IN THE AFTERMATH OF *GOODYEAR DUNLOP*: OYEZ! OYEZ! OYEZ! A CALL FOR A HYBRID APPROACH TO PERSONAL JURISDICTION IN INTERNATIONAL PRODUCTS LIABILITY CONTROVERSIES

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> *"Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted."*[1]

I. INTRODUCTION

To render a valid judgment against a non-resident defendant, a court must have the power to assert personal jurisdiction over the individual or company.[2] Where a court renders a judgment without the requisite personal jurisdiction, the judgment is void and not entitled to full faith and credit by other jurisdictions.[3] For over 130 years,[4] the Supreme Court has grappled with determining the boundaries of procedural due process[5] as it relates to

[1] Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961).

[2] Kulko v. Superior Court, 436 U.S. 84, 91 (1978); Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 685 (2009) ("Personal jurisdiction is power: the power to force persons to answer grievances within a particular judicial system.") (citing FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 71–72 (3d ed. 1985)).

[3] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (citing Pennoyer v. Neff, 95 U.S. 714, 732–33 (1877)); *see also* Burnham v. Superior Court, 495 U.S. 604, 608–09 (1990) (employing "the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*").

[4] The first decision to address the requirements of procedural due process was *Pennoyer*. *See* 95 U.S. at 714. Relying on international and conflict of laws principles, the *Pennoyer* Court devised an approach based upon the territorial power of the states as individual sovereigns. *See id.* at 722. "[T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity . . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions." *Id. See also* Douglas McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753–54 (2003).

[5] The concept of "due process of law" has a prestigious historical pedigree that can be traced back to the phrase "by the law of the land" found in the Magna Carta. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (recognizing that "[t]he words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*"); *see also* Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 142 (2005).

The U.S. Constitution contains two Due Process Clauses. The first is found in the Fifth Amendment, which states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The federal courts analyze due process

the assertion of personal jurisdiction over nonresident defendants, those from either from a sister-state or foreign country.

Beginning with the seminal case *International Shoe Co. v. Washington*,[6] the modern role of procedural due process has been to safeguard liberty interests[7] of nonresident defendants by guaranteeing that no court may assert personal jurisdiction over an alien defendant unless the defendant has certain "contacts, ties, or relations" with the forum State.[8] Where such contacts exist, the assertion of jurisdiction will not run afoul of "traditional notions of fair play and substantial justice."[9] A linchpin of any constitutional personal jurisdiction inquiry[10] is the determination that the

in light of the Fifth Amendment where a case arises under federal question subject-matter jurisdiction. 28 U.S.C § 1331 (West 2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); Packerware Corp. v. B & R Plastics, Inc., 15 F. Supp. 2d 1074, 1077 (D. Kan. 1998) (employing a Fifth Amendment analysis where subject matter for trademark infringement is asserted under 28 U.S.C. § 1338). The second Due Process Clause lies within the Fourteenth Amendment and provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment is applicable to all state courts and to the federal courts when sitting in diversity. 28 U.S.C. § 1332 (West 2006).

[6] 326 U.S. 310 (1945).

[7] Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) (discussing how "[t]he restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause"); Laughlin, *supra* note 2, at 693.

[8] *Int'l Shoe*, 326 U.S at 319–20. The origin of Chief Justice Harlan Fiske Stone's phrase "minimum contacts" is unknown. Attempts to give the phrase an historical pedigree have been in vain. McFarland, *supra* note 4, at 757 ("The effort to find an earlier origin of 'minimum contacts' is futile. Others have searched for the derivation with no success. I joined the search with the same result . . . . The inescapable conclusion is that Chief Justice Stone created the phrase wholly out of his fertile legal imagination. Consequently, we are left with the bare language of this portion of the test itself. No history aids our interpretation."); *see also* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 809–15 (1995) (There has been no success in tracing the history of the phrase "minimum contacts" despite a thorough examination of precedents, submissions, the record, internal Court memoranda, Chief Justice Stone's personal papers and correspondence with the surviving law clerk for the 1944 term.).

[9] *Int'l Shoe*, 326 U.S. at 316.

[10] The first inquiry by federal or state courts in determining if personal jurisdiction may properly be asserted is not a constitutional analysis. Rather, the court must first determine whether the case falls within the forum state's long-arm statute. It is only after determining that a case meets the requirements of the relevant long-arm statute that the court will engage in its constitutional analysis. Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998) (discussing that the first "analytical step[]" which must be taken "in determining whether

defendant engaged 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."[11]

Complicating things a bit more, in later cases the Court relied upon the language of *International Shoe* to separate personal jurisdiction into two categories.[12] First, where the alien defendant's contacts with the forum relate to the plaintiff's cause of action, the defendant is amenable to "specific" or "case-linked" personal jurisdiction.[13] Where a nonresident defendant has the requisite "minimum contacts,"[14] specific personal

personal jurisdiction can be asserted over a nonresident defendant" is determining whether the case falls within the forum state's long-arm statute).

State long-arm statutes come in two varieties: broad and enumerated. Under a broad long-arm statute, a court may assert personal jurisdiction over an out-of-state defendant as long as the assertion comports with the requirements of the Due Process Clause. In contrast, an enumerated long-arm statute sets out specific types of activities that may subject a defendant to jurisdiction in the forum. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004).

Federal long-arm statutes are found in Rules 4(k)(1)(A) and 4(k)(2) of the Federal Rules of Civil Procedure. Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987) (recognizing that under the predecessor statute to Rule 4(k)(1)(A), "[a] federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state"); Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, No. 10C1884, 2011 U.S. Dist. LEXIS 89213, at *4–5 (N.D. Ill. August 11, 2011) (citing ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 551 (7th Cir. 2001) (clarifying that Rule 4(k)(2) authorizes personal jurisdiction over "persons who do not reside in the United States, and have ample contacts with the nation as a whole, but whose contacts are so scattered among states that none of them would have jurisdiction"); Katherine Neikirk, *Squeezing Cyberspace Into* International Shoe: *When Should Courts Exercise Personal Jurisdiction over Noncommercial Online Speech?*, 45 VILL. L. REV. 353, 356–57 (2000). It should also be noted that in addition to personal jurisdiction, due process also requires that the defendant be given adequate notice of the suit. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950).

[11] Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319) (emphasizing that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State").

[12] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8–9 (1984). The terminology of "specific" and "general" personal jurisdiction was first employed not by the Court, but by Arthur von Mehren and Donald T. Trautman in their article *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HAR. L. REV. 1121, 1136–45 (1966).

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

[14] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (reaffirming that "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State") (citing *Int'l Shoe*, 326 U.S. at 316).

jurisdiction may be asserted as long as "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[15]

Originally, the "minimum contacts" inquiry for specific personal jurisdiction was a unified test.[16] In one breath, the question was whether the defendant had to have sufficient minimum contacts with the forum so that the assertion of personal jurisdiction over the out-of-state party does not offend traditional notions of fair play and substantial justice.[17] This was not an and/or test—it was a one-step inquiry.[18] It was reasonable to exercise jurisdiction over a foreign corporation due to the defendant's contacts with the forum State.[19] With time, however, the test has become bifurcated, resulting in two distinct inquiries.[20] The first prong now focuses on minimum contacts, while the second generally focuses on five fairness[21] or "Gestalt" factors.[22] These factors include the burden on the defendant in being required to appear in the particular forum;[23] the interest of the forum

[15] *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1949)).

[16] *Id.* (holding that where a defendant is not served within the state, personal jurisdiction may be asserted by the forum as long as the defendant "[has] certain minimum contacts with it *such that* the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (emphasis added)).

[17] *Id.*

[18] McFarland, *supra* note 4, at 763 ("[T]he Court created a unitary test. Although in recent years the Court has claimed the test to be two-part, or even multi-part, the original, unpolished *International Shoe* test is clearly a one-step unitary test.").

[19] *Int'l Shoe*, 326 U.S.. at 317 (finding that the requirements of due process "may be met by such contacts . . . as make it reasonable . . . to require the corporation to defend the particular suit which is brought there").

[20] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). *But see* McFarland, *supra* note4, at 763 ("[T]he Court created a unitary test. Although in recent years the Court has claimed the test to be two-part, or even multi-part, the original, unpolished International Shoe test is clearly a one-step unitary test."). In actuality, the Court in *International Shoe* set forth four variations of the minimum contacts test. In addition to "minimum contacts" and "fair play and substantial justice" criteria, it also stated that the Due Process Clause required "such contacts . . . as make it reasonable" to assert personal jurisdiction. *Int'l Shoe*, 326 U.S. at 317.

[21] *World-Wide Volkswagen*, 444 U.S. at 292.

[22] Harrelson v. Seung Heun Lee, No. 09-11714-RGS, 2011 U.S. Dist. LEXIS 79383, at *18 (D. Mass. July 21, 2011).

[23] *World-Wide Volkswagen*, 444 U.S. at 292; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985) (reiterating the five fairness factors set forth in *World-Wide Volkswagen* and stating that once minimum contacts have been established with the forum State, "these contacts may be considered in light of other [fairness] factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'" (quoting *Int'l Shoe*, 326 U.S. at 320)).

State "in adjudicating the dispute";[24] the interest of the plaintiff "in obtaining convenient and effective relief[25] . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum";[26] the interest of the interstate judicial system "in obtaining the most efficient resolution of controversies; and the common interests of all sovereigns in promoting substantive social policies."[27] The Court has found that where contacts are slim, the fairness factors may permit the assertion of jurisdiction.[28] To keep the lower courts on their toes, it has also reached the opposite conclusion.[29]

The second category of personal jurisdiction is that of general jurisdiction.[30] This theory of jurisdiction encompasses situations where a foreign defendant's contacts with the forum do not relate to the cause of action, but are "so 'continuous and systematic' as to render them essentially at home in the forum state."[31] In this scenario, due process is not contravened by a court's exercise of general, "all-purpose" jurisdiction over such defendants, hearing any and all claims against them.[32] Although this appeared to be a jurisdictional approach that was freely adjustable to the rise of the global economy, with modified due process standards when applied to international cases, such an approach is nonexistent.[33]

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[24] *World-Wide Volkswagen*, 444 U.S. at 292 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

[25] *Id.* (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1978)).

[26] *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977)).

[27] *Harrelson*, 2011 U.S. Dist. LEXIS 79383, at *18 (citing *Burger King*, 471 U.S. at 477).

[28] *Burger King*, 471 U.S. at 477 (finding that the fairness factors "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required") (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984)); *McGee*, 355 U.S. at 223–24; Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.").

[29] *Asahi*, 480 U.S. at 114. Despite a majority of the justices finding sufficient minimum contacts with the forum State, albeit for different reasons, eight of the justices agreed that fairness factors dictated that personal jurisdiction could not constitutionally be asserted over a Japanese component manufacturer who had been impleaded into the action as a third-party plaintiff by the defendant, a Taiwanese manufacturer.

[30] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[31] *Id.* (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[32] *Id.*

[33] *See infra* notes 47–49 and accompanying text.

The Court added an additional tale to its saga of personal jurisdiction in *World-Wide Volkswagen*[34] by embracing a unique theory of specific personal jurisdiction applicable in products liability disputes.[35] In order to determine whether the various participants in a commercial chain of distribution have sufficient minimum contacts with a particular forum, the Court adopted a theory of jurisdiction predicated upon placement of a product into the stream of commerce.[36] This figure of speech is used to determine the indirect, but very real, contacts a manufacturer may have with a State as a result of its product dissemination by third parties.[37] Pursuant to this approach to minimum contacts, a forum "does not exceed its power[] under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state."[38] According to the majority in *World-Wide Volkswagen*, the type of foreseeability that is key to a stream-of-commerce analysis "is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[39]

Justice Brennan took exception to this caveat, arguing in his dissent that the fulcrum for the due process test is whether the assertion of personal jurisdiction in a particular instance contravened "traditional notions of fair play and substantial justice."[40] In his view, minimum contacts were

[34] 444 U.S. 286 (1980).

[35] The theory was originally espoused by the Illinois Supreme Court in *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

[36] For an excellent analysis of *Gray* and the influence of its version of stream-of-commerce jurisdiction, *see generally* Diane S. Kaplan, *Paddling up the Wrong Stream: Why the Stream of Commerce Theory Is Not Part of the Minimum Contacts Analysis*, 55 BAYLOR L. REV. 503 (2003).

[37] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (describing the stream of commerce metaphor as referring "to the movement of goods from manufacturers through distributors to consumers").

[38] *World-Wide Volkswagen*, 444 U.S. at 297–98.

[39] *Id.* at 297. It is interesting to note that in *World-Wide Volkswagen*, it was only the local New York car retailer and the local tri-state area distributor who challenged personal jurisdiction. The conclusion that the assertion of personal jurisdiction by the Oklahoma state court over the international car manufacturer and the importer the manufacturer employed to market its products to consumers throughout the U.S. appears to have been universally accepted. *Id.* at 288.

[40] *Id.* at 300 (Brennan, J., dissenting) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

"merely one way" that fairness and reasonableness could be established.[41] Consequently, fairness factors could trump the minimum contacts of a stream-of-commerce analysis.[42]

Seven years after *World-Wide Volkswagen* was decided, the Court revisited the proper approach to stream-of-commerce jurisdiction in *Asahi Metal Industry Co. v. Superior Court*.[43] Unfortunately, the Justices were unable to reach a consensus as to how due process concerns could be satisfied when utilizing a stream-of-commerce analysis to establish sufficient minimum contacts with the forum by a participant in a products chain of distribution scenario.[44]

As the checkered past of the tests for personal jurisdiction demonstrate, the concerns of Justice Black in *International Shoe* have been realized as the views of what constitutes desirable versus "undesirable" procedural due process has mirrored changes in the makeup of the Court.[45] In the name of "reasonableness," "fair play" and "justice,"[46] the vagaries of the majority have twisted the elastic "minimum contacts" test. What should have been an expansive "general jurisdiction" approach is now fraught with confusion[47] and characterized as "architecturally grotesque."[48] Numerous commentators have admonished the Court for its failure to articulate a "coherent theory" of personal jurisdiction.[49] Nowhere has this failure been

[41] *Id.*

[42] *See id.*

[43] 480 U.S. 102 (1987).

[44] *Id.* at 102–05. Stream-of-commerce jurisdiction has not been limited solely to product liability actions. It has been extrapolated into many areas of the law, including copyright, unfair competition, and trademark dilution. *See, e.g.*, Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 470–73 (5th Cir. 2006); *see also* Kaplan, *supra* note 36, at 506–07.

[45] *Int'l Shoe*, 326 U.S. at 326 (Black, J., dissenting).

[46] *Id.*

[47] *See* Rhodes, *supra* note 5, at 139 (discussing how different commentators have characterized the state of personal jurisdiction jurisprudence as "a 'mess,' 'incoherent', and 'in chaos.'"); *see also* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (describing the doctrine of personal jurisdiction as "a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined"); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991) ("Jurisdictional doctrine is in chaos.").

[48] Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 598 (2001).

[49] Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of* In Personam

more glaring than in the area of products liability, particularly where the defendant is a foreign manufacturer.[50]

Seldom does a foreign manufacturer sell its product directly to customers.[51] Rather, it generally places products into the United States commercial market where they are sold by another entity in the chain of distribution.[52] Consequently, it is not feasible for the foreign manufacturer to have "minimum contacts" with the forum state.[53] The Court has addressed this conundrum by applying the "stream of commerce" approach to minimum contacts recognized in *World-Wide Volkswagen*, thereby translating a method designed for domestic due process challenges to the

Jurisdiction, 43 CASE W. RES. L. REV. 97, 109 (1992) (noting that the doctrine has transmuted "into its current, incoherent form"); Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 915 (2000) ("Despite these several attempts at judicial fine-tuning, the doctrine today is unwieldy, incoherent, and unpredictable."); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 529–30 (1991) ("Despite its apparent interest in the subject, the Court has been unable to develop a coherent doctrine."); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989) (bemoaning the Court's failure "to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens").

Not all commentators find the Court's personal jurisdiction jurisprudence incoherent. *See, e.g.*, Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669, 670 (1987) (employing the *Asahi* decision "as a paradigm to argue that the decisional pattern of personal jurisdiction cases is the product of the interaction of a number of perfectly understandable conceptions of fairness held by individual Justices").

[50] When employing the term "foreign" or "alien" manufacturer, this article is referring to an entity from another country or nation, not one located in a sister-state. This article does not discuss suggested changes in approaches to procedural due process in the domestic setting. For an interesting piece examining that issue, *see* Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, at 522–28.

[51] See, for example, the Court's most recent decision in the area of specific personal jurisdiction, *J. McIntyre Mach., Ltd. v. Nicastro*. 131 S. Ct. 2780 (2011) (involving a British manufacturer who distributed its product via a U.S. distributor employing a nationwide distribution system). *See also* Timothy C. Lynch, Note, *Roman Candles and Bottle Rockets: The Eighth Circuit Blows Up the "Stream of Commerce Plus" Analysis in* Barone v. Rich Bros. Interstate Display Fireworks, Inc., 29 CREIGHTON L. REV. 1371, 1419 (1996) ("Today, most manufacturers sell their products through distributorships . . . .").

[52] *See supra* note 51 and accompanying text.

[53] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298–99 (1980).

international arena.[54] This has proven to be about as effective as trying to jam a square peg into a round hole.[55]

The premise of this paper is that the Court's continuing insistence that the general personal jurisdiction analyses utilized in domestic products cases are equally applicable in the international setting is seriously flawed.[56] The Court's most recent decision in the area of general personal jurisdiction, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[57] will be analyzed and used to illustrate how the Court continues to ignore the special considerations which arise when alien manufacturers are defendants in domestic lawsuits.[58] This piece will argue that the time has come for the Court to embrace a realistic, commercial approach to procedural due process, which recognizes that a foreign company's profits made by engaging in a U.S. product-distribution system come at the price of amenability to jurisdiction.[59] The proposed paradigm is composed of: (1) a

[54] *See supra* notes 34–42 and accompanying text.

[55] *See infra* Part III.C.

[56] Arguably, the stream-of-commerce test as presently applied in products liability cases involving domestic defendants is equally flawed. *See, e.g.*, Kaplan, *supra* note 36, at 508 (arguing "for the disentanglement of stream of commerce jurisdiction from the minimum contacts doctrine and for recognition of the stream of commerce doctrine as a *sui generis* form of jurisdiction").

[57] 131 S. Ct. 2846 (2011).

[58] *See, e.g.*, Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 1 (1987) (arguing for "a modification of domestic Due Process limitations on personal jurisdiction in cases involving foreign defendants"); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 800 (1988) (discussing how the Supreme Court has failed to "come to grips with what special consideration ought to be given" due to the "special burdens imposed on aliens" when required to defend themselves in the United States); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 2 (2006) (concluding that "the current approach to personal jurisdiction over foreign defendants is doctrinally inconsistent with broader notions of American constitutionalism"). For the relationship of the current due process approach to personal jurisdiction on international trade, *see* Jessica Shelton, Comment, *Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade*, 16 ROGER WILLIAMS U. L. REV. 171, 174 (2011) ("[L]egislation designed to remedy the defective system of suing foreign manufacturers should be implemented" in order to "reduce litigation time . . . [and to] eas[e] the burden faced by American consumers seeking redress." Furthermore the legislation would alert "foreign manufacturers that they would no longer be able to circumvent the U.S. legal system, thereby escaping liability . . . ."); *see also* Emily B. Randall, Comment, Asahi Metal Industry Co. v. Superior Court: *Effect of State Court Jurisdiction on International Trade*, 3 AM. U. INT'L L. REV. 197 (1988).

[59] *See infra* notes 123–128 and accompanying text.

single-enterprise theory of jurisdiction;[60] (2) a national aggregation-of-contacts doctrine which eliminates the arbitrary Mason-Dixon Line between specific and general jurisdiction;[61] (3) a theory of "stream-of-distribution" jurisdiction which is market, not forum, based and which satisfies due process "fair play" concerns as a result of the reciprocal benefits and obligations voluntarily incurred by a foreign manufacturer;[62] and (4) the doctrine of forum non conveniens in conjunction with jurisdictional resequencing to ensure "substantial justice" for the foreign defendant.[63]

The goal of the proposed hybrid approach is to design a theory that comports with the prevalent worldview of proper jurisdiction while still honoring constitutional constraints. An added benefit is that the approach should also discourage outsourcing or distribution schemes that serve as shields to protect foreign or American manufacturers from liability in American courts. While many of the individual ingredients of this proposed model do not originate with this author, it is hoped that this article will contribute to legal scholarship with its offering of a theory which integrates some new ideas with the various individual proposals in the area of personal jurisdiction set forth in prior court decisions or publications.

II. THE CASE

After more than twenty-five years of silence,[64] it appeared that the Court was finally going to expand upon its general personal jurisdiction jurisprudence when it agreed to entertain *Goodyear Dunlop*.[65] This case centered on an international products liability action against a foreign

[60] *See infra* Part III.A.

[61] *See infra* Part III.B.

[62] *See infra* Part III.C.

[63] *See infra* Part III.D.

[64] The last time the Court addressed the issue of personal jurisdiction was in 1987 in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

[65] 131 S. Ct. 63 (2010). At the same time the Court agreed to hear *Goodyear Dunlop*, it also granted certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*, a case concerning specific personal jurisdiction. 131 S. Ct. 62 (2010). While the facts and personal jurisdiction issues in each case were distinct, both cases were products liability actions against a foreign manufacturer. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2850 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011). The joint backdrop for both cases was the globalization of commerce and its attendant marketing of products by foreign manufacturers through distribution systems into any of the fifty states. It is not surprising that the Court chose to hear the cases argued in tandem. *See Goodyear Dunlop*, 131 S. Ct. at 63; *Nicastro*, 131 S. Ct. at 62 (2010).

subsidiary whose products had been distributed by its U.S. parent company throughout the nation.[66] In light of the issues raised by the facts of the case, it is not surprising that the Court's election to hear the case led to a flurry of suppositions in the legal community.[67] Would the Court expand the concept of general personal jurisdiction, which it declined to do in *Helicopteros*,[68] or would it continue to venerate *Perkins*?[69] Perhaps the Court would finally embrace a test for personal jurisdiction that recognized the need for a different analysis where the defendants were manufacturers from foreign countries.[70] Or one that recognized that stream-of-commerce was a viable theory on which to predicate general jurisdiction.[71] Would the Court endorse a "single entity" theory as appropriate in the area of jurisdiction with the result that the ties of the subsidiary with the forum would consolidate with those of its parent?[72]

Regrettably, the Court elected pedigree over pragmatism as it answered the proffered multiple-choice question.[73] On June 27, 2011, the *Goodyear Dunlop* decision was handed down, painting a desolate landscape for procedural due process principles[74] as it revealed the of inability of the

[66] *Goodyear Dunlop*, 131 S. Ct at 2852.

[67] *See, e.g.*, Linda S. Mullenix, *Outsourcing Liability: General and Specific Jurisdiction over Foreign National Corporations in American State Courts*, PREVIEW OF UNITED STATES SUPREME COURT CASES, January 10, 2011, at 174–80, *available at* http://www.utexas.edu/law/magazine/2011/01/20/mullenix-analyzes-cases-for-scotus-preview/.

[68] *See infra* notes 101–111 and accompanying text.

[69] 342 U.S. 437, 438 (1952).

[70] *See infra* notes 109–111 and accompanying text.

[71] *See infra* notes 191–193 and accompanying text.

[72] *See infra* notes 134–139 and accompanying text.

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

[74] The result in *Nicastro* was equally distressing when a plurality opinion failed to clarify its fractured specific personal jurisdiction jurisprudence in the area of products liability and the theory of stream-of-commerce jurisdiction resulting from the divergent views of a splintered Court in *Asahi*. *See supra* notes 43–44 and accompanying text.

In *Nicastro*, the foreign defendant utilized a distribution system which targeted the U.S. national market, not that of a particular state. *See* Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577 (N.J. 2010). The New Jersey Supreme Court recognized that "[t]oday, all the world is a market" and found that the defendant, a British manufacturer, was subject to specific personal jurisdiction where its "defective and dangerous" product was distributed in the forum, causing severe injury to a New Jersey citizen. *Id.* In contrast, the Supreme Court's plurality opinion shows that they failed to grasp the modern economic reality of global commerce in products liability cases with its rejection of an approach to specific personal jurisdiction, which would clearly prevent foreign manufacturers from escaping liability by use of a distribution

Court to adapt to changing times[75] by its failure to "discard[] 19th-Century business models" or "address the realities of 21st-Century transnational commerce . . . ."[76]

A. Goodyear Dunlop

1. The Relevant Facts

Goodyear Dunlop involved a bus accident in France that resulted in the deaths of two thirteen-year-old boys from North Carolina.[77] The bus veered off the highway and overturned, allegedly due to tire failure.[78] The tires were manufactured by Goodyear Turkey, a foreign affiliate of the U.S.

system. *See* J. McIntyre Mach. Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011). Justice Kennedy, along with three of the more conservative members of the Court, Chief Justice Roberts, Justice Scalia, and Justice Thomas, waxed nostalgic as they turned back the hands of time in order to once again protect corporate interests. *Id.* at 2786–91. The plurality explicitly rejected the stream-of-commerce approach of Justice Brennan in *Asahi*. *See infra* note 226 and accompanying text. It thereby rejected the credo of *International Shoe* mandating considerations of "traditional notions of fair play and substantial justice." *Nicastro*, 131 S. Ct. at 2786–90. Justices Breyer and Alito filed a concurring opinion. *Id.* at 2785–91. Justice Ginsburg led the charge of the dissenters, which included Justice Sotomayor and Justice Kagan. *Id.* at 2794–804.

While the focus of this article is not on *Nicastro*, the decision will be referred to when relevant to the premise of this piece that a hybrid approach to personal jurisdiction is needed in international product liability cases. This approach is equally applicable to pure distribution scenarios, such as in *Nicastro*, as well as cases like *Goodyear Dunlop* that involve a combination out-sourcing/distribution scheme by the parent corporation. *See Goodyear Dunlop*, 131 S. Ct. at 2852; *Nicastro*, 131 S. Ct.. at 2786.

[75] In contrast, in its 1980 decision, *World-Wide Volkswagen Corp. v. Woodson*, the Court recognized that as industrialization and new technologies transformed the economic structure of the United States, the need for the Due Process Clause to be "a guarantor against inconvenient litigation" has decreased as the need for the jurisdictional reach of state courts to be expanded has grown. 444 U.S. 286, 292–93 (1980) ("The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years . . . . [T]his trend is largely attributable to a fundamental transformation in the American economy . . . ."); *see infra* note 91 and accompanying text; *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957) (discussing the nationalization of commerce and how "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity").

[76] Brief for Respondents at 15, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76), 2010 WL 5125441, at *15.

[77] Brown v. Meter, 681 S.E.2d 382, 384–85 (2009), *rev'd sub nom.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

[78] *Id.* at 385.

company, Goodyear Tire and Rubber.[79] The parents of the two boys brought suit in North Carolina against the domestic parent corporation and its foreign subsidiaries: Goodyear Turkey, Goodyear France, and Goodyear Luxembourg.[80] Because the dispute did not arise or relate to defendants' contacts with the forum, the issue in the case was whether or not the court could properly assert general, rather than specific, personal jurisdiction over the foreign manufacturers.[81]

The Court of Appeals of North Carolina[82] found that the assertion of general jurisdiction over the foreign defendants was constitutional due to the amount of tires manufactured by the foreign subsidiaries[83] sold in North Carolina "through the operation of a continuous and highly-organized distribution process."[84] The wholly-owned foreign subsidiaries of Defendant Goodyear Tire and Rubber Co.[85] would make specific tires,[86] which would be shipped to the U.S and then distributed nationally, when ordered to do by its Goodyear parent.[87] This "continuous and systematic"

[79] *Id.*

[80] *Id.* at 384. Goodyear Turkey was the manufacturer of the allegedly defective tire. In addition to the Goodyear foreign subsidiaries, the plaintiffs also named Goodyear Tire and Rubber Company, Goodyear S.A., and Goodyear Dunlop Tires Europe B.V. as defendants in their amended complaint. *Id.* at 384 n.1.

[81] *Id.* at 388.

[82] The Supreme Court of North Carolina denied a petition for discretionary review. Brown v. Meter, 695 S.E.2d 756 (2010).

[83] *Meter*, 681 S.E.2d at 385 (From 2004 to 2007, 6,402 tires manufactured by Goodyear Luxembourg were ultimately shipped to North Carolina. Similarly, 33,923 tires manufactured by Goodyear France reached North Carolina during that same period. Finally, 5,906 tires manufactured by Goodyear Turkey were shipped into North Carolina for sale during this interval.).

[84] *Id.* at 394 (discussing Bush v. BASF Wyandotte Corp., 306 S.E.2d 562, 568 (N.C. Ct. App. 1983)).

[85] *Id.* at 386.

[86] The trial court also found that tires manufactured by the foreign subsidiary, including both those made at the direction of Goodyear and distributed in the U.S. and the individual tire which failed resulting in the bus accident in Paris, contained "warnings and directions" written in English, a U.S. Department of Transportation marking which showed it was qualified to be sold in the U.S., a "U.S. code listing load and pressure ratings that conform[ed] to United States standards set by the Tire and Rim Association," and a "'Safety Warning,' written in English, which conform[ed] to the warnings found on all tires for sale in the United States." *Id.* at 385.

[87] *Id.* at 386 n.4. The Goodyear parent's sales and marketing offices developed "sales plans" and then would determine whether the products needed to meet the plans would "be obtained" from a foreign affiliate. If so, the foreign affiliate would manufacture the needed tires and ship them to the U.S., where the Goodyear parent would distribute the product manufactured by the

process employed by the Goodyear organization supported the trial court's "conclusion that Defendants 'purposefully injected their product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina,'"[88] and consequently "purposefully availed themselves of the protection of the laws of this State."[89] This was so even where the foreign manufacturers "did not have their own distribution system for the sale of their tires, but instead used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and North Carolina."[90]

In *Goodyear Dunlop*, the Court was presented with a golden opportunity to recognize that the same due process analysis should not be employed for both foreign and domestic manufacturers.[91] It was a chance to embrace a transactional approach to international products liability actions involving distribution schemes premised on voluntary reciprocity between the foreign defendant and the U.S. market.[92] Instead, the Court ignored the international character of the case and automatically applied the constrictive domestic minimum contacts test for general personal jurisdiction dating back to the 1950s.[93]

2. Prior General Jurisdiction Jurisprudence

Prior to its decision in *Goodyear Dunlop*, the Court had only considered the question of general personal jurisdiction in two cases.[94] In 1952, the Court found that the assertion of general jurisdiction was justified based

foreign affiliate via its "existing distribution system."

[88] *Id.* at 395 (citing *Bush*, 306 S.E.2d at 568).

[89] *Id.* at 395.

[90] *Id.* at 386.

[91] Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 383–87 (1995) (discussing the failure of the Supreme Court to address the differences between cases involving domestic as compared to foreign defendants and how the United States courts "have assumed it appropriate to overlook international jurisdiction law and apply solely United States constitutional, statutory, and common law doctrines related to jurisdiction" in all cases).

[92] *See infra* notes 123–127 and accompanying text.

[93] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011). In his dissent in *World-Wide Volkswagen*, Justice Brennan noted that the principle of *International Shoe*, "with its almost exclusive focus on the rights of defendants, may be outdated." 444 U.S. 286, 308 (1980).

[94] *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 409 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952).

upon the unique facts of *Perkins v. Benguet Consolidated Mining Company*.[95] In *Perkins*, a Philippine corporation had been forced to relocate to Ohio as a result of World War II.[96] When suit was brought against the company in Ohio state court for its failure to issue stock certificates and dividends prior to relocation,[97] the Court found that the assertion of general personal jurisdiction comported with Due Process requirements as a result of the business conducted by the mining company in Ohio, even "where the cause of action arose from activities entirely distinct from [the company's] activities in Ohio."[98] Traditionally, the Court has supported a finding of general jurisdiction based on a corporation's place of incorporation or principal place of business within the forum.[99] While the *Perkins* Court focused on the company's business activities in the forum, arguably it was comfortable finding that the exercise of general jurisdiction was permissible because Ohio was the corporation's principal, if temporary, place of business.[100]

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court raised the threshold for general jurisdiction when it declined to find general personal jurisdiction irrespective of the multiple business contacts by the defendant with the forum state.[101] The defendant, Helicol, was a Colombian company that provided transportation in South America for oil construction workers.[102] Four United States citizens were killed when a helicopter owned by Helicol crashed.[103] The survivors of the four decedents instituted wrongful death actions in a Texas state court.[104] Helicol's business dealings with Texas included the negotiations of the contract to provide transportation services,[105] the purchase of helicopters and other equipment over a period of years, and sending pilots and management personnel to Texas for training and consultations about

[95] 342 U.S. at 448.

[96] *See id.* at 447.

[97] *Id.* at 438–39.

[98] *Id.* at 447.

[99] Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 733–35 (1988).

[100] *See Perkins*, 342 U.S. at 447–48.

[101] 466 U.S. 408, 416–18 (1984).

[102] *Id.* at 409.

[103] *Id.* at 410.

[104] *Id.*

[105] *Id.*

technical matters.[106] Despite such "continuous commercial contacts with the forum,"[107] the majority found that general jurisdiction was not available because Helicol's contacts with Texas did not "constitute the kind of continuous and systematic general business contacts" that existed in *Perkins*.[108] In the wake of *Helicopteros*, it appeared that the growth of general jurisdiction as a viable theory of personal jurisdiction had stagnated.[109] General jurisdiction was apparently unavailable absent a finding that the forum was the foreign company's "virtual"[110] principle place of business.[111]

3. The Opinion

In *Goodyear Dunlop*, the Court eviscerated the argument that general, not just specific, personal jurisdiction consequences should flow from a foreign manufacturer or subsidiary participating in a product distribution scheme in the United States despite the number of its products steadily reaching the forum state via the stream-of-commerce.[112] Such an analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction."[113] The Court framed the issue as whether such subsidiaries were "amenable to suit in state court on claims unrelated to" their own activities in the forum.[114] The phrasing of the question, which sounded much more in the realm of specific rather than general jurisdiction, foreshadowed the ultimate ruling that the fact that some of the tires made by the foreign subsidiaries reached the forum was "an inadequate basis for the exercise of general jurisdiction."[115] In reaching this conclusion, the Court once again embraced *Perkins*, finding that it "remains '[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation

[106] *Id.* at 411.

[107] *Id.* at 424 (Brennan, J., dissenting).

[108] *Id.* at 416.

[109] *See* Brilmayer et al., *supra* note 99, at 725 ("[G]eneral jurisdiction is now of less practical importance than it once was.").

[110] *See* Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003).

[111] B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1110–11 (1990).

[112] 131 S. Ct. 2846, 2855 (2011).

[113] *Id.*

[114] *Id.* at 2850.

[115] *Id.* at 2851.

that has not consented to suit in the forum.'"[116] In contrast to the defendant in *Perkins*, the foreign subsidiaries in *Goodyear Dunlop* were "in no sense at home" in the forum state.[117]

Ultimately, the unanimous decision in *Goodyear Dunlop* was simply a vehicle for hammering the final nail into the coffin of the doctrine of general personal jurisdiction.[118] Authored by civil procedure guru, Justice Ginsberg,[119] the opinion rejects a stream-of-commerce approach to general jurisdiction and re-affirms that absent unusual circumstances, such as those in *Perkins*, an assertion of general personal jurisdiction will not meet due process requirements.[120] What began in *Helicopteros* as a "forshadow[ing of] substantial limitations on the exercise of general jurisdiction based upon a [foreign] corporation's business dealings in the forum"[121] is now reality.[122]

III. A SUGGESTED PARADIGM FOR A HYBRID APPROACH TO PERSONAL JURISDICTION

In a *Goodyear Dunlop*-type scenario, i.e., one involving a U.S. parent/distributor and a subsidiary/foreign manufacturer,[123] framing the personal jurisdiction issue as whether the foreign manufacturer has

[116] *Id.* at 2856 (quoting Donahue v. Far E. Air Transp. Corp., 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

[117] *Id.* at 2857.

[118] *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1246 (2011).

[119] Legal Information Institute, *Ruth Bader Ginsburg: Biographical Data*, http://www.law.cornell.edu/supct/justices/ginsburg.bio.html (last visited Dec. 5, 2011).

[120] *See Goodyear Dunlop*, 131 S. Ct. at 2856–57.

[121] *E.g.*, Weintraub, *supra* note 50, at 529 (noting that a limitation of general jurisdiction by the *Helicol* Court to *Perkins*-type situations was highly unlikely).

[122] *See* Borchers, *supra* note 118, at 1276 ("The practical consequences of [recent] decisions . . . are troubling. *J. McIntyre* may leave many U.S. plaintiffs without recourse to a U.S. forum against products manufacturers who target and benefit greatly from serving the U.S. market. *Goodyear's* . . . suggestion that a defendant is subject to contacts-based general jurisdiction only if its connection to the forum is such that it is essentially at home in the forum may well prove troublesome in future cases, particularly ones in which the defendant's presence in the forum is entirely virtual.").

[123] 131 S. Ct. at 2850. This approach is equally relevant to a scenario in which the foreign manufacturer directly engages an independent distributor to disseminate its product nationwide. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011). The effectiveness of the hybrid tests will also be evaluated by its application to *Nicastro*. *See infra* note 264.

"sufficient"[124] minimum or "continuous and systematic contacts"[125] with a particular forum is simply an exercise in futility.[126] The U.S. distributor serves as a "middleman," thereby permitting a foreign manufacturer to claim ignorance of the ultimate destinations for its products.[127] Rather, the question should be whether the foreign defendant can demonstrate that it would be unfair to require it to submit to jurisdiction in the U.S.[128] This is the thrust of the hybrid theory of jurisdiction. There are a number of hurdles, however, which must be successfully jumped if this jurisdiction scheme is to be found viable.

A. The "Single Business Enterprise" Theory of Jurisdiction

While the disappointing results of the *Perkins/Helicopteros/Goodyear Dunlop* line of jurisprudence appears to be firmly entrenched, the light at the end of the tunnel for both jurisdiction and removing incentives to outsource to avoid liability may come from an avenue the Court did not travel: the single business entity or enterprise theory of general jurisdiction.[129]

In *Goodyear Dunlop* itself, the Court found that any argument for jurisdiction based on a single business entity theory had been waived by the respondent.[130] However, at oral argument, Justice Ginsburg was extremely

[124] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[125] *Goodyear Dunlop*, 131 S. Ct. at 2851.

[126] *See* Borchers, *supra* note 118 and accompanying text.

[127] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980).

[128] Peter S. Levitt, Comment, *The Extraterritorial Assertion of Long-Arm Jurisdiction and the Impact on the International Commercial Community: A Comment and Suggested Approach*, 9 U. PA. J. INT'L BUS. L. 713, 715 (1987) (proposing a test for jurisdiction which "links the reasonableness of an assertion of international jurisdiction to a particular alien manufacturer's position in the production/distribution chain").

[129] This theory in the context of jurisdiction was addressed by the Supreme Court in 1925. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337–38 (1925). In that case, the Court held that the acts of the defendant foreign corporation's subsidiary did not render it amenable to jurisdiction in the forum state. *Id.* However, some courts have determined that this decision "has been at least qualified in later cases holding foreign corporations amenable to the personal jurisdiction of local courts because of the local activities of subsidiary corporations upon the theory that the corporate separation is fictitious, or that the parent has held the subsidiary out as its agent, or . . . that the parent has exercised an undue degree of control over the subsidiary." Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292, 296 (6th Cir. 1964) (footnotes omitted).

[130] *Goodyear Dunlop*, 131 S. Ct. at 2857 ("Neither below nor in their brief in opposition to the

interested in the views of all counsel regarding the proper parameters of jurisdiction over a controlled foreign subsidiary of a U.S. multinational corporation,[131] and Justice Scalia recognized that failing to address the question of whether the subsidiary had a separate corporate existence or whether "the parent and sub . . . merge . . . [into] one enterprise"[132] for the purposes of jurisdiction would not result in the kind of "opinion the world is waiting for."[133] Consequently, the door to designing an effective, single business enterprise schema for general jurisdiction may not be wide open, but neither is it locked.

To achieve the goal of a single business enterprise approach to personal jurisdiction in situations where a plaintiff is attempting to assert jurisdiction over the subsidiary of a U.S. company, it is of paramount importance to distinguish between the control needed for a finding of jurisdiction and that required to pierce the corporate veil.[134] "Liability and jurisdiction are two separate inquiries."[135] Courts often fail to grasp this distinction and inappropriately require control by the parent over the subsidiary to the degree necessary to pierce the corporate veil or to find that the subsidiary is the alter ego of the parent.[136]

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petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a 'unitary business,' so that jurisdiction over the parent would draw in subsidiaries as well. Respondents have therefore forfeited this contention," so the Court declined to address it. (footnote omitted)).

[131] Transcript of Oral Argument at 39–41, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76), 2011 WL 87746.

[132] *Id.* at 7.

[133] *Id.* at 8.

[134] *See, e.g.*, Vogt v. Greenmarine Holding, LLC, No. CIV.A.1:01-CV0311JOF, 2002 WL 534542, at *2–3 (N.D. Ga. Feb. 20, 2002); Alto Eldorado P'ship v. Amrep Corp., 124 P.3d 585, 595 (N.M. Ct. App. 2005) (holding that "a plaintiff need not establish all elements of alter ego to make a prima facie case for jurisdiction"); Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 14 (1926) (finding that the required nexus between a subsidiary and its parent for the purposes of jurisdiction is "entirely different" than that for substantive liability).

[135] *Vogt*, 2002 WL 534542, at *3; *see also* Berry v. Lee, 428 F. Supp. 2d 546, 554 (N.D. Tex. 2006); Antoinette Sedillo Lopez, Comment, *The Alter Ego Doctrine: Alternative Challenges to the Corporate Form*, 30 UCLA L. REV. 129, 154 (1982).

[136] *See, e.g.*, Warren v. Honda Motor Co., 669 F. Supp. 365, 368 (D. Utah 1987); Wyatt v. Walt Disney World, Co., 565 S.E.2d 705, 710 (N.C. Ct. App. 2002). *But see* Taurus IP, LLC v. DaimlerChrysler Corp., 519 F. Supp. 2d 905, 918–19 (W.D. Wis. 2007) (recognizing that "[t]he alter ego doctrine and related doctrines are typically employed to . . . disregard a corporation fiction to reach a controlling entity," but that such inquiries are also "relevant to . . . personal

The proper approach to be employed when engaging in a single-entity or single business enterprise analysis to establish jurisdiction recognizes that the inquiries are not the same because imputing the contacts of the parent to the subsidiary *does not* result in finding the parent liable.[137] A showing under the single enterprise approach need not, and should not, be as stringent as the traditional analysis used to pierce the corporate veil or establish alter ego[138] for the purposes of liability.[139]

Under an alter ego argument to pierce the corporate veil for purposes of liability, the protected status of the corporate form is basically inviolate absent extraordinary circumstances, such as a showing of fraud,[140] injustice,[141] or "rare instances" of "gross inequity."[142] Such requirements

jurisdiction" (citing IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998)). *See also* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1029 (2004).

[137] Walker v. THI of N.M. at Hobbs Ctr., No. CIV 09-0060 JB/KBM, 2011 WL 2728946, at *22 (D.N.M. July 6, 2011) (quoting *Alto Eldorado*, 124 P.3d at 592–94 (holding that "liability and jurisdiction are different inquiries that focus on different principles and frequently on different bodies of law" and finding that "alter ego theory under substantive corporate law principles is not a substitute for minimum contacts")); Energy Reserves Grp., Inc. v. Superior Oil Co., 460 F. Supp. 483, 490, 506–07 (D. Kan. 1978) (concluding that "alter ego principles no longer play any proper role in the analysis of the constitutional propriety of the exercise of" personal jurisdiction).

[138] Patin v. Thoroughbred Power Boats Inc., 294 F.3d. 640, 653 (5th Cir. 2002) ("[F]ederal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego . . . of a corporation that would be subject to personal jurisdiction in that court." The court recognized that "[t]he theory underlying these cases is that, because the two corporations . . . are the *same entity*, the jurisdictional contacts of one *are* the jurisdictional contacts of the other for the purposes of the *International Shoe* due process analysis.").

[139] *See Berry*, 428 F. Supp. 2d at 553 ("'The analysis undertaken when determining whether separate corporate entities should be treated as one for jurisdictional purposes is different than that undertaken when determining whether separate corporate entities should be treated as one for liability purposes.'" (quoting El Puerto de Liverpool, S.A de C.V. v. Servi Mundo Llantero S.A. de C.V., 82 S.W.3d 622, 634 (Tex. App.—Corpus Christi 2002, pet dism'd w.o.j.)); Wooley v. Lucksinger, 61 So. 3d 507, 582 n.196 (La. 2011) (noting that Texas courts recognize a different analysis when undertaking a jurisdictional analysis as compared to the issue of liability for the purpose of determining whether separate corporate entities should be treated as a single entity).

[140] *See, e.g.*, Hanson v. Bradley, 10 N.E.2d 259, 264 (Mass. 1937).

[141] *Id.*

[142] *See* Spaneas v. Travelers Indem. Co., 668 N.E.2d 325, 326 (Mass. 1996) ("Only in rare instances, in order to prevent gross inequity, will a Massachusetts court look beyond the corporate form."); *see also* PHC-Minden, L.P. v. Kimberly-Clark Corp., 202 S.W.3d 193, 200 (Tex. App.—Tyler 2005) (observing the distinction between the "'alter ego' theory," which "generally involves

have no relationship to issues surrounding amenability to jurisdiction.[143] Instead, the constitutional question in a jurisdictional inquiry is what constitutes the proper definition of "the nexus that parties must have before the substantive legal relationship obtains jurisdictional significance."[144]

A "non-exhaustive" list of relevant factors to be considered in determining whether purportedly distinct entities should be fused and characterized as a single enterprise for jurisdictional purposes is found in Texas jurisprudence.[145] These include: (1) whether the companies have common business names; (2) whether the stock of one company is owned by the other; (3) whether services are rendered by the employees of either company for the benefit of the other; (4) whether the companies have common officers and directors; and (5) whether the two entities have common departments and/or employees.[146] It is important to note that "not all of these factors must be present" for the contacts of the subsidiary to be imputed to the parent.[147] Ultimately, it is a question of control.[148] The cases delineating these factors generally concern the imputation of the contacts of a subsidiary to its parent.[149] The logical corollary is that these

proof of fraud," whereas "no proof of fraud is required" when using the single business enterprise approach in questions of jurisdiction), *rev'd on other grounds*, 235 S.W.3d 163 (Tex. 2007).

Another key argument in support of recognizing a distinction between piercing the corporate veil for liability purposes and viewing the parent and subsidiary as a single entity for jurisdictional purposes is one of uniformity. The contours of veil-piercing law change from state to state. Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 24–25 (1986) ("[T]here is no general common law" in the area of veil piercing. Rather, the doctrine varies "in [its] precise contours from state to state.").

[143] Brilmayer and Paisley are recognized as "authors of the leading academic exegesis," which endorses employing a substantive approach, "including the veil-piercing doctrine, to determine whether a constitutional basis exists for exercising jurisdiction. . . . Their article . . . has had considerable influence on courts and the practicing bar . . . ." Hoffman, *supra* note 136, at 1031 (citing Brilmayer & Paisley, *supra* note 142, at 28 ("[D]ue process should take into account only bona fide state substantive relations, and it should truncate such substantive relations only in limited circumstances.")).

[144] Brilmayer & Paisley, *supra* note 142, at 28.

[145] Berry v. Lee, 428 F. Supp. 2d 546, 554 (N.D. Tex. 2006).

[146] *See id.*; *see also* El Puerto de Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V., 82 S.W.3d 622, 634–35 (Tex. App.—Corpus Christi 2002, pet. dism'd w.o.j.).

[147] *El Puerto de Liverpool*, 82 S.W.3d at 635.

[148] *Berry*, 428 F. Supp. 2d at 554.

[149] *Id.* (observing that the "more typical alter ego or single business enterprise entity scenario [is one] where the issue is whether a parent corporation has exceeded the normal exercise of

factors are equally applicable in a *Goodyear Dunlop* scenario concerning whether the contacts of the parent may be imputed to the subsidiary for jurisdictional purposes.[150] The "formal separation of corporate identities does not raise a constitutional barrier to the exercise of jurisdiction over a non-resident whose affiliated corporation has a substantial nexus with the forum."[151] Therefore, where a foreign subsidiary is a wholly owned unit of a U.S. parent company, and the parent exercises the necessary control over the subsidiary,[152] an umbrella of jurisdiction may properly be found, which covers both the parent and its subsidiary.[153]

Unfortunately at oral argument, when the Justice Ginsburg asked plaintiff's counsel if she could provide any authority to support the concept that whenever a parent company is subject to general personal jurisdiction, so are its subsidiaries, the attorney was caught in the unenviable position of having no cases to offer.[154] The reason counsel for the plaintiff was unable to provide appropriate authority is because there are no cases on point.[155]

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control inherent in ownership of the stock of the subsidiary").

[150] As Professor Brilmayer correctly observes, the attribution of the contacts of a parent to its subsidiary as compared to the relationship of the subsidiary to the parent for the purposes of veil piercing is asymmetrical. *See* Brilmayer & Paisley, *supra* note 142, at 14. ("[B]ecause a subsidiary ordinarily engages in activities at its parent's request rather than vice versa . . . the parent-subsidiary relationship is asymetric [sic] in that the parent controls the subsidiary to a greater degree than the subsidiary controls the parent.") This consideration is probative in determining the issue of control necessary to pierce the veil for liability purposes. However, it has little (if any) relevance in jurisdictional determinations, because the jurisdictional standard is "less stringent" than the single-business-enterprise-liability standard. *See* Hargrave v. Fireboard Corp., 710 F.2d 1154, 1161 (5th Cir. 1983).

[151] Energy Reserves Grp., Inc. v. Superior Oil Co., 460 F. Supp. 483, 490 (D. Kan. 1978).

[152] For an excellent discussion of the major factors to be considered to determine control of the parent over its subsidiary company, see Richmond McPherson & Nader Raja, Empirical Study, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 957–65 (2010).

[153] Some scholars have even argued that the parent and subsidiary should be treated as one for jurisdictional purposes simply because they are part of a "single economic entity." *See* Charles I. Wellborn, *Subsidiary Corporations in New York: When Is Mere Ownership Enough to Establish Jurisdiction over the Parent*, 22 BUFF. L. REV. 681, 687–88 (1973). *But see* Hoffman, *supra* note 136, at 1032 (arguing that "the use of veil piercing for jurisdictional purposes is unwarranted as a matter of precedent and unwise as a matter of policy").

[154] Transcript of Oral Argument at 39–41, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2486 (2011) (No. 10-76), 2011 WL 87746.

[155] Jurisdictional veil piercing depends on the peculiar facts and circumstances of each specific relationship between a parent and a subsidiary, not on the general parent-subsidiary relationship. *See* El Puerto de Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V., 82

The reason for this dearth of authority is the Court's continued insistence on forcing factual situations that should be resolved by employing a single-enterprise theory of vicarious jurisdiction into the mold of a minimum contacts analysis.[156] *Goodyear Dunlop* is a prime example of this state of affairs.[157]

Fortunately, if adoption of the single enterprise aspect of hybrid jurisdiction proves too radical for the current legal regime, the proposed paradigm may still achieve its goals with the endorsement of the other two tenets of the approach: an aggregation of national contacts, and a steam-of-distribution theory of jurisdiction.

B. National Aggregation of Contacts Test

The single enterprise theory results in the relevant contacts of the parent with a forum state being imputed to its subsidiary.[158] However, an equally viable and perhaps more palatable approach,[159] which would not entail use of the single business enterprise test, is to premise jurisdiction on the alien defendant's contacts with the United States as a whole.[160]

In determining national contacts jurisdiction, a court should examine the affiliations with U.S. in its status as a sovereign nation created by a

S.W.3d 622, 634 (Tex. App.—Corpus Christi 2002, pet. dism'd w.o.j.) (recognizing that "[c]ourts must examine all relevant facts and circumstances to determine whether the parent and subsidiary should be considered separate or joined").

[156] As the Court recognized in *Goodyear*, "The canonical opinion in this area remains *International Shoe*, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] . . . .'" Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011) (alteration in original) (citations omitted).

[157] Ironically, the Court hid behind its own procedural rules to avoid answering the jurisdictional veil-piercing question. *Id.* at 2857.

[158] *See* Part III.A.

[159] The Court has struggled with vicarious jurisdictional liability for over a century. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; *nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary*.") (emphasis added). As support for this contention, the Court cited to cases from 1933 and 1907. *Id.*

[160] The national aggregate contacts test was first formulated by Professor Thomas F. Green in 1961. Thomas F. Green, Jr., *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 969–70 (1961).

distribution scheme.[161] From an international perspective, characterizing contacts as relating to any particular state is counter-intuitive because a state is simply a component part the United States.[162] Because distribution stream contacts and connections with the U.S. are not "'random,' 'fortuitous,' or 'attenuated,'"[163] a foreign manufacturer engaging in a U.S. distribution scheme will have sufficient national contacts of its own for the assertion of jurisdiction to be fair and reasonable.[164] Under the suggested system, the national aggregation approach is single-pronged. There is no requirement of a second prong consisting of various factors to be considered in determining whether the "assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'"[165] These "Gestalt factors"[166] (or some variation of a fairness analysis) are currently employed by the courts in both specific and general jurisdiction cases.[167] However, this second prong will prove unnecessary in this context because any additional fairness concerns will be addressed by the doctrine of forum non conveniens.[168]

[161] *See* Born, *supra* note 58, at 37 ("[I]nternational law looks only to the propriety of a nation-state's assertion of jurisdiction over foreigners.").

[162] *See* Degnan & Kane, *supra* note 58, at 813 ("In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in musical comedy, where the corn grows as high as an elephant's eye and the wind goes sweeping down the plain.").

[163] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citations omitted).

[164] *See* Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 788 (1984) ("Often, the question of whether jurisdiction over an alien defendant is fair is answered more sensibly by considering the defendant's contacts with the nation as a whole rather than with any single state. It may be no more burdensome or inconvenient for an alien to be sued in one state than another . . . .").

[165] N. Ins. Co. of N.Y. v. Constr. Navale Bordeaux, No. 11 60462 CV, 2011 WL 2682950, at *6 (S.D. Fla. July 11, 2011) (citations omitted).

[166] "Gestalt" is a term coined by the First Circuit to refer to the five fairness factors from the Burger King decision. McFarland, supra note 4, at 785. Ironically, Gestalt means "a unified whole." *Id.* at 785 n.140. As McFarland points out, the application of these factors has been anything but uniform. *Id.* at 783. "The other nine courts of appeals have dealt with the International Shoe minimum contacts/fair play test in widely varying fashions." *Id.*

[167] For an application in a case of specific jurisdiction, see *N. Ins. Co. of N.Y.*, 2011 WL 2682950, at *5–6. For an application in a case of general jurisdiction, see Esoterix Genetic Labs., L.L.C. v. McKey, No. 11 CVS 1379, 2011 WL 3667698, at *7–12 (N.C. Super. Ct. Aug. 22, 2011) (finding that while plaintiff had not established specific personal jurisdiction, the defendant was subject to general personal jurisdiction, and just being subject to general jurisdiction made the maintenance of the suit reasonable and fair).

[168] *See infra* Part III.D.

In addition, when engaging in the single-prong national-contacts inquiry, it should be irrelevant whether the court addressing the issue of jurisdiction is federal[169] or state,[170] or whether the subject matter of the

[169] Arguably, there is no impediment to the U.S. Congress enacting legislation that would recognize national aggregation of contacts in all types of cases. Certainly this is true for the federal courts. As Professor Lilly explained almost thirty years ago:

> While the Constitution may limit a state's power to consider nationwide contacts, it does not impose similar restraints upon federal court jurisdiction. . . . Congress can confer upon the national courts the authority to assert jurisdiction over persons (or property) physically present within the United States or its territories. This is simply an implementation of the principle that a sovereign has power over persons or things extant within its borders. . . . Although a sovereign has no direct authority over property without its territory, it has in personam power over nonresidents if there are affiliating circumstances. Thus, an alien can be brought within the jurisdiction of the United States if he has minimum contacts with the nation. This exercise of judicial power would not violate the fifth amendment . . . . [A] federal court could, consistent with the Constitution, "aggregate" the defendant's contacts with the United States as a whole when deciding whether a sufficient nexus exists for jurisdiction.

Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 128–29 (1983) (footnotes omitted). *See* Toran, *supra* note 164, at 786 (noting that any difficulties presented by long-arm statutes "could be alleviated, at least in the federal courts, by congressional legislation permitting jurisdiction based on the national contacts of an alien defendant or by modification of the Federal Rules of Civil Procedure" (footnotes omitted)); Yvonne Luketich Blauvelt, Comment, *Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 49 OHIO ST. L.J. 853, 868–69 (1988) ("The general assumption is that Congress, if it chose, could give the federal courts a nationwide range of personal jurisdiction. State boundaries, after all, have no particular significance for fifth amendment due process." (citing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 4.06[5] (1st ed. 1983))); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (plurality opinion) (recognizing that in international products cases where subject matter jurisdiction is premised on diversity of citizenship between the parties, "[i]t may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts"); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (recognizing a possible national contacts theory of jurisdiction in diversity cases when it observed that "[w]e have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregation of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits"). *Cf.* Degnan & Kane, *supra* note 58, at 806 n.30 (discussing the works of a number of commentators who have found that it would be improper for the federal courts to adopt a national contacts approach under the Fifth Amendment or taken the stance that it should be limited (as it currently is under Rule 4(k)(2)) to federal question suits).

[170] *See* Lilly, *supra* note 169, at 148 (arguing that *International Shoe* rests on the Fourteenth Amendment, not the Fifth, and its holding "delimit[ed] the in personam power that a state

action is based on allegations of contravention of federal or state law.[171] It is the position of this paper that premising a finding of jurisdiction by aggregating the contacts of the foreign defendant with the U.S. resulting from its participation in a distribution system is inherently fair and reasonable.

First, it is appropriate to find amenability to jurisdiction because "it is proper to infer an intention to benefit" economically from the distribution of its products in the U.S. market.[172] It is also proper to infer "an intention to submit to the laws of the forum State."[173] Clearly a manufacturer, whether an independent company or a subsidiary, who has engaged in a distribution scheme that targets the U.S., in whole or in part, has the requisite intention to benefit from its actions.[174] It also constitutes engaging in an activity within the U.S., which permits the defendant to "enjoy[] the benefits and protections of the laws of" the U.S.[175] Consequently, the act of engaging in a national distribution scheme alone should justify subjecting a foreign manufacturer to suit.[176] The actions of the manufacturer give rise to obligations and "so far as those obligations arise out of or are connected with the [foreign defendant's] activities within the [United States], a procedure which requires the [foreign manufacturer] to respond to a suit

sovereign may confer on its courts." However, "[i]t does not, other than by possible implication, restrict Congress's power to enlarge a state court's personal jurisdiction. Congressional control over interstate and international commerce or . . . congressional authority in the foreign relations field should provide a basis for empowering state courts to aggregate contacts"). *Cf.* Bradley W. Paulson, *Personal Jurisdiction Over Aliens: Unraveling Entangled Case Law*, 13 HOUS. J. INT'L L. 117, 146 (1990) (arguing that national contacts jurisdiction is limited to the federal courts); Brian B. Frasch, Comment, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686, 687 n.12, 698–99 (1982) (arguing that national contacts are only appropriate in federal question suits and that authority for such jurisdiction must come from Congress or an amendment to Rule 4 of the Federal Rules of Civil Procedure).

[171] Degnan & Kane, *supra* note 58, at 817.

[172] Harrelson v. Seung Heun Lee, No. 09-11714-RGS, 2011 WL 2909760, at *4 (D. Mass. July 21, 2011) (citing *J. McIntyre Mach*, 131 S. Ct. at 2787).

[173] *Id.*

[174] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (commenting that jurisdiction over a national distributor and a foreign manufacturer who had intentionally targeted the U.S. national market via the distributor might be sued in any state where the product caused injury due to defectiveness).

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

[176] *Cf.* Esoterix Genetic Labs., L.L.C. v. McKey, No. 11 CVS 1379, 2011 WL 3667698, at *12 (N.C. Super. Ct. Aug. 22, 2011) ("Having proven an adequate basis for general jurisdiction, it is reasonable and fair that the case be litigated in this Court.").

brought to enforce them can . . . hardly be said to be undue."[177] Therefore, there is no unfairness in employing a national contacts test to determine whether a foreign defendant's actions in participating in a national distribution scheme are directly related to the ultimate products liability action resulting from the use of one of the defendant's defective products.[178] It is time to replace the prior contact analysis for both general[179] and specific[180] jurisdiction, erasing the artificial demarcation line between the two species of jurisdiction.

Second, a national aggregation of contacts approach "is consistent with international notions of the allocation of jurisdiction between sovereign nations."[181] Acceptance of this theory is the way to negate the provincial view that domestic personal jurisdiction doctrines are equally applicable in cases involving foreign defendants.[182] This perspective is also of

[177] *Int'l Shoe*, 326 U.S. at 319.

[178] The logic of *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., MDL No. 1373, 2001 WL 34691976 (S.D. Ind. Nov. 14, 2001) is persuasive and relevant to the application of a national aggregation of contacts theory in international product liability cases. As in *Goodyear Dunlop*, the multidistrict litigation proceedings also stemmed from allegations of tire tread separation. *In re* Bridgestone/Firestone Inc., Tires Prods. Liab. Litig., 155 F. Supp. 2d 1069, 1077 (S.D. Ind. 2001), *rev'd in part*, 288 F.3d 1012 (7th Cir. 2002). In addition to various state law claims, a claim was also asserted pursuant to federal Magnuson–Moss Warranty Act. *Bridgestone*, 2001 WL 34691976, at *3. When Bridgestone, a Japanese corporation with its principal place of business in Tokyo, Japan, refused to identify a particular state forum where it would be amenable to suit, the *Bridgestone* court analyzed jurisdiction pursuant to the national aggregation of contacts permitted by Rule 4(k)(2). *Id.* at *1, *4. In finding amenability to suit, the court performed a general jurisdictional analysis to determine whether the defendant had "continuous and systematic" contacts with the U.S. as a result of the actions of Firestone, its wholly owned American subsidiary, selling, importing, and manufacturing Bridgestone tires in the U.S. *See id.* at * 5–6. The reasoning of the *Bridgestone* court has been adopted by at least one court where no federal question existed. *See* Henry v. Bridgestone Corp., No. 05-CV-02605-WYD-BNB, 2006 WL 1980622, at *4–5 (D. Colo. July 13, 2006). Under the proposed hybrid approach to jurisdiction, a comparable national contacts analysis would be employed in international, product liability not premised upon federal question jurisdiction. Rather than engaging in a fact specific, general personal jurisdiction inquiry, the court would focus on whether the defendant had voluntarily engaged in a distribution scheme targeting the U.S. market. If so, under a distribution-of-commerce theory, personal jurisdiction could be properly asserted.

[179] *See supra* notes 30–32 and accompanying text.

[180] *See supra* notes 13–27 and accompanying text.

[181] Degnan & Kane, *supra* note 58, at 818.

[182] *See, e.g.*, Lilly, *supra* note 169, at 124–27 (discussing the difficulties and inappropriateness of the application of the minimum contacts test in international cases involving alien defendants); Parrish, *supra* note 58, at 2 (asserting that "the uncritical assumption that the same due process

tantamount importance if considerations of international law and foreign relations are ever to be allowed to enter the arena of jurisdiction over foreign defendants.[183]

In cases implicating foreign relations because they involve alien defendants, there is a special need for uniformity in the treatment of federal constitutional issues.[184] In such delicate situations, what is required is a court of the nation, not a court of a particular state.[185] Where a judgment is rendered in a particular state, other nations do not view it as a New Jersey or North Carolina decision, but as a United States ruling.[186] It is the sovereignty of the United States, not a defendant's minimum contacts with a particular state, that is of paramount importance.[187] It is also important to prevent a foreign manufacturer from easily circumventing jurisdiction

considerations apply to alien defendants as to domestic defendants" has resulted in a current approach that is "doctrinally inconsistent with broader notions of American constitutionalism"); Strauss, *supra* note 91, at 383 ("When one of the parties is foreign, United States courts have assumed it appropriate to overlook international jurisdiction law and apply solely United States constitutional, statutory, and common law doctrines related to jurisdiction."). It should be noted that in *Asahi*, Justice O'Connor did accord some significance to international concerns when she recognized two factors: "'The unique burdens placed upon one who must defend oneself in a foreign legal system' and the potential implications for United States foreign policy." Maltz, *supra* note 49, at 679 (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987)). However, on the whole, the Court's silence on the question (whether a different approach to jurisdiction should be employed when a case involves a foreign defendant) is quite puzzling. This is particularly so in light of the emphasis placed on this issue in *Helicopter*os by Justice Campbell when the case was decided by the Texas Supreme Court. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 875 (Tex. 1982) (Campbell, J., concurring) ("We do not have a dispute over jurisdiction between coequal sovereigns in a federal system. We are deciding jurisdiction between countries; as to citizens of the United States and a resident of Columbia. Therefore, 'due process' in this case must be universal in its application."), *rev'd*, 466 U.S. 408 (1984).

[183] *See* Degnan & Kane, *supra* note 58, at 817 ("[I]nternational constraints require only that there be substantial contacts with the country as a whole; if there are, we may demand a foreign national to submit to our courts." (footnote omitted)).

[184] Born, *supra* note 58, at 11.

[185] *See* Degnan & Kane, *supra* note 58, at 818 (proposing that the contacts of the alien defendant should be measured in terms of the whole United States: "Constitutional authority is premised on sovereign territorial power over the defendant through his contacts with the nation.").

[186] *See id.* at 813 ("In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in musical comedy, where the corn grows as high as an elephant's eye and wind goes sweeping across the plain . . . . In short, it lacks every single attribute of a 'state' for international purposes." (footnote omitted)).

[187] *See id.* at 818.

simply by utilizing a distributor.[188] In essence, the territorial principals of *Pennoyer* should ride again. The observation that "jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory; for, otherwise, there can be no sovereignty exerted . . . . no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions"[189] should be resuscitated.[190]

C. A Transactional Approach to the Contacts Analysis: The Stream-of-Distribution Theory of Jurisdiction

According to the *Goodyear Dunlop* Court, the proposition that a stream-of-commerce theory can serve as the basis for the assertion of general jurisdiction is in error.[191] This conclusion begs the real issue of how to

[188] Consider the following question posed by Justice Ginsburg:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting).

[189] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (Boston, Hilliard Gray & Co. 1834).

[190] From a pragmatic perspective, uniform jurisdictional rules are also necessary for effective business planning and to avoid unwelcome economic surprises. Born, *supra* note 58, at 11. As the Supreme Court wisely recognized, the country "must speak with one voice when regulating commercial relations with foreign governments . . . ." Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976); *see also* Zschernig v. Miller, 389 U.S. 429, 440 (1968) ("The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

[191] *See* Goodyear Dunlop Tires Operations., S.A. v. Brown, 131 S. Ct. 2846, 2855 (2011); *see also* Eli Lilly & Co. v. Sicor Pharm., Inc., No. 1:06-CV-238-SEB-JMS, 2007 WL 1245882, at *6 n.8 (S.D. Ind. Apr. 27, 2007) ("As Defendants properly note, this 'stream of commerce' theory may not serve as a basis for an exercise of *general* jurisdiction." (citing Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 788 (7th Cir. 2003))).

integrate modern economic reality and jurisdiction. This is exactly what the *International Shoe* Court did when it recognized the realities of the commercial market of the 1950s by abandoning the outdated concept of "presence" for the purposes of suing a foreign corporation and provided an answer suitable for the 1940s.[192] It is time to recognize that the minimum contacts requirements, which the Court has subsequently engrafted on the stream-of-commerce approach to personal jurisdiction, are completely inappropriate in international, product distribution, situations. This article argues that a stream-of-distribution theory of jurisdiction (which recognizes the interplay between transactional and jurisdictional action) is the local answer for our times.[193]

Prior to *Helicopteros*, prognostications by eminent scholars that any failure to recognize general jurisdiction would quickly be remedied by the Supreme Court were clearly misplaced.[194] Sadly, rather than providing us with a landmark opinion on general jurisdiction, the *Goodyear Dunlop* Court accepted the *Perkins*/*Helicopteros* legacy of sharply limiting general jurisdiction to the unique circumstances found in *Perkins*.[195] These circumstances will likely never occur again.[196] This limitation, and the drawing of an absolute line between general and personal jurisdiction methodologies, has basically eviscerated the concept and usefulness of general personal jurisdiction.[197]

The *Goodyear Dunlop* case was a wasted opportunity to finally do away with the artificial line the Court has drawn between specific and general personal jurisdiction.[198] There, the Court criticized the lower appellate

[192] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17, 319 (1945).

[193] For an outstanding discussion of recharacterizing minimum contacts as transactional in products liability cases, see Kaplan, *supra* 36, at 590–96. A number of other scholars have made similar arguments. *Id.* at 595–96 (discussing the works of those who preceded and laid a foundation for her arguments).

[194] *See, e.g.*, Weintraub, *supra* note 50, 511–12 (noting that a limitation of general jurisdiction by the *Helicopteros* Court to *Perkins*-type situations was highly unlikely).

[195] *See supra* Part II.A.3.

[196] *See id.*

[197] See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 633–36 (1988), for an interesting perspective on the distortion of the category of general jurisdiction. *See also* Rhodes, *supra* note 5, at 139 (discussing how courts have confused the appropriate parameters of specific and general jurisdiction).

[198] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (overruling the North Carolina court's decision that had blended the two principles).

court's analysis,[199] finding it had confused or improperly blended the jurisdictional principles of specific and general personal jurisdiction.[200] Contrary to the position of the Court, the lower court was on the right track. A better characterization of the analysis is the effort by the North Carolina Court of Appeals to comport with the true admonition in *International Shoe*, that jurisdiction be fair in light of changing times.[201] In stark contrast, the Supreme Court's ruling in *Goodyear Dunlop* "frustrate[s] the task of matching jurisdictional theory to modern social realities."[202]

In response to the North Carolina Court of Appeal's apparent confusion of the requirements for specific and general jurisdiction, the *Goodyear Dunlop* Court simplified the situation first by reiterating the absolute boundary between general and specific jurisdiction[203] and then by negating the feasibility of general jurisdiction occurring in any case other than *Perkins*.[204] Arguably, there is a fallacy of creating distinctive boundaries between "specifically and generally affiliating contacts."[205] *Helicopteros* is a prime example of the misconception that there should be a definitive line drawn between the two jurisprudential approaches.

It is certainly disputable as to whether *Helicopteros* should have been approached as a general jurisdiction case.[206] From Justice Blackmun's

[199] The Supreme Court of North Carolina declined to exercise discretionary review. *Id.* at 2853.

[200] *See id.* at 2851 (noting that in finding the foreign subsidiary amenable to general jurisdiction in North Carolina, the lower court was "[c]onfusing or blending general and specific jurisdictional inquiries").

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

[202] Weintraub, *supra* note 50, at 512.

[203] *See Goodyear Dunlop*, 131 S. Ct. at 2851.

[204] *See id.* at 2857 ("Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted" in the forum state, the petitioners in *Goodyear Dunlop* were "in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." (citing Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 416 (1984))).

[205] Weintraub, *supra* note 50, at 530; *see also* Rhodes, *supra* note 5, at 139–40 (discussing the "confusion regarding the appropriate parameters of specific and general jurisdiction" and how the misapplication of the concepts "has deleterious effects on predictability"); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444 (1988) ("What is considerably less clear is whether, in particular cases, the relevant basis for authority is general or specific [personal jurisdiction] . . . . We find ourselves now with disputes in which it is far from clear whether jurisdiction, if it exists, is general or specific." (footnote omitted)).

[206] *See Helicopteros*, 466 U.S. at 415.

opinion, clearly the parties to the action "conced[ed] that the respondents' claims against Helicol did not 'arise out of,' and [were] not related to, Helicol's activities within Texas."[207] However, "[u]nlike in 'Alice in Wonderland,' simply saying," or in this case, conceding, "something is so does not make it so."[208] Certainly, Justice Brennan had no trouble finding that the contacts being examined would support a finding of both specific and general jurisdiction.[209] Because the same contacts are relevant to both varieties of personal jurisdiction, the analyses for each theory need not be mutually exclusive.[210]

The attempt by the North Carolina court to combine general/specific personal jurisdiction in situations where U.S. citizens are injured or killed abroad due to a defective product should be applauded. Although the lower court reached the right results, a better approach than a blending of personal and general jurisdiction would have been to employ the national aggregation of contacts requirement of hybrid jurisdiction in conjunction with what could be called "stream of distribution" analysis.

The basis for a stream-of-distribution theory is a transactional one, not one premised in tort.[211] The focus should be on markets, not forums.[212] The key is not *control*, *awareness*, or *foreseeability*, which are the touchstones of the "minimum contacts" analysis.[213] Instead, jurisdiction under this prong of the hybrid model is premised upon concepts of reciprocity and obligation.[214] The foreign defendant will have entered into the stream-of-distribution of the American market for economic gain. It is only fair that the defendant "be amenable to jurisdiction wherever its bargain yields benefits."[215] Procedural due process requirements will be

[207] *Id.*

[208] Alan Riquelmy, *Judge Tosses Out Army Captain's Complaint Questioning President's Birth; Orly Taitz on Notice*, LEDGER-ENQUIRER, Sept. 16, 2009, http://www.ledger-enquirer.com/2009/09/16/v-print/841419/judge-tosses-out-army-captains.html.

[209] *Helicopteros*, 466 U.S. at 423–25 (Brennan, J., dissenting).

[210] *See* Brilmayer, *supra* note 205, at 1444–45.

[211] Kaplan, *supra* note 36, at 593–96.

[212] *Id.* at 589–90.

[213] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[214] Kaplan, *supra* note 36, at 601.

[215] *Id.* at 598 (citing Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 285 (1965)).

satisfied because it will be forewarned of the jurisdictional consequences of its choice.[216]

In addition to jettisoning the demarcation between general and specific jurisdiction,[217] the stream-of-distribution aspect of the hybrid system will correct the doctrinal error that the Court made in *Helicopteros* and continued to make in *Goodyear Dunlop*.[218] This will permit the law of modern personal jurisdiction to be reconciled and to comport with the spirit of *International Shoe*, which made no such distinction.[219] Such action would also obviate the confusion regarding the appropriate parameters of specific and general jurisdiction, which has a proven "deleterious effect on predictability."[220] Current due process jurisprudence has placed contacts at the forefront of any jurisdictional analysis, resulting in the minimum contacts prong of the current test being far too fact specific.[221]

It is time for a new stream-of-distribution theory of personal jurisdiction, which highlights fairness.[222] A stream-of-distribution theory is

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[216] *See World-Wide Volkswagen*, 444 U.S. at 310–11 (Brennan, J., dissenting).

[217] *See* Weintraub, *supra* note 50, at 530.

[218] See J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794–95 (2011) (Ginsburg, J., dissenting), for a glaring illustration of the error. See also *supra* note 74 for further discussion of *Nicastro*.

[219] Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (blending concepts of general and specific personal jurisdiction with its finding that the defendant non-resident corporation had "systematic and continuous" activities and that the "obligation[s] . . . sued upon arose out of those very activities").

[220] Rhodes, *supra* note 5, at 139–40.

[221] Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 434 (1998) ("After fifty years of doctrinal development, the minimum contacts test remains so fact-specific and uncertain that the outcome of the jurisdictional analysis in any particular case is unpredictable." (footnote omitted)).

[222] In his dissent in *World-Wide Volkswagen*, Justice Brennan reiterated that "[t]he clear focus in *International Shoe* was on fairness and reasonableness." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1979) (Brennan, J., dissenting) (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1978)). Justice Brennan further opined that the Court in *International Shoe* had "specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant . . . . The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness." *Id.* Brennan further noticed that:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.* That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate

inapposite to a minimum contacts analysis because it is grounded in a transactional reality.[223] Stream-of-distribution should be recognized "as a *sui generis* form of jurisdiction."[224] As the Court first expounded in *International Shoe*, it is the "the quality and nature of the activity in relation to the fair and orderly administration of the laws" that should be examined to be sure that due process requirements have been met.[225] Brennan argued that sufficient contacts were not *de rigueur*; they were simply one avenue to ensuring fairness.[226]

In contrast to a minimum contacts analysis, the hybrid system of jurisdiction would not exalt minimum contacts. There would no longer be a need to distinguish between general and personal jurisdiction.[227] Jurisdiction would be premised upon the fact that when one receives a benefit, obligations are incurred.[228] Where a foreign manufacturer receives the benefit of the bargain by placing its good into the U.S. market, it should constitutionally be subject to suit.[229] As the Court recently noted, "The principle inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign."[230]

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defendant with which the state has *no* contacts, ties or relations.

Id. (emphasis in original) (quoting *Int'l Shoe*, 326 U.S. at 319).

[223] Weintraub, *supra* note 50, at 520 ("Jurisdiction is the quid pro quo for choosing to deal with a nonresident supplier or buyer.").

[224] Kaplan, *supra* note 36, at 508.

[225] *Int'l Shoe*, 326 U.S. at 319.

[226] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 120 n.3 (1987) (Brennan, J., concurring) ("[T]he foreseeability that a customer would use a product in a distant State was a sufficient basis for jurisdiction." (citing *World-Wide Volkswagen*, 444 U.S. at 306–07, 307 nn.11–12))).

[227] Weintraub, *supra* note 50, at 530 ("Treating *Helicopteros* as a general jurisdiction case illustrates the fallacy of drawing a sharp line between specifically and generally affiliating contacts.").

[228] *See Int'l Shoe*, 326 US. at 319 (noting that when a corporation conducts activities within a state, that activity comes with benefits and obligations).

[229] As Professor Robert Abrams emphasized: Isn't it time to "stop thinking that, because for administrative purposes it is convenient to divide the United States into judicial districts, a federal court 'sits within and for that district; and is bounded by its local limits,' as the Supreme Court once put it? It also sits within and for the United States . . . ." Robert Haskall Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1 (1982) (citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 22 n.87 (1945)).

[230] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011).

D. Fairness Concerns Addressed Via the Doctrine of Forum Non Conveniens & Jurisdictional Resequencing

1. The Doctrine of Forum Non Conveniens

As illustrated by *Asahi*, even where a majority of the Court finds sufficient "minimum contacts," fairness concerns may trump contacts.[231] Thus, the elevation of minimum contacts to the status of being the *sine qua non* of jurisdiction has been in error. Embracing the hybrid scheme and its reliance on the doctrine of forum non conveniens to serve as the barometer for due process fairness requirements would allow concepts of personal jurisdiction to evolve as needed to keep in step with the rapid advancements in technology and changing economic landscapes.[232] There is no simple "one size fits all" in this area of jurisprudence. Jurisdictional determinations must be made on a case-by-case basis, with the emphasis on whether the particular defendant can demonstrate such a level of unfairness that the assertion of personal jurisdiction over it by a particular forum would be improper.[233] The weaker the showing of unfairness by the defendant in being required to litigate in a particular forum, the less the burden on the plaintiff to rebut such a showing of unfairness.[234]

Where a national aggregation of contacts approach to jurisdiction is employed, "the focus of the argument would shift from the convenience of

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[231] *See supra* note 29.

[232] In addition, the Supreme Court has already addressed the use of forum non conveniens in the international setting and consequently "there exists well-developed doctrine allowing for easy application." Degnan & Kane, *supra* note 58, at 819 (footnote omitted). *Cf.* Marilyn Maxwell Gaffen, Note, *Maritime Law—*American Dredging Company v. Miller*: The Supreme Court Leaves the Forum Non Conveniens Debate Unresolved*, 19 W. NEW ENG. L. REV. 275, 276–77 (1997) (discussing the application of local procedural rules in maritime cases rather than forum non conveniens); Anne McGinness Kearse, Note, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C. L. REV. 1303, 1312–13 (1998) (discussing a balancing test to determine when a case will be dismissed for forum non conveniens); Jeffrey A. Van Detta, *The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases*, 87 MARQ. L. REV. 425, 453 (2004) (suggesting a "preservation-of-court-access rule" in place of the doctrine of forum non conveniens).

[233] *See* Weintraub, *supra* note 50, at 530.

[234] *Id.* ("The less the unfairness to the defendant in requiring it to defend in the forum, the less the relationship between forum contacts and the cause of action that should be required to rebut that unfairness.").

suit in a particular state to the convenience of suit anywhere in the United States."[235] In terms of historical pedigree, the Court should look no further than *International Shoe* to validate whether the use of forum non conveniens may properly be employed[236] to insure due process "according to our traditional conception of fair play and substantial justice . . . ."[237] The original test of *International Shoe* was one of fairness, not contacts.[238] A finding of sufficient contacts is simply one way that the fairness requirement of the Due Process Clause could be satisfied.[239] In *International Shoe*, the Court rephrased its new approach to due process no less than four times.[240] At no time did it enunciate *minimum contacts* as an absolute requirement under a due process analysis.[241] As long as an alien manufacturer is given "adequate notice and an opportunity to defend," the Due Process Clause should not be offended simply "because the defendant has to board a plane to get to the site of trial."[242]

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[235] Toran, *supra note* 164, at 788. It should also be noted that if a foreign defendant prefers the courts of one state over another, change of venue pursuant to 28 U.S.C. Section 1404(a) and the doctrine of forum non conveniens provide mechanisms for change of forum. *See* Eng'g Equip. Co. v. S.S. Selene, 446 F. Supp. 706, 710 (S.D.N.Y. 1978).

[236] See, for example, *Burnham v. Superior Court*, 495 U.S. 604, 606 (1990) (citations omitted), in which Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice O'Connor, "concluded that historical pedigree, although important, is not the *only* factor to be taken into account in establishing whether a jurisdictional rule satisfies due process, and that . . . [r]eliance solely on historical precedent is foreclosed by International Shoe Co. v. Washington and Shaffer v. Heitner, which demonstrate[s] that *all* rules of state-court jurisdiction, even ancient ones such as transient jurisdiction, must satisfy contemporary notions of due process."

[237] Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[238] McFarland, *supra* note 4, at 764 ("[T]he sum of the *International Shoe* test, whether it is labeled the minimum contacts test or something else, is basic fairness." (footnote omitted)).

[239] *See* Shaffer v. Heitner, 433 U.S. 186, 225–26 (Brennan, J., concurring in part, dissenting in part) ("[W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.").

[240] McFarland, *supra* note 4, at 763 ("Thus, the opinion states or applies the new law no fewer than four times, and uses different language every time.").

[241] *Id.* at 764–65 ("[W]hat is the [minimum contacts] test? Fairness. Dressed up in fancy word clothing, the test is nothing more—and nothing less—than that a court should consider all the circumstances of the case and decide whether jurisdiction over the defendant by that state in that case strikes the court as fair.").

[242] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting).

While the hybrid process will also make it more probable that plaintiffs in a *Goodyear Dunlop*[243] situation will be able to sue the foreign subsidiary at home,[244] a forum non conveniens analysis is no guarantee of possible home field advantage.[245] In international cases, such as *Helicopteros*, *Asahi*, or *Goodyear Dunlop*, the foreign defendant, who will have the initial burden of establishing unfairness, is certainly free to argue that it would be unfair to subject it to the jurisdiction of the selected local because "convenience of the parties and the ends of justice would be better served" if the case were tried in an alternate forum.[246] This aspect of the hybrid system is premised upon the doctrine of forum non conveniens.[247] The doctrine satisfies due process requirements in cases involving alien defendants because of its focus upon the "orderly administration of the laws."[248]

The federal common law of the doctrine of forum non conveniens calls upon the courts to first determine whether an alternate forum exists.[249] Once such a determination is made, the courts then exercise discretion and may decline to assert otherwise sound jurisdiction where a balancing of certain public and private factors confirm that the case is more appropriately heard in another forum.[250] The seminal Supreme Court decision in this area is *Piper Aircraft Co. v. Reyno*, which discussed and applied certain public and private factors that are to be considered in determining the appropriate forum.[251] One key advantage of employing

[243] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

[244] This would be equally true for plaintiffs in a *Nicastro*-type scenario where the action is brought against a foreign manufacturer employing a U.S. national distributor. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

[245] *See, e.g.*, *Goodyear Dunlop*, 131 S. Ct. at 2846; Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Asahi Metal Indus. Co. v. Superior Court, 480 U.S.102 (1987).

[246] Myers v. Boeing Co., 794 P.2d 1272, 1279 (Wash. 1990) (en banc) (quoting Johnson v. Spider Staging Corp., 555 P.2d 997, 999 (Wash. 1976)).

[247] *See id.*

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

[249] Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1060 (2010).

[250] *Id.* at 1060–61.

[251] 454 U.S. 235, 257–61 (1981). See Degnan & Kane, *supra* note 58, at 824–28 for an extensive discussion of the facts and holding in *Piper*. The Supreme Court first addressed the relevant factors in a forum non conveniens inquiry in *Gulf Oil*. Recognizing that the doctrine of forum non conveniens is within the discretion of the trial court, the Court declined to set a bright line rule. Instead it set out public and private interests to be weighed and balanced. The private

forum non conveniens instead of the Gestalt factor[252] approach of a minimum contacts analysis is "conditional dismissal."[253] For example, employing this ability, courts have granted forum non conveniens dismissal premised upon the defendant agreeing not to raise a statute of limitations objection in the foreign court.[254]

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interests to be considered include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). The public interest factors to be considered are:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508–09.

[252] *See supra* notes 166–167.

[253] *See* Degnan & Kane, *supra* note 58, at 828 ("[In] assessing . . . the hardship that may be imposed on the plaintiff" if the case is dismissed and tried in a foreign forum, the court "has the power to condition its dismissal so as to avoid some of the potential burdens that otherwise might exist. This flexibility is unique to *forum non* [conveniens] and is an additional factor supporting the preference for this device over using a jurisdictional determination to assess convenience and fairness.").

[254] *Id.* at 828 n.137 (discussing cases where the dismissal was conditioned upon the defendant agreeing not to raise a statute of limitations challenge); *see also* Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U. C. DAVIS L. REV. 559 (2007); Linwood G. Lawrence, III, Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 767–68 (1976-1977) (discussing how courts often require defendants to agree to conditions before granting a motion to dismiss for forum non conveniens); Barbara M. Yukins, Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 63 n.33 (1967) (discussing various conditions that have been imposed on defendants to assure that the plaintiff's interests are not prejudiced).

2. Jurisdictional Resequencing

In 1999 and again in 2007, there were interesting developments in the area of civil procedure, which strengthen the theory that forum non conveniens is the proper due process gatekeeper to insure reasonableness and fairness.[255]

In *Ruhgas AG v. Marathon Oil Co.*, the Supreme Court held that the principle of *Steel Co. v. Citizens for a Better Environment*, requiring federal courts to determine its subject-matter jurisdiction before turning to the merits,[256] did not apply to non-merit issues.[257] Eight years later, in *Sinochem International Co. v. Malaysia International Shipping Corp.*, the Court addressed the same issue in the context of a forum non conveniens dismissal.[258] A unanimous Court held that the district court has discretion to respond at once to a defendant's motion and dispose of an action by forum non conveniens before establishing its own jurisdiction.[259]

The new jurisdictional twist of permitting jurisdictional resequencing is a major consideration when judging the efficacy of the hybrid system's reliance upon forum non conveniens to moderate fairness.[260] Now, even prior to addressing a challenge to personal jurisdiction, a foreign defendant can raise the issue of dismissal based upon forum non conveniens, and the court has the discretion to respond at once to the plea.[261]

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[255] *See infra* notes 256–261 and accompanying text.

[256] 523 U.S. 83, 84 (1998).

[257] Ruhgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999) ("We hold that . . . there is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry.").

[258] 549 U.S. 422, 425 (2007).

[259] *Id.* ("We hold that a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection.").

[260] *See* Heather Elliot, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 734–35 (2009).

[261] In a reverse situation to that of *Goodyear Dunlop*, where the plaintiffs are aliens and the defendant is a U.S. multinational corporation, an interesting argument has been made that the courts are employing forum non conveniens to abdicate their responsibility of providing an adequate forum. Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L L. & BUS. 53, 54 (2003); *see also* Maria A. Mazzola, Note, Forum Non Conveniens *and Foreign Plaintiffs: Addressing the Unanswered Questions of* Reyno, 6 FORDHAM INT'L L.J. 577, 577 n.1 (1982–1983).

Arguably, the federal common law doctrine of forum non conveniens and federal decisions permitting jurisdictional resequencing do not bind state courts.[262] However, in light of the fact that a state court is sitting as a "court of the nation" when it entertains a products liability action with an alien defendant, a strong case can be maintained that state and federal courts should employ the same methodology in their forum non conveniens determinations.[263] Consequently, all should be guided by the *Piper* decision, and all should address any forum non conveniens challenge to jurisdiction post-haste.

As a less exacting and more expansive test for jurisdictional purposes, the proposed hybrid approach to jurisdiction (consisting of a national aggregation of contacts prong in conjunction with a single business enterprise theory of jurisdiction, grounded in a transactional perspective employing a stream-of-distribution analysis) tempered by the doctrines of forum non conveniens and jurisdictional resequencing should set a proper course true to the map drawn by *International Shoe*.[264]

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[262] *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988) ("Federal *forum non* conveniens principles simply cannot determine whether Texas courts, which operate under a broad 'open-courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit.").

[263] Degnan & Kane, *supra* note 58, at 831 nn.150, 152.

[264] The ultimate efficacy of the hybrid approach is demonstrated by its application to the specific fact pattern of *Goodyear Dunlop*. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). This litmus test demonstrates that the proposed model satisfies the procedural due process requirements originally delineated in *International Shoe*. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Arguably, jurisdiction could be premised upon the single business enterprise theory of jurisdiction. *See supra* Part III.A. The foreign defendant is a wholly owned subsidiary and manufactures tires for the U.S. market at the direction of its parent, Goodyear. *Goodyear Dunlop*, 131 S. Ct. at 2852. In addition, the parent also served as the distributor or used a distribution system to disseminate products manufactured by its subsidiary. *Id.* This in itself demonstrates a high degree of control over the subsidiary. Thus, as determined by the lower courts in G*oodyear Dunlop*, there was no unfairness in imputing the contacts of the parent to a wholly owned, foreign subsidiary, which manufactures at the direction of the parent/distributor and markets the products of its subsidiary in the U.S. *Id.* at 2851.

The application of a national contacts theory, *see supra* Part III.B., in conjunction with the stream-of-distribution theory of the hybrid system, *see supra* Part III.C., should also result in upholding the North Carolina trial court's finding that the assertion of personal jurisdiction was proper over the Goodyear's foreign subsidiaries. *Goodyear Dunlop*, 131 S. Ct. at 2848. Jurisdiction is proper because the products of the subsidiaries were distributed in the U.S. according to an agreement between the subsidiaries and the parent. *See id.* at 2852. Their products were placed into the international, commercial stream-of-commerce and ultimately flowed into the U.S. The bottom line was profits to the foreign defendants. Thus, under the

IV. CONCLUSION: WHERE IS DARWIN WHEN YOU NEED HIM?

The high hopes raised for the evolution of personal jurisdiction prior to the *Goodyear Dunlop* decision have been dashed by the Court's continued demarcation between specific and general jurisdiction and its confinement of general personal jurisdiction to *Perkinsesque* scenarios.[265] These results were not pre-ordained by precedent.[266]

The Court recognizing that the boundaries of personal jurisdiction need to change with the times is not a new phenomenon.[267] In 1957, in response to a fundamental transformation in the American economy in terms of inter-state transaction, the Court probed the outer limits of the concept of sufficient minimum contacts, finding jurisdiction proper where the defendant had only a single contact with the forum state where that contact directly related to the cause of action.[268] This expansive view of the "minimum contacts" test was a direct result of the Court's acknowledgement that:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made

stream-of-distribution prong, the defendant should be amenable to jurisdiction in the U.S. Under the proposed fairness analysis pursuant to the doctrine of forum non conveniens, however, the case would likely be dismissed. *See supra* Part III.D.1. In the final analysis, the ruling of the Supreme Court would be upheld.

In contrast, the ruling in *Nicastro* by the Court would not stand. Under the hybrid approach, the manufacturer should be amenable to personal jurisdiction based upon its national contacts and pursuant to the stream-of-distribution theory. There, a foreign manufacturer had a number of national contacts via its product distribution by a national distributor. The *modus operendi* of the manufacturer was to target the U.S. market for economic gain. *See supra* note 74. In light of the additional facts of the case, which include injury of a U.S. plaintiff in the forum state by a defective product sold to plaintiff by the distributor, there should be no dismissal under a forum non conveniens analysis. Justice Ginsburg's dissent should prevail. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794–04 (Ginsburg, J., dissenting).

[265] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). For a discussion of the facts of *Perkins*, *see supra* Part II.A.2.

[266] *See supra* Part I.

[267] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

[268] *Id.*

> it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[269]

And it was in response to commercial reality that the Court first devised the stream-of-commerce version of specific personal jurisdiction in order to hold manufacturers and distributors accountable for defective products.[270]

In *Goodyear Dunlop*, the Court once again confronted economic reality.[271] This time, however, the change was not just the "fundamental transformation of the American economy."[272] Rather, it was a transformation on an international scale.[273] This globalization of commerce has resulted in foreign manufacturers marketing products through distribution systems into all of the fifty states.[274] A common theme of the Court in prior minimum contacts decisions has been the need to provide certainty to companies by providing sufficient notice so that they may structure their businesses to minimize risks.[275] The *Goodyear Dunlop* Court's failure to take "into account the contemporary reality of how companies in foreign countries market their products in the United States"[276] negates such planning strategies. Once again, to remain viable, the law needed to adapt to a shifting economic landscape. The Court was not up to the challenge.

In the aftermath of *Goodyear Dunlop*, it is highly unlikely that the Roberts Court will embrace a single business enterprise theory of

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[269] *Id.*

[270] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." (quoting Hanson v. Denckla, 357 U.S. 235, 250–51 (1958))).

[271] Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851 (2011).

[272] *World-Wide Volkswagen*, 444 U.S. at 293.

[273] *See supra* note 65.

[274] *Id.*

[275] *World-Wide Volkswagen*, 444 U.S. at 297 ("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, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or if the risks are too great, severing connection with the State." (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

[276] Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 585 (2010) (citing Charles Gendler & Co. v. Telecom Equip. Corp., 508 A.2d 1127, 1136–37 (1986)), *rev'd*, 131 S. Ct. 2780 (2011).

jurisdiction,[277] let alone the proposed hybrid theory in international products cases.[278] Even so, it can be hoped that somewhere in the future, a majority of the Court will, at a minimum, recognize a more expansive view of general jurisdiction than that of *Perkins* as applicable in international product liability situations[279] and that stream-of-distribution, i.e., stream-of-commerce *sans* the minimum contacts analysis, will be recognized not only as a viable transactional jurisdictional theory to hybrid personal jurisdiction, but as an essential element of procedural due process. Until then, it appears that foreign manufacturers will be able to insulate themselves from suit in the United States, irrespective of the injury caused by one of their product to a citizen of the United States, by simply employing or a Pontius Pilot-like washing of the hands[280] via a combination outsourcing/distribution scheme.[281] In essence, the *Goodyear Dunlop* decision has created an instruction manual for American, multi-national corporations on how to utilize their wholly owned foreign subsidiaries to cut-corners and costs in the manufacturing processes without fear of the potential for the expansive liability available under U.S. law. Thus, profits will increase for the American parent irrespective of the fact that U.S. citizens were injured by the product.[282] This author takes heart from the perspective that ultimately: *"In the struggle for survival, the fittest win out at the expense of their rivals because they succeed in adapting themselves best to their environment."*[283] It is hoped that the Roberts Court will take heed of this Darwinian maxim

[277] *See supra* Part III.A.

[278] *See* Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2851 (2011) (reiterating the absolute boundary between general and specific jurisdiction indicates a rigid inflexibility for adopting a new form of jurisdictional jurisprudence).

[279] *See supra* Part II.A.2.

[280] Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995) ("A defendant that releases a product for sale should be subject to jurisdiction in any state where the product causes harm if the product comes there either in the normal course of commercial distribution or is brought into that state by someone using the product as it is intended to be used. Otherwise . . . to avoid being haled into court where a user is injured, [the manufacturer] need only Pilate-like wash its hands of a product having independent distributors market it.").

[281] *See Goodyear*, 131 S. Ct.at 2852. This observation is equally true for a pure distribution scheme as illustrated in *Nicastro*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting).

[282] *See Nicastro*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

[283] 2 T. WALTER WALLBANK, CIVILIZATION PAST AND PRESENT 326 (5th ed. 1965) (paraphrasing Darwin's general hypothesis on evolutionary theory).

and embrace a new approach to jurisdiction designed to address the realities of international relations and global economies in the 21st century.