "'purposefully direct[ ]' [their] activities at residents

> What is troubling about the Court's opinion, however, are the implications that might be drawn from the way in which the Court approaches the constitutional issue it addresses. First, the Court limits its discussion to an assertion of general jurisdiction of the Texas courts because, in its view, the underlying cause of action does not aris[e] out of or relat[e] to the corporation's activities within the State . . . . By posing and deciding the question presented in this manner, I fear that the Court is saying more than it realizes about constitutional limitations on the potential reach of in personam jurisdiction. . . . [B]y refusing to consider any distinction between controversies that relate to a defendant's contacts with the forum and causes of action that arise out of such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum.

Helicopteros, 466 U.S. at 419–20 (Brennan, J., dissenting) (citations omitted) (internal quotation marks omitted).

55. *Helicopteros*, 466 U.S. at 414 n.8.

56. *Id.* at 414 n.9.

57. *See, e.g.*, Kristina L. Angus, Note, *The Demise of General Jurisdiction: Why the Supreme Court Must Define the Parameters of General Jurisdiction*, 36 SUFFOLK U. L. REV. 63, 73 (2002) (noting "[s]ome federal district courts have also used the *Helicopteros* case as a measuring stick when analyzing general jurisdiction").

58. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)) ("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.'"); *see also* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 823 (1991) (arguing Court has "bifurcat[ed]" specific jurisdiction's "contacts and fairness" inquiries).

59. *See Burger King*, 471 U.S. at 476.

of the forum."[60] The court may then proceed to the "fair play and substantial justice" prong.[61] Almost all of the Supreme Court cases discussing personal jurisdiction during this time frame turned on whether the defendant had established "minimum contacts" with the forum state.[62]

Accordingly, it is not surprising that during this same time frame *Villanova Law Review* pieces discussing personal jurisdiction focused on the circumstances in which minimum contacts were met.[63] Most scholarship discussing personal jurisdiction in the *Villanova Law Review* during this time period discussed the biggest issue to confront personal jurisdiction since the automobile—the internet.[64]

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60. *See id.* at 472 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

61. *See id.* at 476 (quoting *Int'l Shoe*, 326 U.S. at 320).

62. In those cases where the Court analyzes specific jurisdiction more carefully, there is little question that the litigation arose from the defendant's contact with the forum state. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011) (finding that "[t]he accident occurred in New Jersey, but the machine was manufactured in England, where [defendant] is incorporated and operates" and that "[t]he question here is whether the New Jersey courts have jurisdiction over [defendant], notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there"); Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) (plaintiff, a foreign corporation, manufactured tube valve involved in motorcycle accident in California and brought suit against California challenging jurisdiction); *Burger King*, 471 U.S. at 468–70 (stating Burger King brought suit in Florida against two Michigan residents who breached franchise obligations by failing to make payments to Burger King's place of business in Miami and continued to operate said franchise in Michigan without authorization from Burger King headquarters in Florida); Calder v. Jones, 465 U.S. 783, 784 (1984) ("Respondent Shirley Jones brought suit in California Superior Court claiming that she had been libeled in an article written and edited by petitioners in Florida. The article was published in a national magazine with a large circulation in California."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772 (1984) (noting New York resident brought suit against Ohio corporation over libel in corporation's magazines and corporation's "contacts with New Hampshire consist of the sale of some 10 to 15,000 copies of *Hustler* magazine in that State each month"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) (considering whether "an Oklahoma court may exercise in personam jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma"); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (finding Texas insurance company subject to jurisdiction when "the suit was based on a contract which had a substantial connection with [the forum] State" and suit arose from such contract); *Int'l Shoe*, 326 U.S. 310 (bringing suit against Missouri shoe company that had salesmen reside in forum state, who were compensated based on their sales made in the forum state, and cause of action arose from unpaid contributions to forum state unemployment fund which required all employers in state to contribute).

63. *See* Noonan, *supra* note 3; Perritt, *supra* note 3; Fritch, *supra* note 3; Logue, *supra* note 3; Neikirk, *supra* note 3.

64. *But see* Noonan, *supra* note 3; Malloy, *supra* note 3.

The first, *Jurisdiction in Cyberspace* by Henry H. Perritt, Jr., was published in 1996.[65] Although Perritt discusses personal jurisdiction only briefly, he correctly identifies the problem—the internet does not necessarily align with any prior bases for exercising jurisdiction over an absent non-resident defendant.[66] Similarly, the following year, *If the International Shoe Fits, Wear It* noted that "one area of law that cyberspace seems inherently in conflict with is that of personal jurisdiction."[67] Nevertheless, using *CompuServe, Inc v. Patterson*[68] as a basis, the author argues that "cyberspace contacts may provide a basis for the assertion of jurisdiction."[69]

By 2000, Americans' internet usage had evolved and now included listservs, discussion groups, and chat rooms.[70] Like its predecessors, *Squeezing Cyberspace into International Shoe* applied traditional jurisdiction principles to this new context.[71] The last article to appear during this timeframe was published in 2004.[72] Interestingly, this piece centered on a "sliding scale" model to determine personal jurisdiction in cyberspace.[73] The author argues that, despite its appeal and convenience, the sliding scale model from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[74] should not supplant traditional fact intensive inquiries in personal jurisdiction cases.[75]

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65. *See* Perritt, *supra* note 3.

66. *See id.* at 13–25.

67. *See* Logue, *supra* note 3, at 1214.

68. 89 F.3d 1257 (6th Cir. 1996).

69. *See* Logue, *supra* note 3, at 1215.

70. *See* Neikirk, *supra* note 3, at 354.

71. *See generally id.*

72. *See* Fritch, *supra* note 3.

73. *See id.* Unlike the sliding scale model discussed earlier in this piece, the sliding scale model discussed in this 2006 piece was articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc. See id.* In *Zippo*, the court explained its sliding scale as follows:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. . . . At one end of the spectrum are situations where a defendant clearly does business over the Internet . . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa 1997) (citations omitted) (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).

74. 952 F.Supp. 1119 (W.D. Pa. 1997).

75. *See* Fritch, *supra* note 3, at 954–56.

True to the *Villanova Law Review*, these pieces carefully examined the law, identified the unanswered issues, and offered insightful solutions to these problems. These articles have many merits, yet none of these articles seemed to predict or even hint at the resurgence of general jurisdiction as an issue in the Supreme Court.

E. *2010–2014: General Jurisdiction Becomes Clear*

Until recently, the Court had only engaged in general jurisdiction analysis in two cases—*Perkins* and *Helicopteros*.[76] In the former, the Supreme Court suggests that when the defendant's "principal" but "temporary" place of business is located in the forum state, there is sufficient contact to support general jurisdiction. In contrast, in *Helicopteros*, the Court concludes that business purchases and related trips in the forum are *not* enough. This left lower courts in the uncomfortable position of rendering general jurisdiction determinations using a "bigger than a thimble, smaller than a breadbox" type of approach.[77]

In June of 2011, almost thirty years after *Helicopteros*, the Court finally revisited the analytical framework for general jurisdiction in *Goodyear*

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76. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 343 U.S. 917 (1952).

77. *See* Angus, *supra* note 57, at 73. Many lower courts looked to what they sometimes refer to as "traditional indicia" of general jurisdiction. *See, e.g.*,Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Rockefeller Univ. v. Ligand Pharms., Inc., 581 F. Supp. 2d. 461 (S.D. N.Y. 2008) (finding "that [defendant's] unrevoked authorization to do business and its designation of a registered agent for service of process amount to consent to personal jurisdiction in New York"); Lemke v. St. Margaret Hosp., 552 F. Supp. 833 (N.D. Ill. 1982) (allowing jurisdiction over defendant who was "doing business" in state). Other courts seized on the language in *Perkins* and echoed in *Helicopteros* and phrase the test for general jurisdiction as whether the defendant has "continuous and systematic contacts" with the forum state. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996). Yet, even when applying the same standard for general jurisdiction, courts varied widely as to the nature and extent of activities necessary to satisfy "continuous and systematic contacts." *Compare* Northlake Cardiology Assocs., Inc. v. Alpha Gulf Coast, Inc., 1995 U.S. Dist. LEXIS 18640, at *8 (E.D. La. Dec. 11, 1995) (finding "billboards placed along the interstate highway" in forum state as factor fulfilling "continuous and systematic" requirement), *with* J-L Chieftan, Inc. v. W. Skyways, Inc., 351 F. Supp. 2d 587 (E.D. Tex. 2004) (declining to exercise general jurisdiction despite defendant's wide-ranging contacts with forum). Some courts considered whether the defendant's contacts with the forum state are so extensive as to "approximate physical presence in the forum." *See* Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). This test is akin to the "doing business" test courts applied in the decades leading up to *International Shoe*. Other courts stopped short of articulating a physical presence requirement, instead considering "continuous and systematic" contacts to be something "significantly more than mere minimum contacts," or contacts that are simply more "extensive" than those that would support specific jurisdiction. *See* Provident Nat'l Bank v. Cal. Fed. Savs. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). Formulations of the general jurisdiction test frequently included inquiry into the quantity as well as the nature of the contacts.

Dunlop Tires Operations, S.A. v. Brown.[78] In *Goodyear*, the Supreme Court of North Carolina held that the state could exercise general jurisdiction over foreign tire manufacturers whose products had reached the state through the stream of commerce.[79] Reversing, the Supreme Court noted that North Carolina courts were "confusing or blending general and specific jurisdictional inquiries."[80] In a unanimous opinion, Justice Ginsburg explained that the defendants' "sporadic" tire sales in North Carolina were insufficient to satisfy general jurisdiction's "continuous and systematic" requirement.[81] Although the Court failed to explain what, if any, percentage of a corporation's sales might render it amenable to general jurisdiction, the Court did note that the "the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation it is an equivalent place, one in which the corporation is fairly regarded as at home."[82]

The Court further clarified its position on general jurisdiction in *Daimler AG v. Bauman*.[83] In *Daimler*, the plaintiff noted that the defendant's indirect subsidiary had "multiple California-based facilities" and was "the largest supplier of luxury vehicles to the California market."[84] Based upon these extensive contacts, the plaintiff asked the court to "look beyond the exemplar bases *Goodyear* identified and approve the exercise of general jurisdiction in every state in which a corporation 'engages in a substantial, continuous, and systematic course of business.'"[85] The Court rejected this approach, holding that it "is unacceptably grasping."[86] Thus, following *Daimler*, it seems clear that general jurisdiction over a corporate

78. 564 U.S. 915 (2011). In *Goodyear*, the plaintiffs, the administrators of the decedent estates of two thirteen year-old boys who died in a bus crash in France, brought suit against three subsidiaries of the Goodyear Tire and Rubber Company ("Goodyear USA") located in France, Luxembourg, and Turkey. *See id.* at 918. The subsidiaries manufactured the tire that allegedly caused the crash, and the suit was brought in North Carolina state court. *See id.* The North Carolina Court of Appeals used a sliding scale approach to justify exercising jurisdiction over the subsidiaries by finding the defendants placed their tires "in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina." *See id.* at 926.

79. *See id.*

80. *See id.* at 919–20.

81. *See id.* at 929. The Court in *Goodyear* stated:

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

Id. at 929.

82. *See id.* at 924.

83. 134 S. Ct. 746 (2014).

84. *See id.* at 752.

85. *See id.* at 760–61 (quoting Respondents Br. 16 nn.7–8, 17).

86. *See id.* at 761.

defendant requires the corporation to be incorporated in or have its principal place of business in the forum, and general jurisdiction over an individual defendant requires the defendant to be a resident of the forum state.

III. 2015: COMING FULL CIRCLE

In 2015, fifty years after the *Villanova Law Review* published its first issue, it is abundantly clear that specific and general jurisdiction are two separate categories of personal jurisdiction. Furthermore, personal jurisdiction jurisprudence indicates that due process concepts vary depending on the circumstances. Due process demands that the defendant must be regarded as at home in the forum when the litigation is unrelated to the defendant's contact with the forum state, but due process requires only "minimum contacts" when the plaintiff's claim is closely connected to the defendant's contact with the forum. Nevertheless, neither of these standards necessarily explains *why* the "arises from" inquiry should factor into personal jurisdiction analysis. Recently, Justice Kennedy noted, "[f]reeform [sic] notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."[87] In other words, our understanding of personal jurisdiction's "fairness" requirement should be informed by precedent and history. Part III of this Article suggests that we can better understand modern categorizations of specific and general jurisdiction, as well as the importance of the "arises from" inquiry, by viewing these issues against the backdrop of *Pennoyer* and early personal jurisdiction cases. As suggested herein, recent Supreme Court opinions premise general and specific jurisdiction on the same foundational principles upon which personal jurisdiction was based in *Pennoyer* and its progeny—presence and consent.[88]

A. *General Jurisdiction and "Presence"*

Immediately following *Pennoyer*, there was no question that a state could exercise jurisdiction over a defendant who received service of process within the state's borders. *Pennoyer* indicated that the ability of a state to exercise personal jurisdiction over a defendant who was present in the state was based upon the belief that, as a sovereign, "every State possesses

87. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011).

88. Professor Brilmayer has theorized that specific and general jurisdiction are supported by different philosophical principles. *See* Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 6 (1991). General jurisdiction is supported by a communitarian or membership theory, while specific jurisdiction is supported by a liberal or affirmative act theory. *See id.* Brilmayer reaches this conclusion using "jurisdictional intuitions to test domestic political theories, and vice versa." *See id.* at 3. Although this section employs slightly different terminology, the author believes the arguments advanced herein are consistent with Brilmayer's arguments regarding the philosophical distinctions between specific and general jurisdiction.

exclusive jurisdiction and sovereignty over persons and property within its territory."[89] Although state sovereignty continues to inform personal jurisdiction due process discussions, the theoretical bases supporting personal jurisdiction have changed.[90] In 1982, the Court made plain that "[t]he personal jurisdiction requirement . . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[91]

Recently, the Court has indicated that general jurisdiction is appropriate when defendants' affiliations with the forum state "are so 'continuous and systematic' as to render them essentially at home in the forum State."[92] By limiting general jurisdiction to a defendant's "home" state, the Court implies that there is something unique or special about the defendant's relationship with the state that justifies allowing the state to exercise jurisdiction over "any and all claims against them."[93] In *Milliken v. Meyer*,[94] the Court offered the following justification for a state's jurisdiction over its absent resident:

> Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment . . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates.[95]

Arguably, *Milliken* bases general jurisdiction not simply on defendants being domiciled in the state, but rather the benefits and privileges that stem from being citizens upon which general jurisdiction is based. So viewed, this may justify exercising jurisdiction over defendants so long as the "reciprocal duties" owed to the state (i.e., their abilities to be bound with the state's judicial ruling) are proportional to the privileges and protections afforded to them in the state. Under this "benefits and privileges" understanding of personal jurisdiction, general jurisdiction, the most ex-

89. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

90. *See McIntyre*, 564 U.S. at 884 ("And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.").

91. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

92. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

93. *See id.* at 919.

94. 311 U.S. 457 (1940).

95. *Id.* at 462–64 (citations omitted).

pansive form of jurisdiction, is appropriate when a defendant's "home" is in the forum state.

B. *Specific Jurisdiction and (Implied) Consent*

For decades, the Court has used the phrase *"purposefully avails"* when justifying specific jurisdiction over an absent non-resident defendant.[96] In this respect, specific jurisdiction seems akin to personal jurisdiction based upon implied consent. As suggested in Part I of this Article, post-*Pennoyer* and pre-*International Shoe*, courts allowed states to exercise jurisdiction over defendants who, through their behavior, implicitly consented to jurisdiction for claims stemming from that behavior. Following *International Shoe*, the Court's opinions do not explicitly refer to implied consent as the basis for specific jurisdiction. Nevertheless, this idea seems to lurk beneath the surface of several opinions.[97] This is particularly true of the plurality's opinion in *McIntyre*. Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Thomas, explained that "submission through contact with and activity directed at a sovereign may justify specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum.'"[98] Although the plurality does not use the term *consent*, its description of "submission through contact" seems analogous.[99]

Assuming consent is the basis for specific jurisdiction, the question is whether this viewpoint supports an expansive interpretation of specific jurisdiction. Herein lies one of the major difficulties and criticisms of implicit consent. As Locke, to whom the consent theory is often attributed, observed, "the difficulty is, what ought to be looked upon as *tacit consent*, and how far it binds, *i.e.* how far any one shall be looked on to have con-

96. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) ("[T]he sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State . . . .'"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (citation omitted) ("When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there."); Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.").

97. *See, e.g.*, *Burger King*, 471 U.S. 462 (determining defendant had established minimum contacts because it agreed to forum selection clause in contract); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (holding defendant purposefully availed itself to state's jurisdiction because it distributed magazine in forum state).

98. *McIntyre*, 564 U.S. at 881 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

99. *See id.* at 881, 901 n.5 (Ginsburg, J., dissenting) (citations omitted) ("The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's 'submission,' seems scarcely different from the long-discredited fiction of implied consent.").

sented, and thereby submitted to any government, where he has made no expressions of it at all."[100] When specific jurisdiction jurisprudence is examined through consent theory, it seems that the doctrine attempts to base jurisdiction, and limit consent, to those cases where the defendants have "purposefully availed" themselves to the forum state. Furthermore, as evidenced even in the earliest cases, the forum state's jurisdiction over the defendant is limited to matters arising from the defendant's purposeful contact with the forum state.

IV. CONCLUSION: REFLECTING ON THE PAST

One can learn a great deal by reflecting on the past. This is especially true of the law. While today's personal jurisdiction standards are markedly different from *Pennoyer*'s territorial approach, traces of *Pennoyer* remain in our jurisdiction jurisprudence. As explored in Parts I and III of this piece, specific and general jurisdiction emerged from different theories and are supported by different rationales—general jurisdiction is a consequence of constructive presence or group membership, while specific jurisdiction derives from notions of consent—but each seems to find its genesis in *Pennoyer*.

Importantly, one factor that distinguishes these categories from one another is whether the plaintiff's claim arises from the defendant's contact with the forum state. Yet, the "arises from" factor is one of the least discussed aspects of personal jurisdiction.[101]

Looking back, in the past sixty years the *Villanova Law Review* has discussed many important aspects of personal jurisdiction, from long-arm statues[102] to jurisdiction in cyberspace.[103] Looking forward, it seems that there remain unanswered important questions in personal jurisdiction jurisprudence. Undoubtedly, the *Villanova Law Review* will continue to tackle important questions like this in the next sixty years.

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100. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 64 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690); *see also* Scott & Bradley, *supra* note 14, at 476 ("The inadequacy of the 'consent' rationalization as a basis for the solution of this problem [of non-resident motorists], however, is obvious.").

101. The Supreme Court has failed to define this phrase and, to date, lower courts primarily have used two different tests to determine whether a plaintiff's claim arises from the defendant's contact with the forum state: the "proximate cause" test and the "but for" test. *See, e.g.*, Nowak v. Tak How Invs., Ltd., 94 F.3d 708 (1st Cir. 1996) (applying proximate cause test), *cert. denied*, 520 U.S. 1155 (1997).

102. *See, e.g.*, Thomas B. Erekson, Comment, *The Pennsylvania Long-Arm: An Analytical Justification*, 17 VILL. L. REV. 73 (1971).

103. *See, e.g.*, Perritt, *supra* note 3, Fritch, *supra* note 3.