US Civil Procedure For International Students:

A Strategic and Comparative Perspective

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1 Introduction

1.1 Introduction: Becoming a Great Lawyer

This book begins with a simple premise – law school is not primarily about teaching legal doctrine, but about helping law students on their way to becoming great lawyers. Knowing and applying legal doctrine is part of what lawyers do, but it's a poor lawyer who fails to understand that the job involves much more. Put broadly, the job involves solving – often by anticipating and avoiding – client problems, and doing so in an ethical way that recognizes and honors the lawyer's duties not just to the client but to the system of justice and to society at large.

Because we think law school is about forming great lawyers, we've designed this textbook according to a vision of how great lawyers practice and are trained. We think great lawyers are:

Holistic. This involves situating legal rules and legal process in a larger framework. Formal laws and institutions are just one way to resolve disputes and influence behavior, and great lawyers understand how legal process fits into a bigger picture.

Strategic. This also involves understanding legal rules within a strategic perspective. While law and legal process is and should be so much more than a competitive game (justice matters), nonetheless there is a craft that can be applied to help clients. Great lawyers use rules strategically to help clients fairly achieve legitimate goals, and we try to show you how.

Transnational. This textbook was written for use with international students. Almost all STL students are either PRC nationals or, even if exchange or LL.M. students, mostly from countries other than the USA. While we believe US Civil Procedure is extremely relevant to lawyers worldwide, we also feel that the focus and emphasis should change for those less likely to be engaged in US litigation (a circumstance often true for US law students as well, but less easy to predict in the US). Finally, in the modern world, solving client problems increasingly requires awareness of the variety of competing legal systems

that can be applied – or at least learned from – and to the extent it is consistent with a course focused primarily on a deep dive into one system we take a comparative look at different systems.

Culturally and Socially Competent. Great lawyers are much more than technically competent. Career success depends upon soft skills that are not measured, and generally not well taught, in the traditional law school curriculum. Despite that, great lawyers have well developed soft skills. They can work well as members of or leaders of teams, they can communicate clearly in a range of settings, and they are mindful of the challenges that arise from trying to have both a satisfying life and success in a difficult profession. Transnational lawyers – which at our school means everyone – also need cultural competence. They need to understand and honor other cultural traditions, and to be prepared to operate as a kind of cultural translator when the need arises.

Technically Proficient. While legal technical proficiency is far from enough, it still matters. Lawyers must know how to interpret a statute and carefully read a case. In the common law tradition, they must be able to distinguish dicta from holdings, and know why the difference matters. They must not be thrown off by technical terms unique to legal settings. They must know how to conduct research, and how to access the tools that practicing lawyers use to pursue new questions. While they won't have the answer to every legal question at their fingertips, they must know enough doctrine to recognize when an issue is presented and when changing facts require changing strategies.

Ethical. Law is a profession, and not just an occupation. While pretty much everyone recognizes that law has not proved immune to the fiscal pressures affecting other jobs, the fact remains that to function as a fully formed lawyer requires forming a professional identity, and a professional identity involves more than revenue generation. We think these issues need to be confronted early and often, and try to incorporate them at appropriate places in this course.

To the extent possible, we have designed this course to address all those issues.

We begin with what it means to be a lawyer. Lawyers operate within ethical and legal constraints that do not apply to other occupations. Understanding what these constraint are and why they matter not just to lawyers but to society is an important part of understanding any part of the US legal system.

We then address culture. We do that in large part because this book is designed for a classroom in which the vast majority of the students will not be from the US or intimately familiar with US culture beyond what is portrayed in the media. Law has deep cultural roots – at some level, legal norms are a kind of cultural software. We look at research which has explored cultural and cognitive differences in Asian and Western cultures, and then provide a quick introduction to US culture and history. You are free to disagree with any of what is presented, but to function across cultures will require you to develop your own mindful and intentional approach to cultural issues.

We then turn to conflict. We begin with conflict because law, and different kinds of law, and different processes to enforce law, all arise as ways to deal with conflict. Conflict is pervasive and unending. Conflict occurs in all human cultures, and even in non-human cultures.

Conflict does not always mean battle. Conflict can arise from two different perspectives on an event or a situation, which can create opportunities for mutual gain as much as losses. The issue with conflict thus becomes how to most productively resolve it.

There are many ways to resolve conflict, of which laws and legal process are just one. These include submission to cultural norms, discussion, negotiation, mediation, group resolution including political processes, arbitration, non-governmental establishment of group norms, and formal governmental laws enforced by formal government provided procedures. While lawyers are identified with formal laws and formal procedure, in reality typical lawyers will over the course of their lives and careers resolve disputes through many if not all of these methods that do not involve legal process. Understanding what legal process is and when turning to it makes sense requires understanding how it fits into this larger picture of resolving disputes.

Our first doctrinal module therefore is one either reached at the end of most US courses, or, quite often, not quite reached at all, Alternative Dispute Resolution. We do it this way because of our emphasis on strategy, and based on our belief that addressing client needs should not lead blindly to doctrinally driven solutions.

Our second doctrinal module goes to the end of the formal process – remedies, enforcing judgments, and appeals. This, again, is driven by strategic considerations. The first rule of warfare is to define the objective. Understanding the relief available – especially in transnational settings – will drive strategic choices. Much legal analysis yields uncertain results, and understanding what has to happen before a wrong decision by a trial judge can be challenged will, again, drive strategic decisions made at the outset, not the conclusion, of a matter. Again, reflecting our transnational setting, we look at transnational enforcement of judgments, specifically looking at how US courts approach enforcing judgments obtained abroad.

Only then do we go where many traditional textbooks start, which is the formal commencement of litigation. We don't think litigation should ever be commenced until the alternatives have been examined and the possible outcomes understood, and we try to drive that point home in the way we structure the course.

Government sponsored and hosted litigation, while not the only way to resolve conflicts, is one that gives lawyers a special role. In most jurisdictions, including the United States, only licensed lawyers can represent litigants in most courts (although litigants can always represent themselves). Understanding the formal litigation process is a core competency of lawyers, and one that we will dive into in depth.

Even in the commencement of litigation, we flip the way most books handle it, placing service of process before the issue of personal jurisdiction. We understand that, analytically speaking, that the court's power over a party is a preliminary analytical issue going to the power of the court that should be resolved before the court gets into merits issues or other rules of process. At the same time, we've taught Civ Pro long enough to recognize that the issue of personal jurisdiction can be confusing to students (and, one might fairly conclude, to justices of the US Supreme Court).

We thus start with the somewhat less troubled area of service of process. Here, in comparison to most US textbooks, we spend a little extra time looking at service on overseas defendants. We think that increasingly that will be core for anyone, but it certainly is core for anyone representing foreign-based defendants.

Knowing how process is made allows to segue to our next topic, personal jurisdiction. We again find the strategic prism important for this topic. Personal jurisdiction is the hook that draws foreign defendants into US courts. You cannot competently represent overseas defendants who do any foreign trade without understanding when and how those defendants might become subject to the US legal process.

Once we have covered personal jurisdiction, we turn to the broader issues of notice and right to a hearing.

That concludes what is covered in the first semester. In the second semester, we will turn to the other issues covered in a typical civil procedure course in volume two of this textbook.

In both semesters we will make reference from time to time to a major litigation, the Chinese Dry Wall Cases. We feel these cases help illustrate how and why US Civil Procedure matters for non-US parties and lawyers, and use it to illustrate many of the litigation processes.

1.2 The Lawyer's Role

What does it mean to be a lawyer? In this course, you will be asked to think strategically. You need to understand from the outset that your professional status – and the duties and responsibilities that go along with that – will shape the strategic options available to you.

Our first reading is the preamble to the US Model Rules of Professional Responsibility because that preamble is a good, and much thought about, statement of what the lawyer's role involves. You will note three roles peculiar to lawyers – a representative of clients, an officer of the legal system, and a guardian of justice. To act as a fully formed lawyer, you need to be mindful of each of those roles. As you read along, you will note duties of honesty that apply even to your personal life, a duty to treat others with civility and respect, and a duty of competence.

These roles and duties can impact strategic choices of the type covered in this course. Filing a lawsuit or raising a defense for the sole purpose of harassment might be good strategy in some cases – but it would not be compatible with your duties as a lawyer. Time might be saved by plagiarizing someone else's work without attribution for a brief, but that might also lead to disciplinary issues. It might be tempting to shade the truth or to claim knowledge of facts that have not been established in a filing or a pleading, but, again, such would not be compatible with your duties as a lawyer.

At the same time, lawyers owe a duty to their clients, and must represent them faithfully. At times, that will involve discomfort for you and others. Nothing in this preamble or the entire set of rules says that lawyers must be go along with the flow people. As the preamble notes, conflicts can arise from the various roles a lawyer must play.

As the Preamble makes clear, the role played by lawyers is not simple or linear. Unlike business people, lawyers cannot fall back on a rote "the client is always right" approach, nor can lawyers be unmindful of how what they do impacts society as a whole. A lawyer who views law as being solely a means to a healthy income or social prestige misses much of the point. At the same time, lawyers who wish to be employed must within the ethical constraints be mindful of client preferences and attentive to client needs. At STL you will return in other settings to the ethical context of lawyering, both in classes that cover the topic directly and in doctrinal courses - such as this one - where ethical issues come into play.

We cannot stress the urgency of addressing, early and often, the question of what kind of lawyer you want to be. By that, we don't mean what area of practice, but what kind of professional identity you will adopt. Coming to grips, as clearly as possible, with the full depth of what it means to be an ethical, productive lawyer will impact not just your career, but your personal happiness.

1.3 Preamble to the American Bar Association's Model Rules of Professional Responsibility

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

1.4 Civil Procedure and The Lawyer's Role

The Preamble should leave you with some sense that being a lawyer is unlike other occupations. Keep this vision of what a lawyer does in mind as you progress through STL. You will be asked in practice to make decisions, on short notice, that will force you to balance between these sometimes competing duties. The sooner you begin to anticipate those ethical duties and build them into your sense of what being a professional means to you, the happier you will be.

The ethical duties take different forms in different settings. As you read the following case, ask yourself how a lawyer's ethical duties underlie the court's approach.

1.4.1 Ethical Duties Toward The Judicial System

From the very beginning, we want you to realize that lawyers operate in a special environment. That is true for all lawyers, in all settings, but it takes on a special immediacy in the context of litigation because this part of the lawyer's work involves regular encounters with judges.

1.4.1.1 In re Snyder

IN RE SNYDER

No. 84-310.

Argued April 16, 1985

Decided June 24, 1985

*635Burger, C. J., delivered the opinion of the Court, in which all other Members joined except Blackmun, J., who took no part in the decision of the ease.

[…]

Chief Justice Burger

delivered the opinion of the Court.

We granted certiorari to review the judgment of the Court of Appeals suspending petitioner from practice in all courts of the Eighth Circuit for six months.

HH

In March 1983, petitioner Robert Snyder was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act. After petitioner completed the assignment, he submitted a claim for $1,898.55 for services and expenses. The claim was reduced by the District Court to $1,796.05.

Under the Criminal Justice Act, the Chief Judge of the Court of Appeals was required to review and approve expenditures for compensation in excess of $1,000.1 18 U. S. C. § 3006A(d)(3). Chief Judge Lay found the claim insufficiently documented, and he returned it with a request for additional information. Because of technical problems with his computer software, petitioner could not readily provide the information in the form requested by the Chief Judge. He did, however, file a supplemental application.

The secretary of the Chief Judge of the Circuit again returned the application, stating that the proffered documentation was unacceptable. Petitioner then discussed the matter with Helen Monteith, the District Court Judge's secretary, who suggested he write a letter expressing his. view. Peti*637tioner then wrote the letter that led to this case. The letter, addressed to Ms. Monteith, read in part:

> "In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact

reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

"Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work.. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

"Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

"Thank you for your time and attention." App. 14-15.

The District Court Judge viewed this letter as one seeking changes in the process for providing fees, and discussed these concerns with petitioner. The District Court Judge then forwarded the letter to the Chief Judge of the Circuit. The Chief Judge in turn wrote to the District Judge, stating that he considered petitioner's letter

"totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts." *Id.,* at 16.

The Chief Judge expressed concern both about petitioner's failure-to "follow the guidelines and [refusal] to cooperate with the court," and questioned whether, "in view of the let*638ter" petitioner was "worthy of practicing law in the federal courts on any matter." He stated his intention to issue an order to show cause why petitioner should not be suspended from practicing in any federal court in the Circuit for a period of one year. *Id.,* at 17-18. Subsequently, the Chief Judge wrote to the District Court again, stating that if petitioner apologized the matter would be dropped. At this time, the Chief Judge approved a reduced fee for petitioner's work of $1,000 plus expenses of $23.25.

After talking with petitioner, the District Court Judge responded to the Chief Judge as follows:

"He [petitioner] sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause. . . .

"He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it." *Id.,* at 20.

The Chief Judge then issued an order for petitioner to show cause why he should not be suspended for his "refusal to carry out his obligations as a practicing lawyer and officer of [the] court" because of his refusal to accept assignments under the Criminal Justice Act. *Id.,* at 22. Nowhere in the order was there any reference to any disrespect in petitioner's letter of October 6, 1983.

Petitioner requested a hearing on the show cause order. In his response to the order, petitioner focused exclusively on whether he was required to represent indigents under the Criminal Justice Act. He contended that the Act did not compel lawyers to represent indigents, and he noted that many of the lawyers in his District had declined to serve.2 *639He also informed the court that prior to his withdrawal from the Criminal Justice Act panel, he and his two partners had taken 15 percent of all the Criminal Justice Act cases in their district.

At the hearing, the Court of Appeals focused on whether petitioner's letter of October 6, 1983, was disrespectful, an issue not mentioned in the show cause order. At one point, Judge Arnold asked: "I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter?" *Id:,* at 40. Petitioner answered: "That is not the basis that I am being brought forth before the court today." *Ibid.* When the issue again arose, petitioner protested: "But, it seems to me we're getting far afield here. The question is, can I be suspended from this court for my request to be removed from the panel of attorneys." *Id.,* at 42.

Petitioner was again offered an opportunity to apologize for his letter, but he declined. At the conclusion of the hearing, the Chief Judge stated:

> "I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work that you stand willing and ready to perform such work and will comply with the guidelines of the statute. And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6." *Id.,* at 50.

Following the hearing, petitioner wrote a letter to the court, agreeing to "enthusiastically obey [the] mandates" of any new plan for the implementation of the Criminal Justice Act in North Dakota, and to "make every good faith effort possible" to comply with the court's guidelines regarding com*640pensation under the Act. Petitioner's letter, however, made no mention of the October 6, ¿983, letter. Id., at 51-52.

The Chief Judge then wrote to Snyder, stating among other things:

> "The court expressed its opinion at the time of the oral hearing *that interrelated with our concern* and the issuance of the order to show cause *was the disrespect that you displayed* to the court by way of your letter addressed to Helen Montieth *[sic],* Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.
>
> "Before circulating your letter of February 23,1 would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.
>
> "Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order." *Id.,* at 52-53. (Emphasis added.)

Petitioner responded to the Chief Judge:

> "I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. . . .
>
> "It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences." *Id.,* at 54.

After receipt of this letter, petitioner was suspended from the practice of law in the federal courts in the Eighth Circuit for six months. 734 F. 2d 334 (1984). The opinion stated *641that petitioner "contumaciously refused to retract his previous remarks or apologize to the court." *Id.,* at 336. It continued:

> "[Petitioner's] refusal to show continuing respect for the court *and his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements* are sufficient to demonstrate to this court *that he is not presently fit to practice law in the federal courts.* All courts depend on the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. . . . Without hesitation *we find Snyder's disrespectful statements* as to this court's administration of CJA *contumacious conduct.* We deem this unfortunate.
>
> "We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted." *Id.,* at 337. (Emphasis added.)

The opinion specifically stated that petitioner's offer to serve in Criminal Justice Act cases in the future if the panel was equitably structured had "considerable merit." *Id.,* at 339.

Petitioner moved for rehearing en banc. In support of his motion, he presented an affidavit from the District Judge's secretary — the addressee of the October 6 letter — stating that she had encouraged him to send the letter. He also submitted an affidavit from the District Judge, which read in part:

> *"I did not view the letter as one of disrespect for the Court,* but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.
>
> *642. . Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me." App. 83-84. (Emphasis added.)

The petition for rehearing en banc was denied.[3] An opinion for the en banc court stated:

> *"The gravamen of the situation is that Snyder in his letter [of October 6, 1983] became harsh and disrespectful to the Court.* It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.
>
> ". . . Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself." 734 F. 2d, at 343. (Emphasis added.)

The en banc court opinion stayed the order of suspension for 10 days, but provided that the stay would be lifted if petitioner failed to apologize. He did not apologize, and the order of suspension took effect.

We granted certiorari, 469 U. S. 1156 (1985). We reverse.

I — I I — I

Petitioner challenges his suspension from practice on the grounds (a) that his October 6, 1983, letter to the District Judge's secretary was protected by the First Amendment, (b) that he was denied due process with respect to the notice of the charge on which he was suspended, and (c) that his challenged letter was not disrespectful or contemptuous. We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case. Accordingly, we consider first whether petitioner's conduct and expressions *643warranted his suspension from practice; if they did not, there is no occasion to reach petitioner's constitutional claims.

Courts have long recognized an inherent authority to suspend or disbar lawyers. *Ex parte Garland,* 4 Wall. 333, 378-379 (1867); *Ex parte Burr,* 9 Wheat. 529, 531 (1824). This inherent power derives from the lawyer's role as an officer of the court which granted admission. *Theard* v. *United States,* 354 U. S. 278, 281 (1957). The standard for disciplining attorneys practicing before the courts of appeals[4] is set forth in Federal Rule of Appellate Procedure 46:[5]

> *"(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of* *644*the bar of the court, he will be subject to suspension or disbarment by the court.* The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order." (Emphasis added.)

The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. *In re Bithoney,* 486 F. 2d 319, 324 (CA1 1973). Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:

> "'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 470-471, 162 N. E. 487, 489 (1928) (citation omitted).

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner *645compatible with the role of courts in the administration of justice.

Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.6

B

Apparently relying on an attorney's obligation to avoid conduct that is "prejudicial to the administration of justice,"7 the Court of Appeals held that the letter of October 6, 1983, *646and an unspecified "refusal to show continuing respect for the court" demonstrated that petitioner was "not presently fit to practice law in the federal courts." 734 F. 2d, at 337. Its holding was predicated on a specific finding that petitioner's "disrespectful statements [in his letter of October 6, 1983] as to this court's administration of the CJA [constituted] contumacious conduct." *Ibid.*

We must examine the record in light of Rule 46 to determine whether the Court of Appeals' action is supported by the evidence. In the letter, petitioner declined to submit further documentation in support of his fee request, refused to accept further assignments under the Criminal Justice Act, and criticized the administration of the Act. Petitioner's refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee; however, the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept Criminal Justice Act cases.

We do not consider a lawyer's criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had "merit," 734 F. 2d, at 339, and the court instituted a study of .the administration of the Criminal Justice Act as a result of petitioner's complaint. Officers of the court may appropriately express criticism on such matters.

The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was "harsh," and, indeed it can be read as ill-*647mannered. All persons involved in the judicial process— judges, litigants, witnesses, and court officers — owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy— in this context — does not support a finding of contemptuous or contumacious

conduct, or a finding that a lawyer is "not presently fit to practice law in the federal courts." Nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice Blackmun took no part in the decision of this case.

[…]

Footnote 6:

The Court of Appeals stated that the standard of professional conduct expected of an attorney is defined by the ethical code adopted by the licensing authority of an attorney's home state, 734 F. 2d, at 336, n. 4, and cited the North Dakota Code of Professional Responsibility as the controlling expression of the conduct expected of petitioner. The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise, of their inherent power; the standards imposed are a matter of federal law. *Hertz* v. *United States,* 18 F. 2d 52, 54-55 (CA8 1927).

The Court of Appeals was entitled, however, to charge petitioner with the knowledge of and the duty to conform to the state code of professional responsibility. The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court; the provision that suspension in any other court of record creates a basis for a show cause hearing indicates that Rule 46 anticipates continued compliance with the state code of conduct.[*]

[…]

[*] Note that the overlap between state standards of conduct and federal court standards of conduct for attorneys.

1.4.1.2 Notes on In Re Snyder

In Re Snyder assumes and suggests very much about the role of US lawyers in litigation.

First, let's look at the issue of how lawyers are regulated. As a member of a state bar, a lawyer will be regulated by the state under which his or her license is obtained. That state will have rules of conduct that will be binding. If the lawyer becomes admitted to federal district court, the lawyer will be subject to any rules of conduct promulgated by Congress or that Court. Similarly, if the lawyer is admitted to the Court of Appeals, the appellate rules and any rules of the circuit will be binding. Finally, and not unimportantly, you will note that the Court affirms that courts have *"inherent power"* even aside from rules to regulate those lawyers that practice in front of them.

You will also notice in **In Re Snyder** an expectation, but not a requirement, that lawyers will from time to time assist courts by accepting the referral of indigent clients who cannot afford representation. The Court of Appeals seemed aggrieved that Snyder was refusing to accept any more appointments, but as noted there was not any actual requirement that practice in any of the courts involved required that a lawyer accept such referrals. You will also not a more general expectation that lawyers will be engaged with helping the system of justice, civil and criminal, to function.

You will also note restrictions on how lawyers treat judges - and some lesser restrictions on how judges treat lawyers. If lawyers are excessively rude and contemptuous, courts have power to deal with that, and the sanctions can be substantial. While there was in issue in this case as to what courts the Court of Appeals could suspend Snyder from practicing before, and dispute as to what conduct triggered the Court's ability to impose that sanction, there is no questioning of the principle that if a lawyer acts sufficiently disrespectfully to a court that court can suspend the lawyer's right to practice before them.

In the United States, the First Amendment generally protects freedom of expression, and there is no doubt that a citizen could express similarly derogatory opinions about, say, the operation of the Department of Motor Vehicles, without fear that as a direct consequence his privilege to drive a vehicle would be revoked. Even though **In Re Snyder** reverses the lower court here, it nonetheless seems clear that different facts could have led to a different result. As **In Re Snyder** suggests, it matters greatly here that Snyder was a lawyer. Conduct that would be unaddressable from a member of the public becomes addressable when the person involved is a member of the bar of that court. Take a minute to think through the reasons that might be true, and what that suggests about the special role of lawyers.

1.4.2 Ethical Duties in Commencing Litigation

1.4.2.1 Bridges v. Diesel Service

HUYETT.

MEMORANDUM AND ORDER

I. BACKGROUND

James **Bridges** ("Plaintiff") commenced this action against **Diesel Service**, Inc. ("Defendant") under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*.. By Order dated June 29, 1994, the Court dismissed Plaintiff's Complaint without prejudice for failure to exhaust administrative remedies. In particular, Plaintiff did not file a charge with the Equal Employment Opportunity Commission ("EEOC") until after commencement of this action. Defendant now moves for sanctions pursuant to Fed.R.Civ.P. 11. For the following reasons, Defendant's motion is DENIED.

II. DISCUSSION

The Supreme Court in Zipes v. Trans World Airways, Inc., 455 U.S. 385, 393 (1982), stated that the filing of a timely charge with the EEOC is "not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires." Authorities appear to be divided as to whether the Supreme Court's holding concerns only the *timeliness* of the filing of a charge with the EEOC. *See* discussion in Learned v. City of Bellevue, 860 F.2d 928, 931 (9th Cir.1988), *cert. denied,* 489 U.S. 1079 (1989). Accordingly, Plaintiff's failure to file a charge with the EEOC "may or may not affect jurisdiction under Title VII." *Id.*

However, as explained in this Court's June 29 Order, the filing of a charge with the EEOC is still a condition precedent to maintenance of a discrimination suit under the ADA. *See, e.g., Griffiths v. Cigna Corp.,* No. 91–2356, 1994 U.S. Dist. LEXIS 4078 at *19 (E.D.Pa.1994) ("*Zipes* does not obviate the requirement of administrative filings before bringing a Title VII action in federal court"); Kent v. Director, Missouri Dep't. of Elementary and Secondary Educ., 792 F.Supp. 59, 62 (E.D. Mo.1992). The parties do not dispute that administrative remedies must be exhausted before commencement of an action under the

ADA. Indeed, Plaintiff's counsel stated that it would stipulate to dismissal of the Complaint without prejudice provided Defendant does not explicitly retain the right to move for sanctions under Fed.R.Civ.P. 11.

For these reasons, dismissal without prejudice was warranted. *See, e.g.,* Kent, 792 F.Supp. at 62 (action dismissed without prejudice); *see also* Daugherity v. Traylor Bros., Inc., 970 F.2d 348, 350 n. 3 (7th Cir.1992) (failure to file appropriate administrative claims sufficient reason for dismissal, albeit not a jurisdictional prerequisite); *Griffiths,* 1994 U.S. Dist. LEXIS 4078 at *19 (same).

Rule 11 "imposes an obligation on counsel and client analogous to the railroad crossing sign, 'Stop, Look and Listen'. It may be rephrased, 'Stop, Think, Investigate and Research' before filing papers either to initiate the suit or to conduct the litigation." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir.1987); Project 74 Allentown, Inc. v. Frost, 143 F.R.D. 77, 82 (E.D.Pa.1992), *aff'd without op.,* 998 F.2d 1004 (3d Cir.1993). Rule 11 is violated only if, at the time of signing, the signing of the document filed was objectively unreasonable under the circumstances. Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 289 (3d Cir.), *cert denied,* 112 S.Ct. 373 (1991). "[T]he Rule does not permit the use of the 'pure heart and an empty head' defense." Gaiardo, 835 F.2d at 482. Rather, counsel's signature certifies the pleading is supported by a reasonable factual investigation and "a normally competent level of legal research." Lieb v. Topstone Industries, Inc., 788 F.2d 151, 157 (3d Cir.1986).

The Court is not convinced that Plaintiff's counsel displayed a competent level of legal research. A brief review of case law would have revealed the EEOC filing requirement. Further, an award of sanctions for failure to exhaust administrative remedies is not unprecedented. *See, e.g.,* Worrell v. Uniforms To You & Co., 673 F.Supp. 1461 (N.D. Cal.1987); *Khan v. Loyola Univ. Chicago,* No. 91 C 8344, 1992 U.S. Dist LEXIS 15060 (E.D.Pa.1992).

Notwithstanding, the Court will not grant sanctions. Rule 11 is not intended as a general fee shifting device. Gaiardo, 835 F.2d at 483. The prime goal of Rule 11 sanctions is deterrence of improper conduct. Waltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir.1992); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3d Cir.1988). In this case, monetary sanctions are not necessary to deter future misconduct. Plaintiff's counsel immediately acknowledged its error and attempted to rectify the situation by filing a charge with the EEOC and moving to place this action in civil suspense. In fact, the Complaint has been dismissed without prejudice. The Court expects that Plaintiff's counsel has learned its lesson and will demonstrate greater diligence in future.

Further, Rule 11 sanctions should be reserved for those exceptional circumstances where the claim asserted is patently unmeritorious or frivolous. Doering, 857 F.2d at 194. The mistake in the present case was procedural rather than substantive. It is also possible that Plaintiff's counsel was confused by the different interpretations of the Supreme Court's holding in *Zipes.* Finally, the Court is aware of the need to avoid "chilling" Title VII litigation.

III. CONCLUSION

For the above stated reasons, Defendant's motion pursuant to Fed.R.Civ.P. 11, is DENIED. However, this Opinion should not be read as condoning the conduct of Plaintiff's counsel. As stated above, the standard of pre-filing research was below that required of competent counsel. Plaintiff's case has been dismissed without prejudice. If the action is refiled, the Court fully expects to see a high standard of legal product from Plaintiff's counsel—in particular attorney London, who signed the Complaint.

An appropriate Order follows.

ORDER

HUYETT, J.

Upon consideration of Defendant's motion for sanctions pursuant to Fed.R.Civ.P. 11, and the argument of the parties in support of and in opposition thereto, the motion is DENIED.

IT IS SO ORDERED.

Not Reported in F.Supp., 1994 WL 369508, 3 A.D. Cases 914, 7 A.D.D. 615, 5 NDLR P 300

1.4.2.2 Notes on Bridges

As you go forward, make a habit of being able to answer the following questions about each and every case (you may be asked in the classroom to answer them while all are listening):

1. From which court did the opinion come? (For example, a trial court or an appellate court? Is it in a state court or a federal court?)
2. Overall, what is the lawsuit about that the opinion arises from? Who is the plaintiff? Who is the defendant? What relief is the plaintiff seeking from the defendant?
3. What is the issue the court is asked to decide in this opinion? Who brought the issue to the court for decision, and by what procedural device? What were the options the court was deciding between?
4. What response did the non-moving party make to the issue presented to the court?
5. How did the court rule on the issue? If the court is an appellate court, what rulings occurred in the court or courts below?
6. What legal authority was presented to the court on the issue? What is the source of the legal authority (case, statute, Constitution, mix of the above)? Did the parties present different legal rules or did they argue for different interpretations of the same rule?
7. What facts were essential to the ruling the court reached?
8. Always be able to state the IRAC analysis - The Issue presented, the legal Rule that was applied by the court, the Application of the rule to the facts, and the Conclusion.
    a. Always be able to state what the rule of law is that is established or applied in the case. Keep in mind that the court's language might be broader than the facts, and in a common law system only the necessary language is part of the holding (more on this later).
    b. What changed facts would lead to a changed result as the rule is applied?
9. Be able to turn to the pertinent sections of the case when asked - be able to cite the cases relied on, the important facts, etc..
10. This case involves Rule 11 of the Federal Rules of Civil Procedure. As we shall see in more detail later in this course, this rule puts an affirmative duty on an attorney to conduct an adequate investigation before filing a lawsuit or an answer to a lawsuit. Sanctions may be imposed if an attorney fails to meet this duty including, but not limited to, paying the fees and costs, including attorneys' fees, incurred by the other side as a result of the attorney's failure to meet this burden. While Rule 11 is freestanding, it reflects a duty of prior investigation that in every jurisdiction we are aware of is put on the attorney by operation of ethical rules. In most if not all cases, American jurisdictions have a rule based on Model Rule 3.1 of the American Bar Association's Model Rules of Professional Conduct. That rule provides in part: "A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

11. Can you imagine situations where it might be commercially reasonable to file a lawsuit – or a large group of lawsuits – without first engaging in prefiling investigation? Can you see how the actions of attorneys in some cases may be changed because of the force of these ethical rules? Why do you think courts place such a duty on attorneys?
12. The authors of one leading civil procedure casebook [Stephen C. Yeazell & Joanna C. Schwartz, Civil Procedure] have speculated that the rule 11 motion in this case was filed not in hopes of collecting fees – which are likely to be minor and which were somewhat unlikely to be awarded by the court – but in the strategic interest of bringing to the court's attention the lack of sophistication and the incompetence of the plaintiff's attorney. Once a judge has reason to doubt the capability of a lawyer, it may be harder for that attorney to persuade the court on close issues. We think that the authors of that textbook make an insightful point. Please get in the habit of asking yourself what strategic purpose might have been served in the cases we read in this course. Note, however, that since Bridges was decided Rule 11 has been amended. At present, the Rule 11 motion must be given to opposing counsel at least 21 days before it can be filed with the court, with the lawyer facing sanctions having an opportunity to correct any errors and so preempt the motion. Do you think the current version of Rule 11 would affect whether the court was faced by this motion?

1.4.2.3 Finding Definitions for Legal Terms

As you read this case, the first in this course, you undoubtedly came across some terms you did not understand. For example, did you ask yourself what the court meant by terms such as "subject to waiver as well as tolling when equity so requires."

There is an easy way to get a definition for terms of legal art such as "waiver" and "tolling." It is easily accessible to you thanks to the Westlaw subscription that all STL students enjoy. The resource I recommend is Black's Law Dictionary, which can be accessed as one of the Secondary Sources available in Westlaw.

Below are specific directions for getting to Black's Law Dictionary. Please get in the habit of looking up unfamiliar technical terms as doing so will save you much time in the long run - put differently, if you try to wing it, you may get confused, and fail to understand what is going on.

How to navigate Westlaw to Black's Law Dictionary

Whenever you encounter an unfamiliar term in your textbooks, the best solution is to look it up in the Black's Law Dictionary. Today I'm going to introduce you the convenient way to navigate Westlaw to Black's Law Dictionary.

Step one - Sign in the Westlaw Edge website

Go to the Westlaw Edge (www.westlaw.com) and turn to the sign in page.

12. Enter your **valid** username and password, then click the "sign in" spot.

Step two – Find the Black's Law Dictionary Page

There are two ways to get to the Black's Law Dictionary page. The first one is to use the "secondary resources" spot and the second one is to direct enter the "Black's Law Dictionary" into the searching box on the homepage.

1. The “secondary resources” spot approach
12. Click the “secondary sources“ spot on the homepage.

12. In the right part of this page (under the title Tools & Resources), we can easily find Black’s Law Dictionary.

2. The direct approach
12. Direct enter “Black’s Law Dictionary” in the search box. And then click the “Black’s Law Dictionary” under the title “Content Pages”.

Through those two methods, we would get exactly the same page – The Black’s Law Dictionary Page.

Step three – Use the Black’s Dictionary to Find Out the Accurate Definition of Terms

After finding the Black’s Law Dictionary page, the only thing you need to do is to enter the term into the searching box or the dictionary term box below and then click the search spot. Here we take the term “in rem” as an example.

12. Enter “in rem” into the searching box on the Black’s Law Dictionary page. And then click the search spot. Please notice there are also many useful connections and expenders on the right column that we can easily use.

12. Then find and click the term “in rem” among the searching result page.

12. Now we get the full definition of the term “in rem”.

That's how Westlaw can bring you to the Black's Law Dictionary access provided by STL. Given that the study of American law involves many terms that are unfamiliar even to native English speakers, this is a tool that you can use in all your courses at STL.

1.4.3 Beyond Doctrine: Understanding The Client's Needs

Clients rarely come to lawyers with questions so one dimensional as "what is the holding of this case" or "what does this statute mean?" More often, they come in with questions that involve identifiable law but allow for non-linear solutions. For example, a client might say, "For business reasons, we need to change how our product is distributed in the United States, and are considering acquiring Company Y which has a strong distribution network in the United States. What legal issues might arise?" The questions might be even vaguer. For example, "I'm no longer getting along with the co-founder of my company. What options do you suggest?"

As we hope is clear by now, litigation is only one of many tools that might be used to meet a client's needs. Sometimes, however, it is the appropriate tool. That said, as you go forward in this course, try to think at every juncture, "What was the underlying problem that the client faced? How did litigation fit into addressing that problem?"

Seeing Civil Procedure issues not just as technical rules, but through the prism of helping the client address a need, is an important step forward in thinking like a lawyer. Understanding that your role is to serve clients is essential, and second only to your ethical responsibilities.

1.4.3.1 Identifying The Client Problem

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1.4.4 Beyond Doctrine: Culture

Culture is a deep issue and one much subject to abuse. Discussions of culture can quickly degrade to sharing of stereotypes, and those stereotypes can reflect unfounded prejudices of many kinds.

At the same time, the idea that there are cultural differences seems to us to be true. Those who cross cultural borders naively often come to regret their failure to think critically about the issue of culture. As future transnational lawyers, the burden is on you to form your own approach to working effectively across borders, and that will require starting to develop a mindful approach as soon as possible.

The readings on TWEN are assigned for you to approach critically, not blindly. Our goal is not to win you to any one view of cultural issues, but to nudge you toward developing a high level of cultural competence, and to inform you that in today's world cultural competence is an important part of any transnational lawyer's tool kit.

1.4.4.1 Readings on TWEN

Please refer to the short selections from Richard Nisbett's Geography of Thought that are on TWEN. Full copies of the book are available in the library if you wish to dig deeper into Nisbett's ideas.

1.4.4.2 Notes on Nisbett

There are a number of criticisms that can be made of Nisbett's work, and especially the more speculative parts as he tries to explain the results of the research he has conducted. You should bring your own critical faculties to bear. Can Nisbett be accused of engaging in some form of Orientalism? (See Edward W. Said, Orientalism. For a legal application of the concept of westerners viewing eastern cultures and laws through their own values and interests, see Teemu Ruskola, Legal Orientalism). Even if once true, do and will Nisbett's insights still apply as globalization shifts cultural norms? (Put differently, would Nisbett's arguments apply to you in the same way they might apply to your grandparents?). The point is not to accept Nisbett's ideas blindly, but to use them as a launching point for your own thinking, as you proceed through a multicultural education experience, of the nature and importance of cultural differences, especially as applied to legal issues and processes.

Be aware, as you continue on the path towards being a great lawyer, that cultural competence is likely to be an important part of what makes you stand out.

1.4.4.3 Western Legal Culture: Thinking Like a Lawyer

If Nisbett is right, which is to say if his characterization of Western thinking as being largely about establishing and defining categorical boundaries is true, then western legal thinking is an exaggeration or extension of western thinking in general. Much of what you will encounter in the first year of your J.D. curriculum involves reducing complex fact patterns to 'operative' facts and placing those facts in the correct analytical category.

We now proceed to some short readings that discuss the nature of the common law analytical process. It is been our experience, as well as that of others, that is on point as these readings are, they are often not fully appreciated by students who are just starting out in their common law legal education. We encourage you to reread these later in the year, and to think about whether or not they ring true with the experience you have by then accrued.

1.4.4.3.1 Thinking Like A Lawyer Readings on TWEN

Please refer to the short reading fromFrederic Schauer's Thinking Like a Lawyer that are available on TWEN. The complete book should be, again, available in multiple copies in the library for your further reference.

An average US law student has deep knowledge of both US history and US governmental structure by the time she or he reaches law school. Popular culture, family lore, courses at every level of school, and even just day to day life help familiarize students with these themes.

1.4.4.4 American Culture: US History and Governmental Structure

The same is not necessarily true for international students. Some have extraordinary levels of knowledge, perhaps higher than that of the average US law student, while others either have little overall knowledge or, more commonly, important gaps that can create mistaken impressions.

Time prevents a deep exploration, but to "level the playing field" just a bit we will spend some time in the classroom giving a highly compressed overview of these issues.

1.4.4.4.1 Some Key Points on U.S. History

Some key takeaways for your consideration:

The colonies that later became the basis for the original 13 United States were part of a larger wave of European colonies throughout the Americas, involving many European nations. We won't have time to dive into the many moral and political questions arising from colonization, and this is a rich area for further exploration.

The British colonies in North America were not, prior to the revolution, a unified entity, but a collection of individual colonies, each with separate charters and separate governance. Indeed, there were many British colonies in and near North America - in Canada, Bermuda, The Bahamas, and the Caribbean - that did not become part of the United States.

Because they were independent of each other, each of the colonies viewed themselves as separate sovereignties. This idea of states as sovereigns has had important repercussions in American political and legal history.

Human chattel slavery played a central role in the development of the United States, and the consequences of this practice reverberate throughout US history. Most dramatically, the Civil War turned on the issue of slavery, but even in contemporary times the history and consequences of slavery play a role.

Industrialization also played a role in the development of the United States, and bore both on the the kind of governance that was needed and the kind of governance that was possible.

The Civil War marks a sharp dividing line in US history. After the war, the supremacy of the federal, central government was unquestionable, and the post war amendments had the effect of further strengthening the power of the federal government versus the individual states.

Another thread in US history has been immigration. There have been multiple waves of immigration into the US, and each wave has had an impact both on contemporary domestic politics and the longer term nature of the country.

The US has grown geographically over time. Be familiar with how and when the geographic scope of the United States changed.

1.4.4.4.2 U.S. Governmental Structure

While at STL you will spend much time, directly and indirectly, addressing US governmental structure. Some of that will come in this class, when in Quarter Three we take a deep look at how power to hear a case is allocated between the federal courts and the state courts.

Again, in class, we will take a look at US governmental structure in an effort to bring those of you without a deep background in US governance up to par. In the meantime, some of the takeaways:

The US government is a federal system, which means that power is split between the central, federal government, and that of the individual states. Some areas are reserved to the federal government; others, even today, are in the hands of the states. This makes the US different from unitary governments where the central government ultimately has direct control over local governments.

The federal government is a government of limited power. Only those powers granted to the central government under the Constitution are legitimate areas where it can act. While judicial interpretation has expanded the reach of the federal government under grants of authority such as the commerce clause, at least in theory, and occasionally in practice, that reach is not unlimited.

Even within the federal government, power is allocated between the legislative branch (the Congress), the executive branch (the President and the organs of government under his direction), and the courts. Again, unlike in a unitary state, the power of any one governmental actor is limited. The President, for example, has extensive, even awesome, power, but in the end there are areas beyond his or her control.

The structure of the US government reflects a concern the founding fathers had about the rise of a tyrannical ruler. They felt that dispersed power created a system of "checks and balances" that would limit the ability of a would be tyrant to consolidate power. The motivation anticipates the dictum of the 19th Century British writer, Lord Acton, who famously wrote, "Power tends to corrupt, and absolute power corrupts absolutely." For better or worse, in the US system no single individual has absolute power.

The states and the federal government have different spheres of activity and power, even though these spheres are sometimes overlapping and even duplicative.

There are federal courts, and each state has its own court system. To a significant degree (more on this in quarter three), the kinds of cases the different court systems can hear overlap when we are talking about civil (as opposed to criminal) law. A few federal law areas are reserved exclusively to the federal courts (for example, patents); in most cases the state courts can hear and decide cases based on federal law unless the defendant acts to 'remove; the case to federal court. In some but not all cases the federal courts can hear civil cases arising from state law.

Someone who has grown up in America is likely to have a basic understanding of what kinds of governmental activities happen in the federal government and what kinds of governmental activities happen at the state level. Pay attention to the slides that go into this.

2 Dispute Resolution: The Big Picture

2.1 Thinking About Conflict and How to Resolve It

Conflict is inevitable, and even those who do not plan to ever practice in a courtroom must spend time thinking about how potential conflicts must be resolved. A great lawyer is strategic, and does not reflexively head to court but thinks about where the conflict might best be resolved. A great lawyer also anticipates that conflict might arise when putting together an agreement, and in many if not most cases provides a forum for dispute resolution as part of the contract.

As the following excerpt from a book on international commercial agreements illustrates, those drafting important commercial agreements must think about conflict resolution before the deal is ever signed. The following excerpt walks through the major options that are relevant, and some of the advantages and disadvantages of each.

2.2 Fox: Addressing Modes of Conflict Resolution In Creating Agreements

From William F. Fox, International Commercial Agreements and Electronic Commerce (6th Edition 2018). Used by permission of the author.

§ 3.4 PLANNING FOR DISPUTE RESOLUTION

Many persons entering into international agreements for the first time find it difficult even to contemplate something going wrong with the deal. People enter commercial transactions with the expectation that the contracts will be fully performed. Frequently when a negotiation session is going well and after some decent personal relationships have been formed, it is almost impossible to look across the table and conceived of the other person reneging on the deal. But it is in the planning and drafting process that a party must anticipate problems and must consider how disagreements might be managed if they do arise.

Dispute resolution is the management and resolution of conflict between the parties that can range over a broad spectrum of different possibilities. It is something that cannot be docked in international commercial transactions because the parties will be at great distances from each other after the agreement is consummated. The people responsible for drafting and negotiating the agreement are rarely those who have the day-to-day responsibility for performance. Even if the parties have the greatest sense of well-being and security at the time of signing the contract, external conditions can still disrupt the agreement no matter how much personal regard and trust the negotiating parties have for each other.

For this reason, virtually all properly drafted international contracts contain some kind of dispute resolution clause. For those contracts fully performed without incident, the clause is superfluous. However, for those deals that fall apart, the clause can be crucial. A few minutes of inattention to dispute resolution at the planning and drafting stage of an agreement can cost millions of dollars later on when a dispute has to be resolved.

Many dispute resolution clauses are drafted haphazardly and put in as an afterthought and without the consideration that they really deserve.Many less-than-acceptable clauses simply incorporate some boilerplate from a book of forms with very little inquiry into how the clause might actually work if a dispute occurs. Worse, garden-variety dispute resolution clauses often incorporate the more rigid techniques of dispute resolution such as arbitration and litigation without obliging the parties to try to work things out between themselves in a milder, less-threatening setting such as renegotiation or mediation.

A lot of these mistakes are made because many of the people who drafting plan contracts know relatively little about dispute resolution. The following discussion is an introduction to the various forms of dispute resolution for contract drafters and planners. Chapter 4 sets out some useful dispute resolution clauses, and chapters 8 through 13 of this book contains an extensive discussion of each of these different devices as they are employed in practice.

There is no uniform worldview of dispute resolution. Lawyers in the United States have a favorite saying: "One person's delay is another person's due process." Developing proper dispute resolution procedures in domestic controversies now occupies a great deal of the time of many US legal scholars. In international transactions many additional factors, such as cultural and language differences, often affect dispute resolution process. For example, the antagonism and ferocity of US litigation is taken for granted in the United States, but is regarded as totally unproductive – perhaps even despicable – by societies in the Far East and elsewhere in the world. Understanding the apprehensions that these cultural differences create might persuade the parties negotiating a contract to opt for some less-drastic dispute resolution mechanism – such as mediation – to be attempted before a more adversarial process such as arbitration or litigation is utilized.

Yet those processes which are less adversarial such as mediation and arbitration are often much less final and certain; and finality of result (i.e., The understanding that a dispute has been conclusively resolved and that the final decision is enforceable against the losing party) is very important in most commercial transactions. Agreeing to engage in a process of dispute resolution that cannot lead, in and of itself, to a final decision may have the effect of lengthening the overall dispute resolution phase of an agreement and multiplying the cost of obtaining a permanent resolution of the dispute.

There are a number of devices regularly used to resolve international commercial matters. They include the device of adaptation by which the contract itself is drafted in a sufficiently flexible fashion to accommodate unanticipated occurrences such as supply shortages, strikes or sharp price increases or decreases. Similarly, since international contracts are normally the product of negotiation by definition they are always subject to renegotiation. Frequently, adaptation and renegotiation go hand in hand. The twin concepts of mediation and conciliation are essentially processes by which negotiation between the parties takes place in the presence and with the assistance of a third party who is sometimes referred to as a facilitator. The more structured forms of commercial dispute resolution, arbitration and litigation, are probably the best known among the public at large and easily the most frequently utilized devices on the international level but each of these can still be rigid, costly, time-consuming, totally under the control of specialists, and so adversarial that the parties' relationship is permanently damaged.

§ 3.4.1 ADAPTATION

Contract provisions such as force majeure clauses and flexible pricing terms that turn, say, on the increase or decrease of a published cost of living index are provisions that allow a contract to change with new circumstances without provoking a breach or forcing the parties into some kind of formal dispute resolution. Long-term contracts almost always contain a number of adaptation provisions. Frequently, even when the contract does not contain such clauses, the law underlying the contract will supply certain adaptation and gap-filling terms. For example, under the UCC a contract for the sale of goods does not even have to specify a price. If the contract is silent as to price, UCC section 2-305 provides that the price is "a reasonable price at the time of delivery [of the goods.]" The legal doctrines of impossibility and frustration may excuse performance in

whole or in part or for a certain period of time even if the contract does not contain a force majeure clause or even if the force majeure clause does not expressly cover the incident that has caused the problems.

§ 3.4.2 RENEGOTIATION

If the contract cannot itself adapt to changing circumstances, the parties may always renegotiate. Some parties place an express obligation of renegotiation in the contract with the expectation that the parties will not resort to a more formal method of dispute resolution without first trying to talk to each other. Some companies that have a large stake in preserving existing contracts, such as the US airplane manufacturer, Boeing Corporation, insert renegotiation clauses in their contracts that specify that the renegotiation must take place between two high-level corporate officials. In multi-billion-dollar contracts to be performed over a period of many years, renegotiation can be a matter of life and death for the contracting parties. Like the initial negotiation, renegotiation is simply a dialogue or discussion between the disputing parties that has as its goal the resolution of the dispute by mutual agreement. Normally, it is cheap, quick and has the advantages of a solution that is neither coerced nor imposed by external entities. One of its best features is that it can be undertaken while the contract continues to be performed. To the extent that a negotiated solution is possible, it is almost always the most advantageous and cost-beneficial device.

§ 3.4.3 MEDIATION/CONCILIATION

The twin devices of mediation and conciliation are, as noted above negotiation in the presence of or with the help of a third party. In some settings, mediation may be nothing more than a friendly conversation. In other settings, particularly when conducted under formal commercial mediation rules it can rival the formality of commercial arbitration. To a certain extent, mediation has many of the advantages of a negotiated settlement in then that it is relatively uncoerced, fast, and confidential; but in complex matters it may take a great deal more time. The addition of the third-party mediator is an additional expense and the educating of that person on the facts of the dispute can lengthen the proceeding. However, to the extent that the parties believe they have worked out the final solution themselves (albeit with the assistance of a third party mediator), they may find the end result highly satisfactory.

§ 3.4.4 ARBITRATION

Most international commercial agreements call for arbitration of any disputes that may arise under the contract by incorporating standard form arbitration clauses. These clauses, in turn, usually incorporate the procedural rules of one or another of the major international arbitral bodies such as the ICC or UNCITRAL. Some clauses incorporate the rules of a national arbitrable body such as the AAA or the Japan Commercial Arbitration Association. Some local or regional business entities, such as the Stockholm Chamber of Commerce, promulgate rules and supervise arbitration proceedings.

Under modern procedural systems, arbitration is essentially the litigation of a dispute before an arbitrator rather than a judge. The procedure is adversarial and almost always handled by lawyer-specialists. However, there are many arbitrations in which nonlawyer sit as arbitrators and there is usually no requirement that either the representatives of the parties or the arbitrator be a lawyer. It is just that arbitration is such a complicated undertaking and is so close in concept to Anglo-American style litigation that most parties put themselves in the hands of their lawyers if they have to arbitrate. Often, the arbitration clause

will require that the arbitrator be expert in the underlying subject matter. For example, an arbitration clause in, say, a construction contract might call for an arbitrator with at least 10 years' experience in the construction industry.

Parties who are worried about the ability and for integrity of a single arbitrator, irrespective of whom that person may be, often provide for a three-person arbitration panel with each side choosing one of the arbitrators. The two party-appointed arbitrators then pick the third member of the panel, who normally chairs the panel and presides over the arbitration. Contrary to the beliefs of many laypersons, arbitration is often costly, time-consuming, and far from satisfactory. Especially antagonistic opponents frequently go into court both before, during, and after the arbitration to test the ultimate validity of the process. As a result, arbitration is not always a complete substitute for litigation. The administrative fees that must be paid at the outset merely to commence the arbitration under the supervision of organizations such as the ICC or the AAA are substantial.

There is very little so-called *nonbinding* arbitration in international commercial arbitration. To the extent that this concept exists, it is probably only a species of mediation and is used mainly in the labor relations sector. Thus, the decision of a commercial arbitrator is – at least in theory – final and conclusive. However, in certain instances when the losing party balks at the decision of the arbitrator, who issues her decision in the form of an *arbitral award*, it must be taken into some domestic court system for confirmation and enforcement against the losing party. Sometimes a party will refuse to commence arbitration. Then the party seeking arbitrate must resort to domestic courts for an order compelling the other party to arbitrate.

Even with these inherent disadvantages, arbitration is generally favored by most commentators and appears to be the dispute resolution device of choice in most international commercial agreements. One of the major reasons for this pride-of-place is that an international treaty, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – permits the enforcement of arbitral awards rendered in one country to be enforced in another country. Except within the EU, there is no parallel treaty for the enforcement of court judgments. As a result, if one is worried about where enforcement might take place, arbitration is often superior to litigation.

§ 3.4.5 LITIGATION

Litigation is a formal proceeding conducted in an appropriate court in the country of the buyer or the country of the seller, or in some instances in a country perceived to be neutral by the parties. There is really no such thing as international litigation or an international court for parties to private agreements. The International Court of Justice at the Hague is restricted to disputes between countries, although it has served as the site for arbitration of commercial disputes between United States and Iran under the Algerian accords of 1981. As litigation's detractors constantly note, the process is expensive, costly, and often protracted. It can be handled only by lawyer-specialists. Indeed, in many countries no one other than a lawyer may litigate a case.

In many circumstances, litigation can cause additional hostility and antagonisms between the parties. Unlike arbitration or mediation, parties usually do not resort to litigation until and unless the entire agreement has fallen completely apart. By contrast, arbitration and mediation can often be utilized to resolve a dispute that arises within the overall commercial undertaking without terminating the agreement itself. Litigation has some advantages. It is generally final when concluded – that is, there is usually no other form (other than an appeal to a higher court) and no other recourse for the losing party except

to honor the judgment of the court. The failure to comply with the court's judgment in most countries creates contempt of court problems for the recalcitrant party.

Litigation is sometimes a mechanism of choice even in international commercial contracts, because a number of lawyers – particularly in the United States – are cynical about the other forms of dispute resolution and conclude that they might as well go into court in the first instance because in all likelihood that is where the parties will wind up in any event. However, there some special difficulties in using litigation and domestic courts to resolve international commercial disputes. Domestic courts frequently lack jurisdiction over parties in other countries. They also have a great deal of difficulty in enforcing their judgments abroad. To a certain extent, domestic courts can evidence prejudice against foreign parties who come into those courts.

Some contracting parties try to eliminate the problem of local prejudice by providing for litigation in the courts of the third country. To the extent that the third country agrees to hear the case, this maneuver is always a possibility. For example, in one important case eventually decided by the United States Supreme Court, the *Bremen v. Zapata Off-Shore Oil Company*, a dispute arising between a German shipping company and an American oil company, the contract provided for dispute resolution in the High Court of Justice in London. Great Britain had nothing to do with the contract or the two parties. The United States Supreme Court honored that choice of form even when one of the parties tried to litigate the dispute in federal court in the United States. Within the EU choice of forum causes, including causes a call for litigation in a neutral form, are generally honored so long as one of the parties is deemed to be domiciled within the jurisdiction of a country that is part of the Union.

§ 3.4.6 OTHER FORMS OF DISPUTE RESOLUTION

There are other forms of dispute resolution worthy of attention that may have increasing utility for commercial disputes even know they are not commonly used by the international business community. For example, businesses in the United States have experimented with a commendable device known as the *minitrial*, a procedure in which lawyers for the contending parties present a summary of each party's case to an important corporate official, such as a corporation VP, for each of the parties. That official must attend the proceeding with express authority to settle the case. The executives listen to a short presentation by the parties' attorneys and are frequently assisted by a third-person referee, often a retired judge. After the abbreviated presentations are concluded – and normally they last only a day or so – the executives and the referee consider the presentations and attempt to negotiate a final agreement.

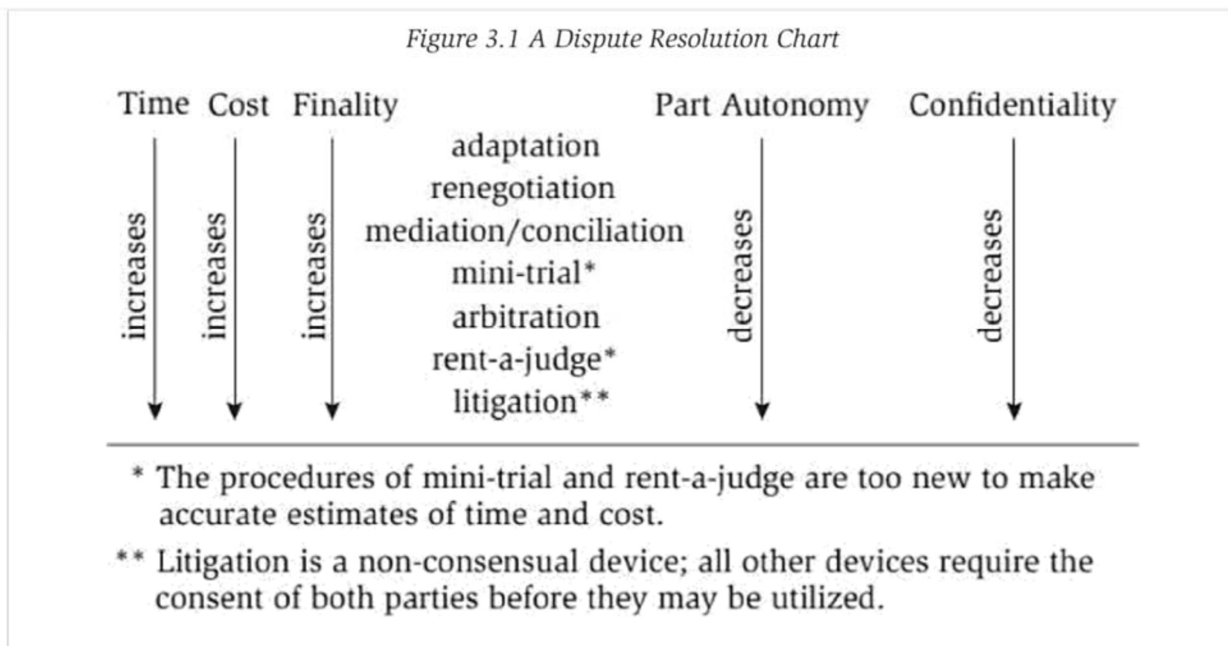
Some jurisdictions in the United States, notably the state of California, now permit parties to seek out and hire their own judge in a program formally referred to as the California Reference Procedure, but colloquially labeled *rent-a-judge*. No party can be forced into this procedure, but if both parties agree to its use, it is helpful in moving quickly to a resolution of the case because it avoids the congestion of the regular system of state courts (many civil cases in the United States take 3 to 4 years to reach a final decision). Moreover, the decision rendered by the judge is binding on the parties just as if it had been rendered in a regular court. There is no evidence that the rent-a-judge procedure has caught on elsewhere in the world, however.

Having set out these elaborate descriptions of the various forms of dispute resolution, it may be helpful to see some of the same ideas presented in pictorial form. The following chart, see figure 3.1, depicts the alternatives in terms of various factors [*this chart is available on TWEN*]. On the left side of the chart are the factors of time, cost, and tonality. Those factors increase as one moves down the chart. For example, the mechanisms become more time-consuming (in terms of how long from start to

finish it normally takes to complete the procedure) and more expensive. By definition, litigation – because it is procedurally far more complex and because it is heavily dependent on court-imposed timetables in court-created congestion – is more expensive than mediation. The final factor on the left side of the chart, finality, simply reflects whether the parties may move to another form of dispute resolution if they do not like the result in the mechanism in question.

Put another way, if mediation fails or an arbitrable award is not complied with voluntarily by the losing party, the parties must normally go into court to resolve the dispute. By contrast, there is no subsequent dispute resolution forum after litigation. There the parties receive a final judgment rendered by court that must be complied with, so long as the court has jurisdiction over both parties. All the mechanisms other than litigation require consent by both parties. Litigation is the only process that one party may utilize without the consent of the other side. (Of course, even this requires a small disclaimer. If the parties have already signed an agreement to arbitrate, they will be held to that agreement even of one party now wishes to litigate.)

The factors on the right side of the chart, party autonomy and confidentiality, decrease as one moves down the list. Party autonomy is a matter of party control. Obviously, the parties have less control over an arbitration or court proceeding (those devices are much more the hands and under the control of arbitrators or judges) than over renegotiation. As one moves down the list, the dispute is placed in the hands of neutral, third parties over whom the disputing parties have very little control. The factor of confidentiality is frequently an important one in commercial dispute resolution, particularly for those disputes that involve important commercial or trade secrets. To the extent that one moves down the chart, more and more people become aware of and have knowledge of the parties' dispute.



None of these procedures is perfect. No perfect procedure is likely to be discovered. For persons engaged in planning and drafting international commercial agreements, one thing is clear. To the extent of the parties do not choose a method of dispute resolution on their own, one will be imposed on them whenever a dispute arises under the contract.

2.2.1 Notes on Dispute Resolution Methods

It is worth remembering that the conflict resolution techniques listed above are not mutually exclusive. In many cases, one or more of these methods may operate, even in parallel.

For example, in what has come to be known as "bargaining in the shadow of the law," many negotiations take place against the background of what is most likely to happen if the matter is taken to court or arbitration. Negotiators take into account both the risk-adjusted probability of success or failure in the cost of the process in evaluating whether a negotiated agreement would better serve their needs. In the United States, most litigated matters never make it to trial. They are either resolved by motion practice or, quite often, settled by negotiated agreement, with the negotiations preceding even as litigation continues. Far fewer than 10% of all filed cases in the being tried.

One difference between state-sponsored litigation and the other methods of resolving conflict is that state-sponsored litigation does more than just resolve the dispute between the parties. It serves a public function. In common law systems, the resolution of the dispute creates law they can be applied to other cases. In the United States, litigation also serves a regulatory function, with many industries regulated as much through litigation as through government ministries.

What happens when this regulatory function is cut short by pushing cases into arbitration?

2.3 Binding Arbitration

As a dispute resolution system, arbitration is exceptional in a number of ways. First, to a high degree, arbitration awards in proceedings that operate pursuant to the New York Convention on arbitration are enforceable in state operated legal systems worldwide. In fact, it is generally considered easier to enforce an arbitration award than a foreign court judgment.

Arbitration is also exceptional in that parties can elect ahead of any ripe dispute to submit disputes to arbitration, and so be foreclosed from going to state run arbitration systems. By contrast, those who agree to negotiate or mediate may still proceed to state run litigation if no voluntary agreement is reached. Arbitration serves as an either/or - electing arbitration closes the doors to the courthouse.

In systems where litigation serves a public purpose, as it does in common law systems where cases build out the law, arbitration reduces the grip of the legal system on those public issues. Large scale redirection to arbitration can also impact the regulatory function of litigation by making aggregrate litigation of common disputes uneconomical if not impossible.

Different countries vary in what they consider a binding agreement to submit a potential matter to arbitration. In some countries, the level of formality has to be high (a clear remit in governing legal documents); in others, more informal documentation, such as exchange of emails, may suffice. In addition, to the degree that contract laws differ by nation, issues such as public interest and unconscionability may figure differently.

The following case illustrates the US policy of favoring arbitration.

2.3.1 AT&T Mobility LLC v. Concepcion

AT&T MOBILITY LLC *v.* CONCEPCION et ux.

No. 09-893.

Argued November 9, 2010 —

Decided April 27, 2011

[…]

*

[…]

*336Justice Scalia

delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T).1 The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." App. to Pet. for Cert. 61a.2 The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions. The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may *337then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.3

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory *338under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use," and likely to "promp[t] full or . .. even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *Laster* v. *T-Mobile USA, Inc.,* 2008 WL 5216255, *11-*12 (SD Cal., Aug. 11,2008). Nevertheless, relying on the California Supreme Court's decision in *Discover Bank* v. *Superior Court,* 36 Cal. 4th 148, 113 P. 3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. *Laster,* 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank. Laster* v. *AT&T Mobility LLC,* 584 P. 3d 849, 855 (2009). It also held that the *Discover Bank* rule was not pre-empted by the PAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." 584 F. 3d, at 857 (internal quotation marks omitted). In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that " 'class proceedings will reduce the efficiency and expeditiousness of arbitration"' and noted that *"Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.' " *Id.,* at 858 (quoting *Shroyer* v. *New Cingular Wireless Services, Inc.,* 498 F. 3d 976, 990 (CA9 2007)).

We granted certiorari, 560 U. S. 923 (2010).

*339h-i HH

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L. L. C.* v. *Mattel, Inc.,* 552 U. S. 576, 581 (2008). Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.,* 460 U. S. 1, 24 (1983), provides, in relevant part, as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S. C. §2.

We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra,* at 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc.* v. *Jackson,* 561 U. S. 63, 67

(2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna,* 546 U. S. 440, 443 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.,* 489 U. S. 468, 478 (1989).

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconseionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc.* v. *Casarotto,* 517 U. S. 681, 687 (1996); see also *Perry* v. *Thomas,* 482 U. S. 483, 492-493, n. 9 (1987). *340The question in this case is whether § 2 pre-empts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." Cal. Civ. Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz* v. *Foundation Health Psychcare Servs., Inc.,* 24 Cal. 4th 83, 114, 6 P. 3d 669, 690 (2000); accord, *Discover Bank,* 36 Cal. 4th, at 159-161, 113 P. 3d, at 1108.

In *Discover Bank,* the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

> "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.,* at 162-163, 113 P. 3d, at 1110 (quoting Cal. Civ. Code Ann. § 1668).

California courts have frequently applied this rule to find arbitration agreements unconscionable. See, *e. g., Cohen* v. *DIRECTV, Inc.,* 142 Cal. App. 4th 1442, 1451-1453, 48 Cal. Rptr. 3d 813, 819-821 (2006); *Klussman* v. *Cross Country**341*Bank,* 134 Cal. App. 4th 1283, 1297, 36 Cal Rptr. 3d 728, 738-739 (2005); *Aral* v. *EarthLink, Inc.,* 134 Cal. App. 4th 544, 556-557, 36 Cal. Rptr. 3d 229, 237-239 (2005).

Ill

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA §2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California

prohibits waivers of class litigation as well. See *America Online, Inc.* v. *Superior Court,* 90 Cal. App. 4th 1, 17-18, 108 Cal. Rptr. 2d 699, 711-713 (2001).

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston* v. *Ferrer,* 552 U. S. 346, 353 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry* v. *Thomas,* 482 U. S. 483 (1987), for example, we noted that the FAA's pre-emptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.,* at 492, n. 9 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what .. . the state legislature cannot." *Id.,* at 493, n. 9.

An obvious illustration of this point would be a ease finding unconscionable or unenforceable as against public policy *342consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank.* A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory — restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank, supra,* at 161, 113 P. 3d, at 1108-1109 (arguing that class waivers are similarly one sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by §2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid pre-emption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402, 406 (CA2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 39, 54, 66 (2006); Randall, Judicial *343Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L. Rev. 185,186-187 (2004).

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FA A because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.,* at 33 (quoting *Carter* v. *SSC Odin Operating Co., LLC,* 237 Ill. 2d 30, 50, 927 N. E. 2d 1207, 1220 (2010)).4

We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier* v. *American Honda Motor Co.,* 529 U. S. 861, 872 (2000); *Crosby* v. *National Foreign Trade Council,* 530 U. S. 363, 372-373 (2000). As we have said, a federal statute's saving clause " 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.,* 524 U. S. 214, 227-228 (1998) (quoting *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 446 (1907)).

*344We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt,* 489 U. S., at 478; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.,* 559 U. S. 662, 681-682 (2010). This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and §4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure ... to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.,* 473 U. S. 614, 628 (1985), to arbitrate according to specific rules, *Volt, supra,* at 479, and to limit *with whom* a party will arbitrate its disputes, *Stolt-Nielsen, supra,* at 683.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be speci*345fled, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *14 Penn Plaza LLC* v. *Pyett,* 556 U. S. 247, 269 (2009); *Mitsubishi Motors Corp., supra,* at 628.

The dissent quotes *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U. S. 213, 219 (1985), as "'rejecting] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.'" *Post,* at 360 (opinion of Breyer, J.). That is greatly misleading. After saying (accurately enough) that "the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims," but to "ensure judicial enforcement of privately made agreements to arbitrate," 470 U. S., at 219, *Dean Witter* went on to explain: "This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it . . . ." *Id.,* at 220. It then quotes a House Report saying that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration." *Ibid,* (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The concluding paragraph of this part of its discussion begins as follows:

> "We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act — enforcement of private agreements and encouragement of efficient and speedy dispute resolution — must be resolved in favor of the latter in order to realize the intent of the drafters." 470 U. S., at 221.

In the present case, of course, those "two goals" do not conflict — and it is the dissent's view that would frustrate *both* of them.

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. *346They have repeatedly described the Act as "embod[ying] [a] national policy favoring arbitration," *Buckeye Check Cashing,* 546 U. S., at 443, and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone,* 460 U. S., at 24; see also *Hall Street Assocs.,* 552 U. S., at 581. Thus, in *Preston* v. *Ferrer,* holding pre-empted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: *"A* prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results/ " which objective would be "frustrated" by requiring a dispute to be heard by an agency first. 552 U. S., at 357-358. That rule, we said, would, "at the least, hinder speedy resolution of the controversy." *Id.,* at 358.5

California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The rule is limited to adhesion contracts, *Discover Bank,* 36 Cal. 4th, at 162-163, 113 P. 3d, at 1110, but the times in which consumer contracts were anything *347other than adhesive are long past.6*Carbajal* v. *H&R Block Tax Servs., Inc.,* 372 F. 3d 903, 906 (CA7 2004); see also *Hill* v. *Gateway 2000, Inc.,* 105 F. 3d 1147, 1149 (CA7 1997). The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. *Discover Bank, supra,* at 162-163, 113 P. 3d, at 1110. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small, see *Oestreicher* v. *Alienware Corp.,* 322 Fed. Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank,* and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt-Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. 559 U. S., at 684-687. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.,* at 686. This is obvious as a *348structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 559 U. S., at 685. But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA's Consumer Arbitration Caseload, online at http://www.adr.org/si.asp7idr: 5027 (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court's case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, *349or dismissed. Not a single one, however, had resulted in a final award on the merits. Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen,* O. T. 2009, No. 08-1198, pp. 22-24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal — not judgment on the merits — was 583 days, and the mean was 630 days. *Id.,* at 24.7

Second, class arbitration *requires* procedural formality. The AAAs rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at http://www.adr.org/sp.asp?id=21936, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co.* v. *Shutts,* 472 U. S. 797, 811-812 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank,* class arbitration is a "relatively recent development." 36 Cal. 4th, at 163, 113 P. 3d, at 1110. And it is at the very *350least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, see, *e. g., Kohen* v. *Pacific Inv. Management Co. LLC,* 571 F. 3d 672, 677-678 (CA7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U. S. C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy^] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award ... was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct *351rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs., 552* U. S., at 578. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.8

The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *Rent-A-Center, West,* 561 U. S., at 67-69. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post,* at 365. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will *352pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee^]" to be made whole, 584 F. 3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster,* 2008 WL 5216255, *12.

* * *

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. Davidowitz, 312 U. S. 52, 67 (1941), California's *Discover Bank* rule is pre-empted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

1

The Concepcions' original contract was with Cingular Wireless. AT&T acquired Cingular in 2005 and renamed the company AT&T Mobility in 2007. *Laster* v. *AT&T Mobility LLC,* 584 F. 3d 849, 852, n. 1 (CA9 2009).

2

That provision further states that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." App. to Pet. for Cert. 61a.

3

The guaranteed minimum recovery was increased in 2009 to $10,000. Brief for Petitioner 7.

4

The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge "we have not. . . applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings," *post,* at 366 (opinion of Breyer, J.), and that "we should think more than twice before invalidating a state law that ... puts agreements to arbitrate and agreements to litigate 'upon the same footing,' " *post,* at 361.

5

Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress "thought that arbitration would be used primarily where merchants sought to resolve disputes of fact. . . [and] possessed roughly equivalent bargaining power." *Post,* at 362. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our eases. "Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held ... that agreements to arbitrate in that context are enforceable." *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U. S. 20, 33 (1991); see also *id.,* at 32-33 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers and employees). Of course the dissent's disquisition on legislative history fails to note that it contains nothing — not even the testimony of a stray witness in committee hearings — that contemplates the existence of class arbitration.

6

Of course States remain free to take steps addressing the concerns that attend contracts of adhesion — for example, requiring class-action-waiver provisions in adhesive agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

7

The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. *Post,* at 363. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration-by-jui'y by saying that parties will still prefer it to trial-by-jury.

8

The dissent cites three large arbitration awards (none of which stems from elasswide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post,* at 364. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the eases prove is that arbitrators can give huge awards — which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a elasswide basis will have a substantial deterrent effect on incentives to arbitrate.

[…]

2.3.2 Notes on ATT Mobility

1. We have omitted a concurrence by Justice Thomas (what is a concurrence?) and a dissent by Justice Breyer (what is a dissent?).

2. In the US system, both arbitration awards and litigation in a court can resolve individual disputes. However, in litigation, unlike arbitration, litigation can create new law and provide a public vindication of rights. On the other hand, shifting disputes to resolution can reduce costs for the parties and take a burden off the court system. In his celebrated article, Against Settlement, 93 Yale L.J. 1073 (1984), Professor Owen Fiss takes aim at settlement and other alternative dispute resolution devices:

"In my view, however, this account of adjudication and the case for settlement rest on questionable premises. I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

Fiss goes on to note that in the US, litigation serves a public purpose by making law and vindicating rights publicly, among other aspects, and argues that litigation rather than settlement can be virtuous"

"To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . .has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our ideals, but that we alone among the

nations of the world seem willing to do something about it. Adjudication American style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment."

What do you think? Do you think public adjudication serves a public purpose even in systems other than that of the USA, where much legal regulation takes place through litigation instead of through government agencies? If arbitration is cheaper and faster for the parties, should they feel an obligation to create a public good through litigation?

3. Since *ATT Mobility*, consumer contracts in the US increasingly, even almost uniformly, contain mandatory arbitration clauses that effectively preclude class action arbitrations in courts.

2.4 State Run Judicial Systems

2.4.1 Civil Law versus Common Law Legal Systems

When we turn to formal, state run judicial processes, not all systems are the same. This is true both within a country and across nations. For example, in the United States state courts may follow and often do follow a different set of procedural rules than are used in the federal courts. In other countries, on the other hand, special purpose courts exist which will follow their own set of procedures that are optimized for the kind of case they hear, such as intellectual property or international disputes.

There are two families of judicial process that you will encounter at STL. One is the process that is typical in the United States, which has arisen from the British common law tradition. We will spend much time in this course discussing the origins and operation of the common law tradition. You will learn that the United States today no longer represents a pure common-law tradition, as it is been overlaid to significant extent by statutes and codes, but nonetheless the common law process and the role of judges common to that process still form an important part of the US process.

The common law tradition is found in much of the world where the British empire had influence – the UK, Ireland, the USA, Canada, Australia, New Zealand, India, Pakistan, Singapore, Israel, much of sub-Saharan Africa, Hong Kong, and various other former British colonial outposts. Each country's application of the common law differs and is a source of comparative study even within the common law family. In some jurisdictions, while there is a common law tradition the current application is better described as a hybrid between the civil law and the common law. In this course, we will go deep into how the US system operates but not so much into other common law jurisdictions.

The other family of legal traditions that you will encounter will be the civil law systems. The civil law derives not from the British tradition, but from the continental European tradition, in which bodies of law and procedure are compiled into codes. These codes are given legal effect by a legislature or an executive, and then applied by judges whose case-by-case rulings are not understood to change or extend the law. Early examples of civil law codes include one developed under the Roman

Emperor Justinian, whose code still has influence more than a millennium after it was first created, and that of the French Emperor Napoleon, who ordered the creation of a code that had significant impact in Europe and throughout the French empire. To a significant degree, the statutes in China draw upon the civil law tradition, both with regard to substantive law and to procedure, although, of course, the Chinese courts also reflect unique aspects of Chinese tradition and governance. In general, the Chinese procedural code was significantly adopted from that of Japan, which in turn had much earlier adopted the German procedural code as then used in Germany. In recognition that your education at STL will include courses with distinguished Chinese scholars, we will leave extended discussion of the Chinese system to the professors expert in that area.

There are, of course, many other dispute resolution systems that have existed and that could exist. The process used in imperial China, for example, was neither a common law nor a modern civil law system.

The differences between the common law and civil law systems are both substantive (which is to say, inthe way law is created) and procedural. We will look briefly at both categories of differences.

In a pure civil law system, judges apply rather than make law; the relevant civil codes are the exclusive source of all law, and new law comes only from legislative action. Interpretations of the law by a court might be persuasive, of course, but courts are under no obligation to match an application of the law to prior cases.

In reality, how things work may not match this ideal in any given civil system. In China, for example, you will encounter the Guiding Case system, and you will be able to form your own opinion as to whether and to what degree the guiding cases effectively make interstitial law.

In the common law systems, judges do make law. They make law both in the purely traditional common law way, where the body of law has arisen from cases. Tort law and contract law, for example, in some jurisdictions reflect this. Beyond that, and increasingly commonly, judges make interstitial common law. While a statute or the Constitution provides a text for interpretation, the judicial interpretations of that text have binding status. For example, both the interpretation of the Constitution and the interpretation of major statutes such as the Sherman Antitrust Act reflect this process. In many cases the interstitial judicial rulings are effectively the law.

How cases make law depends on a doctrine called stare decisis. What is stare decisis?

"The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." William M. Lile et al., Brief Making and the Use of Law Books 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914).

In application, the concept of "when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved" may prove harder than it at first appears. In general, this is a point that will be covered over and over again in your classes at STL as you are asked to provide the holding of a case. You will find that when a point of law is "directly and necessarily involved" can be elusive.

Aside from this classic application of what a holding is, there are more nuanced approaches that, aside from the binding effect of a holding, look to the signaling effect when the same or a similar set of judges is involved, even if the stated rule is not quite directly or necessarily involved. For now, we refer you to an excellent treatment of holdings by Professor Larry Solum on his Legal Theory Lexcion. We do this for two reasons. First, as with our reference to Black's Law Dictionary, we want to direct your attention to the excellent resource that Professor Solum's site represents. Many foundational issues of legal theory are covered in the blog with precision and nuance, and are accompanied by a carefully curated selection of additional resources. We suggest that you browse through the site and go back whenever some of the guiding concepts of first year study prove confusing. Secondly, we think he handles the issue well. To access his treatment of holdings, go to:

https://lsolum.typepad.com/legaltheory/2019/04/legal-theory-lexicon-holdings.html

If you have difficulty reaching his site, a copy of this entry is available on TWEN.

The processes of civil law systems also often differ from the processes of common law systems. Professor Langbein, elaborating on his famous law review article, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985), has summarized the differences:

"The conduct of civil litigation in Continental legal systems differs markedly from the Anglo-American tradition, although the differences should not obscure the fundamental similarity that both are adversary systems. In Continental systems lawyers for the litigants play important roles in formulating their clients' positions, nominating lines of factual inquiry, and overseeing the work of the court. The greatest difference between the two traditions is the allocation of responsibility for identifying and investigating disputed issues of fact. In our procedure, the adversaries gather potential proofs in out-of-court pretrial discovery proceedings; and if the case resists settlement, the adversaries select and adduce proofs at trial. In Continental practice, by contrast, the court determines the sequence for investigating issues of fact; and, subject to adversary oversight, the court examines witnesses. Our distinction between pretrial and trial is unknown; rather, a European court investigates and adjudicates in discontinuous hearings, as many as the case requires.

. . .

"Beyond description, the article had the further purpose of highlighting the main advantages that arise from the German tradition of judicial control of fact-gathering: (1) By having the trier control the sequence of fact-gathering, the Germans are able to minimize unproductive investigation; in contrast, our division between pretrial discovery and trial provides incentives for excessive search. (2) By having the court examine the witnesses, the Germans prevent lawyers from having pretrial contact with nonparty witnesses, thereby precluding the coaching of witnesses that disfigures our civil justice. (3) The Germans employ neutral experts whose duty is to aid the court in finding the truth, in contrast to the litigation-biased expert witnesses that American lawyers recruit and pay to bolster preordained results.

"Having pointed to these advantages, the article warned that the greater responsibility of the bench for the conduct of civil proceedings in Germany entails risks of its own. Thus, the article discussed how the twin safeguards of a professionalized judiciary and a stunningly liberal right of appellate review provide the needed correctives."

John H. Langbein, Trashing the German Advantage, 82 Nw. U. L. Rev. 763 (1988)

Again, your full course of study at STL will give you deep familiarity with both a common law system, that of the US, and a civil law system, that of China. For now, the following chart addresses in a summary fashion some of the distinctions:

	Civil Law	**Common Law**
Source of Law	Statutes	Statutes and Cases.
Impact of Judicial Ruling	Can be persuasive	Can Be Binding
Jury	Not generally available	Available sometimes
Role of Advocates	Suggest Law; Obtain Factual Evidence at Courts Direction	Make Legal Arguments; Develop Facts
Role of Judge	Directs Litigation	Responds to Advocates; Increasingly managerial
Legal Scholarship	Arguably More Influential	Arguably Less Influential
Nature of Trial	Proceeds in Pieces	Staged Event

2.4.2 The History and Development of Common Law Systems

We now turn to a bit more depth on the origins of the common law system. We will return to aspects of this throughout the course; at present, the goal is to provide an overview of some major themes to help orient you.

2.4.2.1 The Early Development of the Common Law

What came to be known as the common law began to develop in England after the Norman conquest in 1066. The Norman kings established a body of courts under the jurisdiction of the king, rather than directly under the jurisdiction of local lords, as had been the case prior to the conquest.

Henry II did much to institutionalize the common law. He began the practice of sending judges from his court across the country. These judges would resolve cases on a one by one basis, reaching the result they considered fair. However, these judges would return to London and discuss the results of their labors with the other justices of the crown. Over time, a practice developed where the judges followed the decisions of other justices who had faced the same issue. This developed into the doctrine we now know as *stare decisis*.

The King's courts also revived the jury system, where members of the community were impaneled to resolve issues placed before them. The early juries bore little resemblance to today's modern jury, and were expected to rely upon their local knowledge in assessing the facts of the case. Again, however, from these early beginnings arose the division of labor between the judges, who were in charge of applying the law, and the jury, which was expected to determine the facts.

Important to the development of the common law was the system of bringing the case into court. In the common law courts, the case began with the filing of a writ. Early on, a writ was simply a statement of what the dispute was about. However, over time the writs became formalized and for a case to be able to go forward the facts pleaded had to fit within one of the established writs, which roughly correspond to today's causes of action.

In determining whether a given set of facts fit within one of the established writs, the common law judges effectively were making law. They determined the boundaries of the cause of action. They did this from the beginning of the common law system, and were in fact making law in this nature before the British Parliament became a legislative body.

The judges of the time, however, apparently did not view themselves as creating law. Rather, they seem to have viewed the law as something that existed independently, and in their labors they were merely identifying the contours of the law. In the ideology of the time, law was something that was discovered, rather than created.

Over time, the system of writs became very rigid and formalized. Failure to complete the proper red would lead to dismissal of action, although it could be refiled later under the proper risk. Similarly, the common law defenses were rigidly defined, and failure to assert a defense that fit with the facts as they were established could be a fatal error. The rigidity of the common law was one of the factors that led to the evolution in the United Kingdom of a parallel system of justice known as equity.

2.4.2.2 Law and Equity

As noted above, the common law courts of England operated under the authority of the king. It was from the king, through the Lord Chancellor, that plaintiffs would purchase the writs needed to launch a lawsuit.

In some cases no writ fit the fact pattern involved. In those cases, given that the king was all-powerful, a plea could be made to the king in order to have justice done. Over time, the role of responding to these please was delegated from the king to the lord chancellor.

From this informal beginning an alternative system of courts developed. Chancery only operated in those settings where the common law courts provided no adequate remedy. For such cases, however, an alternative system of procedure, remedies, and law developed.

Equity was sometimes referred to as the application of the king's conscience. By its nature, equity is discretionary, unlike the more rigid rule-based common law. It is the goal of the Chancellor to do what's fair, rather than to rigidly apply doctrine to facts.

Remedies also differ. The common law principally provides a remedy of money damages. Equity, on the other hand, often involves injunctions or other orders requiring the defendant to take certain actions.

The net of this was that in England two parallel systems of justice operated under the dominion of the king, that of law and that of equity. On occasion, the two systems could offer competing, and inconsistent, results - when, for example, a party was placed under an injunction to not enforce a common law order. In such situations, equity was given priority, and the ruling of the equity court would prevail.

2.4.2.3 The US Legal System: After the Fact Regulation and Adversarial Legalism

Both the common law and equity features of the courts in the colonies that became the United States after the American Revolution. The law as it existed at the time of American independence was "received" into American law at the time of independence. This meant that both common law and equitable doctrine as it stood at that time became part of the law and the US.

To this day, of course, the US system bear significant resemblance to and owes a great debt to the traditional English system. As with other members of the common law family, the US courts draw on British tradition in the way courts operate in the way legal doctrine is developed.

That said, the US has developed some exceptional aspects of its own. One element of US practice that is unusual is its reliance on "after-the-fact" regulation through litigation. The great litigation creates incentives for obeying the law and disincentives for committing legal violations. The imposition of damages is seen to cause parties to self regulate.

This is joined with a remarkable lack of barriers to initial market entry. In general, many activities that require prior regulatory approval in other countries can take place in the United States without the prior involvement of regulators

As one scholar has noted:

"In all these exchanges over the benefits of a liberalized economic order, the United States is invariably Exhibit A. No country seems to realize the benefits of wide open markets, of relaxed entry into the world of commerce, and of economic dynamism as fully as the United States. . . .

"What distinguishes the United States is not that it is an unregulated market--far from it. What is distinctive about the United States is the extent to which we regulate not entry but consequences. There is a significant difference between an unregulated market and a deregulated market featuring low entry costs but careful scrutiny after the fact. What really sets the United States apart is the fact that its basic regulatory model is ex post rather than ex ante, a form of regulation that draws heavily on its common-law tradition. It is precisely the availability of meaningful ex post accountability that comes to define much of the operation of the rule of law in the United States."

Samuel Issacharoff, *Regulating After the Fact*, 56 DePaul L. Rev. 375, 377 (2007)

As the author of the article notes, shifting regulation to consequences has powerful advantages. Not requiring regulatory approval in advance reduces costs of administration, removes an opportunity for regulatory gatekeepers to engage in corruption, and avoids bureaucratic delays. It also shifts enforcement to those directly affected by violations of the law, rather than relying on perhaps out of touch bureaucratic understandings of where the issues lie.

The US implements this after-the-fact regulation with some unusual aspects of its procedure. Litigants and their lawyers are given coercive investigatory powers. Those litigants often can, and often do, seek redress where government agencies have not chosen to act.

"The American civil discovery process effectively confers upon private litigants and their lawyers the same investigatory powers as federal agencies to compel sworn testimony and to disgorge documents; they can obtain the same court orders

commanding a violator to cease its unlawful conduct and pay for its violations; and the court orders are backed by the same federal police powers."

Sean Farhang, **The Litigation State: Public Regulation and Private Lawsuits in the United States** (p. 8).

"In the past decade, there was an average of about 165,000 lawsuits filed per year to enforce federal statutes in United States district courts. These suits spanned the waterfront of federal policy, including antitrust, civil rights, labor and employment, environmental, banking, and securities/commodities exchange regulation. More than 97 percent of the suits were privately filed. At present, the role of private litigation in many important areas of federal policy in the United States is massive both in absolute terms and relative to enforcement by the national government."

Sean Farhang, **The Litigation State: Public Regulation and Private Lawsuits in the United States** (p. 10).

There is another side, of course. No one likes being sued. Courts are relatively inefficient and expensive. The agendas of private litigators charged with enforcing the laws might not map to the public interest. We are not asking you to conclude that the US system is better.

For now, what matters is to be aware that the US system relies on the litigation system in ways other countries do not. First, as a common law system, courts are used to make law. Both in creating law entirely, as has been the case with traditional contract and tort doctrine, and in giving meaning to sometimes vague (sometimes deliberately vague) statutory language, court cases create legal rules. Second, given the role of after the fact regulation, the US relies on its litigation system to achieve public goals, such as effective regulation, and not just to resolve individual disputes.

There is another aspect of US procedure and governance that bears note. This is the concept of "adversarial legalism." More so than many countries, the US is legalistic – issues tend to get decided according to rules, rather than based on unstructured or holistic judgments. Secondly, more so than in many countries, the process for applying those rules is formal and adversarial.

Robert Kagan, author of the influential book **Adversarial Legalism**, has put it this way:

"Compared to other economically advanced democracies, American civic life is more deeply pervaded by legal conflict and by controversy about legal processes. The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes. American laws generally are more detailed, complicated, and prescriptive. Legal penalties in the United States are more severe. And American methods of litigating and adjudicating legal disputes are more costly and adversarial.

"To encapsulate some of the distinctive qualities of governance and legal process in the United States, I use the shorthand term 'adversarial legalism,' by which I mean policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation. Adversarial legalism can be distinguished from other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation common in most other countries. While the United States often employs these other methods too, it relies on adversarial legalism far more than other economically advanced democracies."

A short excerpt from Kagan's book is on TWEN, and it is required reading for this course. For further reading, multiple copies of his book are available in the library.

For now, what you should be realizing is that while the US, like other countries, uses its public courts to resolve private disputes, it charges its judicial system with duties not always imposed on courts in other countries. Courts in the US make law. They provide an important part of the regulatory system. They are intended to provide a check on the other branches of government. As we dig deeper into the US system, understanding it requires understanding these sometimes important roles. Keep this goals in mind.

2.4.2.4 The US System: Course of a Legal Action

Imagine two neighbors, both farmers. One farmer (whom we will call Farmer Brown) has a prize pig. This pig is the apple of his eye, the subject of his most intense pride and affection. One day this pig is gone. As Farmer Brown searches the neighborhood for his pig, he spies the very pig in the pig pen of his neighbor, Farmer Green. For whatever reason, Farmer Green refuses to return the pig to Farmer Brown, and Farmer Brown must consider his options.

As we have already noted, litigation may not be the preferred way to go, even if litigation is a practical solution. It might be better to talk it out through negotiations, or to draw in another neighbor to mediate the dispute. It should never be assumed that litigation is the best option, even when it looks like litigation might be an available option.

To get to whether litigation is even a feasible option requires addressing some preliminary issues. Farmer Brown must be persuaded that there is a legal theory that would provide relief, and relief of a kind that solves his problem. For a wayward pig with the status of chattel property, it seems like this could be the case. On the other hand, if the hummingbirds that previously have dined at Farmer Brown's backyard feeder, giving him hours of pleasure, decide to fly to another setting, there may not be a legal theory that applies.

Then there is the likelihood of winning the lawsuit. Here, there are facts we don't know that might bear on that. If, for example, Farmer Brown had previously contracted to sell the pig to Farmer Green, but had failed to deliver, the odds of winning might not be so great. Similarly, if the actual identity of the pig is open to debate, the odds of success would go down.

Not least, the issue of cost effectiveness has to be considered. In the US system, setting aside isolated cases, each party must bear its own legal fees. Attorneys are expensive. Even prize pigs, even beloved pigs, are not of unlimited value. Can Farmer Brown obtain relief at a cost that makes sense? The US is a capitalistic society, and as with everything else the wheels of justice are greased with money. Cost effectiveness is not just a matter of fees. Farmer Brown will have to take into account whether Farmer Green is able to pay the damages sought or to return the pig if so ordered by a court.

Only after these issues are worked through will Farmer Brown and his attorney proceed to the next step.

Selecting a proper court

In the United States, litigants often, but not always, have a choice as to where to file suit. In some cases, even cases involving wayward pigs can be filed in federal court (if, for example, the two farmers reside in different states and the value of the pig is above the minimum statutory threshold). In almost every case, a lawsuit can be filed in the appropriate state court (although,

as we shall see, the defendant may have an option to move it to federal court if certain conditions are met). Farmer Brown and his attorney will think long and hard about which court system they would prefer to be in.

The court they choose must have subject matter jurisdiction (that is, be able to hear the kind of case that is brought) and also must have jurisdiction over the parties. Sometimes in state courts claims of a certain size or type are relegated to small claims courts; in some states, cases asserting an equitable claim (such as one seeking an injunction that the pig be returned) must be filed in the Chancery courts which handle equitable claims.

Jurisdiction over the parties has to do with the power of the court over those it requires to submit to its procedures. As you might imagine, a court's reach is not unlimited, and the case and the parties must have some connection to the forum, or must have consented to be there. In the US, this is a complicated issue, which we will spend some time unpacking.

There is also an issue called venue. *Venue* has to do with what location is an appropriate and convenient place for the litigation to go forward. There are situations where there the court has subject matter jurisdiction and jurisdiction over the parties, and yet venue is not proper.

Commencing the action

In some way, Farmer Brown must let Farmer Green know that a lawsuit has been filed. This happens through what is called *service of process*. We will get into this shortly, but generally it requires that Farmer Brown properly serves a summons on Farmer Green. There will be rules, state and federal, on how to do this; simply placing the summons in a bottle and tossing it in a river upstream of Farmer Green's farm is unlikely to meet the statutory requirements.

There are also limitations under the Constitution on how service of process is made. Again, we will address this shortly, but the fundamental issue is whether the method used is sufficiently fair to protect Farmer Green's right to due process under the Constitution.

Pleading and parties

Generally speaking, the first pleading in a case is called the *complaint*, which sets out the nature of the case. As you might imagine, there are questions about how much detail the complaint should go into, and different systems resolve this question in different ways, requiring different levels of information. The complaint also will identify the various causes of action (perhaps a common law action for theft or wrongful detention of a pig; perhaps of violation of the federal Porcine Protection Act. [Note – there is no such statute]. The complaint will also identify the parties. It may be that Farmer Green's wife joins in as a co-plaintiff; it may be that upon getting more background facts Farmer Brown also adds as a defendant Farmer Yellow, who he believes played a role in moving the pig from his farm to that of Farmer Green.

The response (Motions and Answers)

Once Farmer Brown has filed the complaint, the burden shifts to Farmer Green to respond. There are a number of ways that Farmer Green can respond. He can challenge the choice of court, either arguing that the court lacks subject matter jurisdiction or that it lacks power to force him into court. He can also challenge venue.

He can also attack the legal validity of the claim. In what was known in the common law as a demurrer, and what today is known as a motion to dismiss for a failure to state a claim, Farmer Green can argue that the facts alleged by Farmer Brown do

not constitute an actionable legal violation. He can argue that the actions alleged do not constitute a legal wrong (in the case of the hummingbirds who seek a new home, that might be a winning motion). He might argue that an essential element of the claim was not pleaded in the complaint. For example, if the cause of action requires that Farmer Green personally entered upon Farmer Brown's property with an intent to steal a pig, and that is not alleged, that might be applicable. Finally, in some cases, the complaint is simply so confused and haphazard that no sense can be made of it. This happens most often, as you might expect, when attorneys are not involved.

Farmer Green can also respond by filing an answer. An answer presents his position on the case (for example, the pig in his pig pen is not in fact the pig that Farmer Brown is missing), but absent a motion for judgment on the pleadings does not require the court to rule at this time. In the answer, Green must admit or deny the allegations of Brown's complaint, or state that he has insufficient information to do either.

One other thing that Green can do in response is file a counterclaim. As a matter of strategy, this is often an attractive option if a plausible counterclaim exists. It changes the bargaining zone for settlement – for example, without a counterclaim the settlement zone goes from zero to paying the full claim; with a counterclaim, the zone goes from paying Green his full claim to paying Brown his full claim. The counterclaim might or might not be related – Green might decide now is a good time to litigate the $100,000 loan he gave to Brown a few years back that was never repaid, or he might bring a suit for defamation based on Brown's telling everyone in their community that Green is a dirty pig stealer,

Obtaining information prior to trial

One somewhat unusual aspect of the US system is the development of facts before trial. In some systems, and historically in prior versions of the US system, there was little factual development before trial – the parties simply arrived at the courtroom and found out what the other party had to say. In other systems, notably civil law systems, factual development might occur under the direct guidance and through the initiative of the trial judge. In the US system, factual development largely happens outside the courtroom and even outside the judge's actual supervision, as the parties exchange – and are required to exchange – information in a number of ways.

In many ways, discovery, combined with motion practice to narrow or eliminate claims, has become how US cases are litigated in practice. The sharing of information allows both sides to price the claim, and if the case is not dismissed by a court the most frequent resolution in light of this information is that the parties reach a settlement agreement. We will discuss later in this course the number of ways that information can be exchanged – including document requests, interrogatories, depositions, and expert reports – but the key takeaway for now is that discovery is to some degree managed by the court, under limits put in place in the rules, but nonetheless largely conducted by the parties outside of court.

Summary judgment

With discovery bringing forward the facts, not all cases need to go to trial. In some cases, even though a full cause of action was pleaded, discovery has shown that some essential facts underlying a claim or defense cannot be established. For example, imagine if after factual and expert discovery there was no evidence in the record that could show that the pig in Farmer Green's pig pen was in fact the pig that Farmer Brown was missing. In such cases, a court would be required to hold that there

was no proof on an essential element and dismiss the claim. Summary judgment allows the acceleration of that decision to the end of discovery rather than waiting until after trial.

Similarly, in some cases, evidence might conclusively destroy an essential element of the other party's claim or conclusively establish a claim. For example, in an action on an unpaid debt, the uncontested entry of a government document recording the payment of the debt might eliminate the claim. On the other hand, if Farmer Brown admits that he borrowed $100,000, has not repaid it, and has no excuse for not repaying it, Farmer Green might be able to get summary judgment establishing his counterclaim. In such cases, the evidence has to be of a kind that is conclusive, and not open to being believed or disbelieved,.

Summary judgments can also be partial. In a case with multiple legal theories, one of the causes of action might be eliminated while others remain in the case. Similarly, a court might grant summary judgment on all claims that the evidence shows will be barred by a statute of limitations while allowing the more recent claims to be litigated.

Again, strategically, summary judgment is very important. In the pure case, a case can be brought to an end. Just as significantly, the scope of the dispute can be narrowed by partial summary judgment in a way that enables settlement.

Setting the case for trial

If the case is not settled or dismissed, it will be set for trial. Because dockets can be heavy, and because criminal trials can claim priority on the judge's time, the date set might not be immediate. In some courts, the case may be set for trial a year or more away. Even then, developments in the court's workload might cause the trial date to be deferred.

The jury and its selection

If the relief sought is monetary damages, the parties likely have a right to have the case heard by a jury. This right has to be asserted, and can be asserted by either party. The parties can also choose to have a judge decide the facts as well as the law; in some cases, for strategic reasons or to avoid delay both parties might prefer this. Juries are generally not available for claims involving equitable remedies such as injunctions. In some cases, as we will see later in the year, whether a cause of action supports a jury trial can be a complicated issue.

Juries are selected from the local population, and are more or less intended to be a cross section of the community. We will address later how juries are selected.

The trial

In the US, unlike in civil law systems, trials are generally a stand alone event. By contrast, in a common law system, with no juries, the trial will proceed in a series of hearing before the judge. While cases tried to a US judge without a jury can sometimes proceed in a similar way, the use of a jury effectively requires the trial to proceed if possible in one proceeding.

Again, we will discuss later the process of the trial. Suffice it to say for now that trials conducted by effective trial lawyers are essentially a form of drama, where facts that are largely already known are put before the factfinders in ways calculated to have the most impact.

If there is insufficient evidence for a jury to base a verdict on, the defense will move for a directed verdict. (In reality, they will move for a directed verdict without regard to the sufficiency of the evidence).

Submitting the case to the jury

After the trial is closed, the judge will submit the case to the jury. The judge will read to the jury as set of jury instructions that set forth what the law is. The judge will also instruct on which party has the burden of persuasion on the issues. As you struggle through first year courses, ask yourself how confident you are that juries understand and accurately apply these doctrinal instructions.

The jury will meet in private and discuss the case. When they are finished, they will return to the courtroom and announce their findings.

Posttrial motions

After judgment, the losing party will have a chance to challenge the verdict with post trial motions. Most typically, the motion to challenge the sufficiency of the evidence will be renewed. The losing party may also move for a new trial.

The judgment and its enforcement

Once a judgment is obtained, it has to be enforced. In the case of money damages, the defendant may simply pay the money. If the defendant fails to do so, the plaintiff may take the judgment to a location where the defendant has assets, and execute the judgment against those assets. In the United States, the full faith and credit clause means that any valid judgment from any US court can be enforced in any US jurisdiction. When national boundaries are crossed, the enforcement of the judgment gets much more complicated.

Injunctions operate *in personam* against the defendant. Failure to comply - say, if Farmer Green ignores an injunction requiring him to return the pig – can lead to the court holding him in *contempt of court* and imposing sanctions.

Appeal

Litigants have a right to appeal. Legal issues resolved by the trial court can be reviewed by the appellate court. The appellate court can affirm, reverse, or modify the judgment of the trial court.

For strategic purposes, it is important to focus on when appeals can be had. In the US federal system, most issues can only be appealed at the end of the case. For example, if the trial court holds that there is personal jurisdiction over a defendant, the defendant might not be able to appeal that ruling, however questionable, until after trial. Because there is a strong possibility that the case might settle – mooting any appeal – this lack of immediate review has important implications.

There are circumstances where appellate review can be had before final judgment. We will study those this quarter.

State courts can, and sometimes do, have different rules on when appeals can be taken. New York state, for example, is much friendlier to appeals that are brought while the case is ongoing.

Conclusiveness and use of judgments

What does it mean once a case has been finally decided? If a court has found, for example, that Farmer Green only had his own pig in his pig pen, and never took Farmer Brown's pig, Farmer Green would no doubt object if Farmer Brown went back into court to pursue the same a claim a second time to see if he might have better luck.

Rules of claim preclusion deal with this issue. We will study later this year when claims cannot be brought again.

Another issue that arises is when an issue has been decided between two partie, and that issue is relevant to a later case. When can that judicial determination be used to foreclose retrying the same issue? Again, we will address this later in the year.

2.4.2.5 The US Legal System: Operative Questions

The march through the process of a case might not, in fact, be the way a great lawyer thinks about a case. Issues might be addressed out of order in order to develop a strategy. Those questions will vary case to case, but the below should give you some ideas.

What is the nature of the conflict?

What is the substance of the conflict?

Who are the parties with an interest in the conflict? Which parties are essential for to include in the case financial or other reasons, and which are desirable? Which are undesirable?

What is the best way to resolve it? Do we want to go to court or pursue another method of dispute resolution?

If state sponsored litigation is the best way to resolve it, what courts might be able to hear it?

If state sponsored litigation is the best way to resolve it, might the applicable law vary depending on where the suit is filed? If so, which location (venue) is the best for our needs? If the other side filed the lawsuit, is there a way to move the lawsuit to the venue or system we prefer? Will the court have substance matter jurisdiction over the case in our preferred location? Will the court be able to exercise power over the parties?

If state sponsored litigation is the best options, what remedies are available from the court? Does the defendant have assets in the jurisdiction sufficient to meet any claim? If not, can this judgment be enforced in a location where the defendant has assets?

Are there close issues that might determine the outcome of the case? If so, can we get an appeal on those (or avoid an appeal on those) prior to a final judgment? Will the rules with regard to timing of any appeals differ in other potential venues? Should that affect where we litigate?

Taking all of that into account, of the possible venues, which do we think will be the most favorable venue for our side?

If we file first, what can we do to make sure the case remains in the venue we chose?

If the other side filed first, what can we do to move the case to a venue we find more favorable?

What parties and issue should be resolved in this litigation? Are there unrelated claims that it would be efficient to bring at the same time? Are there related claims that must be brought now or lost? What parties might we or the other side want to add, and what does that mean to our strategy? Might adding or eliminating parties affect which courts have power to hear the case?

Can – has – the case been set forward in the pleadings in a way that allows the case to proceed past the pleading stage? Have we met our ethical burdens in the way we present the pleadings?

If we are the defendant, what defenses, legal or factual, can we assert? Do we have counterclaims against the plaintiff that we can assert in good faith? What impact on settlement will those claims have?

What facts need to be established to prove the case at trial? What is the best, most effective way to establish those facts? What information must we provide to the other side? Must we provide any of that information without a request, and is there information that we need to present only if it is properly requested? Are there any grounds for withholding information that has been requested or otherwise is producible? What information does the other side have that we will want to prove our case, and how can we assure that that information comes into the record?

After discovery is concluded, are there contested issues of fact that require a trial for resolution? If there are no contested issues, what methods are available for disposing of the case without trial?

What steps do we need to take to make the case ready for trial? How do we make our 'story' vivid and persuasive for those deciding the case?

How does the trial proceed? Does either party have the right to a jury trial, and have the proper steps been taken to obtain a jury trial? How is the jury selected? How is the case presented differently if a jury is involved? Which jurors do we want on the panel, and which jurors would we prefer to exclude? How can we do that in an ethical way?

What motions can and should we make at trial and after trial? Can we prevent reference to things we don't want the jury to know about? Can we limit what the jury hears in a way that helps us?

Where and how can any judgment be enforced?

3 Defining The Objective: Remedies, Appeals, Enforcement of Judgments

The first rule of warfare is "define the objective." In any dispute resolution process, it is important to understand what outcomes are possible. The objective must be one of the possible outcomes or going to court is a fool's errand.

State-sponsored litigation offers a limited set of outcomes. Some situations are beyond anyone's power to reverse. For example, if someone has been grievously injured in a car accident, the court cannot enter an order that restores the person to health. In other cases, it's conceivable that the situation can be reversed, but it is not the kind of thing that lies within the power of a court. For example, a court cannot restore respect between the parties, or replace a failed business relationship with a new one better suited to current market conditions. In still other cases, the relief sought might be a kind that some courts in some countries would award, such as ordering a state government to comply with the law, but not be one that lies within the powers granted to courts in other jurisdictions.

Courts are also limited in terms of against whom they can award that relief. In some cases, as we will shortly study, the party sought to be brought before the court is beyond the territorial reach of the court. In other cases, the party that might be sued might enjoy immunity - for example, in the United States foreign diplomats enjoy immunity from civil lawsuits except those involving real property because of an international treaty. In other cases, prudential or constitutional doctrines might prevent

the order of an injunction against an Executive Branch official. These limitations will vary depending upon the nature of the judicial system, the location of the judicial system, and choices made in litigation such as the cause of action pursued.

In the American system, there are four kinds of relief a court most often will order. The court can award monetary damages. For example, the plaintiff is injured in an automobile accident, while the court cannot restore health the court can order a losing defendant to give money to the plaintiff in compensation for the injuries suffered. A court can award coercive remedies, such as injunctions or temporary restraining orders. For example, if an industrial plant has been held to be operating in violation of environmental laws, the court can order the owners of the plant to stop those activities that lead to that the illegal emissions. The court can order restitution. For example, if the defendant is found to have illegally taken property from the plaintiff, the defendant can be ordered to restore the property, along with any benefits that accrued to the defendant because of its wrongful possession of the property. Finally, a court can give a declaratory judgment. Declaratory remedies establish the rights or legal relations between the parties, so long as there is an actual controversy involving those rights, even if the dispute is not appropriate for damages, coercive relief, or restitution.

In general, remedies are defined by the law that creates the right, whether that law is common law, statutory, or from the Constitution. For most common law remedies, such as torts and contracts, the normal remedy is money damages. The court will determine if a right has been violated, and if it finds that one has, calculate the level of money damages. The remedy of damages also is sometimes known as a "legal remedy" so as to distinguish it from an equitable remedy.

As you will see in your substantive courses, calculating the correct level of money damages can be a complex undertaking. If someone has been physically injured, should they collect non-economic damages such as pain and suffering? If so, are there settings where a limit should be placed on such non-economic damages? (In some US states, caps have been put on non-economic damages in settings such as medical malpractice). In contracts, if a contract is breached should the damages be limited to the lost profits on the contract or the money paid under the contract, or should more extensive "consequential damages" be awarded if the breach led to follow on injuries beyond the scope of the contract itself?

In some cases, the legal of monetary damages will be linked to the "after the fact" regulatory role of litigation we talked about earlier. For example, in antitrust cases, the court will treble (multiply by three) the level of actual damages to get at a damage award. This is believed to add to the deterrent impact of the antitrust laws. In other cases, particularly egregrious conduct can lead to additional "punitive damages," in which damages are increased as a kind of additional fine, but payable to the plaintiff. In some areas, such as copyright infringement, statutory damages will be allowed in certain circumstances without a requirement that actual damages be proven; these kinds of damages are called statutory damages. In still other cases, attorneys' fees - which under the "American Rule" are normally born by the litigant and not shifted, even if the litigant wins - can be awarded from the losing side, once again in support of regulatory interests.

We won't dig into those sorts of issues in this course, but you will encounter them in other courses. Even more importantly, because the law bearing on remedies can vary from state to state, you will need to do specific research into the scope of available legal remedies early in the litigation process, whether you are a plaintiff or a defendant.

As we will see just a bit later, a monetary damage award can be enforced in courts other than the court where the trial was held. The full faith and credit clause of the US Constitution, which appears in Article IV, Section 1, of the Constitution,

provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." For present purposes, that means that ***valid*** judgments of the courts of one state can be enforced in any other US jurisdiction. This makes damage awards portable within the US to a location where a defendant has assets. As we will also see later, the story with regard to importing foreign judgments or exporting US judgments to other countries is quite a bit less clear.

Other remedies arose from the courts of equity. Most importantly, the remedies employed by a court of equity did not include money damages (although money could be ordered to change hands).

Coercive remedies include injunctions and specific performance. Under an injunction, a party is ordered to take a certain action so as to comply with the law - for example, to desegregate segregated schools, or to eliminate conditions in state prisons that violate the Constitution. Injunctions also apply to private litigants as well. Specific performance arises in the realm of contracts. For example, if you have contracted to purchase the famous Water Bottle of Shenzhen, you might prefer the water bottle to money damages, and specific performance is a way for a court to compel compliance with the contract.

Restitutionary remedies involve situations where the litigant wants to be restored to the position it deserves to be in. Examples would include the restoration of property to its rightful owner. If, for example, your roommate has stolen your collection of signed photographs of C-Pop stars, an order of restitution would return those to you. If your neighbor has 'borrowed' your prize pig and received funds for allowing it to appear in a pig food advertisement, a restitutionary remedy might require the disgorgement of that payment to you. The measurement of restitutionary remedies is typically the defendant's gains rather than the plaintiff's losses - even if no harm was caused to you by the absence of your pig for a day, the restitutionary measure is the funds the defendant wrongly obtained.

Declaratory remedies involve the establishment of legal rights but not the award of damages (although a demand for declaratory relief will sometimes accompany a claim for damages). In the US federal courts, there must be a live case or controversy, so declaratory relief cannot produce just an advisory "maybe someday" opinion, but must be tied to a live situation.

In many national jurisdictions, such as the United Kingdom, it is normal under the "English Rule" for a court to require the losing party to pay at least some substantial part of the winnings party's attorneys fees, although these often are not at all the whole fees incurred. In the United States, on the other hand, the normal "American Rule" is that each party bears its own attorneys' fees. The 'costs' of litigation normally are awarded, but in practice these tend to be relatively minor compared to attorneys' fees. The reasoning for this in the United States is that to do otherwise would make litigants of limited resources reluctant to pursue even valid claims because of the downside risk of paying attorneys' fees. The reasoning against this is that defendants who have been found to have violated no one's rights will nonetheless be required to pay sometimes substantial attorneys' fees out of their own pocket. Even in the United States, some statutes provide for an award of attorney's fees to the winning party. In addition, contracts can provide that for any dispute arising from the contract the winning party shall be awarded its attorneys' fees.

3.1 Remedies - What Are You Asking For

3.1.1 Introduction to Remedies: Preliminary Injunctions and TROs

Preliminary injunctions and Temporary Restraining Orders are a special kind of equitable relief, and a kind of equitable relief that often is encountered in US courts. In both cases the goal is to offer temporary relief that preserves the position of the parties until trial can be held. Of these, the Temporary Restraining Order often comes first. A Temporary Restraining Order (TRO) is sought in order to freeze a situation in place before changes occur that cannot be undone. A TRO can be granted in an emergency *ex parte* hearing (a hearing where the other side is not even present) but generally last only until a more complete hearing can be held. A TRO might be put in place to stop a contractor from tearing down a historic building before a hearing is held on whether the destruction is lawful, for example, or to require an alleged abuser to not come near his or her alleged victim. In many cases, TRO proceedings lead directly to a hearing on whether a preliminary injunction should be granted.

Preliminary injunctions are, as the name suggests, granted preliminarily before a full trial is heard on whetehr a permanent injunction should be granted. Again, as with a TRO, the issue is preserving the situation until there is a full trial. In reality, unlike a TRO in many cases the preliminary injunction can remain in place for a long time. (Note that in injunction and TRO settings, which are equitable in nature, there is no jury).

The following case deals with a request for a preliminary injunction. The Court sets forth the four requirements for the granting of a temporary injunction as: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." In addition, as is true for all equitable remedies, the moving party must show that there is no adequate remedy at law.

As you read this case think of how the equitable procedural tradition deals with situations not readily addressed by common law damage remedies. Also note how the equitable traditions of balancing and discretion are built into the court's approach.

3.1.1.1 FRCP 65 (a)(1), (b), (c), (d)

A current copy of Rule 65 is in the full set of the Rules of Civil Procedure available on TWEN.

https://www.federalrulesofcivilprocedure.org/frcp/title-viii-provisional-and-final-remedies/rule-65-injunctions-and-restraining-orders/

3.1.1.2 Winter v. Natural Resources Defense Council, Inc.

WINTER, SECRETARY OF THE NAVY, et al. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 07-1239.

Argued October 8, 2008

Decided November 12, 2008

*10Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined. Breyer, J., filed an opinion *11concurring in part and dissenting in part, in which Stevens, J., joined as to Part I, *post,* p. 34. Ginsburg, J., filed a dissenting opinion, in which Souter, J., joined, *post,* p. 43.

[…]

12Chief Justice Roberts delivered the opinion of the Court.

> "To be prepared for war is one of the most effectual means of preserving peace." 1 Messages and Papers of the Presidents 57 (J. Richardson comp. 1897). So said George Washington in his first Annual Address to Congress, 218 years ago. One of the most important ways the Navy prepares for war is through integrated training exercises at sea. These exercises include training in the use of modern sonar to detect and track enemy submarines, something the Navy has done for the past 40 years. The plaintiffs, respondents here, complained that the Navy's sonar-training program harmed marine mammals, and that the Navy should have prepared an environmental impact statement before commencing its latest round of training exercises. The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy's sonar training, even though that court acknowledged that "the record contains no evidence that marine mammals have been harmed" by the Navy's exercises. 518 F. 3d 658, 696 (CA9 2008).

The Court of Appeals was wrong, and its decision is reversed.

I

The Navy deploys its forces in "strike groups," which are groups of surface ships, submarines, and aircraft centered around either an aircraft carrier or an amphibious assault ship. App. to Pet. for Cert. 316a-317a (Pet. App.). Seamless coordination among strike-group assets is critical. Before deploying a strike group, the Navy requires extensive integrated training in analysis and prioritization of threats, execution of military missions, and maintenance of force protection. App. 110-111.

Antisubmarine warfare is currently the Pacific Fleet's top war-fighting priority. Pet. App. 270a-271a. Modern diesel-electric submarines pose a significant threat to Navy vessels because they can operate almost silently, making them ex*13tremely difficult to detect and track. Potential adversaries of the United States possess at least 300 of these submarines. App. 571.

The most effective technology for identifying submerged diesel-electric submarines within their torpedo range is active sonar, which involves emitting pulses of sound underwater and then receiving the acoustic waves that echo off the target. Pet. App. 266a-267a, 274a. Active sonar is a particularly useful tool because it provides both the bearing and the distance of target submarines; it is also sensitive enough to allow the Navy to track enemy submarines that are quieter than the surrounding marine environment.1 This case concerns the Navy's use of "mid-frequency active" (MFA) sonar, which transmits sound waves at frequencies between 1 kHz and 10 kHz.

Not surprisingly, MFA sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use. Sonar reception can be affected by countless different factors, including the time of day, water density, salinity, currents, weather conditions, and the contours of the sea floor. *Id.,* at 278a-279a. When working as part of a strike group, sonar operators must be able to coordinate with other Navy ships and planes while avoiding interference. The Navy

conducts regular training exercises under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a variety of situations.

The waters off the coast of southern California (SOCAL) are an ideal location for conducting integrated training exercises, as this is the only area on the west coast that is relatively close to land, air, and sea bases, as well as amphibious *14landing areas. App. 141-142. At issue in this case are the Composite Training Unit Exercises and the Joint Tactical Force Exercises, in which individual naval units (ships, submarines, and aircraft) train together as members of a strike group. A strike group cannot be certified for deployment until it has successfully completed the integrated training exercises, including a demonstration of its ability to operate under simulated hostile conditions. *Id.,* at 564-565. In light of the threat posed by enemy submarines, all strike groups must demonstrate proficiency in antisubmarine warfare. Accordingly, the SOCAL exercises include extensive training in detecting, tracking, and neutralizing enemy submarines. The use of MFA sonar during these exercises is "mission-critical," given that MFA sonar is the only proven method of identifying submerged diesel-electric submarines operating on battery power. *Id.,* at 568-571.

Sharing the waters in the SOCAL operating area are at least 37 species of marine mammals, including dolphins, whales, and sea lions. The parties strongly dispute the extent to which the Navy's training activities will harm those animals or disrupt their behavioral patterns. The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal. The Navy asserts that, at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns.

The plaintiffs are the Natural Resources Defense Council, Inc., Jean-Michael Cousteau (an environmental enthusiast and filmmaker), and several other groups devoted to the protection of marine mammals and ocean habitats. They contend that MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) *15have been "associated" with the use of active sonar. They argue that certain species of marine mammals — such as beaked whales — are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are "very deep divers" that spend little time at the surface.

II

The procedural history of this case is rather complicated. The Marine Mammal Protection Act of 1972 (MMPA), 86 Stat. 1027, generally prohibits any individual from "taking" a marine mammal, defined as harassing, hunting, capturing, or killing it. 16 U. S. C. §§ 1362(13), 1372(a). The Secretary of Defense may "exempt any action or category of actions" from the MMPA if such actions are "necessary for national defense." § 1371(f)(1). In January 2007, the Deputy Secretary of Defense — acting for the Secretary — granted the Navy a 2-year exemption from the MMPA for the training exercises at issue in this case. Pet. App. 219a-220a. The exemption was conditioned on the Navy adopting several mitigation procedures, including: (1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6)

requiring active sonar to be operated at the "lowest practicable level"; and (7) adopting coordination and reporting procedures. *Id.,* at 222a-230a.

The National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, requires federal agencies "to the fullest extent *16possible" to prepare an environmental impact statement (EIS) for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." 42 U. S. C. §4332(2)(C) (2000 ed.). An agency is not required to prepare a full EIS if it determines — based on a shorter environmental assessment (EA) — that the proposed action will not have a significant impact on the environment. 40 CFR §§ 1508.9(a), 1508.13 (2007).

In February 2007, the Navy issued an EA concluding that the 14 SOCAL training exercises scheduled through January 2009 would not have a significant impact on the environment. App. 226-227. The EA divided potential injury to marine mammals into two categories: Level A harassment, defined as the potential destruction or loss of biological tissue (1 *e.,* physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding. *Id.,* at 160-161.

The Navy's computer models predicted that the SOCAL training exercises would cause only eight Level A harassments of common dolphins each year, and that even these injuries could be avoided through the Navy's voluntary mitigation measures, given that dolphins travel in large pods easily located by Navy lookouts. *Id.,* at 176-177, 183. The EA also predicted 274 Level B harassments of beaked whales per year, none of which would result in permanent injury. *Id.,* at 185-186. Beaked whales spend little time at the surface, so the precise effect of active sonar on these mammals is unclear. Erring on the side of caution, the Navy classified all projected harassments of beaked whales as Level A. *Id.,* at 186, 223. In light of its conclusion that the SOCAL training exercises would not have a significant impact on the environment, the Navy determined that it was unnecessary to prepare a full EIS. See 40 CFR § 1508.13.

Shortly after the Navy released its EA, the plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the Navy's SOCAL training exercises violated *17NEPA, the Endangered Species Act of 1973 (ESA), and the Coastal Zone Management Act of 1972 (CZMA).2 The District Court granted plaintiffs' motion for a preliminary injunction and prohibited the Navy from using MFA sonar during its remaining training exercises. The court held that plaintiffs had "demonstrated a probability of success" on their claims under NEPA and the CZMA. Pet. App. 207a, 215a. The court also determined that equitable relief was appropriate because, under Ninth Circuit precedent, plaintiffs had established at least a " 'possibility' " of irreparable harm to the environment. *Id.,* at 217a. Based on scientific studies, declarations from experts, and other evidence in the record, the District Court concluded that there was in fact a "near certainty" of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy. *Id.,* at 217a-218a.

The Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal. 502 F. 3d 859, 865 (2007). After hearing oral argument, the Court of Appeals agreed with the District Court that preliminary injunctive relief was appropriate. The appellate court concluded, however, that a blanket injunction prohibiting the Navy from using MFA sonar in SOCAL was overbroad, and remanded the case to the District Court "to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises." 508 F. 3d 885, 887 (2007).

On remand, the District Court entered a new preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented the following mitigation measures (in addition to the measures the Navy had adopted pursuant to its MMPA exemption): (1) imposing a 12 nautical mile "exclusion *18zone" from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of "helicopter-dipping" sonar; (4) limiting the use of MFA sonar in geographic "choke points"; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. 530 F. Supp. 2d 1110, 1118-1121 (CD Cal. 2008). The Navy filed a notice of appeal, challenging only the last two restrictions.

The Navy then sought relief from the Executive Branch. The President, pursuant to 16 U. S. C. § 1456(c)(1)(B), granted the Navy an exemption from the CZMA. Section 1456(c)(1)(B) permits such exemptions if the activity in question is "in the paramount interest of the United States." The President determined that continuation of the exercises as limited by the Navy was "essential to national security." Pet. App. 232a. He concluded that compliance with the District Court's injunction would "undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of... strike groups." *Ibid.*

Simultaneously, the Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." See 40 CFR § 1506.11.3 The CEQ determined that alternative arrangements were appropriate because the District Court's injunction "create[s] a significant and unreasonable risk that Strike Groups will not be *19able to train and be certified as fully mission capable." Pet. App. 238a. Under the alternative arrangements, the Navy would be permitted to conduct its training exercises under the mitigation procedures adopted in conjunction with the exemption from the MMPA. The CEQ also imposed additional notice, research, and reporting requirements.

In light of these actions, the Navy then moved to vacate the District Court's injunction with respect to the 2,200-yard shutdown zone and the restrictions on training in surface ducting conditions. The District Court refused to do so, 527 F. Supp. 2d 1216 (2008), and the Court of Appeals affirmed. The Ninth Circuit held that there was a serious question regarding whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful. Specifically, the court questioned whether there was a true "emergency" in this case, given that the Navy has been on notice of its obligation to comply with NEPA from the moment it first planned the SOCAL training exercises. 518 F. 3d, at 681. The Court of Appeals concluded that the preliminary injunction was entirely predictable in light of the parties' litigation history. *Ibid.* The court also held that plaintiffs had established a likelihood of success on their claim that the Navy was required to prepare a full EIS for the SOCAL training exercises. *Id.,* at 693. The Ninth Circuit agreed with the District Court's holding that the Navy's EA — which resulted in a finding of no significant environmental impact — was "cursory, unsupported by cited evidence, or unconvincing." *Ibid.4*

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause 564 physical injuries to marine mammals, as well as 170,000 disturb*20anees of marine mammals' behavior. *Id.,* at 696. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs. The court

emphasized that the negative impact on the Navy's training exercises was "speculative," since the Navy has never before operated under the procedures required by the District Court. *Id.,* at 698-699. In particular, the court determined that: (1) The 2,200-yard shutdown zone imposed by the District Court was unlikely to affect the Navy's operations, because the Navy often shuts down its MFA sonar systems during the course of training exercises; and (2) the power-down requirement during significant surface ducting conditions was not unreasonable because such conditions are rare, and the Navy has previously certified strike groups that had not trained under such conditions. *Id.,* at 699-702. The Ninth Circuit concluded that the District Court's preliminary injunction struck a proper balance between the competing interests at stake.

We granted certiorari, 554 U. S. 916 (2008), and now reverse and vacate the injunction.

Ill

A

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Munaf v. Geren,* 553 U. S. 674, 689-690 (2008); *Amoco Production Co.* v. *Gambell,* 480 U. S. 531, 542 (1987); *Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 311-312 (1982).

The District Court and the Ninth Circuit concluded that plaintiffs have shown a likelihood of success on the merits of their NEPA claim. The Navy strongly disputes this determination, arguing that plaintiffs' likelihood of success is low because the CEQ reasonably concluded that "emergency *21circumstances" justified alternative arrangements to NEPA compliance. 40 CFR § 1506.11. Plaintiffs'briefs before this Court barely discuss the ground relied upon by the lower courts — that the plain meaning of "emergency circumstances" does not encompass a court order that was "entirely predictable" in light of the parties' litigation history. 518 F. 3d, at 681. Instead, plaintiffs contend that the CEQ's actions violated the separation of powers by readjudicating a factual issue already decided by an Article III court. Moreover, they assert that the CEQ's interpretations of NEPA are not entitled to deference because the CEQ has not been given statutory authority to conduct adjudications.

The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a. "possibility" of irreparable harm. *Id.,* at 696-697; 530 F. Supp. 2d, at 1118 (quoting *Faith Center Church Evangelistic Ministries* v. *Glover,* 480 F. 3d 891, 906 (CA9 2007); *Earth Island Inst.* v. *United States Forest Serv.,* 442 F. 3d 1147,1159 (CA9 2006)). The lower courts held that plaintiffs had met this standard because the scientific studies, declarations, and other evidence in the record established to "a near certainty" that the Navy's training exercises would cause irreparable harm to the environment. 530 F. Supp. 2d, at 1118.

The Navy challenges these holdings, arguing that plaintiffs must demonstrate a likelihood of irreparable injury— not just a possibility — in order to obtain preliminary relief. On the facts of this case, the Navy contends that plaintiffs' alleged injuries are too speculative to give rise to irreparable injury, given that ever since the Navy's training program began 40 years ago, there has been no documented case of sonar-related injury to marine mammals in SOCAL. And even if MFA sonar does cause a limited number of injuries to individual *marine mammals,* the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that *22would adversely affect *their* scientific, recreational, and ecological interests. For their part, plaintiffs assert

that they would prevail under any formulation of the irreparable injury standard, because the District Court found that they had established a "near certainty" of irreparable harm.

We agree with the Navy that the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Los Angeles* v. *Lyons,* 461 U. S. 95, 103 (1983); *Granny Goose Foods, Inc.* v. *Teamsters,* 415 U. S. 423, 441 (1974); *O'Shea* v. *Littleton,* 414 U. S. 488, 502 (1974); see also 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948.1, p. 139 (2d ed. 1995) (hereinafter Wright & Miller) (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); *id.,* at 154-155 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Mazurek* v. *Armstrong,* 520 U. S. 968, 972 (1997) *(per curiam).*

It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm.[…]

As explained in the next section, even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief. For the same reason, we *24do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits.

B

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf,* 553 U. S., at 689-690. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.,* 480 U. S., at 542. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero-Barcelo,* 456 U. S., at 312; see also *Railroad Comm'n of Tex.* v. *Pullman Co.,* 312 U. S. 496, 500 (1941). In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense.

This case involves "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments." *Gilligan* v. *Morgan,* 413 U. S. 1, 10 (1973). We "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman* v. *Weinberger,* 475 U. S. 503, 507 (1986). As the Court emphasized just last Term, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene* v. *Bush,* 553 U. S. 723, 797 (2008).

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. […]

We accept these officers' assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation.

These interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court. Plaintiffs have submitted declarations asserting that they take whale watching trips, observe marine mammals underwater, conduct scien*26tifie research on marine mammals, and photograph these animals in their natural habitats. Plaintiffs contend that the Navy's use of MFA sonar will injure marine mammals or alter their behavioral patterns, impairing plaintiffs' ability to study and observe the animals.

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President— the Commander in Chief — has determined that training with active sonar is "essential to national security." *Id.,* at 232a.

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.

[…]

The Court of Appeals concluded its opinion by stating that "the Navy may return to the district court to request relief on an emergency basis" if the preliminary injunction "actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense." 518 F. 3d, at 703. This is cold comfort to the Navy. The Navy contends that the injunction will hinder efforts to train sonar operators under realistic conditions, ultimately leaving strike groups more vulnerable to enemy submarines. Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction "actually result[s] in an inability to train ... sufficient naval forces to provide for the national defense" before seeking its dissolution. By then it may be too late.

IV

As noted above, we do not address the underlying merits of plaintiffs' claims. While we have authority to proceed to such a decision at this point, see *Munaf,* 553 U. S., at 691-692, doing so is not necessary here. In addition, reaching the merits is complicated by the fact that the lower courts addressed only one of several issues raised, and plaintiffs have largely chosen not to defend the decision below on that ground.5

*32At the same time, what we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction. An injunction is a matter of equitable

discretion; it does not follow from success on the merits as a matter of course. *Romero-Barcelo,* 456 U. S., at 313 ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

The factors examined above — the balance of equities and consideration of the public interest — are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. See *Amoco Production Co.,* 480 U. S., at 546, n. 12 ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success"). Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such *33training in a manner credibly alleged to pose a serious threat to national security. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal.[…]

The District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MPA sonar during significant surface ducting conditions. The judgment of the Court of Appeals is reversed, and the preliminary injunction is vacated to the extent it has been challenged by the Navy.

It is so ordered.

[…]

Justice Ginsburg,

with whom Justice Souter joins, dissenting.

The central question in this action under the National Environmental Policy Act of 1969 (NEPA) was whether the Navy must prepare an environmental impact statement (EIS). The Navy does not challenge its obligation to do so, and it represents that the EIS will be complete in January 2009 — one month after the instant exercises conclude. If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis — and the Navy's training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve. To justify its course, the Navy sought dispensation not from Congress, but from an executive council that lacks authority to countermand or revise NEPA's requirements. I would hold that, in imposing manageable measures to mitigate harm until completion of the *44EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.

[…]

Ill

A

Flexibility is a hallmark of equity jurisdiction. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Weinberger* v. *Romero-Barcelo,* 456 U. S. 305, 312 (1982) (quoting *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329 (1944)). Consistent with

equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.3, p. 195 (2d ed. 1995). This Court has never rejected that formulation, and I do not believe it does so today.

Equity's flexibility is important in the NEPA context. Because an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm. The Court is correct that relief is not warranted "simply to prevent the possibility of some remote future injury." *Ante,**52at 22 (quoting Wright & Miller, *supra,* §2948.1, at 155). "However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis." Wright & Miller, *supra,* §2948.1, at 155-156 (footnote omitted). I agree with the District Court that NRDC made the required showing here.

3.2 Appeals: The Final Judgment Rule (and Built-In Exceptions)

3.2.1 28 U.S.C. § 1291

The text of 28 U.S.C. § 1291 is also available in the collection of statutes on TWEN.

https://www.govinfo.gov/content/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partIV-chap83-sec1291.pdf

3.2.2 28 U.S.C. § 1292(a)–(b)

The text of 28 U.S.C. § 1292(a)–(b) is also available in the collection of statutes on TWEN.

https://www.govinfo.gov/content/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partIV-chap83-sec1292.pdf

3.2.3 Liberty Mut. Ins. Co. v. Wetzel

As you read Liberty Mutual, note the ways in which the Court treats federal appellate jurisdiction as a question that resembles or involves subject matter jurisdiction. Among other similarities, you may notice that: (1) courts may raise the issue sua sponte and (2) parties may not waive such jurisdictional requirements.

424 U.S. 737 (1976)

LIBERTY MUTUAL INSURANCE CO. v. WETZEL ET AL.

[…]

Supreme Court of United States.

[…]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.
[…]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents filed a complaint in the United States District Court for the Western District of Pennsylvania in which they asserted that petitioner's employee insurance benefits and maternity leave regulations discriminated against women in violation of Title VII of the Civil Rights Act of 1964, […] The District Court ruled in favor of respondents on the issue of petitioner's liability under that Act, and petitioner appealed to the Court of Appeals for the Third Circuit. That court held that it had jurisdiction of petitioner's appeal under 28 U. S. C. § 1291, and proceeded to affirm on the merits the judgment of the District Court. We [740] granted certiorari, […] and heard argument on the merits. Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists. […] Because we conclude that the District Court's order was not appealable to the Court of Appeals, we vacate the judgment of the Court of Appeals with instructions to dismiss petitioner's appeal from the order of the District Court.
Respondents' complaint, after alleging jurisdiction and facts deemed pertinent to their claim, prayed for a judgment against petitioner embodying the following relief:
"(a) requiring that defendant establish non-discriminatory hiring, payment, opportunity, and promotional plans and programs;
"(b) enjoining the continuance by defendant of the illegal acts and practices alleged herein;
"(c) requiring that defendant pay over to plaintiffs and to the members of the class the damages sustained by plaintiffs and the members of the class by reason of defendant's illegal acts and practices, including adjusted backpay, with interest, and an additional equal amount as liquidated damages, and exemplary damages;
"(d) requiring that defendant pay to plaintiffs and to the members of the class the costs of this suit and a reasonable attorneys' fee, with interest; and
"(e) such other and further relief as the Court deems appropriate." App. 19.
After extensive discovery, respondents moved for partial summary judgment only as to the issue of liability.[…] The District Court on January 9, 1974, finding no issues of material fact in dispute, [741] entered an order to the effect that petitioner's pregnancy-related policies violated Title VII of the Civil Rights Act of 1964. It also ruled that Liberty Mutual's hiring and promotion policies violated Title VII.[2] Petitioner thereafter filed a motion for reconsideration which was denied by the District Court.[…]

It is obvious from the District Court's order that respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees, but received none.
Counsel for respondents when questioned during oral argument in this Court suggested that at least the District Court's order of February 20 amounted to a declaratory judgment on the issue of liability pursuant to the provisions of 28 U. S. C. § 2201. Had respondents sought *only* a declaratory judgment, and no other form of relief, we would of course have a different case. But even if we accept respondents' contention that the District Court's order was a declaratory judgment on the issue of liability, it nonetheless left unresolved respondents' requests for an injunction, for compensatory and exemplary damages, and for attorneys' fees. It finally disposed of none of respondents' prayers for relief.
The District Court and the Court of Appeals apparently took the view that because the District Court made the recital required by Fed. Rule Civ. Proc. 54 (b) that final judgment be entered on the issue of liability, and that there was no just reason for delay, the orders thereby became appealable as a final decision pursuant to 28 U. S. C. § 1291. We cannot agree with this application of the Rule and statute in question.
Rule 54 (b)[…] "does not apply to a single claim [743] action . . . . It is limited expressly to multiple claims actions in which `one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal." […] Here, however, respondents set forth but a single claim: that petitioner's employee insurance benefits and maternity leave regulations discriminated against its women employees in violation of Title VII of the Civil Rights Act of 1964. They prayed for several different types of relief in the event that they sustained the allegations of their complaint, […]but their complaint advanced a single legal theory which was applied to only one set of facts.[5] Thus, despite the fact that the District Court undoubtedly made the findings required [744] under the Rule, had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U. S. C. § 1291. […]
We turn to consider whether the District Court's order might have been appealed by petitioner to the Court of Appeals under any other theory. The order, viewed apart from its discussion of Rule 54 (b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, […] and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "final" within the meaning of 28 U. S. C. § 1291.[…] Thus the only possible authorization for an appeal from the District Court's order would be pursuant to the provisions of 28 U. S. C. § 1292.
If the District Court had granted injunctive relief but had not ruled on respondents' other requests for relief, this interlocutory order would have been appealable under § 1292 (a) (1).[…]But, as noted above, the court did not issue an injunction. It might

be argued that the order of the District Court, insofar as it failed to include the injunctive relief requested by respondents, is an interlocutory [745] order refusing an injunction within the meaning of § 1292 (a) (1). But even if this would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction.

Nor was this order appealable pursuant to 28 U. S. C. § 1292 (b)[…]Although the District Court's findings made with a view to satisfying Rule 54 (b) might be viewed as substantial compliance with the certification requirement of that section, there is no showing in this record that petitioner made application to the Court of Appeals within the 10 days therein specified. And that court's holding that its jurisdiction was pursuant to § 1291 makes it clear that it thought itself obliged to consider on the merits petitioner's appeal. There can be no assurance that had the other requirements of § 1292 (b) been complied with, the Court of Appeals would have exercised its discretion to entertain the interlocutory appeal.

Were we to sustain the procedure followed here, we would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the question of liability of the defendant, [746] and the defendant would thereupon be permitted to appeal to the court of appeals without satisfying any of the requirements that Congress carefully set forth. We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a "final decision" for appeal in every case, and has in those sections made ample provision for appeal of orders which are not "final" so as to alleviate any possible hardship. We would twist the fabric of the statute more than it will bear if we were to agree that the District Court's order […] was appealable to the Court of Appeals.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded with instructions to dismiss the petitioner's appeal.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

[…]

[…]

[2] The portion of the District Court's order concerning petitioner's hiring and promotion policies was separately appealed to a different panel of the Court of Appeals. The judgment rendered by the Third Circuit upon that appeal is not before us in this case. See *Wetzel* v. *Liberty Mutual Ins. Co.,* 508 F. 2d 239, cert. denied, 421 U. S. 1011 (1975).

[3] "Judgment upon multiple claims or involving multiple parties. "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[4] Following *Mackey,* the Rule was amended to insure that orders finally disposing of some but not all of the parties could be appealed pursuant to its provisions. That provision is not implicated in this case, however, to which *Mackey*'s exposition of the Rule remains fully accurate.

[5] We need not here attempt any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules. See 6 J. Moore, Federal Practice ¶¶ 54.24, 54.33 (2d ed. 1975). It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.

[6]

"The courts of appeals shall have jurisdiction of appeals from:"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

[7] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

3.2.4

Comparison: New York State Appeals

Reprinted below is the text of section 5701 of the New York Civil Practice Law and Rules, the state-law equivalent of 28 U.S.C. §§ 1291–1292. Unlike its federal counterpart, New York law allows parties to appeal most orders—whether final or interlocutory—to the state's Appellate Division (the intermediate appellate court). What difference might this make strategically?

§ 5701. Appeals to appellate division from supreme and county courts.

(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it:

(i) grants, refuses, continues or modifies a provisional remedy; or

(ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or

(iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or

(iv) involves some part of the merits; or

(v) affects a substantial right; or

(vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or

(vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or

(viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or

3. from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

(b) Orders not appealable as of right. An order is not appealable to the appellate division as of right where it:

1. is made in a proceeding against a body or officer pursuant to article 78; or

2. requires or refuses to require a more definite statement in a pleading; or

3. orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

(c) Appeals by permission. An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of the judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

3.2.5

The Final Judgment Rule and Strategy

You should now understand the final judgment rule: in the ordinary situation, the appeal cannot be had until the case has reached its end. That means, if you lose a motion to dismiss for lack of personal jurisdiction, your next time to raise that issue (because it's not really amenable to summary judgment) is that perhaps far off day when trial has been completed. In fact, in the ordinary run of cases, that day never comes, because as you recall most cases never come to trial - they are either voluntarily dismissed, dismissed pursuant to a motion such as summary judgment, or settled.

Facing that reality, you will have strategic decisions to make. If you are facing a lengthy litigation process, you will consider settlement. When and how to pursue settlement presents strategic concerns aside from the desirability of settlement overall. Should settlement be pursued before or after the court rules on a personal jurisdiction motion? If the motion is denied, the leverage of the plaintiff will go up, and the leverage of the defendant will go down. Conversely, if the motion is granted, the plaintiff's leverage is quite low, although the plaintiff can file an immediate appeal and hope to win it. The same logic will apply to other important motions.

The following sections deal with exceptions of various kinds to the final judgment rule. You will see that in some cases an appeal may be had on part of case. In other cases a judge may allow an interlocutory appeal, as happened in the Chinese Drywall cases, to facilitate accurate management of the litigation. In some other situations, a subsidiary issue, such a party being put under an order of contempt, can lead to an appeal. In yet other cases, a claim can be advanced that the judge acted outside the permissible limits of his or her authority, and should be required to act lawfully. As you will immediately see, knowing whether any of these would allow an immediate appeal will have a direct effect on your strategic thinking.

3.3 Rule 54(b) and Cases Involving Multiple Claims

3.3.1 Link to Rule 54

Rule 54(b) is also available in the current complete copy of the Federal Rules that is on TWEN.

https://www.federalrulesofcivilprocedure.org/frcp/title-vii-judgment/rule-54-judgment-costs//

3.3.2 Sears, Roebuck & Co. v. Mackey

SEARS, ROEBUCK & CO. *v.* MACKEY et al.
No. 34.
Argued February 28, 1956.
Decided June 11, 1956.
*428*Walter J. Rockier* argued the cause and filed a brief for petitioner.
Edward I. Rothschild argued the cause for respondents. With him on a brief for Mackey, respondent, was *John Paul Stevens.*
Mr. Justice Burton
delivered the opinion of the Court.

This action, presenting multiple claims for relief, was brought by Mackey and another in the United States District Court for the Northern District of Illinois, Eastern Division, in 1953. The court expressly directed that judgment be entered for the defendant, Sears, Roebuck & Co., on two, but less than all, of the claims presented. It also expressly determined that there was no just reason for delay in making the entry. After Mackey's notice of appeal from that judgment to the Court of Appeals for the Seventh Circuit, Sears, Roebuck & Co. moved to dismiss the appeal for lack of appellate jurisdiction. The Court of Appeals upheld its jurisdiction and denied the *429motion, relying upon 28 U. S. C. § 1291 and Rule 54 (b) of the Federal Rules of Civil Procedure, as amended in 1946. 218 F. 2d 295. Because of the importance of the issue in determining appellate jurisdiction and because of a conflict of judicial views on the subject,1 we granted certiorari. 348 U. S. 970. For the reasons hereafter stated, we sustain the Court of Appeals and its appellate jurisdiction.

Although we are here concerned with the present ap-pealability of the judgment of the District Court and not with its merits, we must examine the claims stated in the complaint so as to consider adequately the issue of appealability.

The complaint contains six counts. We disregard the fifth because it has been abandoned and the sixth because it duplicates others. The claims stated in Counts I and II are material and have been dismissed without leave to amend. The claim contained in Count III and that in amended Count IV are at issue on the answers filed by Sears, Roebuck & Co. The appeal before us is from a *430judgment striking out Counts I and II without disturbing Counts III and IV, and the question presented is whether such a judgment is presently appealable when the District Court, pursuant to amended Rule 54 (b), has made "an express determination that there is no just reason for delay" and has given "an express direction for the entry of judgment."

[…]

The jurisdiction of the Court of Appeals to entertain Mackey's appeal from the District Court's judgment depends upon 28 U. S. C. § 1291, which provides that "The courts of appeals shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States . . . ." (Emphasis supplied.)

If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of § 1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a judgment striking out all four would be a final and appealable decision under § 1291. The controversy before us arises solely because, in this multiple claims action, the District Court has dismissed the claims stated in Counts I and II, but has left unadjudicated those stated in Counts III and IV.2

Before the adoption of the Federal Rules of Civil Procedure in 1939, such a situation was generally regarded as leaving the appellate court without jurisdiction- of an attempted appeal. It was thought that, although the judgment was a final decision on the respective claims in Counts I and II, it obviously was not a final decision of *432the whole case, and there was no authority for treating anything less than the whole case as a judicial unit for purposes of appeal.3 This construction of the judicial unit was developed from the common law which had dealt with litigation generally less complicated than much of that of today.4

With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. Largely to *433meet this need, in 1939, Rule 54 (b) was promulgated in its original form through joint action of Congress and this Court.5 It read as follows:

"(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate

judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

It gave limited relief. The courts interpreted it as not relaxing the requirement of a "final decision" on each individual claim as the basis for an appeal, but as author*434izing a limited relaxation of the former general practice that, in multiple claims actions, *all* the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them.6

Thus, original Rule 54 (b) modified the single judicial unit theory but left unimpaired the statutory concept of finality prescribed by § 1291. However, it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Largely to overcome this difficulty, Rule 54 (b) was amended, in 1946, to take effect in 1948.7 Since then it has read as follows: "(b) Judgment Upon Multiple Claims. *When more than one claim for relief is presented in an action,* whether as a claim, counterclaim, cross-claim, or third-party claim, *the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination**435*that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis supplied.)

In this form, it does not relax the finality required of each decision, as an individual claim, to render it appeal-able, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case. The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure. Its "negative effect" has met with uniform approval. The effect so referred to is the rule's specific requirement that for "one or more but less than all" multiple claims to become appealable, the District Court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." A party adversely affected by a final decision thus knows that *436his time for appeal will *not* run against him until this certification has been made.8

In the instant case, the District Court made this certification, but Sears, Roebuck & Co. nevertheless moved to dismiss the appeal for lack of appellate jurisdiction under § 1291. The grounds for such a motion ordinarily might be (1) that the judgment of the District Court was not a decision upon a "claim for relief," (2) that the decision was not a "final decision" in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order.

In the case before us, there is no doubt that each of the claims dismissed is a "claim for relief" within the meaning of Rule 54 (b), or that their dismissal constitutes a "final decision" on individual claims. Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other.

Petitioner contends that amended Rule 54 (b) attempts to make an unauthorized extension of § 1291. We disagree. It could readily be argued here that the claims stated in Counts I and II are sufficiently independent of those stated in Counts III and IV to satisfy the requirements of Rule 54 (b) even in its original form. If that were so, the decision dismissing them would also be appealable under the amended rule. It is nowhere contended today that a decision that would have been appealable under the original rule is not also appealable under the amended rule, provided the District Court makes the required certification. *437While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54 (b), there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court.9 Thus the instant case affords an excellent illustration of the value of the amended rule which was designed to overcome that difficulty. Assuming that the requirements of the original rule are not met in this case, we nevertheless are enabled to recognize the present appellate jurisdiction of the Court of Appeals under the amended rule. The District Court *cannot,* in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may,* by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is,

with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals.
Rule 54 (b), in its original form, thus may be said to have modified the single judicial unit practice which had been developed by court decisions. The validity of that rule is no longer questioned. In fact, it was applied by this Court in *Reeves* v. *Beardall,* 316 U. S. 283, without its validity being questioned.
*438Rule 54 (b), in its amended form, is a comparable exercise of the rulemaking authority of this Court. It does not supersede any statute controlling appellate jurisdiction. It scrupulously recognizes the statutory requirement of a "final decision" under § 1291 as a basic requirement for an appeal to the Court of Appeals. It merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of by judicial decision. By its negative effect, it operates to restrict in a valid manner the number of appeals in multiple claims actions.
We reach a like conclusion as to the validity of the amended rule where the District Court acts affirmatively and thus assists in properly timing the release of final decisions in multiple claims actions. The amended rule adapts the single judicial unit theory so that it better meets the current needs of judicial administration. Just as Rule 54 (b), in its original form, resulted in the release of some decisions on claims in multiple claims actions before they otherwise would have been released,10 so amended Rule 54 (b) now makes possible the release of more of such decisions subject to judicial supervision. The amended rule preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule.11 Accordingly, the appellate jurisdiction of the Court of Appeals is sustained,12 and its judgment denying the motion to dismiss the appeal for lack of appellate jurisdiction is
Affirmed.
1
[…]
3.4 Discretionary Appeals Under 28 USC 1292

Section 1292, as you may have noted when you read it earlier, allows interlocutory appeals when the trial judge allows such an appeal to be made. The trial judge is limited in his discretion. The statute provides:
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.
In the Chinese Drywall Litigation, appeal of the personal jurisdiction was allowed under section 1292. Below is the court's discussion of the issue in one of the consolidated cases (2012 WL 4928869):
III. LAW AND ANALYSISA. Standard of Review*7 This Court has the discretion to certify its Order and Reasons for interlocutory appeal under 28 U.S.C. §1292(b). *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals."). Pursuant to Section 1292(b), this Court may certify an order for appeal where: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. 28 U.S.C. § 1292(b).Here, the Court finds, and the parties do not dispute, that its Order and Reasons denying challenges to its exercise of personal jurisdiction over Taishan involves a controlling question of law. Similarly, the Court finds that an immediate appeal would materially advance the litigation by eliminating the possibility of a meaningless trial. As to the disputed second element, the Court finds that a substantial ground exists for difference of opinion concerning the propriety of the Court's exercise of personal jurisdiction over Taishan. Although the Court in its Order and Reasons has considered and addressed the arguments Taishan now raises, the Court agrees that Taishan's position is not insubstantial. Accordingly, because the Court finds that its Order and Reasons of September 4, 2012, Record Document 15755, involves a controlling question of law as to which there is substantial ground for difference of opinion, and because the Court further finds that an immediate appeal from that Order and Reasons may materially advance the ultimate termination of this MDL, the Court certifies its Order and Reasons for immediate appeal pursuant to Title 28 of the United States Code, Section1292(b). The Court also finds that a stay of the proceedings against Taishan Gypsum Co. Ltd. and Tai'an TaishanPlasterboard Co., Ltd. pending the appeal is appropriate.Skip to table of contents: III. LAW AND ANALYSISSkip to table of contentsSkip to table of contents: A. Standard of ReviewSkip to table of contents**IV. CONCLUSION**For the foregoing reasons, **IT IS ORDERED** that the following motions are **GRANTED:** (1) Motion Pursuant to 28U.S.C. § 1292(b) to Certify the Court's Order & Reasons for Interlocutory Appeal and Stay Further Proceedings Pending the Appeal filed solely on behalf of Taishan Gypsum Co. Ltd. (R. Doc. 15812); and (2) Motion Pursuant to 28 U.S.C. § 1292(b) to Certify the Court's Order & Reasons for Interlocutory Appeal and Stay Further Proceedings Pending the Appeal filed on behalf of Taishan Gypsum Co. Ltd. and Tai'an Taishan Plasterboard Co. Ltd. (R. Doc. 15813). **IT IS FURTHER ORDERED** that all proceedings

against Taishan Gypsum Co. Ltd. ("TG") and Tai'an Taishan Plasterboard Co., Ltd. ("TTP") be and are hereby **STAYED** during the pendency of this appeal and until further ordered by the Court.

3.5 The Collateral Order Doctrine

3.5.1 Cohen v. Beneficial Industrial Loan Corp.

337 U.S. 541 (1949)
COHEN, EXECUTRIX, ET AL. v. BENEFICIAL INDUSTRIAL LOAN CORP. ET AL.
No. 442.
Supreme Court of United States.
Argued April 18, 1949.
Decided June 20, 1949.
[…]

MR. JUSTICE JACKSON delivered the opinion of the Court.
The ultimate question here is whether a federal court, having jurisdiction of a stockholder's derivative action only because the parties are of diverse citizenship, must apply a statute of the forum state which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment.
[…]

At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U.S.C. § 1291 provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided.[…]
The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. […]
We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient [547] of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.
[…]

3.5.2 Note on Collateral Order Doctrine

Cohen seems to announce a rule that would have broad applicability, but in the event the Supreme Court has often held that a party's interlocutory appeal based on the collateral order doctrine should be rejected despite hardship for the appealing party. As often happens in the common law process, the body of cases following a decision is what tells us to what extent a case will have broad impact. *Cohen* has not been overruled, but in a number of settings where *Cohen* might seem to apply the Supreme Court has refused to apply the doctrine. *See, e.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (Order to disqualify a party's attorney not subject to immediate appeal); *Van Cauwenberghe v. Chasser*, 486 U.S. 517 (1988) (claim thar foreign defendant who had been extradited to U.S. was immune from civil service could wait until end of case); *Lauro Lines S.L.R. v. Chasser*, 490 U.S. 495 (1989) (holding that a defendant's argument that a case should have been filed in Italy instead of the United States in accordance with a contract would be reviewable only at the end of the case); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (holding that immediate review was not available from an order rejecting a party's claim to immunity from a suit under a private settlement agreement); *Cunningham v. Hamilton County*, 527 U.S. 198 (1999) (Imposition of

sanctions for discovery violations on an attorney who no longer represented the client in an ongoing matter could not be appealed while case was not final); Will v Hallock, 546 U.S. 345 (2005) (Judgment bar arising from prior case could not be appealed under *Cohen*).

On the other hand, criminal contempt of court, arising from a situation where a party has refused to obey a court order, has led to some cases where interlocutory appeal is permitted because the issue is both important and distinct from the merits of the underlying case. *See, e.g.*, *United States v. Ryan*, 402 U.S. 530 (1971). In some unique circumstances, the Court has gone even further to allow an appeal. For instance, in the unusual historical circumstances that arose during the Watergate scandal, in *United States v. Nixon*, 418 U.S. 683, 690 - 92 (1974), the Court held that an appeal of an order requiring the President of the United States to produce certain tape recordings was appealable even though the President had not refused to comply and thus had not been held in contempt. According to the Court, "[t]o require a President of the United States to place himself in a posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of government."

3.6 Mandamus

3.6.1 Mandamus

[Some Cohen with modification by Campbell]

Mandamus

Beyond appellate review, you can also petition for what are called "extraordinary writs". These are writs by which the appellate court orders the trial court to do or not to do something. The two most common are *mandamus*, ordering the trial court to do something it has a mandatory duty to do, and *prohibition* to stop the court from doing something it has no jurisdiction to do.

The distinction between mandamus and prohibition has broken down over time such that now the term *mandamus* is the dominant term.

In federal court, the power to issue a writ comes from the All Writs Act, 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The words "in aid of" jurisdiction is interpreted to mean you can only issue a writ when the district court has done something it has no power to do or abused its discretion in a way that usurps power of the Court of Appeals.The words "in aid of" jurisdiction is interpreted to mean you can only issue a writ when the district court has done something it has no power to do or abused its discretion in a way that usurps power of the Court of Appeals.

The grants of writs are always discretionary not automatic, hence the "extraordinary" in "extraordinary writs."The grants of writs are always discretionary not automatic, hence the "extraordinary" in "extraordinary writs."

The error has to be "clear and indisputable" not just a matter where the appeals court has a different view from the district court.The error has to be "clear and indisputable" not just a matter where the appeals court has a different view from the district court.

To get the writ you can't have any other avenue for relief, including appeal. So it isTo get the writ you can't have any other avenue for relief, including appeal. So it is **Not** a substitute for appeal.

Be aware that the standards for obtaining extraordinary writs can and will differ between federal court and state courts, and between different state courts. As is always the case in US litigation, if you find you have a client involved in US litigation you will need to research the standards that apply to the local jurisdiction.

Examples of Situations where Mandamus is Granted In Some Courts

A district court proceeding without Personal Jurisdiction.

Review of judge's decision not to recuse herself

To correct lower court's refusal to permit a jury.

In old days it was used to undo improper class certification for class actions, but the rules introduce a special appellate mechanism in FRCP 23(f) so now mandamus should be unnecessary for that.

Mandamus Cases

(We will see this later this quarter) World Wide Volkswagen v. Woodson arose via a writ of prohibition; Woodson was the judge who denied a motion to dismiss for lack of PJ.

In some states, that is how a mandamus proceeding is captioned, with the name of the judge whose decision is being challenged. In other states, it is the name of the court, so "
Asahi v. Superior Court
." As you read the federal cases, particularly *World Wide Volkswagen v. Woodson,* ask yourself whether today a writ of mandamus would be available in federal court on the same facts and same trial court holding. Once you have resolved that, ask yourself what the strategic implications of any difference would be.
In the federal courts we no longer put the judge's name in since it is too personal. The judge is technically a party but in most cases he does not elect to participate because the losing side is arguing for him….sometimes, though, both sides are against him as in …
Although state practice may differ, obtaining a favorable ruling on a writ of mandamus is very difficult to achieve in federal court, even in cases where deferring review until the end of the case will effectively defeat having any meaningful review at hall. Hence, In *Will v. United States*, 389 U.S. 90 (1967), the court refused to grand mandamus when a criminal defendant had been granted discovery into the prosecution's case. In *Kerr v. United States District Court*, 426 U.S. 394 (1976), the court affirmed denial of mandamus when the claim was a district court should not have ordered the turning over of prison personnel files. In *Cheney v. United States District Court*, 542 U.S. 367 (2004), the court found that mandamus was proper in a dispute in which the Vice President had asserted Executive Privilege in order to not produce discovery into the activities of the National Energy Policy Development Group, an executive branch task force with many energy industry members that was making recommendations on energy policy. Although it granted mandamus the court's test and language make clear how rare a remedy this is. The opinion for the court by Justice Kennedy states:
The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259—260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche* v. *Evaporated Milk Assn.*,319 U.S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,' " *Will* v. *United States*, 389 U.S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial 'usurpation of power,' " *ibid.*, or a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S., at 95. As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, three conditions must be satisfied before it may issue. *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.*–a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey*, *supra*, at 260. Second, the petitioner must satisfy " 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable." ' " *Kerr, supra,* at 403 (quoting *Banker's Life & Casualty Co.*, *supra*, at 384). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra,* at 403 (citing *Schlagenhauf* v. *Holder,* 379 U.S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru,* 318 U.S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will, supra*, at 95, citing *Maryland* v. *Soper (No. 1)*, 270 U.S. 9 (1926). Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations. Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." App. 343. These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. It is well established that "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' " *United States* v.*Nixon*, 418 U.S., at 715. Chief Justice Marshall, sitting as a trial judge, recognized the unique position of the Executive Branch when he stated that "[i]n no case … would a court be required to proceed against the president as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807). See also *Clinton* v. *Jones*, 520 U.S. 681, 698—699 (1997) ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies" (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982))); 520 U.S., at 710—724 (Breyer, J., concurring in judgment). As *United States* v. *Nixon* explained, these principles do not mean that the "President is above the law." 418 U.S., at 715. Rather, they simply acknowledge that the public interest requires that a

coequal branch of Government "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice," *ibid.*, and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.

3.7 Standard of Review and Timing on Appeal

Note directions for FRAP 4.

3.7.1 Standard of Review and Timing on Appeal

[Mainly Cohen with some modification by Campbell]

STANDARD OF REVIEW:

At several points in the course we have asked under what standard an appellate court reviews an element of a district court ruling. As you will see in moot court and in any actual U.S. appellate litigation the standard of review can be very important as to whether you will win the issue on appeal.

From a system design point of view, there is a trade-off between the appellate court's desire to "Get the issue right" by looking at it with its own fresh eyes versus its belief that the district court, which has spent a lot longer with the case, and was sitting in the courtroom in the case of trial, deserves deference for his or her expertise. How that balance is resolved varies by the kind of the issue we are talking about.

Pure questions of law:

- E.g., did you give an improper instruction as to the elements of a claim or defense to the jury? Did you apply the wrong standard for SJ or JMOL? Did you give an improper instruction as to the elements of a claim or defense to the jury?
- Review is **de novo**.
- There is no reason to think the trial judge has more expertise on this issue, appellate judges answer pure questions of law all the time and facts do not matter.

Pure questions of fact (aka "historical fact")

- E.g., Was the light red? Did the defendant drink alcohol before the accident? Did the Def sign the contract? Is the witness lying?
- When judge is sitting as factfinder (bench trial): Review is for clear error. FRCP 52(a). Very deferential. Do not set aside findings of fact "**clearly erroneous**," that is only if "on the entire evidence [the appellate court] is left with the definite and firm conviction that a mistake has been committed." (Pullman-Standard v. Swift, 456 U.S. 273, 289 n.12 (1982)). We give deference here because the trial judge is sitting closer to the evidence, the witness testimony.
- When it is a jury trial there is event more deference because of the 7th Amendment: "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." In this instance the matter is reviewed under a similar standard to the way the court decides to grant a JMOL, you should ask if a reasonable fact-finder could have reached that conclusion, with all evidence, including all credibility determinations and inferences, resolved in light most favorable to the verdict. If so, you don't upset the decision below

Mixed Questions of fact and law:

- What is it? S. Ct. has said "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard, 456 U.S. at 289 n.12.
- E.g.,the words said and actions taken by Def are facts, whether they constitute intentional discrimination is a mixed questions. The representation made by Def is fact, whether it was "material" for stock fraud is a mixed question. Other examples s: Interpretation of a contract; Whether use of copyrighted material is "fair use" ; whether parties agreed to arbitrate a dispute all have been treated as mixed questions.
- Mixed questions are reviewed **de novo**, though some courts, like 1st cir will actually say it is a continuum, the more fact intensive the more deference.

Decisions committed to the sound discretion of the district court:

- **Abuse of discretion** review.
- E.g., whether to allow pleading amendments that are within your discretion, consolidate cases, order separate trials, discovery orders, etc.
- These are the kinds of things that it is harder to say the district judge is wrong about, because there is not a clear cut right and wrong because is discretionary to begin with.
- In general when something is reviewed for abuse of discretion review, the appellate court is very unlikely to overturn the district court's decision on the point.

TIMING FOR AN APPEAL:

You appeal by filing a "notice of appeal" with the district court.

In a civil case, you normally have to file the notice "with the district clerk within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(A).
This rule is jurisdictional and cannot be altered by consent of the parties.
The time limit begins to run when judgment is entered as described in FRCP 58. But if a post-trial motion (such as renewed JMOL, New Trial, 60(b) relief from judgment, etc) is pending and is itself timely filed, the time for filing the notice of appeal does not run until there is an order disposing of that motion. FRAP 4(a)(4).
Only the district court, not the appellate court, can extend the time to file a notice by a maximum of 30 days for "Excusable neglect," but only if the extension motion comes before the end of the 30 day period to file. FRAP 4(a)(5).
In *Bowles v. Russell*, 551 U.S. 205 (2007), an inmate serving a life sentence challenged his conviction through a writ of habeas corpus. He lost in the District Court. Representing himself, he failed to meet the deadline for filing an appeal. The District Court granted his motion to extend the time for filing, and told him that he had seventeen days to make the filing. On the seventeenth day, he filed his appeal. Unfortunately for the prisoner, the District Court had erred in calculating the time to file, and the correct time was fourteen days - which means he missed the filing window by three days.
The Court of Appeals dismissed the appeal for lack of jurisdiction. The Supreme Court affirmed. The Court held that the time to file is jurisdictional, and that it lacked power, no matter how sympathetic or excusable the circumstances, to make exceptions on equitable grounds.
Do you think this was a fair result? Does it matter whether it was 'fair' if the court's power is, in fact, jurisdictionally limited?

3.7.2 FRAP 4(a)

http://www.law.cornell.edu/rules/frap/rule_4

3.7.3 Preserving An Issue For Appeal

To be added

3.8 Reviewing Appeals - The Liberty Mutual Case

3.8.1 Liberty Mut. Ins. Co. v. Wetzel

As you read Liberty Mutual, note the ways in which the Court treats federal appellate jurisdiction as a question that resembles or involves subject matter jurisdiction. Among other similarities, you may notice that: (1) courts may raise the issue sua sponte and (2) parties may not waive such jurisdictional requirements.

424 U.S. 737 (1976)

LIBERTY MUTUAL INSURANCE CO.

v.

WETZEL ET AL[…]

5.

Supreme Court of United States[…]

6.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUI[…]
9] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents filed a complaint in the United States District Court for the Western District of Pennsylvania in which they asserted that petitioner's employee insurance benefits and maternity leave regulations discriminated against women in violation of Title VII of the Civil Rights Act of 1964[…]). The District Court ruled in favor of respondents on the issue of petitioner's liability under that Act, and petitioner appealed to the Court of Appeals for the Third Circuit. That court held that it had jurisdiction of petitioner's appeal under 28 U. S. C. § 1291, and proceeded to affirm on the merits the judgment of the District Court. We [740] granted certiorari[…]), and heard argument on the merits. Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists[…]). Because we conclude that the District Court's order was not appealable to the Court of Appeals, we vacate the judgment of the Court of Appeals with instructions to dismiss petitioner's appeal from the order of the District Court.

Respondents' complaint, after alleging jurisdiction and facts deemed pertinent to their claim, prayed for a judgment against petitioner embodying the following relief:

> "(a) requiring that defendant establish non-discriminatory hiring, payment, opportunity, and promotional plans and programs;
>
> "(b) enjoining the continuance by defendant of the illegal acts and practices alleged herein;
>
> "(c) requiring that defendant pay over to plaintiffs and to the members of the class the damages sustained by plaintiffs and the members of the class by reason of defendant's illegal acts and practices, including adjusted backpay, with interest, and an additional equal amount as liquidated damages, and exemplary damages;
>
> "(d) requiring that defendant pay to plaintiffs and to the members of the class the costs of this suit and a reasonable attorneys' fee, with interest; and
>
> "(e) such other and further relief as the Court deems appropriate." App. 19.

After extensive discovery, respondents moved for partial summary judgment only as to the issue of liabilit[…]). The District Court on January 9, 1974, finding no issues of material fact in dispute, [741] entered an order to the effect that petitioner's pregnancy-related policies violated Title VII of the Civil Rights Act of 1964. It also ruled that Liberty Mutual's hiring and promotion policies violated Title VII.[2] Petitioner thereafter filed a motion for reconsideration which was denied by the District Cour[…]

> 4.

It is obvious from the District Court's order that respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees, but received none.

Counsel for respondents when questioned during oral argument in this Court suggested that at least the District Court's order of February 20 amounted to a declaratory judgment on the issue of liability pursuant to the provisions of 28 U. S. C. § 2201. Had respondents sought *only* a declaratory judgment, and no other form of relief, we would of course have a different case. But even if we accept respondents' contention that the District Court's order was a declaratory judgment on the issue of liability, it nonetheless left unresolved respondents' requests for an injunction, for compensatory and exemplary damages, and for attorneys' fees. It finally disposed of none of respondents' prayers for relief.

The District Court and the Court of Appeals apparently took the view that because the District Court made the recital required by Fed. Rule Civ. Proc. 54 (b) that final judgment be entered on the issue of liability, and that there was no just reason for delay, the orders thereby became appealable as a final decision pursuant to 28 U. S. C. § 1291. We cannot agree with this application of the Rule and statute in question.

Rule 54 ([…][3] "does not apply to a single claim [743] action . . . . It is limited expressly to multiple claims actions in which `one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal.[…][4] Here, however, respondents set forth but a single claim: that petitioner's employee insurance benefits and maternity leave regulations discriminated against its women employees in violation of Title VII of the Civil Rights Act of 1964. They prayed for several different types of relief in the event that they sustained the allegations of their complaint[…], but their complaint advanced a single legal theory which was applied to only one set of facts.[5] Thus, despite the fact that the District Court undoubtedly made the findings required [744] under the Rule, had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U. S. C. § 1291[…]8.

We turn to consider whether the District Court's order might have been appealed by petitioner to the Court of Appeals under any other theory. The order, viewed apart from its discussion of Rule 54 (b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory[…]), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "final" within the meaning of 28 U. S. C. § 129[…]). Thus the only possible authorization for an appeal from the District Court's order would be pursuant to the provisions of 28 U. S. C. § 1292.

If the District Court had granted injunctive relief but had not ruled on respondents' other requests for relief, this interlocutory order would have been appealable under § 1292 (a) (1[…][] But, as noted above, the court did not issue an injunction. It might be argued that the order of the District Court, insofar as it failed to include the injunctive relief requested by respondents, is an interlocutory [745] order refusing an injunction within the meaning of § 1292 (a) (1). But even if this would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction.

Nor was this order appealable pursuant to 28 U. S. C. § 1292 ([…][] Although the District Court's findings made with a view to satisfying Rule 54 (b) might be viewed as substantial compliance with the certification requirement of that section, there is no showing in this record that petitioner made application to the Court of Appeals within the 10 days therein specified. And that court's holding that its jurisdiction was pursuant to § 1291 makes it clear that it thought itself obliged to consider on the merits petitioner's appeal. There can be no assurance that had the other requirements of § 1292 (b) been complied with, the Court of Appeals would have exercised its discretion to entertain the interlocutory appeal.

Were we to sustain the procedure followed here, we would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the question of liability of the defendant, [746] and the defendant would thereupon be permitted to appeal to the court of appeals without satisfying any of the requirements that Congress carefully set forth. We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a "final decision" for appeal in every case, and has in those sections made ample provision for appeal of orders which are not "final" so as to alleviate any possible hardship. We would twist the fabric of the statute more than it will bear if we were to agree that the District Court's orde[…]4, was appealable to the Court of Appeals.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded with instructions to dismiss the petitioner's appeal.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

[…]

[…]

[2] The portion of the District Court's order concerning petitioner's hiring and promotion policies was separately appealed to a different panel of the Court of Appeals. The judgment rendered by the Third Circuit upon that appeal is not before us in this case. See *Wetzel* v. *Liberty Mutual Ins. Co.,* 508 F. 2d 239, cert. denied, 421 U. S. 1011 (1975).

[3] "Judgment upon multiple claims or involving multiple parties. "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[4] Following *Mackey,* the Rule was amended to insure that orders finally disposing of some but not all of the parties could be appealed pursuant to its provisions. That provision is not implicated in this case, however, to which *Mackey*'s exposition of the Rule remains fully accurate.

[5] We need not here attempt any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules. See 6 J. Moore, Federal Practice ¶¶ 54.24, 54.33 (2d ed. 1975). It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.

[6]

> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

[7] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal

hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

3.9 Recap: Remedies, Appeals, and Strategy

How do trial court decisions get reviewed by higher courts? We've seen several methods, and it will be helpful to you to keep them organized analytically.

First, in the US system federal courts generally need affirmative grants of jurisdiction. The Constitution and then a statute needs to give them the authority to hear a case.

The first such grant for appellate jurisdiction that we saw was 28 U.S.C. § 1291. This section provides appellate review when a trial court has made a 'final decision.' You will recall that a final decision is one where, in effect, things have come to end - the court has nothing left to do. It's not just any of the many decisions that judges will make in the course of handling litigation, but the big, concluding, final decision that resolves the claim. In the ordinary case, where the final decision involves all the claims in the case, the loser (and sometimes both sides are losers on different issues) can go straight to the Court of Appeals with her appeal, with no permission required from the trial court.

There are two wrinkles to § 1291, but neither one is an exception to the rule of finality. In both cases, there is a kind of finality, and the grant of appellate jurisdiction still flows from § 1291.

First, FRCP Rule 54(b) deals with those situations where a case has many claims and many parties, which was not the case under some of the common law rules of procedure in effect when preceding versions of what is now § 1291 first took effect. Rule 54(b) addresses this situation by making the trial judge a gatekeeper or a dispatcher. When a final decision is reached on part of a case - that is, if relief is granted to one party on one or more claims, or one party is dismissed, or one claim is dismissed - but other parts of the case continue, those parts where a final decision has been reached can be addressed under Rule 54(b). Imagine a situation where a plaintiff has brought both a contract claim and a fraud claim involving the same set of facts. The trial court dismisses the fraud claim, but allows the contract claim to continue toward trial. Because the dismissal of the fraud claim is a final decision under the meaning of § 1291, the judge can certify that there is no just reason for delay and the plaintiff can (and must if they ever want to take an appeal, because the time to appeal starts running) go straight to the appellate court. Because the judge's decision on the contract claim is not a final decision - the case is not over, but continues - Rule 54(b) does not allow for certification of that issue, and there is no option under Rule 54(b) to get an appeal on that issue.

The second wrinkle is the *Cohen* collateral judgment rule. Under this doctrine, which interprets finality practically, certain side issues are treated as final. An immediate appeal on just that issue is allowed. Again, *Cohen* is clearly situated under § 1291.

We next turn to 28 U.S.C. § 1292. When we get to § 1292, we are not talking variations on the final judgment rule, but true exceptions - situations where no kind of final judgment is required.

The first part of § 1292 that we deal with is § 1292 (a). This statute involves injunctions. Injunctions are not final in the sense required under § 1291 because typically the court will retain jurisdiction and supervise the actions of the parties. Nonetheless, at the time the request for an injunction on the merits of the case has been decided, the court has effectively made its decision - the facts have been weighed, the law has been considered, and the court has decided what it will do. In this context, § 1292

relects a policy choice that even without finality actions such as granting, modifying, or denying an injunction on the merits are actions that warrant immediate appellate review.

Also under § 1292 we have § 1292(b). Again, this represents an exception to finality, and in this case the grant of interlocutory appeals provides a kind of safety valve so immediate appeals can be taken in those somewhat rare situations where waiting for the end of the case would make managing the litigation more difficult for the judge and deciding how to resolve the dispute more difficult for the parties. The decision we read in the Chinese Dry Wall case represents a casebook example of a good application of this gateway to appeal. In that case the decision on personal jurisdiction would be outcome determinative if decided differently, and there were two reasonable sides to this complex issue. Knowing that the issue was finally decided allowed the judge presiding over the multidistrict litigation security in proceeding to merits discovery and resolution over literally thousands of cases, and also allowed the defendants to better calculate the benefits of settlement since they now knew that a free exit thanks to personal jurisdiction was not going to be in the cards. The § 1292 approach requires the judge first to determine that the situation meets the three qualifying categories - if it does not, there is no discretion to allow a § 1292(b) appeal. Even when it does, then both the trial court and the appellate court have discretion with regard to whether the appeal goes forward.

The final way of getting a judge's decision to a higher court that was looked at was the so-called 'extraordinary writ' of mandamus. In understanding mandamus (which means "We command" in the language of Latin) it's important to understand that the writ does not exist, unlike appeals, for the principal purpose of reviewing legal decisions. Rather, it is broader than that. It exists to require that government officials, including but not limited to judges, act in lawful ways. Through mandamus, the court commands government officials to do their duty. It has been used, for example, to command a body charged with accrediting schools to accredit a university according to the lawful criteria, rather than blocking accreditation because they disagreed with religious requirements the school imposed on faculty.

In the context of the courts, mandamus overlaps with a separate doctrine that bears on appellate courts, which the power and duty of appellate courts to supervise those courts underneath them. It's the job of a state supreme court, for example, to address lower court judges who are acting in ways that exceed the authority granted to them, and this duty exists apart from the normal appellate process.

The language of mandamus opinions in all courts makes clear that mandamus is to be granted only in rare circumstances, and that indeed seems to be the practice in the federal courts. If you reread the language in the *Cheney* you will note the general language establishing the extraordinary nature of the writ as well as the demanding three part test, which requires far more than error in the court below. While mandamus was granted in *Cheney*, that was an unusual outcome, and depended in large part on the need to avoid conflict between the executive and judicial branches of the federal government.

The takeaway for those exposed to US federal litigation (and remember that state courts might have different appellate rules, which may be one reason to prefer or not prefer being in state court), is that the default rule where you get an appeal as of right requires that the case be over, done and dusted, final. The wrinkles on and exceptions to § 1291 are things you need to understand and be able to apply as you consider your strategic options, but overall you don't want to confuse the existence of

a doctrine such as collateral issue appeals with a likelihood that such an appeal is likely. Knowing the actual odds and the various wrinkles and exceptions will involve up to date research in the relevant jurisdiction at the time.

4 Service of Process

4.1 Basics

4.1.1 Cheat Sheet on Service of Process in the Federal System

When a lawsuit begins, notice of some kind has to be given to those being sued. There are two dimensions of this that we will study this quarter. Later, we will exam the minimum level of notice that is acceptable under the US Constitution as a matter of due process. Now, we look at the statutes and rules that provide specific methods of service in state and federal courts.

FRCP 4 and the term "service of process", to be finicky, is just for the complaint. It gets singled out because it is of particular importance as the first notice (usually) that there is a lawsuit. All other pleadings, motions, discovery requests, etc, fall under the more forgiving requirements of FRCP 5.

A. Basics.

What is the "process" to be served: technically we mean it is giving the defendant the initial notice of a lawsuit filed against him (aka the summons) with a complaint attached [FRCP 4(a)(1) and 4(c)(1).]

What does the "process" contain?

FRCP 4(a)(1)

Contents. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

For an example look at form 3 linked to on H20.

How do you do service? There are different rules for individuals v. corporations and other entities. The rules also differ, substantially, for service within or outside the US.

For individuals in the U.S.

5 methods. **3 traditional methods** in FRCP 4(e)(2):

(**A) delivering a copy of the summons and of the complaint to the individual personally;**

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Can casual guest accept it under 4(e)(2)(B)? No.

Notice that the (C) clause is more restrictive than the equivalent clause for corporations below, in that it only allows it to go to agents authorized by appointment or by law to receive service of process, not general agents.

What is missing here? Mail. The old system used mail but rulemakers decided it was more hassle than it was worth, so no mail except through the waiver system or if that is authorized by state law system.

Who can be the person who delivers using these options? Anyone over 18 yrs old who is not a party to the action [FRCP 4(c)(2)]

Before 1983 the rule was different and required a US Marshall or someone designated by court. That delayed things a lot, so they scrapped it but at plaintiff's request you could still use a marshall, [FRCP 4(c)(3)] e.g., serving a plaintiff for a battery action in a domestic abuse situation. If the plaintiff is a seaman or in forma pauperis the court must do it by marshall.

4th option: Use the method of service of the state in which the federal court in which you are suing in sits [FRCP 4(e)(1)]. E.g., if in C.D. Cal you can use California's service of process rules. This is plaintiff's option.

5th option: if the defendant resides outside the state in which the action is commenced, you can use *that* state's service rule. [FRCP 4(e)(1)] If you are doing "tag" jurisdiction, you can also serve him with the service rule of the state where you "tag" him (more on this later with *the Burnham* case in the Personal Jurisdiction Section). You would not know it but it comes from the words "where service is made" in 4(e)(1).

Notice that FRCP allows service of process outside of the forum state. That was an innovation from 1993 amendments. Not all states do the same.

For individuals outside the U.S.

Special rules for serving individuals outside the U.S. R.4(f). Different countries use widely different methods of service of process. Rule allows "internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." That convention requires each contracting state to establish a central authority which receives and executes requests for service or process from other contracting states and makes sure that certification of service of process is effective.

The Menon case, below, and the notes that follow will take us a bit deeper into international service of process. Remember that it will vary by country. We will look especially at China.

For corporations, partnerships, associations inside the U.S.

4 methods.

FRCP 4(h)(1)(a): Directs you to **the two options** in FRCP 4(e)(1) (service by the method of the state where the case is filed, or where the corp can be served) [but note, you'd use the equivalent state law method for serving *a corporation*, not serving individuals]

FRCP 4(h)(1)(B) adds **a third and fourth** method:

by delivering a copy of the summons and of the complaint to an officer, a managing or general agent,

or [by delivering it to] any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant

The third: Officers are officially appointed as a matter of corp law, usually required to be identified with forms you file with the state in chartering your corp.

The **fourth** one is meant to be for a case where a contract specifies, for action on this contract about candlestick sales, Jean Valjean will receive service ("by appointment"), or a case where a state says by statute (as we'll see in the *Hess* case later in the course) if you drive in Massachusetts you authorize service on the department of motor vehicles for any suit arising from an accident ("by law").

On the option of delivering to officer, managing, or general agent….

Insurance Co of North America v. S/S Hellenic Challenger (SDNY) is coming right up.

For corporations, partnerships, associations outside the U.S.

FRCP 4(h)(2) directs you to the same methods in FRCP 4(f) for individuals (except personal delivery under FRCP 4(f)(2)(C)(i) - where there is no internationally agreed upon method you cannot use the (i) delivering a copy of the summons and of the complaint to the individual personally. This is a level of detail not worth bothering yourself about.

B. Waiver of Service

A different way of satisfying the rule, without doing service.

FRCP 4(d): Waiver of service is encouraged: the plaintiff notifies the defendant in writing ("by first class mail or other reliable means") that he wants him to waive service with pertinent info (spelled out in rules), the complaint, two copies of a waiver of service form [look at Form 5 and 6 in Canvas] and prepaid envelope asking him to waive service and giving him at least 30 days to respond (60 if outside U.S.). If the defendant fails to waive service without good cause, the def has to pay the expenses of service along with any expenses relating to collecting those expenses (unless the defendant is outside the US, in which case they are not required to pay costs).

If plaintiff uses this method and defendant agrees to waive, the defendant gets 60 days from the day the request for waiver (and complaint) was sent (90 if outside the U.S.) to file answer or 12(b)(6) motion.

So two carrots for the defendant: you don't have to pay for the service and you get extra time to respond.

Waiving service is not a waiver of objections to venue or personal jurisdiction.

Notice how the waiver idea solves any notice concern, if you waive you obviously got it. If you don't we just go back to personal service, the default method.

C. Timing, AKA the consequence of bad service:

FRCP 4(m): For service in the U.S., if the plaintiff fails to serve w/in 120 days of filing complaint, the court can dismiss without prejudice (unless the plaintiff shows good cause for delay).

It is a dismissal without prejudice, so no preclusion effects [we will discuss preclusion later in the course].

D. Challenging Bad Service:

FRCP 12(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

. . .

(4) insufficient process;

(5) insufficient service of process;

. . .

What is the difference between the two provisions? A motion to dismiss under Fed. R. Civ. Pro. 12(b)(4) attacks the sufficiency of process, thus challenging the form of the summons itself. A defect in the form of the summons results from "noncompliance with the provision of [Fed. R. Civ. Pro.] 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the summons." Most defects in the form of the summons are considered technical in nature. E.g., incorrect name of the defendant. Thus, dismissal is generally not appropriate unless the moving party can establish some actual prejudice.

By contrast, a Rule 12(b)(5) motion, which is based on insufficiency of the service of process, does not challenge the form of the summons, but the service of the summons on the defendants. A Rule 12(b)(5) motion is the proper vehicle for challenging the lack of delivery or the failure to comply with the provisions of Rule 4(d)-(m), which outline various requirements of service.

The failure to properly serve defendants grants the court broad discretion to dismiss an action pursuant to Rule 12(b)(5) or quash service of process in the alternative and allow them to re-serve.

E. Return of Service

After process-server has delivered the papers, she must file a return, which should disclose enough facts to demonstrate that defendant actually has been served and given notice to appear in court. Proper return is ordinarily necessary for the trial court to conclude it has jurisdiction. Specific forms differ from state to state. Usually an affidavit by the person who performed the service or sworn statement of marshal, sheriff, if they did it. That is the federal rule in FRCP 4(l) (an affidavit required unless it is US marshal serving),

If you do this there is a strong presumption that Rule was satisfied, can be overcome but very hard to do. Defendant's own testimony is not enough, you need something to corroborate it.

E.g, Miedrich case, S. Ct., upheld a mortgage foreclosure action even though the person was never served, the sheriff just lied and said he did serve. Rationale? The party serving the complaint did everything they were supposed to. Court notes that when the return is false, under that state's law, the aggrieved could proceed against the sheriff who has to post a bond.

4.1.2 FRCP 3

https://www.federalrulesofcivilprocedure.org/frcp/title-ii/rule-3-commencing-an-action/

4.1.3 FRCP 4(a) – (f), (h), (m)

https://www.federalrulesofcivilprocedure.org/frcp/title-ii/rule-4-summons/

4.1.4 FRCP 12(b)(4), (5)

https://www.federalrulesofcivilprocedure.org/frcp/title-ii/rule-4-summons/

4.1.5 Insurance Co. of North America v. S/S "Hellenic Challenger"

31 FR Serv2d 846

88 FRD 545

INSURANCE CO. OF NORTH AMERICA
v.
S/S "HELLENIC CHALLENGER"

US Dist Ct, SDNY, August 27, 1980

[…]

Defendant, Hellenic Lines Limited, has moved for an order of this court to set aside the default judgment entered on February 14, 1980, awarding to plaintiff, Insurance Company of North America, damages of $33,352.02 with interest and costs for cargo damages, shortage, loss and non-delivery. […]

On May 29, 1979, a United States Marshal deposited plaintiff's summons and complaint with a claims adjuster at the office of defendant. The complaint stated an admiralty and maritime claim for $33,352.02 for non-delivery, shortage, loss and damage of a shipment of pickled sheepskins shipped from Port Sudan to New York aboard defendant's vessel, the S/S Hellenic Challenger. Subsequently, the summons and complaint were misplaced and thus were never brought to the attention of the appropriate authorities.

The adjuster who had accepted service of the summons· and complaint is not expressly authorized by defendant to accept service of process; the only employees 'endowed with express authority to accept service of process on behalf of· defendant are all titled officers and the Claims Manager. At the time of service' of the Summons and Complaint, the<·Claims Manager was absent due to' illness and the adjuster, an assistant to the Claims Manager, accepted service.

Since the adjuster misplaced the summons and complaint, defendant remained unaware of the pendency of the lawsuit until March 10, 1980, when defendant's bank informed it that defendant's bank account had been attached by plaintiff. It was at this time that defendant first learned that plaintiff's counsel had filed a default judgment and that a writ of execution had been issued on the judgment for $36,392.06.

[…]

[…] Rule 4(d)(3) *has been liberally construed by the courts and, as interpreted, does not ,require rigid formalism. To be valid, service of process is not limited solely to officially designated officers, managing agents or agents appointed by law for the receipt of process. Rather, "[r]ules governing service of process [are] to be construed in a manner reasonably calculated to effectuate their primary purpose: to give the defendant adequate notice that an action is pending . . . [T]he rule does not require that service be made solely on a restricted class of formally titled officials, but rather permits it to be made 'upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive services.'" Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa, 428 F Supp 1237, 1251 (SDNY 1977) (quoting Montclair Electronics, Inc. v. Electra/Midland Corp., 326 F Supp 839 (SDNY 1971)).

Plaintiff's method of service of the summons and complaint was indeed "reasonably calculated" to alert defendants to the initiation of the suit. Mr. Syed, the adjuster served with the summons and complaint, can be categorized as a representative of defendant "well-integrated" into the organization and quite familiar with the formalities associated with the receipt of service of summonses and complaints. He had accepted service of summonses and complaints on behalf of defendant on at least two previous occasions (PI Exhs L, M) in connection with his ordinary duties of receiving and investigating new claims against. defendant. Furthermore, it may be inferred from the facts presented on this motion that Mr., Syed had easy access to Mr. Diamond, the claims manager officially authorized to accept service of process, since the two men are separated from each other only by Mr. Diamond's glass-walled office. In view of these facts, this court concludes that Mr. Syed was sufficiently acquainted with the procedure associated with receipt of service of process to render it fair and just for this court to imply authority on his part to receive service of the summons and complaint. Mr. Syed's familiarity with service of process negates any and all suspicion that the U. S. Marshal delivered the summons and complaint to a representative of defendant who had infrequent contact with summonses and complaints and whose unfamiliarity with service of process increased the risk of careless or improper handling. See Goetz v. Interlake S. S. Co., 47 F2d 753 (SDNY 1931).

Next, defendant argues that the default judgment should be set aside for the reason that the loss of the summons and complaint constitutes "excusable neglect" pursuant to Rule 60(b) (1) of the Federal Rules of Civil Procedure. Rule 60(b)(l) provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . ."

While Rule 60(b) (1) is designed to grant relief for the .mistakes and excusable neglect of a party who seeks to vacate a default judgment, this remedy has been utilized by courts to rectify mistakes of attorneys but not those of clients. 'Fischer v. Dover Steamship Co., 218 F2d 682 (2d Cir 1955); Greenspun v. Bogan, 492 F2d 375 (1st Cir 1974). "[T]he liberal construction is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients, not where the client's own internal procedures [849] are at fault." Id. at 382. See Horn v. :Intelectron Corp., 294 F Supp 1153 (SDNY 1968).

In the case at hand, the adjuster's loss of the summons and complaint clearly cannot be ascribed to· any carelessness on the part of defendant's counsel. The procedure for handling the receipt of summonses and complaints is clearly an "internal procedure" of defendant. The adjuster's loss of the summons and complaint is a mistake in the ordinary course of the internal operations of defendant's business and thus does not merit remedial relief […]

* Now FRCP 4(h) [#124347]

4.2 Immunity and Etiquette

4.2.1 Article IV, Section 1 of the United States Constitution

ARTICLE IV

Section 1

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

4.2.2 Wyman v. Newhouse

93 F.2d 313 (1937)
WYMAN
v.
NEWHOUSE.
No. 90.
Circuit Court of Appeals, Second Circuit.
December 6, 193[…]

s.

MANTON, Circuit Judge.

This appeal is from a judgment entered dismissing the complaint on motion before trial. The action is on a judgment entered by default in a Florida state court, a jury having assessed the damages. The recovery there was for money loaned, money advanced for appellee, and for seduction under promise of marriag[…]

d.

Appellant and appellee were both married, but before this suit appellant's husband died. They had known each other for some years and had engaged in meretricious relations.

The affidavits submitted by the appellee deemed to be true for the purpose of testing the alleged error of dismissing the complaint established that he was a resident of New York and never lived in Florida. On October 25, 1935, while appellee was in Salt Lake City, Utah, he received a telegram from the appellant, which read: "Account illness home planning leaving. Please come on way back. Must see you." Upon appellee's return to New York he received a letter from appellant stating that her mother was dying in Ireland; that she was leaving the United States for good to go to her mother; that she could not go without seeing the appellee once more; and that she wanted to discuss her affairs with him before she left. Shortly after the receipt of this letter, they spoke to each other on the telephone, whereupon the appellant repeated, in a hysterical and

distressed voice, the substance of her letter. Appellee promised to go to Florida in a week or ten days and agreed to notify her when he would arrive. This he did, but before leaving New York by plane he received a letter couched in endearing terms and expressing love and affection for him, as well as her delight at his coming. Before leaving New York, appellee telegraphed appellant, suggesting arrangements for their accommodations together while in Miami, Fla. She telegraphed him at a hotel in Washington, D. C., where he was to stop en route, advising him that the arrangements requested had been made. Appellee arrived at 6 o'clock in the morning at the Miami Airport and saw the appellant standing with her sister some 75 feet distant. He was met by a deputy sheriff who, upon identifying appellee, served him with process in a suit for $500,000. A photographer was present who attempted to take his picture. Thereupon a stranger introduced himself and offered to take appellee to his home, stating that he knew a lawyer who was acquainted with the appellant's attorney. The attorney whom appellee was advised to consult came to the stranger's home and seemed to know about the case. The attorney invited appellee to his office, and upon his arrival he found one of the lawyers for the appellant there. Appellee did not retain the Florida attorney to represent him. He returned to New York by plane that evening and consulted his New York counsel, who advised him to ignore the summons served in Florida. He did so, and judgment was entered by default[…]l.

These facts and reasonable deductions therefrom convincingly establish that the appellee was induced to enter the jurisdiction of the state of Florida by a fraud perpetrated upon him by the appellant in falsely representing her mother's illness, her intention to leave the United States, and her love and affection for him, when her sole purpose and apparent thought was to induce him to come within the Florida jurisdiction so as to serve him in an action for damages. Appellant does not deny making these representations. All her statements of great and undying love were disproved entirely by her appearance at the airport and participation in the happenings there. She never went to Ireland to see her mother, if indeed the latter was sick at al[…]

6.

This judgment is attacked for fraud perpetrated upon the appellee which goes to the jurisdiction of the Florida court over his person. A judgment procured fraudulently, as here, lacks jurisdiction and is null and void. Lucy v. Deas, 59 Fla. 552, 52 So. 515. Thompson v. Thompson, 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347. A fraud affecting the jurisdiction is equivalent to a lack of jurisdiction. Dunlap & Co. v. Cody, 31 Iowa 260, 7 Am.Rep. 129; Duringer v. Moschino, 93 Ind. 495, 498; Abercrombie v. Abercrombie, 64 Kan. 29, 67 P. 539. The appellee was not required to proceed against the judgment in Florida. His equitable defense in answer to a suit on the judgment is sufficient. A judgment recovered in a sister state, through the fraud of the party procuring the appearance of another, is not binding on the latter when an attempt is made to enforce such judgment in another state[…]t.

The appellee was not required to make out a defense on the merits to the suit in Florida[…]n. An error made in entering judgment against a party over whom the court had no jurisdiction permits a consideration of the jurisdictional question collaterally. The complaint was properly dismissed.

Judgment affirmed.

4.2.3 Types of Immunity From Service

To be added

4.3 Service of Process on International Defendants

4.3.1 Water Splash, Inc. v. Menon

137 S.Ct. 1504

Supreme Court of the United States

WATER SPLASH, INC., petitioner

v.

Tara MENON.

No. 16–254.

Argued March 22, 2017.Decided May 22, 2017.

472 S.W.3d 28, vacated and remanded.
ALITO, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the case.

Opinion
This case concerns the scope of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), 20 U.S.T. 361, T.I.A.S. No. 6638. The purpose of that multilateral treaty is to simplify, standardize, and generally improve the process of serving documents abroad. Preamble, *ibid.*; see Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). To that end, the Hague Service Convention specifies certain approved methods of service and "pre-empts inconsistent methods of service" wherever it applies. Id., at 699, 108 S.Ct. 2104. Today we address a question that has divided the lower courts: whether the Convention prohibits service by mail. We hold that it does not.

I

A

Petitioner Water Splash is a corporation that produces aquatic playground systems. Respondent Menon is a former employee of Water Splash. In 2013, Water Splash sued Menon in state court in Texas, alleging that she had begun working for a competitor while still employed by Water Splash. 472 S.W.3d 28, 30 (Tex.App.2015). Water Splash asserted several causes of action, including unfair competition, conversion, and tortious interference with business relations. Because Menon resided in Canada, Water Splash sought and obtained permission to effect service by mail. *Ibid.* After Menon declined to answer or otherwise enter an appearance, the trial court issued a default judgment in favor of Water Splash. Menon moved to set aside the judgment on the ground that she had not been properly served, but the trial court denied the motion. *Ibid.*

Menon appealed, arguing that service by mail does not "comport with the requirements of the Hague Service Convention." *Ibid.* The Texas Court of Appeals majority sided with Menon and held that the Convention prohibits service of process by mail. Id., at 32. Justice Christopher dissented. Id., at 34. The Court of Appeals declined to review the matter en banc, App. 95–96, and the Texas Supreme Court denied discretionary review, *id.,* at 97–98.

The disagreement between the panel majority and Justice Christopher tracks a broader conflict among courts as to whether the Convention permits service through postal channels. Compare, *e.g.,* Bankston v. Toyota Motor Corp., 889 F.2d 172, 173–174 (C.A.8 1989) (holding that the Convention prohibits service by mail), and Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F.3d 374, 385 (C.A.5 2002) (same), with, *e.g.,* Brockmeyer v. May,383 F.3d 798, 802 (C.A.9 2004) (holding that the Convention allows service by mail), and Ackermann v. Levine,788 F.2d 830, 838–840 (C.A.2 1986) (same). We granted certiorari to resolve that conflict. 580 U.S. ——, 137 S.Ct. 547, 196 L.Ed.2d 442 (2016).

B

The "primary innovation" of the Hague Service Convention—set out in Articles 2–7—is that it "requires each state to establish a central authority to receive requests for service of documents from other countries." Schlunk, supra, at 698, 108 S.Ct. 2104. When a central authority receives an appropriate request, it must serve the documents or arrange for their service, Art. 5, and then provide a certificate of service, Art. 6.

Submitting a request to a central authority is not, however, the only method of service approved by the Convention. For example, Article 8 permits service through diplomatic and consular agents; Article 11 provides that any two states can agree to methods of service not otherwise specified in the Convention; and Article 19 clarifies that the Convention does not preempt any internal laws of its signatories that permit service from abroad via methods not otherwise allowed by the Convention.

At issue in this case is Article 10 of the Convention, the English text of which reads as follows:

"Provided the State of destination does not object, the present Convention shall not interfere with—

"(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

"(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

"(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." 20 U.S.T., at 363.

Articles 10(b) and 10(c), by their plain terms, address additional methods of service that are permitted by the Convention (unless the receiving state objects). By contrast, Article 10(a) does not expressly refer to "service." The question in this case is whether, despite this textual difference, the Article 10(a) phrase "send judicial documents" encompasses sending documents *for the purposes of service.*

II

A

In interpreting treaties, "we begin with the text of the treaty and the context in which the written words are used." Schlunk, 486 U.S., at 699, 108 S.Ct. 2104 (internal quotation marks omitted). For present purposes, the key word in Article 10(a) is "send." This is a broad term,[1] and there is no apparent reason why it would exclude the transmission of documents for a particular purpose (namely, service). Moreover, the structure of the Hague Service Convention strongly counsels against such a reading.

The key structural point is that the scope of the Convention is limited to service of documents. Several elements of the Convention indicate as much. First, the preamble states that the Convention is intended "to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time." (Emphasis added.) And Article 1 defines the Convention's scope by stating that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." (Emphasis added.) Even the Convention's full title reflects that the Convention concerns "Service Abroad."

We have also held as much. Schlunk, 486 U.S., at 701, 108 S.Ct. 2104 (stating that the Convention "applies only to documents transmitted for service abroad"). As we explained, a preliminary draft of Article 1 was criticized "because it suggested that the Convention could apply to transmissions abroad that do not culminate in service." *Ibid.* The final version of Article 1, however, "eliminates this possibility." *Ibid.* The wording of Article 1 makes clear that the Convention "applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended." *Ibid.*

In short, the text of the Convention reveals, and we have explicitly held, that the scope of the Convention is limited to service of documents. In light of that, it would be quite strange if Article 10(a)—apparently alone among the Convention's provisions—concerned something other than service of documents.

Indeed, under that reading, Article 10(a) would be superfluous. The function of Article 10 is to ensure that, absent objection from the receiving state, the Convention "shall not interfere" with the activities described in 10(a), 10(b) and 10(c). But Article 1 already "eliminates [the] possibility" that the Convention would apply to any communications that "do not culminate in service," id., at 701, 108 S.Ct. 2104 so it is hard to imagine how the Convention could interfere with any non-service communications. Accordingly, in order for Article 10(a) to do any work, it *must* pertain to sending documents for the purposes of service.

Menon attempts to avoid this superfluity problem by suggesting that Article 10(a) does refer to serving documents—but only *some* documents. Specifically, she makes a distinction between two categories of service. According to Menon, Article 10(a) does not apply to *service of process* (which we have defined as "a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action," id., at 700, 108 S.Ct. 2104). But Article 10(a) does apply, Menon suggests, to the service of "post-answer judicial documents" (that is, any additional documents which may have to be served later in the litigation). Brief for Respondent 30–31. The problem with this argument is that it lacks any plausible textual footing in Article 10.[2]

If the drafters wished to limit Article 10(a) to a particular subset of documents, they presumably would have said so—as they did, for example, in Article 15, which refers to "a writ of summons or an equivalent document." Instead, Article 10(a) uses the term "judicial documents"—the same term that is featured in 10(b) and 10(c). Accordingly, the notion that Article 10(a) governs a different set of documents than 10(b) or 10(c) is hard to fathom. And it certainly derives no support from the use of the word "send," whose ordinary meaning is broad enough to cover the transmission of *any* judicial documents (including litigation-initiating documents). Nothing about the word "send" suggests that Article 10(a) is *narrower* than 10(b) and 10(c), let alone that Article 10(a) is somehow limited to "post-answer" documents.

Ultimately, Menon wishes to read the phrase "send judicial documents" as "serve a subset of judicial documents." That is an entirely atextual reading, and Menon offers no sustained argument in support of it. Therefore, the only way to escape the conclusion that Article 10(a) includes service of process is to assert that it does not cover service of documents at all—and, as shown above, that reading is structurally implausible and renders Article 10(a) superfluous.

B

The text and structure of the Hague Service Convention, then, strongly suggest that Article 10(a) pertains to service of documents. The only significant counterargument is that, unlike many other provisions in the Convention, Article 10(a) does not include the word "service" or any of its variants. The Article 10(a) phrase "send judicial documents," the argument goes, should mean something different than the phrase "effect service of judicial documents" in the other two subparts of Article 10.

This argument does not win the day for several reasons. First, it must contend with the compelling structural considerations discussed above. See Air France v. Saks, 470 U.S. 392, 397, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)(treaty interpretation must take account of the "context in which the written words are used"); cf. University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. ——, ——, 133 S.Ct. 2517, 2529, 186 L.Ed.2d 503 (2013)("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices").

Second, the argument fails on its own terms. Assume for a second that the word "send" must mean something other than "serve." That would not imply that Article 10(a) must *exclude* service. Instead, "send[ing]" could be a broader concept that includes service but is not limited to it. That reading of the word "send" is probably *more* plausible than interpreting it to exclude service, and it does not create the same superfluity problem.[3]

Third, it must be remembered that the French version of the Convention is "equally authentic" to the English version. Schlunk, 486 U.S., at 699, 108 S.Ct. 2104. Menon does not seriously engage with the Convention's French text. But the word "adresser"—the French counterpart to the word "send" in Article 10(a)—"has been consistently interpreted as meaning service or notice." Hague Conference on Private Int'l Law, Practical Handbook on the Operation of the Service Convention ¶ 279, p. 91 (4th ed. 2016).

In short, the most that could possibly be said for this argument is that it creates an ambiguity as to Article 10(a)'s meaning. And when a treaty provision is ambiguous, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Schlunk, supra, at 700, 108 S.Ct. 2104 (internal quotation marks omitted). As discussed below, these traditional tools of treaty interpretation comfortably resolve any lingering ambiguity in Water Splash's favor.

III

Three extratextual sources are especially helpful in ascertaining Article 10(a)'s meaning: the Convention's drafting history, the views of the Executive, and the views of other signatories.

Drafting history has often been used in treaty interpretation. See Medellín v. Texas, 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008); Saks, supra, at 400, 105 S.Ct. 1338; see also Schlunk, supra, at 700, 108 S.Ct. 2104(analyzing the

negotiating history of the Hague Service Convention). Here, the Convention's drafting history strongly suggests that Article 10(a) allows service through postal channels.

Philip W. Amram was the member of the United States delegation who was most closely involved in the drafting of the Convention. See S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (App.) (1967) (S. Exec. Rep.) (statement of State Department Deputy Legal Adviser Richard D. Kearney). A few months before the Convention was signed, he published an article describing and summarizing it. In that article, he stated that "Article 10 permits direct service by mail ... unless [the receiving] state objects to such service." The Proposed International Convention on the Service of Documents Abroad, 51 A.B.A.J. 650, 653 (1965).[4]

Along similar lines, the Rapporteur's report on a draft version of Article 10—which did not materially differ from the final version—stated that the "provision of paragraph 1 also permits service ... by telegram" and that the drafters "did not accept the proposal that postal channels be limited to registered mail." 1 Ristau § 4–3–5(a), at 149. In other words, it was clearly understood that service by postal channels was permissible, and the only question was whether it should be limited to registered mail.

The Court also gives "great weight" to "the Executive Branch's interpretation of a treaty." Abbott v. Abbott, 560 U.S. 1, 15, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010) (internal quotation marks omitted). In the half century since the Convention was adopted, the Executive has consistently maintained that the Hague Service Convention allows service by mail.

When President Johnson transmitted the Convention to the Senate for its advice and consent, he included a report by Secretary of State Dean Rusk. That report stated that "Article 10 permits direct service by mail ... unless [the receiving] state objects to such service." Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message From the President of the United States, S. Exec. Doc. C, 90th Cong., 1st Sess., 5 (1967).

In 1989, the Eighth Circuit issued *Bankston,* the first Federal Court of Appeals decision holding that the Hague Service Convention prohibits service by mail. 889 F.2d, at 174. The State Department expressed its disagreement with *Bankston* in a letter addressed to the Administrative Office of the U.S. Courts and the National Center for State Courts. See Notice of Other Documents (1), United States Department of State Opinion Regarding the *Bankston* Case and Service by Mail to Japan Under the Hague Service Convention, 30 I.L.M. 260, 260–261 (1991) (excerpts of Mar. 14, 1990, letter). The letter stated that "*Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country." *Id.,* at 261. The State Department takes the same position on its website.[5]

Finally, this Court has given "considerable weight" to the views of other parties to a treaty. Abbott, 560 U.S., at 16, 130 S.Ct. 1983 (internal quotation marks omitted); see Lozano v. Montoya Alvarez, 572 U.S. ——, ——, 134 S.Ct. 1224, 1233, 188 L.Ed.2d 200 (2014) (noting the importance of "read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties" (internal quotation marks omitted)). And other signatories to the Convention have consistently adopted Water Splash's view.

Multiple foreign courts have held that the Hague Service Convention allows for service by mail.[6] In addition, several of the Convention's signatories have either objected, or declined to object, to service by mail under Article 10, thereby

acknowledging that Article 10 encompasses service by mail.[7] Finally, several Special Commissions —comprising numerous contracting States—have expressly stated that the Convention does not prohibit service by mail.[8] By contrast, Menon identifies no evidence that any signatory has ever rejected Water Splash's view.

In short, the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not "interfere with ... the freedom" to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law. See Brockmeyer, 383 F.3d, at 803–804.

Because the Court of Appeals concluded that the Convention prohibited service by mail outright, it had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash. We leave that question, and any other remaining issues, to be considered on remand to the extent they are properly preserved.

For these reasons, we vacate the judgment of the Court of Appeals, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

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Footnotes

1
See Black's Law Dictionary 1568 (10th ed. 2014) (defining "send," in part, as "[t]o cause to be moved or conveyed from a present location to another place; esp., to deposit (a writing or notice) in the mail").

2
The argument also assumes that the scope of the Convention is not limited to service of process (otherwise, Article 10(a) would be superfluous even under Menon's reading). *Schlunk* can be read to suggest that this assumption is wrong. 486 U.S., at 700–701, 108 S.Ct. 2104; see 1 B. Ristau, International Judicial Assistance § 4–1–4(2), p. 112 (1990 rev. ed.) (Ristau) (stating that the English term "service" in the Convention "means the formal delivery of a legal document to the addressee in such a manner as to legally charge him with notice of the institution of a legal proceeding"). For the purposes of this discussion, we will assume, *arguendo,* that Menon's assumption is correct.

3
Another plausible explanation for the distinct terminology of Article 10(a) is that it is the only provision in the Convention that specifically contemplates direct service, without the use of an intermediary. See Brief for United States as *Amicus Curiae*13 ("[I]n contrast to Article 10(a), all other methods of service identified in the Convention require the affirmative engagement of an intermediary to effect 'service' "). The use of the word "send" may simply have been intended to reflect that distinction.

5
Dept. of State, Legal Considerations: International Judicial Assistance: Service of Process (stating that "[s]ervice by registered ... mail ... is an option in many countries in the world," but that it "should ... not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels)"), online at https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html (all Internet materials as last visited May 19, 2017).

6
See, *e.g., Wang v. Lin,* [2016] 132 O.R.3d 48, 61 (Can.Ont.Sup.Ct. J.); *Crystal Decisions (U.K.), Ltd. v. Vedatech Corp.,* EWHC (Ch) 1872 (2004), 2004 WL 1959749 ¶ 21 (High Court, Eng.); R. v. *Re Recognition of an Italian Judgt.*, 2000 WL 33541696, ¶ 4

(D.F.Thes.2000); Case C–412/97, *ED Srl v. Italo Fenocchio,* 1999 E.C.R. I–3845, 3877–3878, ¶ 6 [2000] 3 C.M.L.R. 855; see also Brockmeyer v. May, 383 F.3d 798, 802 (C.A.9 2004) (noting that foreign courts are "essentially unanimous" in the view "that the meaning of 'send' in Article 10(a) includes 'serve' ").

7

Canada, for example, has stated that it "does not object to service by postal channels." By contrast, the Czech Republic has adopted Czechoslovakia's position that "judicial documents may not be served ... through postal channels." Dutch Govt. Treaty Database: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Parties With Reservations, Declarations and Objections, (entries for Canada and the Czech Republic) online at https://treatydatabase.overheid.nl/en/Verdrag/Details/004235_b; see also, *e.g., ibid.* (entries for Latvia, Australia, and Slovenia). In addition, some states have objected to *all* of the channels of transmission listed in Article 10, referring to them collectively with the term "service." See, *e.g., ibid.* (entries for Bulgaria, Hungary, Kuwait, and Turkey).

8

Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions ¶ 55, p. 11 (Oct. 28–Nov. 4, 2003) ("reaffirm[ing]" the Special Commission's "clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels"), online at https://assets.hcch.net/upload/wop/lse_concl_e.pdf; Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ¶ 16, p. 5 (Apr. 1989) (criticizing "certain courts in the United States" which "had concluded that service of process abroad by mail was not permitted under the Convention"), online at https://assets.hcch.net/upload/scrpt89e_20.pdf; Report on the Work of the Special Commission on the Operation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 21–25, 1977, 17 I. L. M. 312, 326 (1978) (observing that "most of the States made no objection to *the service* of judicial documents coming from abroad directly by mail in their territory" (emphasis added)).

* * *

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4.3.2 Notes on International Service of Process

1) Does the defendant need to be served abroad? A potential defendant may be incorporated and headquartered overseas, or may be an individual living off the grid in a far away land. Is it always necessary to make service through 4(f) and, by extension, the Hague Convention? What if the defendant has registered to do business in a U.S. state? In many cases, such registration requires the designation of an agent – perhaps a state official – to receive service. In such situations, courts generally allow service on the designated agent. Fed. Rules Civ. Proc. Rule 4(h)(1)(B), 28 U.S.C.A. What if the defendant has an office or other facility with employees in the United States? In such situations, courts have held that service may be made at the U.S. office. See, e.g., *Vega Glen v. Club Mediterranee S.A.*, 359 F. Supp. 2d 1352 (S.D. Fla. 2005). What if the company has no office of its own, but has a partly or wholly owned subsidiary with offices and operations in the U.S.? These cases get a bit more gnarly, but in some cases courts have held that service could be made on the U.S. based subsidiary. See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 716 (1988). In some cases, a court may allow service on the defendant's U.S. based lawyer if the defendant is unreachable. *See, e.g., Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1023 (9th Cir. 2002) (Email service acceptable where Hague convention was not applicable). Do not fall into the trap of thinking that because the defendant is foreign based that service overseas is the only way to go.

2) As *Menon* makes clear, whether service by mail can be made in lieu of service through the but only if the foreign country at issue has not rejected service by mail. Through a formal reservation to Article 10 of the Hague Convention China has rejected service by mail. *See* https://www.hcch.net/en/instruments/conventions/status-table/notifications/.

3) What happens if a foreign defendant has, in bad faith, sought to evade service? In cases where the Hague convention is not applicable, courts have allowed creative methods of reaching plaintiffs, including email and social media, in situations where the plaintiff clearly is dodging service.

4) The Hague Convention is far from an ideal method for quick, efficient delivery of service. While the US, China, and more than 70 other nations are signatories, the process can be somewhat convoluted. The Hague Convention requires each member country to designate a Central Authority that is responsible for receiving and processing requests to serve defendants located in that country. A plaintiff wishing to serve a defendant abroad must transmit a service request form, along with the summons and complaint, to the Central Authority in the country where the defendant is to be served. (Hague Convention, Article 2-3). The Central Authority is then responsible for delivering the summons and complaint to the defendant and for providing the plaintiff a certificate of service (Hague Convention, Article 5-6.) A plaintiff seeking to serve a defendant through a Central Authority must strictly comply with the Hague Convention's procedures, often must periodically check on the status of service

with a foreign Central Authority, and in many instances must obtain a translation of the summons and complaint. Therefore, service under the Hague Convention can be time-consuming and expensive. The Hague Convention also allows a plaintiff to obtain a default judgment against a foreign defendant if the Central Authority does not provide proof of service within six months of its receipt of a proper request for service (Hague Convention, Article 15).
5) Do you think modern technologies might change the approach enacted in the Hague Convention? For example, if a defendant is known to regularly log on to email or Twitter or WeChat, at some point can service be made through that kind of electronic communication? Even though we are a good quarter century into the internet era, that question remains largely unaddressed, but one would expect modern electronic forms of communication to be taken into account during the span of your career.

5 Personal Jurisdiction

5.1 Introduction to Personal Jurisdiction

As we have discussed some before and will discuss later, courts are limited in many ways with regard to what cases they can hear. In the United States, as we will explore later, that includes the issue of subject matter jurisdiction - in a federal government of limited powers, what kinds of cases can be heard by federal courts?
It also involves the issue of personal jurisdiction, or the court's power to bind a party with its judgment. Worldwide, there is a sense that courts have territorial limits. In the United States, because states are considered separate sovereignties, those territorial limits are often conceived of as state limits.
There are many different ways to establish a court's power over an individual. The following excerpt from the Hague Convention on Judgments reflects an international consensus on settings in which jurisdiction can be established, and you will note that those bases vary. The power can flow from citizenship, the location of property, from activities such as forming and executing contracts or committing torts, from consent, and others.
We will, over the coming weeks, cover all the ways the US establishes personal jurisdiction. The story begins with a case called Pennoyer v. Neff. For generations, Pennoyer has been a kind of rite of passage in American law schools, in part because it requires close and careful reading to understand. You will be expected to give the case that kind of close and careful reading (I am, after all, an evil professor). You will be given, however, a list of questions to address that may help structure that reading so you do not feel altogether lost. This is a very good case to discuss with your study group, if you have one, or a group of friends, if you did not form a study group, so that you can come to class fully prepared.
In class, I will start with the students who are next up when we finish service of process, but may jump around since the questions are already distributed. Please be fully prepared.

5.1.1
Comparative View: Hague Convention on Judgments - Acceptable Jurisdictional Assertions
To provide a comparative viewpoint to the journey we are staring, below is the section of the Hague Convention on Judgments as regards jurisdiction over the parties. This represents an international agreement on assertions of jurisdictional power that are broadly viewed as acceptable.
As we go forward, keep this approach in mind and contrast it to the approach chosen in the United States. Ask yourself which approach provides more clarity and certainty to the parties. Also ask yourself whether the US approach is broader, narrower, or some of both. Keep in mind that some of the jurisdictional categories listed below may be more complicated than they first appear - for example, paragraph J provides:
(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
What does the term "act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred" mean? For example, in a products liability case, does the "act or omission causing such harm" occur where the product fails, proximately causing the injury, or only where it was designed and manufactured?

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
(a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
(b) the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
(d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
(f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
(g) the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
(i) the agreement of the parties, or
(ii) the law applicable to the contract, in the absence of an agreed place of performance,
unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated;
(i) the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem;
(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
(k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
(ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.
This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;
(l) the judgment ruled on a counterclaim –
(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.
For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.
2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –
(a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
(b) paragraph 1(f), (g) and (m) do not apply.
3. Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

5.2 The Beginning

5.2.1 Introduction to Pennoyer

Pennoyer is a difficult case to understand, and that, in fact, is one reason it has remained a staple of the first year law school curriculum for more than a century. Close reading of difficult documents is part of what lawyers do, and any student up to the task of unpacking what lies in the Pennoyer decision will be ready for whatever life throws at them later.

We start with a hint - but one that many students need. There are two lawsuits that matter here. One was filed earlier, proceeded to conclusion, and was never appealed. Then there is a second lawsuit, which is the case which is on appeal. Take the time to understand what happened in each of the lawsuits and why the first matters to the second, and you are on track to understanding the case.

5.2.2 Pennoyer v. Neff

Please be prepared to answer the questions that follow the case. This is a good case to discuss before class, and perhaps after class as well, with members of your regular study group or any ad hoc group you can pull together.

95 U.S. 714 (____)

PENNOYER

v.

NEFF.

Supreme Court of United States[…]

a.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of Sept. 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J.H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State [720] that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. D'Arcy v. Ketchum et al., 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

[721] There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type, — he does not usually have a foreman or clerks, — it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case; observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." Bunce v. Reed,

16 Barb. (N.Y.) 350. And, following this ruling, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. Sharp v. Daugney, 33 Cal. 512. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his Dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand [722] of a resident creditor except by a proceeding in rem; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status *and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding [723] such persons or property in any other tribunals." Story, Confl. Laws, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. Penn v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch, 148; Watkins v. Holman, 16 Pet. 25; Corbett v. Nutt, 10 Wall. 464.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident [724] have no property in the State, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in Picquet v. Swan, 5 Mas. 35, Mr. Justice Story said: —

"Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to

compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason, that, except so far as the property is concerned, it is a judgment coram non judice."

And in Boswell's Lessee v. Otis, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said: —

"Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

These citations are not made as authoritative expositions of the law; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in Cooper v. Reynolds, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served [725] with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. In that case, the action was for damages for alleged false imprisonment of the plaintiff; and, upon his affidavit that the defendants had fled from the State, or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in ex parte as to them. Publication was had; but they made default, and judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding, the court, speaking through Mr. Justice Miller, said: —

"Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear; and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is [726] the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.[…]

. It is the only doctrine consistent with proper protection to citizens of other States. If, without personal service, judgments in personam, obtained ex parte** against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon [727] which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate

it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.
The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below: but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and [728] the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In Webster v. Reid, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said: —
"These suits were not a proceeding in rem against the land, but were in personam against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."
[729] The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter. M'Elmoyle v. Cohen, 13 Pet. 312. In the case of D'Arcy v. Ketchum, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the Circuit Court of the United States for Louisiana, brought upon a judgment rendered in New York under a State statute, against two joint debtors, only one of whom had been served with process, the other being a non-resident of the State. The Circuit Court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments by any State of the Union, so far [730] as known; and that the State courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was

not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another." The Lafayette Insurance Co. v. French et al., 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of Thompson v. Whitman, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the State and Federal courts, where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interests in property, within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily [731] appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In Bissell v. Briggs, decided by the Supreme Court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned, and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one State has goods, effects, and credits in another, his creditor living in the other State may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the State of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the State of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.

In Kilbourn v. Woodworth, 5 Johns. (N.Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that [732] the attachment bound only the property attached as a proceeding in rem, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice DeGrey, used in the case of Fisher v. Lane, 3 Wils. 297, in 1772. See also Borden v. Fitch, 15 Johns. (N.Y.) 121, and the cases there cited, and Harris v. Hardeman et al., 14 How. 334. To the same purport decisions are found in all the State courts. In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is coram non judice and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, — it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered[…]3.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals [733] of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the

personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against [734] him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings in rem in the broader sense which we have mentione[…]

5.

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute [735] right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., sect. 156.

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in Vallee v. Dumergue, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also The Lafayette Insurance Co. v. French et al., 18 How. 404, and Gillespie v. Commercial Mutual Marine Insurance Co., 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their [736] interest subject to the conditions prescribed by law. Copin v. Adamson, Law Rep. 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.
MR. JUSTICE HUNT dissentin[…]
e.
The precise case is this: A statute of Oregon authorizes suits to be commenced by the service of a summons. In the case of a non-resident of the State, it authorizes the service of the summons to be made by publication for not less than six weeks, in a newspaper published in the county where the action is commenced. A copy of the summons must also be sent by mail, directed to the defendant at his place of residence, unless it be shown that the residence is not known and cannot be ascertained. It authorizes a judgment and execution to be obtained in such proceeding. Judgment in a suit commenced by one Mitchell in the Circuit Court of Multnomah County, where the summons was thus served, was obtained against Neff, the present plaintiff; and the land in question, situate in Multnomah County, was bought by the defendant Pennoyer, at a sale upon the judgment in such suit. This court now holds, that, by reason of the absence of a personal service of [737] the summons on the defendant, the Circuit Court of Oregon had no jurisdiction, its judgment could not authorize the sale of land in said county, and, as a necessary result, a purchaser of land under it obtained no title; that, as to the former owner, it is a case of depriving a person of his property without due process of la[…]
y.
The result of the authorities on the subject, and the sound conclusions to be drawn from the principles which should govern the decision, as I shall endeavor to show, are these: —
1. A sovereign State must necessarily have such control over the real and personal property actually being within its limits, as that it may subject the same to the payment of debts justly due to its citizens.
2. This result is not altered by the circumstance that the owner of the property is non-resident, and so absent from the State that legal process cannot be served upon him personally.
3. Personal notice of a proceeding by which title to property is passed is not indispensable; it is competent to the State to authorize substituted service by publication or otherwise, as the commencement of a suit against non-residents, the judgment in which will authorize the sale of property in such State.
4. It belongs to the legislative power of the State to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.
5. Whether the property of such non-resident shall be seized [738] upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a matter not of constitutional power, but of municipal regulation only.
To say that a sovereign State has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustaine[…]
[…]
e.
Without going into a wearisome detail of the statutes of the various States, it is safe to say that nearly every State in the Union provides a process by which the lands and other property of a non-resident debtor may be subjected to the payment of his debts, through a judgment or decree against the owner, obtained upon a substituted service of the summons or writ commencing the action.
The principle of substituted service is also a rule of property under the statutes of the United State[…]
r.
All these statutes are now adjudged to be unconstitutional and void. The titles obtained under them are not of the val[…]1] of the paper on which they are recorded, except where a preliminary attachment was issue[…]
n.
I am not willing to declare that a sovereign State cannot subject the land within its limits to the payment of debts due to its citizens, or that the power to do so depends upon the fact whether its statute shall authorize the property to be levied upon at the commencement of the suit or at its termination. This is a matter of detail, and I am of opinion, that if reasonable notice be given, with an opportunity to defend when appearance is made, the question of power will be fully satisfied.
* Why do you think the Court raises the issue of civil status? When they discuss civil status, they are talking about such things as marital status. ** If you don't know what terms like ex parte mean, look them up in Black's Law Dictionary. You can share this work with other members of your study group.

5.2.3 Pennoyer Questions

What is *in rem* jurisdiction? (See the discussion below and remember that Black's is useful for questions like this).
With regard to the property here, what would have an *in rem* suit looked like?
Why would *in rem* be considered to give jurisdiction over Neff, even if he was out of state?
Is that explanation always going to be consistent with the facts, or is it a fiction?
What is *quasi in rem* jurisdiction?
How would a *quasi in rem* lawsuit be started in case 1?
Why would *quasi in rem* be considered to give jurisdiction over Neff, even if he was out of state?
Is that explanation always going to be consistent with the facts, or is it a fiction?
What is *in personam* jurisdiction?
Explain the difference between *in personam* and *in rem* jurisdiction.
Explain the difference between *in personam* and *quasi in rem* jurisdiction.
Was Suit 1 brought as an *in personam* or *in-rem* suit? Please provide support for your answer (page and paragraph).
How was service made in Suit 1?
Did anyone appear to question the method of service in the first suit?
When did the property become Neff's?
When did it enter litigation?
Why didn't the property provide an adequate jurisdictional basis for the first suit?
What did the property have to do with the first suit?
What actions did Neff take in suit 1?
What was the result in Suit 1?
What is a default judgment?
What is a sheriff's deed and how did this property come to be sold pursuant to a sheriff's deed?
Did Neff take an appeal from the first suit?
Was Pennoyer part of the first suit?
When and how does Pennoyer enter the situation?
Who sued whom in Suit 2?
What claim is being asserted?
What is the legal basis for that claim?
How is the first suit relevant to the second suit?
Did the district court look at the method of service in the first suit?
What defects, if any, did the district court identify in the service of process?
What was the result in the lower (trial) court in suit 2?
What was the basis of the lower court's holding in suit 2?
What was the result of Suit 2 in the U.S. Supreme Court?
Did the Supreme Court affirm, reverse, or vacate the ruling of the lower court?
Did the Supreme Court apply the same reasoning as the lower court?
Identify the two "principles of public law" the Supreme Court relied upon in support of its decision.
How did the Supreme Court apply these principles of public law to the facts of this case? (In other words, why did the Supreme Court conclude that there was no personal jurisdiction over Neff in Suit 1?)
Although the court's opinion is based on the two "principles of public law" you discussed in question 8, the opinion also discussed several U.S. constitutional provisions. What Constitutional provisions does the court discuss?
When did those Constitutional provisions become law?
Is this discussion necessary to the holding of the case? Why or why not?
What do we call discussion in a case that is not necessary to the holding?
Does such discussion matter?
What is "full faith and credit"?
Does the Court hold it governs the outcome here?
Why or why not?
State in your own words the holding of *Pennoyer v. Neff*
If you are advising a client after *Pennoyer v. Neff* who is a citizen of a state but not physically present in that state, what would you tell them about whether the holding of *Pennoyer v. Neff* applies to their situation if they are sued in the state where they are a citizen?
If you are advising a client after *Pennoyer v. Neff* who is a citizen of a state but not physically present in that state, what would you tell them about what guidance in *Pennoyer v. Neff* applies to their situation if they are sued in the state where they are a citizen?

Same questions, if they were married in a forum state and their spouse now wishes to file a divorce action in that state?
Same questions, if a state has required a corporation to appoint an in state agent for service of process in order to do business in the state?
If a valid judgment is entered against your client in a state other than the forum state, does the holding of *Pennoyer v. Neff* require that that judgment be given recognition in a second state?
Notwithstanding what you think about what the holding requires, if a valid judgment is entered against your client in a state other than the forum state, would you advise a client after *Pennoyer v. Neff* that the judgment will be given recognition in a second state?
Create a timeline with the following dates in it: When Neff retained Mitchell, When Mitchell Sued Neff for not paying legal fees, When Mitchell received his default judgment, When Neff received his land grant, When Mitchell had the property seized to satisfy the debt, when the sheriff's sale took place, when Pennoyer acquired the property, when the second suit was filed. See if understanding the timeline helps you understand the case a bit better.

5.2.4 The Factual Background of Pennoyer v. Neff

You are not required to read the linked article, but if you have an interest and have the time, it provides some fascinating background to the characters involved in Pennoyer v. Neff. To give you just a taste:
Early in 1862 Neff made the unfortunate decision to consult a local Portland attorney, J. H. Mitchell. Although the nature of the legal services is unclear, Neff may have consulted Mitchell in an attempt to expedite the paperwork concerning his land patent. Neff was illiterate, and at the time he consulted Mitchell the government had still not issued his patent. Mitchell, moreover, specialized in land matters. In mid-1862, several months after Neff first consulted Mitchell, another affidavit was filed on Neff's behalf. Several months thereafter Neff received a document from the government certifying that he had met the criteria for issuance of a patent.

Whatever Neff's reasons for seeking Mitchell's legal services, he certainly could have done better in his choice of lawyers. 'J. H. Mitchell' was actually the Oregon alias of one John Hipple. Hipple had been a teacher in Pennsylvania who, after being forced to marry the 15-year-old student whom he had seduced, left teaching and took up law. He practiced with a partner for several years, but apparently concluded that it was time to move on to greener pastures. Thus, in 1860 Hipple headed west taking with him four thousand dollars of clientmoney and his then current paramour, a local school teacher. They made their way to California where Hipple abandoned the teacher, ostensibly because she was sick and her medical expenses had become too burdensome, and moved on to Portland, Oregon. There, using the name John H. Mitchell, he quickly established himself as a successful lawyer, specializing in land litigation and railroad right-of-way cases. He also remarried without bothering to divorce his first wife. As one historian has observed, Mitchell's success as a lawyer cannot be attributed to either intellectual or oratorial skills; rather, his strengths included exceptional political instincts, a generous disposition, and a friendly handshake. What he lacked in ethics and ability, he made up for with persistence and desire for success. In his subsequent political career, he became known as a man whose 'political ethics justified any means that would win the battle.'
Despite his character flaws, Mitchell went on to become a US Senator from Oregon. He eventually left office and soon thereafter died after being caught up in a major corruption scandal. Pennoyer, who had bought the plot of land from Mitchell after the sheriff's sale, went on to become governor of Oregon. One of his key campaign positions, incidentally, was opposition to Chinese immigration in Oregon, with the US at that time going through one of its periodic anti-immigrant moods. He retained bitter animosity toward the US Supreme Court due to the decision in this case, and made attacking the US Supreme Court the centerpiece of his inaugural address as Governor. Neff disappears from view after the case, but apparently despite being unable to read and write he had prospered financially after moving to California.
https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1479&context=law-faculty-publications

5.2.5 In Rem, Quasi-in-Rem, and In Personam Personal Jurisdiction

You saw in *Pennoyer* reference to different types of jurisdiction - *in rem*, *quasi in rem*, and *in personam*. It would have been a good idea to look up those terms, and others, in Black's Law Dictionary.
All of these terms are Latin terms because, especially back in the day, lawyers liked to use a language no uneducated person could speak or understand (well, maybe that was not the reason, but it certainly was the effect). The word *res* (*rem* when it is the object of a preposition) simply means thing. *In rem* and *quasi in rem* both refer to jurisdiction that is established because a thing - that is to say, some property belonging to the defendant - is located within the boundaries of the forum state. *Personam* means, no surprise, person, and *in personam* jurisdiction means jurisdiction established over a person.
In Rem jurisdiction: *In rem* jurisdiction involves disputes about the ownership of a specific piece of property, and seeks to resolve that ownership issue against all possible claimants. For example, if a suit was brought to establish the true owner of the famous house and land of the Blackacre estate, the lawsuit would proceed as *In Re Blackacre* and be *in rem*. Common example in modern litigation is ownership of a ship or its contents in admiralty, or actions to condemn a piece of property and

shift ownership to the state. Another modern application is lawsuits over whether property seized for forfeiture - as, for example, when the car, boat, or home of an alleged drug dealer of illegal drugs is seized under civil forfeiture laws that enhance criminal penalties - has been lawfully seized; such lawsuits proceed *in rem*. A relatively new application is litigation over who owns an internet URL, which proceed *in rem* against the domain address itself. *In rem* litigation is against all the world - it purports to resolve the ownership of the thing against all possible owners. *In rem* litigation typically begins with the attachment or seizure of the piece of property, followed by giving notice to those who are known to claim or who might claim ownership of the property, and purports to resolve the legal question against any possible owner in existence. *In rem* cases are styled not with the names of the party, but *In Re [Property]*, such as *In Re 40 Shipping Containers*. (Note that not all *In Re* captions involve in rem litigation; the *in re* style also is used in bankruptcy and in multidistrict or other mass litigation).

Quasi In Rem cases: Like *in rem* cases, *quasi in rem* case involve property; unlike true *in rem* cases, *quasi in rem* cases do not purport to resolve the status of property against all the world. Rather, they proceed like an *in personam* case, and the property both provides a basis for jurisdiction and a way to satisfy the judgment if the plaintiff wins. There are two types of *Quasi in Rem* cases, and the difference can be important. Type One ("QIR1") cases are where the case is in some sense about the property - for example, a lawsuit between plaintiff and defendant about which of them has a better claim to own the famous landed estate Blackacre. Such a case would be styled with the names of the party, like an *in personam* case - for example, *Cousin v. Cousin*. Unlike a true *in rem* case, there is no claim that the ownership of the property will be decided against all the world, persons present and not present. Rather, the object of the lawsuit is to resolve the ownership as between the parties in the lawsuit. Type Two ("QIR2") cases are not about ownership of the property. In these cases, the property is incidental to the claims in the case, but it provides a connection between the defendant and the forum, and provides a way to satisfy any judgment. The theory was that people were always aware of what was happening with their property, and so that it was fair to attach the property and bring a lawsuit where the property was even if it had no connection to the case (we will see when we get to the *Shaffer* case that ideas as to what is sufficiently fair can change).

Back in the day, under the strict territorial regime of *Pennoyer*, *in rem* and *quasi in rem* in general provided a way to get jurisdiction in a local jurisdiction even when the defendant could not be reached under the *in personam* approach set out in *Pennoyer*. If the defendant had sufficient assets in the local jurisdiction, a proceeding on a QIR2 basis would provide a way for a local court to assert jurisdiction even on matters unrelated to the state. (Again, when we get to *Shaffer*, we will see how the doctrine has shifted).

There are two disadvantages to *In Rem* and *Quasi In Rem* personal jurisdiction as opposed to getting *in personam* personal jurisdiction. (1) Cases that are *In Rem* and *Quasi in Rem* are enforceable only to the extent of the property in the jurisdiction. If a case is brought *Quasi in Rem*, using a $200,000 Maserati car as the *rem* but the claimed damages are $1,000,000, the enforcement is limited to that car. In contrast, *in personam* judgments can be enforced against any property of the losing party that can be found. 2) Because *Quasi in Rem* cases do not involve establishing personal jurisdiction over the defendant, they are not portable to other jurisdictions under the Full Faith and Credit Clause. The Full Faith and Credit Clause requires that, in the first case, personal jurisdiction be properly established over the defendant, and when the jurisdiction is established over a thing and not a person that step doesn't happen. The result is that the ruling is enforceable only in the original state and against the attached assets.

Note that for both *in rem* and *quasi in rem* the property involved can be either tangible or intangible. Tangible property includes things such as the real estate known as Blackacre or the forty containers of widgets that have landed at the dock in San Jose, California. For some tangible property, such as Blackacre, the location never changes; for other tangible property such as the containers of widgets, the location of the property at any given moment is clear. Intangible property involves assets that do not have a physical presence - for example, the ownership of a debt. In such cases, the location can be unclear and even contested as different jurisdictions may apply different rules to assigning a location to such intangible assets.

5.2.6 States as Sovereigns

As you will recall from our discussion of US history and the US Constitutional system, the British colonies that later formed into the United States were all originally separate from one another, and viewed themselves as independent sovereigns. In significant ways, the US Constitution preserved the notion that states retained important elements of sovereignty, which limited both the federal government and, relevant in this setting, any other states that might wish to intrude upon their sovereign zone.

To some degree in this course but more in a Constitutional law course, you will have an opportunity to examine whether the Fourteenth Amendment and its expansive application (an application that owes no small debt to *Pennoyer's* assertion that the Fourteenth Amendment could matter to such things as a local sale of land) has effectively reduced the states versus the federal government to something less than sovereigns in their dealings with the federal government. What we will examine more in this course is whether state sovereignty, and the limits put on state power in order to allow sister states to have equivalent sovereignty, continues as a motivating factor in personal jurisprudence doctrine. We don't want to spoil the big reveals that are coming, but stay alert to this issue as we go forward.

5.2.7 Direct versus Collateral Attacks on the Sufficiency of Personal Jurisdiction

Think a moment about how the issue of personal jurisdiction was contested in this case. Neff never appeared in the first action, and of course took no appeal. Rather, in a separate action, the issue of the validity of the first action became the decisive issue. Challenging whether there was personal jurisdiction in the first action allowed him to challenge whether the first judgment had any validity, and to therefore set it aside as having no effect if he could persuade the court that there was no personal jurisdiction in the first case.

The difference between taking an appeal and challenging the validity of the first case in a separate action is referred to as a direct attack on personal jurisdiction versus a collateral attack on personal jurisdiction.

For a direct attack, the party must be part of the first litigation. That is to say, they must appear, and raise the issue in the proper fashion. The cost is, if the court rules against them they are bound by that decision, having submitted to the court's authority, and as we've already seen a meaningful appeal of the trial court's decision may occur at a distant date, if ever. One advantage is that once they are in the lawsuit, they can raise whatever defenses on the merits they may have. Here, for example, the claimed legal fees from Pennoyer seem quite high for what it appears he did for Neff, and Neff might have had a defense that all fees had been paid or that the actual amount owing was far less than Pennoyer claimed. By not appearing, those defenses were lost forever.

For a collateral attack, the invalidity of the first judgment is asserted in a second litigation. Here, somewhat unusually, Neff filed a writ of ejectment to make Pennoyer leave his land. In response, Pennoyer asserted that he held lawful title pursuant the sheriff's sale that took place as a result of the first lawsuit; Neff then responded that the judgment in the first lawsuit was invalid due to lack of jurisdiction, and that therefore the sheriff's sale was invalid. A more common application of a collateral attack is to assert the invalidity of the first judgment when a party seeks to enforce a default judgment in a location where the defendant has assets.

A collateral attack cannot be made when you have appeared in the first litigation. If you appear, you are bound, and you cannot have both an appeal (however distant) and a collateral attack. An appearance waives your ability to make a collateral attack.

On the other hand, if you don't appear, the normal course is for a default judgment to be entered. This judgment can be for any amount up to the damages claimed in the plaintiff's claim. If the plaintiff seeks $1 billion for the loss of the famed Magic Water Bottle of Shenzhen, it is entirely possible that a $1 billion judgment will be entered and be presumptively enforceable, even if litigation on the merits would have shown a true value of 33 cents for a very ordinary water bottle. If you default, what you waive is any chance to ever raise those substantive defenses. In effect, you gamble that you will win on the issue of personal jurisdiction (or notice, or other issue that undercuts the validity of the judgment).

If this is in any way unclear to you, Black's has a good definition of collateral attack.

Why does this matter to you? If you represent a client who has been sued, and there is a plausible defense on an issue such as personal jurisdiction, you and your client will have to make a strategic decision on whether to appear. If you default, you can still challenge personal jurisdiction, and if you win the default judgment will not be enforced by the second court. If you lose, however, it will be enforceable anywhere in the US where your client has assets. On other hand, if you appear and the court rules against you, you may find yourself enmeshed in expensive, protracted litigation, with any appellate review of the key issue a long way away. You and your client will have decide which way to go based on a careful examination of the alternatives, which include matters such as the tendency of the judge on the case to grant or deny personal jurisdiction motions, the amount claimed in the complaint, the strength of the personal jurisdiction argument, the strength of any arguments on the merits, and the presence of assets in any jurisdiction where a US default judgment might be enforced. It can be a very tough call with no obvious correct answer. Of course, making the right decision in tough situations is what great lawyers do.

5.3 The Modern Doctrine and the Constitutional Limits of Due Process

5.3.1 Pennoyer to International Shoe

This note helps explain the Supreme Court's treatment of the Traditional Bases in the post-Pennoyer but Pre-International Shoe era.

Traditional Bases: *Domicile* (in the Absence of Presence)

The Supreme Court explained the extent of U.S. courts' personal jurisdiction over citizens both abroad and in other states of the union, and relatedly, the ability of such courts to render binding decisions in the absence of such citizens when duly served in *Blackmer v. U.S.* (for U.S. citizens abroad) and *Milliken v. Meyer* (for U.S. citizens in a U.S. state other than their state of domicile).

In *Blackmer v. U.S.*, 284 U.S. 421 (1932), the Supreme Court unequivocally asserted the jurisdiction of U.S courts over U.S. citizens duly served abroad and the validity of judgments rendered in their absence if they failed to appear. In *Blackmer*, the Court found that the service of process on an American citizen in France by a means consistent with U.S. legislation is no imposition or encroachment on foreign sovereign. The duty of such a citizen duly served was framed as a matter that arises

"solely … between the United States and the citizen." The Court explained that "the jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, and he is personally bound to take notice of the laws that are applicable to him and to obey them."

Milliken v. Meyer, 311 U.S. 457 (1940) confirmed that the same principle applied to the power of a state court over absent citizens who are found in other U.S. states. Meyer, a Wyoming resident, was served in Colorado for a claim brought before a Wyoming state court. Meyer refused to appear, and a default judgment was rendered against him. When Milliken subsequently tried to enforce the order against Meyer in Colorado, Meyer resisted, but the Supreme Court held that the Wyoming judgment was valid and entitled to full faith and credit. The Court found that "[d]omicile alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service … [T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of domicile may also expect reciprocal duties."

Traditional Bases: *Agency* and *Consent* (and Automobiles)

As interstate mobility increased and interstate movement of citizens became more commonplace in the early twentieth century as a result of the popularity and availability of automobiles, states began to enact new laws to ensure that they would be able to exercise jurisdiction over out-of-state drivers (even after they had left the forum state) for acts that had occurred while in the forum state.

New Jersey, for example, enacted a law requiring out-of-state drivers to formally consent to New Jersey state court jurisdiction by filing an instrument appointing a New Jersey agent to receive process on their behalf before being able to use the state's highways. When challenged, the requirement was upheld by the Supreme Court in *Kane v. New Jersey*, 242 U.S. 160 (1916). However, the burden of obtaining express consent from all out-of-state motorists soon proved to be unworkable, and states moved towards modes of establishing implied consent to jurisdiction.

Massachusetts, for example, enacted a law which equated the fact of a nonresident's "operat[ion] … of a motor vehicle on a public way in the commonwealth" with "an appointment by such nonresident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which the said nonresident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any process against him which is so served shall be of the same legal force and validity as if served on him personally." The law outlined the procedures for such process requiring that "[s]ervice of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said nonresident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration."

Unlike the New Jersey law which required an out-of-state driver to explicitly file paperwork appointing an agent in the state, the Massachusetts law imputed (implied) consent to jurisdiction to the act of driving on Massachusetts roads by appointing the state registrar an agent for process purposes.

The compliance of the Massachusetts law with the due process clause of the Fourteenth Amendment was challenged by a Pennsylvania motorist who was served in accordance with the law after allegedly "negligently and wantonly dr[iving] a motor vehicle on a public highway in Massachusetts" that struck and injured the defendant in *Hess v. Pawloski*, 274 U.S. 352 (1927). Although the Court recognized that "[n]otice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. … There must be actual service within the state of notice upon him or upon some one authorized to accept service for him" and that "[t]he mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts," the Court nonetheless upheld the Massachusetts law and the validity of the service of process it authorized.

In reaching this conclusion, the Court first noted that "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways." Importantly, the statute limited implied consent to "proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved" and did not authorize general, all-purpose jurisdiction over such nonresident. Furthermore, the statute required actual receipt of such notice and provided measures to ensure that reasonable time and opportunity for defense were available.

Ultimately, the Court concluded that "[t]he difference between the formal and implied appointment [of an in-state agent for service of process] is not substantial, so far as concerns application of the due process clause of the Fourteenth Amendment."

Traditional Bases: Corporations?

The limits of the traditional bases were also tested as corporations became more and more significant interstate actors.

Similar to the case of automobiles, many states began developing theories of either explicit or implied consent for corporations conducting business within their borders to deal with this issue. Under the "consent" theory – which assumed a foreign corporation could only transact business in a state with such state's consent – states began to make the explicit appointment of in-state agents to receive service of process a precondition of doing business in the state. Eventually, as with automobiles, states started moving toward an implied consent model in which, even if no agent was formally appointed, the corporation was deemed to have granted implied consent to jurisdiction by the mere act of transacting business in a state.

The shortcomings of this model led many states to move from an implied "consent" basis for exercising jurisdiction to more of a corporate "presence" basis. However, establishing a corporation's "presence" in a state for the purpose was often conclusory as the test was framed as: "A foreign corporation is amenable to process … if it is doing business within the State in such a manner and to such an extent as to warrant the inference that it is present there" (*Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917)). Additionally, under this modified "presence" test, a state court lost all authority over a corporation once it ceased to do business in the forum state.

With both these tests, courts were left to make case-by-case determinations with little clear, over-arching guidance on whether a corporation was "doing business" within in a state, and the case law became muddled and confusing. In 1945, the Supreme Court would finally address the issue more definitively in *International Shoe Co. v. Washington*, 326 U.S. 310.

5.3.2 International Shoe Co. v. Washington

326 U.S. 310 (1945)

INTERNATIONAL SHOE CO.

v.

STATE OF WASHINGTON ET AL[…]

7.

Supreme Court of United States[…]

s.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, § 9998-103a through § 9998-123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. [312] The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by appellees. Section 14 (c) of the Act (Wash. Rev. Stat., 1941 Supp., § 9998-114c) authorizes appellee Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice[…]s.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion [313] and ruled that appellee Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 22 Wash.2d 146, 154 P.2d 801. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under § 237 (a) of the Judicial Code, 28 U.S.C. § 344 (a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at

which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which [314] they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. *International Harvester Co.* v. *Kentucky,* 234 U.S. 579, 587; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U.S. 79, 87; *Frene* v. *Louisville Cement Co.,* 77 U.S. App. D.C. 129, 134 F.2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a [315] substantial volume of merchandise regularly shipped by appellant to purchasers within the state[…]e.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U.S.C. § 1606 (a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it[…]9.

Appellant also insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state[…]7. And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff,* 95 U.S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.[…]3.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Board of Supervisors,* 282 U.S. 19, 24, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are [317] used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, J., in *Hutchinson* v. *Chase & Gilbert,* 45 F.2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson* v. *Chase & Gilbert, supra,* 141.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given[…]8. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there[…]. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.
[318] While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity[…], there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities[…]*a.*
Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it[…]6, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit[…]. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents[…]. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction[…]5.
It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less[…]. 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 defendant with which the state has no contacts, ties, or relations[…]0.
But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue[…]5.
[320] Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.
We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual[…]. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit[…][…]
q.
Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax. *Equitable Life Society* v. *Pennsylvania,* 238 U.S. 143, 146; cf. *International Harvester Co.* v. *Department of Taxation,* 322 U.S. 435, 442, *et seq.; Hoopeston Canning Co.* v. *Cullen,* [322] *supra,* 316-319; see *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335.
Affirme[…]
e.
MR. JUSTICE BLACK delivered the following opinio[…]
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[323] Certainly appellant cannot in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical "presence.[…]. Nothing could be more irrational or more designed to defeat the function of our federative system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before[…]. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us[…]n.

The criteria adopted insofar as they can be identified read as follows: Due Process does permit State courts to "enforce the obligations which appellant has incurred" i[…]4] it be found "reasonable and just according to our traditional conception of fair play and substantial justice." And this in turn means that we will "permit" the State to act if upon "an `estimate of the inconveniences' which would result to the corporation from a trial away from its `home' or principal place of business," we conclude that it is "reasonable" to subject it to suit in a State where it is doing busines[…]

t.

I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts," a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon thi[…]5] Court's notion of "fair play," however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words "fair play," "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives[…]. Express prohibitions against certain types of legislation are found in the Constitution, and under the long-settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons and businesses within the State, provided proper service can be had[…][…]

n.

5.3.3 International Shoe Questions

Who was suing whom in this case? Why?

How did the defendant get into court to begin with? Was it served and if so how?

The defendant responded to the complaint by filing a motion to dismiss for lack of personal jurisdiction. What did the trial court, the state supreme court and the U.S. Supreme Court rule with respect to this issue?

Is the U.S. Supreme Court opinion in International Shoe opinion based on statutory grounds or constitutional grounds?

What was the defendant's argument to the U.S. Supreme Court about why the defendant was not subject to personal jurisdiction in Washington? What body of law did the defendant rely upon to make this argument? (Did this argument sound familiar?)

What rule of law or test did the U.S. Supreme Court use to determine whether there was personal jurisdiction over the defendant? (And what source of law did the Supreme Court rely upon for this test?)

What reasons or rationale did the court identify in support of the rule of law it employed for its jurisdictional analysis?

How did the Court apply its test to the facts of this case?

In IRAC terms, why did defendant lose at the Supreme Court level? Did the Court agree with the defendant about the rule of law that applied, but disagree about its application to these facts? Or did the Court disagree with defendant about the rule of law to apply to this personal jurisdiction case?

Why did Justice Black disagree with the majority? Did he disagree about the rule of law that should apply, agree with the rule, but disagree about its application to the facts of the case, both or neither?

Similar to Pennoyer, International Shoe contains dicta that is useful for understanding how the court thinks its rule might apply to different fact patterns. What page contains this dicta in the opinion?

5.3.4 Notes on International Shoe

International Shoe represents a different approach to analyzing personal jurisdiction issues than what was used in *Pennoyer*. While it would be wrong to say that state boundaries don't matter - the approach is still profoundly territorial in looking to contacts with a state - no longer do state boundaries on their own have the kind of magical power that they did under Pennoyer. Under *Pennoyer*, you could view a court as being empowered with a magic wand that could pull in to the court any persons or property

located within the state, but that ceased having any power at all once the state line was crossed. Under *International Shoe*, the analysis is more complex, and state boundaries more permeable based on past events.
Ask yourself this: under the *International Shoe* approach, could personal jurisdiction be established on an in personam basis on Neff in California, based on the facts in *Pennoyer*? So long as we are rethinking *Pennoyer*, could personal jurisdiction have been established over Neff in California on the *Pennoyer* facts on grounds deemed acceptable by the Hague Convention on Judgments?

5.3.5 General and Specific In Personam Personal Jurisdiction

In I*nternational Shoe*, the Supreme Court moved beyond the 'presence' theory that was an effort to make *Pennoyer* fit the 20th century, and turned to an inquiry that looks simply at whether the defendant's contacts with the state were such that binding the defendant in the lawsuit would satisfy the basic fairness requirements of due process. You will note that in discussing contacts with the state, the court distinguished two different kinds of situations where jurisdiction had been upheld. In one kind, the "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." In the other kind, the actions might be less than systematic and continuous, but nonetheless sufficient to establish jurisdiction over a case arising from those actions.
You can visualize the situation via the chart below. We will explore the quadrants in the chart as we go forward. The column to the left we will know as general jurisdiction. The column on the right we will know as specific jurisdiction.

	"[C]ontinuous corporate operations within a state . . .so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."	Single or sporadic contacts with the Forum State [also called casual & sporadic]
Contacts in the Forum State are related to the lawsuit		
Contacts in the Forum State are not related to the lawsuit		

5.3.6 Rules, Standards, Principles, Catalogs, and Discretion

Compare the statement of the law in Pennoyer with that in International Shoe:
“No State can exercise direct jurisdiction and authority over persons or property outside its territory.”
“Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly adminisration 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 and individual or defendant with which the state has not contact, ties or relations.”
Do you see a difference? The first is very clear and establishes a bright line rule; the second establishes a standard that is less bright line but more capable of dealing with complexities.
In the article linked below as part of the required reading for this course, Professor Solum looks at the ways legal norms can be declared. Different approaches can be adopted for different reasons - how predictable we want the norm to be in advance, how much we want to empower the judge to get the fairest result in applying the norm, how complex we expect the situation to be, and to whom we wish to delegate the power to make the decision as to who should prevail.in
If we wish to establish norms for allowing or excluding vehicles in the park, here are ways that seem consistent to use with Professor Solum's categories:
“No vehicles in the park that have four wheels, weigh over 100 kilos, and have an engine.”
“No vehicles in the park that are likely to disturb the peace of others or have a high risk of causing injury to others.”
“People should use the park in a way that allows others to enjoy the park safely as well.”
“Excluded from the park are trucks, cars, vans, motorcycles, motor scooters, electric bikes, and other similar vehicles.”
“The park service is directed to use its discretion to exclude from the park all vehicles and conveyances that would create a risk of injury or disturb others in their use of the park.”

5.3.7 Link to Legal Theory Lexicon on Rules, Standards, Principles, Catalogs, and Discretion

You must read Professor Solum's discussion of the various ways legal norms are stated. It's a basic concept for you to have a command of as you progress through STL on your way to being an accomplished lawyer.
https://lsolum.typepad.com/legaltheory/2017/12/legal-theory-lexicon-rules-standards-principles-catalogs-and-discretion.html/

5.4 Introduction to Long Arm Statutes: State Long Arms

5.4.1 Introduction to Long-Arm Statutes

You will recall from our coverage of service of process that the traditional methods of service of process more or less assumed a defendant or property within the jurisdiction of the court. Either service is delivered to the defendant or the property is attached, but the governing assumption in the era of territoriality was something to serve or attach within the territory of the court.

Cases such as *Hess* show that there can be cases where the defendant is located outside the territory of the state where the court is located, but it is Constitutionally permissible for one reason or another (a fiction of consent in the case of *Hess*) to exert power over this non-resident defendant. After *International Shoe* it became still more clear that defendants outside the state but with minimum contacts could be served.

But how to do that with statutes that assume a local defendant? States began to pass statutes that have become known as 'long arm' statutes, because they allowed the long arm of state jurisdiction to cross state borders. There are two types, and in the case that follows you will see each in action.

One kind articulates a list of actions that will give rise to long arm jurisdiction - commission of a tort within the state, creation of a contract to be fulfilled within the state, and so on. The first of these was passed in Illinois, and contains a long list of activities. Be aware, however, that interpretation of these statutes is not always straight forward. In Illinois, for example, it has long been held that the list of categories does not set the limits of the state's long arm reach, which in fact the courts have held is intended to reach as far as the Constitution allows.

The list or enumerated category version of a long arm statute is the variety of long arm statute found in Florida and applied in the case that follows. As the case illustrates, in a common law system it is not enough to simply read the statute to figure out what the reach of the statute is. You need to know how it has been interpreted by the courts. You might be surprised to read the discussion about whether a company located in China with no offices or staff in Florida is doing business in Florida. That said, the case seems to be properly based on interpretations of the law by the Florida state courts. The holdings of a state supreme court have binding power under stare decisis, and will control over someone else's contrary reading of the statutory terms.

The second kind simply states that the jurisdictional reach goes to the full extent allowed by the Constitution. This kind of statute has been adopted, among others, by California, Rhode Island, and Louisiana.

To establish jurisdiction over a defendant, both the long arm statute and the Constitution have to be satisfied. In a case where a state long arm statute does not go to the full extent of the Constitution, the state may not have chosen to exert jurisdiction over conduct that satisfies the minimum contact test. On the other hand, if a state statute is overbroad and reaches conduct the Constitution would not reach (for example, if it allowed long arm reach even where a state citizen was injured even if there were no contacts with the state), the Constitution would block the assertion of jurisdiction.

BOTH the long arm statute and the Constitution have to be satisfied for the case to proceed. BOTH.

As you will see in the case that follows, the court must go through a two part inquiry. First, does the long arm statute reach the conduct at question in the lawsuit? (And, remember that to know if the statute reaches the conduct you need to know what the cases say the statute reaches). Second, if it does, does the Due Process clause allow the exercise of personal jurisdiction? Both questions must be answered.

The case that follows has been clipped to present only the long arm analysis. The Due Process analysis will follow later in the quarter.

5.4.2 Long Arm Statute In China Dry Wall Litigation

5.4.2.1 Taishan Gypsum Co. v. Gross

This excerpt looks only at the long arm statute analysis of this opinion. Later in our study of personal jurisdiction, we will read the sections of this case that deal with the Due Process aspects of personal jurisdiction.

In re CHINESE-MANUFACTURED DRYWALL PRODUCTS LIABILITY LITIGATION. Taishan Gypsum Company, Limited; Tai'An Taishan Plasterboard, Company, Limited, Defendants-Appellants v. David Gross; Cheryl Gross; Lois Velez, individually and on behalf of others similarly situated, Plaintiffs-Appellees. In re Chinese-Manufactured Drywall Products Liability Litigation. Taishan Gypsum Company, Limited, Defendant-Appellant v. Mitchell Company Incorporated, individually and on behalf of others similarly situated, Plaintiff-Appellee. In re Chinese-Manufactured Drywall Products Liability Litigation. Taishan Gypsum Company, Limited; Tai'An Taishan Plasterboard, Company, Limited, Defendants-Appellants v. Kenneth Wiltz, individually and on behalf of all others similarly situated, Barbara Wiltz, individually and on behalf of all others similarly situated, Plaintiffs-Appellees.

No. 12-31213.

United States Court of Appeals, Fifth Circuit.

May 20, 2014.

[…]

Before SMITH, DeMOSS, and HIGGINSON, Circuit Judges.
HIGGINSON, Circuit Judge:
This appeal encompasses three cases in the Chinese Drywall multidistrict litigation — Mitchell, Gross, and Wiltz. Picking up where we left off in Germano v. Taishan Gypsum Company, Ltd., 742 F.3d 576 (5th Cir.2014) (affirming as to a fourth), we hold that personal jurisdiction lies over Taishan Gypsum Company, Limited and Tafan Taishan Plasterboard Company, Limited, in their respective cases. We further hold that the district court did not abuse its discretion when it refused to vacate the preliminary default entered in Mitchell. We therefore AFFIRM.
I.
From 2005 to 2008, a housing boom coincided with the destruction of Hurricanes Katrina and Rita to sharply increase the demand for construction materials in the Gulf South and East Coast. In response, Chinese companies manufactured considerable quantities of gypsum wallboard ("Chinese drywall") and sold it to United States companies. Homeowners experienced problems with the drywall,1 and affected parties sued entities involved in manufacturing, importing, and installing the Chinese drywall. The cases multiplied, and the Judicial Panel on Multidistrict Litigation transferred the cases to a single court in the Eastern District of Louisiana (the "MDL" court). The Honorable Eldon E. Fallon presides over the MDL.
Four cases in the MDL have reached our court: Germano, Mitchell, Gross, and Wiltz. Germano is a class action originally filed by Virginia homeowners in the United States District Court for the Eastern District of Virginia. Mitchell is a class action originally filed by homebuilders in the United States District Court for the Northern District of Florida. Gross and Wiltz are class actions on behalf of property owners and were directly filed in the MDL in the Eastern District of Louisiana.
Plaintiffs-Appellees are the class-action plaintiffs in each of the four cases. Defendants-Appellants are two Chinese companies that manufacture and sell drywall: Taishan Gypsum Company, Limited ("TG") and Tai'an Taishan Plasterboard Company, Limited ("TTP") (collectively "Taishan"). Both entities are defendants in Gross and Wiltz, but only TG is a defendant in Germano and Mitchell. TG and TTP appeal in their respective cases from the MDL court's omnibus September 4, 2012 order.
In Germano v. Taishan Gypsum Company, Ltd., 742 F.3d 576 (5th Cir.2014), our court affirmed the district court's decision finding personal jurisdiction over TG. We are tasked with the three remaining appeals: Mitchell, Gross, and Wiltz.
A. Mitchell, Gross, and Wiltz
1. Mitchell
The Mitchell Company ("Mitchell") is an Alabama construction company that has built homes and apartments in Alabama, Mississippi, Louisiana, Georgia, and Florida. On March 6, 2009, Mitchell sued TG, among others, in the United States District Court for the Northern District of Florida. Mitchell sued on behalf of itself and a class "composed of all persons and entities" in Alabama, Mississippi, Louisiana, Georgia, Texas, and Florida who "constructed an improvement to real estate using drywall manufactured or distributed by Defendants" and incurred expenses associated with repairing the drywall itself, repairing property damage that the drywall caused, and liability to property owners as a result of the damage.
Mitchell properly served TG on May 8, 2009. On June 15, 2009, the MDL panel transferred Mitchell to the Eastern District of Louisiana. TG failed to appear, and Mitchell moved for a default judgment. The Clerk entered a preliminary default against TG on September 22, 2009, and on June 10, 2010, TG made its first appearance. TG moved to vacate the preliminary default under Rule 55(c) and also moved to dismiss the case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The MDL court denied TG's motions in its omnibus September 4, 2012 order.
2. Gross
The Gross plaintiffs filed directly in the MDL court on October 7, 2009. The plaintiffs sued, among others, TG and TTP, on behalf of themselves and all United States homeowners who have defective drywall in their homes. They allege that defendants' drywall has caused them economic harm ¡from the costs of inspection, costs of repairs, and devaluation of their homes, and physical harm such as an increased risk of disease. Because plaintiffs concede that they have failed to "identify the manufacturer of the product that caused the harm," they urge liability for the defendants "in ratio to their proportionate share of the relevant market."2 After jurisdictional discovery, TG and TTP moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2). The district court denied the motion in its omnibus September 4, 2012 order.
3. Wiltz
The Wiltz plaintiffs also filed directly in the MDL court. They are suing, among others, TG and TTP, on behalf of themselves and all owners and residents of property containing defective Chinese drywall. After completing jurisdictional discovery, TG and TTP moved to dismiss Wiltz for lack of personal jurisdiction under Rule 12(b)(2). The district court denied the motion in its omnibus September 4, 2012 order.3
B. The Taishan Entities (TG and TTP)
TG is a Chinese corporation with its principal place of business in Ta'in City, Shandong Province, China. It began manufacturing drywall in 1992 and has grown to be one of the largest drywall manufacturers in China. In 2006, TG formed a wholly owned subsidiary, TTP. TTP stopped operating in 2008. TG and TTP are referred to collectively as "Taishan."
C. The District Court's Order

On September 4, 2012, the district court ruled on Taishan's motions in Germano, Mitchell, Gross, and Wiltz in a 142-page order. In Germano the district court determined that personal jurisdiction was proper over TG in Virginia. The district court also denied TG's motion to vacate the default judgment.4 In Mitchell, the district court determined that personal jurisdiction was proper over TG in Florida. In so holding, the district court determined that TTP's contacts with Florida could be imputed to TG for the purposes of personal jurisdiction. The district court also denied TG's motion to vacate the preliminary default. In Gross and Wiltz,5 the district court determined that personal jurisdiction was proper over TG and TTP in Louisiana. The district court again held that TTP's contacts could be imputed to TG for the purposes personal jurisdiction. The district court subsequently certified an interlocutory appeal under 28 U.S.C. § 1292(b), and this court granted permission to appeal.

II.

Whether personal jurisdiction can be exercised over a defendant is a question of law subject to de novo review. Patin v. Thoroughbred Poiver Boats Inc., 294 F.3d 640, 652 (5th Cir.2002) (citing Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331, 335 (5th Cir.1999)). A district court's jurisdictional findings of fact, however, are reviewed for clear error. Lonatro v. United States, 714 F.3d 866, 869 (5th Cir.2013). "The burden of establishing personal jurisdiction over a nonresident defendant lies with the plaintiff." Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 176 (5th Cir.), cert. denied, — U.S. -, 134 S.Ct. 644, 187 L.Ed.2d 420 (2013). Because the district court held an evidentiary hearing on personal jurisdiction, the plaintiffs must establish personal jurisdiction by a preponderance of the evidence. Germano, 742 F.3d at 585; see also Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co., 517 F.3d 235, 241-42 (5th Cir.2008).

Under Federal Rules of Civil Procedure 55(c) and 60(b), a district court may set aside an entry of default for "good cause." Lacy v. Sitel Corp., 227 F.3d 290, 291-92 (5th Cir.2000). The denial of such relief is reviewed for abuse of discretion and any factual determinations underlying the district court's decision are reviewed for clear error. Id.

III.

We begin with the Mitchell appeal, in which TG argues that the district court erred in finding specific jurisdiction over it in Florida. […]

B. The Florida Long-Arm Statute

"A federal district court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution." Ainsworth, 716 F.3d at 177 (quoting Latshaw v. Johnston, 167 F.3d 208, 211 (5th Cir.1999)). The first prong of this two-prong jurisdictional analysis asks "whether the long-arm statute of the forum state confers personal jurisdiction over the defendant." Stripling v. Jordan Prod. Co., LLC, 234 F.3d 863, 869 (5th Cir.2000). It is undisputed that Florida's long-arm statute — Fla. Stat. Ann. § 48.193 — applies. Florida's long-arm statute provides in relevant part:

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:

1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
2. Committing a tortious act within this state.
6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

a. The defendant was engaged in solicitation or service activities within this state; or
b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

§ 48.193. "Florida's long-arm statute is to be strictly construed," Sculptchair Inc. v. Century Arts, Ltd., 94 F.3d 623, 627 (11th Cir.1996) (citing Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 891 (11th Cir.1983)), and some courts interpreting Florida's statute have noted that it "confers less jurisdiction upon Florida courts than allowed by the Due Process Clause." Am. Investors Life Ins. Co. v. Webb Life Ins. Agency, Inc., 876 F.Supp. 1278, 1280 (S.D.Fla.1995); see also McRae v. J.D./M.D., Inc., 511 So.2d 540, 543 n. 4 (Fla.1987) ("It has been held by other courts that our long arm statute requires more activities or contacts than is mandated by the constitution." (citing Mallard v. Aluminum Co. of Canada, Ltd., 634 F.2d 236, 241 (5th Cir.1981))).

First we overlay Taishan's (TTP and TG's) contacts with Florida and then analyze their sufficiency under § 48.193(l)(a)(l).9

1. Taishan's contacts with Florida

Having concluded that TTP was TG's agent under Florida law allowing imputation of TTP's contacts to TG, we next ask whether the entities' contacts with Florida were sufficient to allow personal jurisdiction over TG in Florida. Again, we benefit from the district court's extensive factual findings on Taishan's contacts with Florida.

a. Taishan deals with OTC.

Taishan sold 200,000 sheets of its drywall to Florida customers or customers doing business in Florida and made almost $800,000 from these sales. Taishan's specific dealings with OTC, however, are particularly relevant to our jurisdictional analysis. TTP entered into a sole agency agreement with OTC — a Florida company — in which OTC agreed to purchase at least 20,000 sheets of TTP drywall between November 2006 and February 2007, and not less than 1,000,000 sheets in the following twelve months. The agreement with OTC was notarized under Florida law, OTC paid a $100,000 deposit to TTP under the agreement, and OTC purchased about 57,800 sheets of drywall for $208,711.20 from TTP.

Taishan knew through communications with OTC that its drywall would be shipped to Florida, as invoices and emails provided that shipments would be to Miami, Florida.10 TTP also issued export invoices on 44,490 pieces of drywall sold to OTC and shipped to Miami. OTC and Taishan discussed expanding the sales in the United States, and Taishan said it would help OTC market and sell the drywall.

Further, OTC requested that the drywall meet American Codes and Standards. Specifically, Taishan customized its drywall to meet American Society for Testing and Materials ("ASTM") standards and provided ASTM certificates. Taishan also manufactured its drywall in inches, altered its DUN brand colors to reflect the colors of the American flag, and shipped samples of its drywall to Florida. Moreover, Taishan hosted OTC's representative for a visit in China.

Taishan arranged shipments from China to Florida, and although the shipping was FOB China, Taishan handled and paid for the shipping of drywall to Florida.11 Taishan made suggestions as to which Florida port would be best for shipping,12 and all of OTC's shipments went to Florida. Taishan also complied with Florida Department of Transportation's regulations. After their business relationship ended, OTC and Taishan discussed a new business relationship, in which Taishan would provide electronics to OTC in the United States.

b. Taishan deals with B. America.

TTP also sold drywall to B. America Corporation through Onyx GBB Corporation — both Florida companies. B. America purchased 1,320 sheets of TTP drywall, compliant with ASTM standards, and delivered "CFR MIAMI." B. America wired half of the purchase price to TTP, but the deal fell through when the American market suffered. B. America tried to get a refund for the wire transfer, but TTP refused. As a result, B. America purchased the drywall from TTP and contacted R & R Building Materials ("R & R") to purchase this drywall from B. America. TTP prepared an invoice selling 660 sheets to B. America in exchange for $5,656.20 and noting that the delivery was "CIF [cost, insurance, freight] Miami Port." In communications to Onyx and B. America, Taishan wrote: "We will arrange the shipping to Miami Port at an early time." TTP took out insurance on its shipment to B. America, and the policy notes that the shipment is going to Florida. After the shipment reached Florida, Onyx sold it to R & R in Miami.

c.Taishan deals with Wood Nation.

Wood Nation, Inc. — another Florida company-also purchased drywall from TTP. Richard Hannam, the president of Wood Nation, visited TTP in China, and entered into a contract with TTP for the purchase of 333,000 sheets of TTP drywall. The contract provided that the port of discharge was Tampa, Florida and that Wood Nation was registered at Tampa, Florida. TTP provided Wood Nation with test reports showing that it qualified with ASTM standards. Wood Nation requested that TTP customize the drywall by putting "ASTM C 1396-04" on the back of each piece of drywall, and TTP stamped each board with "Tampa, Florida" as the contact location as well as a Florida phone number as the contact phone number.13 Wood Nation revised its contract to purchase only 26,000 sheets of drywall in order to accommodate a smaller order from its customer. Wood Nation handled shipping the drywall from China to Florida.

d. Taishan sells drywall to Devon.

A Pennsylvania company, Devon International Trading, was also interested in purchasing Chinese drywall. Devon's president toured Taishan's factory in China, and TG sent samples of its drywall to Devon. Devon and another company, North Pacific Group, entered a purchase order of 485,044 sheets of drywall to be sent to Pensacola, Florida. Devon requested to purchase drywall from TG to satisfy the North Pacific purchase order. The product was purchased through a trading company, Shanghai Yu Yuan Import & Export Company, and the Devon logo was stamped on each package. Each piece of drywall was also stamped with a guarantee that it met ASTM standards. In the course of the drywall's transit to Pensacola, Florida, about half of the drywall was damaged, and North Pacific only purchased a fraction of what it original ordered. Devon sold the left over drywall to distributors, wholesalers, and some individuals. Devon sold some drywall to Emerald Coast Building Supply, and Emerald Coast sold 840 boards of drywall to Right-way Drywall, who finally sold it to Mitchell — the named plaintiff. This drywall had the same markings requested by Devon, specifically, the drywall is stamped that it is "made in China" and "Meet[s] or exceeds ASTM C1396 04 standard." Mitchell then used the drywall to build homes in Florida.

e. Taishan sends Carn Construction samples in Florida.

Carn Construction Corporation, a Florida corporation, also contacted Taishan to purchase drywall after it discovered Taishan through Alibaba.com. Taishan represents on this website that it exports drywall on Alibaba.com, and when Carn contacted Taishan and informed Taishan that it was a Florida company, Taishan represented that it exported to the United States and said it was willing to "ship their products to [Carn] in Florida." Taishan sent drywall samples to Carn in Florida. "[F]or marketing purposes," Taishan would "give [Carn] the option in [the] order to mark a brand" on the drywall.14

2. Conducting business within Florida

Under § 48.193(l)(a)(l) TG is subject to jurisdiction in Florida for "any cause of action arising from ... [Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." In order to satisfy this provision, "[t]he activities of the [defendant] sought to be served ... must be considered collectively and show a general course of business activity in the State for pecuniary benefit." Sculptchair, 94 F.3d at 627 (quoting Dinsmore v. Martin Blumenthal Assocs., Inc., 314 So.2d 561, 564 (Fla.1975)); see also Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir.2000) (per curiam); Golant v. German Shepherd Dog Club of Am., Inc., 26 So.3d 60, 63 (Fla.Dist.Ct.App.2010) (noting the same); Citicorp Ins. Brokers (Marine), Ltd. v. Charman, 635 So.2d 79, 81 (Fla.Dist.Ct.App.1994) (noting the same).

Further, "[i]t is not necessarily the number of transactions, but rather the nature and extent of the transaction(s) that determines whether a person is 'carrying on a business venture' within the state." Joseph v. Chanin, 869 So.2d 738, 740 (Fla.Dist.Ct.App.2004). In Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162, 1167 (11th Cir.2005), the court highlighted "[factors relevant, but not dispositive" to this analysis. These include: (1) "the presence and operation of an office in Florida," (2) "the possession and maintenance of a license to do business in Florida," (3) "the number of Florida clients served," and (4) "the percentage of overall revenue gleaned from Florida clients." Id. (citing Florida cases utilizing each factor).

The third and fourth factors are relevant here. First, Taishan sold 200,000 sheets of drywall for about $800,000 in Florida.15 Second, Taishan negotiated with Florida companies, and arranged shipping to Florida. See Robert D. Harley Co. v. Global Force (U.K.) Ltd., No. 05-21177-CIV, 2007 WL 196854, at *4 (S.D.Fla. Jan. 23, 2007) (jurisdiction proper under Florida law because, among other reasons, defendant "shipped from [its] factories in Jordan and China directly to VF Corp's Tampa location"). Third, Taishan granted a Florida company the sole right to purchase a specific brand of its drywall. See Sierra v. A Betterway Rentt-A-Car, Inc., 863 So.2d 358, 360 (Fla.Dist.Ct.App.2003) (finding statute satisfied when defendants "were aware that its vehicles were driven in Florida," "did not discourage or prohibit its customers from driving in Florida," and advertised itself as a "global system of rental agencies, available for worldwide rental arrangements"). Fourth, Taishan specifically altered some boards by stamping "Tampa, Florida" and a Florida phone number; shipped samples to Florida; and insured its shipments to Florida.

These and the other Florida contacts "show a general course of business activity in the state for pecuniary benefits." Citi-corp Ins., 635 So.2d at 81 (deriving commissions of $600,000 over five years, "sending numerous letters and telefaxes back and forth to negotiate a deal with a Florida insurance broker," and responding to a request by the Florida Insurance broker to provide coverage for a vessel moored in Florida, all supported long-arm jurisdiction); see Lennar Homes, No. 09-07901 CA 42, at 8 (holding that "Taishan was 'carrying on business' in Florida and that the Court may assert jurisdiction over Taishan under Section 48.193(1)(a)(l) of the Florida long-arm statute."), aff'd sub nom., Taishan Gypsum Co. Ltd., 123 So.3d at 637.

3. "Arise-from" requirement

Florida's long-arm statute also requires that plaintiffs cause of action arise from the defendant's acts. TG argues that the statute is not satisfied because plaintiffs' causes of action do not arise from its contacts with Florida.16 As the Court in Lennar Homes recognized: "It is enough under the long-arm statute that the type of Taishan drywall that injured homeowners, and caused the damages sustained by plaintiffs, was otherwise available for purchase in Florida."17 The arise-from requirement is met because Mitchell's complaint alleges that the homebuilders incurred costs because they installed Taishan's drywall, the profile forms submitted by the parties demonstrate that the drywall at issue in Mitchell is traceable to Taishan, and testimony from Lennar — a Florida homebuilder — identifies 400 homes containing Taishan drywall.

Additional evidence supports tracing Taishan drywall to the Mitchell plaintiffs: Devon and North Pacific Group, entered a purchase order of 485,044 sheets of drywall to be sent to Pensacola, Florida. Devon requested to purchase drywall from TG to satisfy the North Pacific purchase order. The product was purchased through a trading company, Shanghai Yu Yuan Import & Export Company, and the Devon logo was stamped on each package. Devon sold some drywall to Emerald Coast Building Supply, and Emerald Coast sold 840 boards of drywall to Rightway Drywall, who finally sold it to Mitchell— the named plaintiff. Accordingly, the district court properly found the Florida long-arm statute satisfied.

C. Due Process

Having satisfied Florida's long-arm statute, Taishan's contacts must also support a finding of personal jurisdiction consistent with Due Process. […]

V.

TG and TTP challenge the district court's finding of personal jurisdiction in Gross and Wiltz. Although the forum is different, the outcome is the same — specific jurisdiction is proper over TG and TTP in Louisiana.

[…]

B. Due Process

The Louisiana Supreme Court has held that "[t]he limits of the Louisiana Long-arm Statute and the limits of constitutional due process are now coextensive," accordingly, "the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the

constitutional due process requirements." Petroleum Helicopters, Inc. v. Avco Corp., 513 So.2d 1188, 1192 (La.1987). All parties agree that Gross and Wiltz are governed by Fifth Circuit law.
[…]

5.5 Development of General In Personam Jurisdiction

5.5.1 General Jurisdiction Before Daimler

In *International Shoe*, the Court recognized that there were some circumstances where the activities of a company in a state were so extensive that it was fair to sue the company on actions unrelated to the activities in the state:

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, **there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.**

This has come to be known as 'general jurisdiction,' in contrast to those cases where the actions in the state are related to the lawsuit and hence give rise to 'specific jurisdiction.' Both general and specific jurisdiction are variants of *in personam* jurisdiction under the minimum contacts test of *International Shoe*.

The Supreme Court applied general jurisdiction in the case of *Perkins v/. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952). In that case, a Philippine corporation had moved operations to the state of Ohio during the Japanese occupation of the Philippines during World War Two. For those years, with the Philippines inaccessible, the company carried out essentially all of its activities that could be carried out in such situations in Ohio. The plaintiff filed suit in Ohio state court seeking damages from the corporation. The corporation sought to quash the summons on grounds of lack of personal jurisdiction. (Note how quashing service of process is one way to raise a personal jurisdiction defense.)

In addressing the issue in Perkins, the Court held:

The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test. For example, the state of the forum may by statute require a foreign mining corporation to secure a license in order lawfully to carry on there such functional intrastate operations as those of mining or refining ore. On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings in personam in that state, at least insofar as the proceedings in personam seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.

The instant case takes us one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so. This conforms to the realistic reasoning in International Shoe Co. v. Washington, supra, 326 U.S. at pages 318—319, 66 S.Ct. at pages 159—160:

'* * * there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See Missouri, K. & T.R. Co. v. Reynolds, 255 U.S. 565, 41 S.Ct. 446, 65 L.Ed. 788;6 Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915; cf. St. Louis S.W.R. Co. v. Alexander, supra (227 U.S. 218, 33 S.Ct. 245, 57 L.Ed. 486).

'* * * some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. Lafayette Insurance Co. v. French, 18 How. 404, 407; St. Clair v. Cox, supra, 106 U.S. (350) 356, 1 S.Ct. (354) 359, 27 L.Ed. 222; Commercial Mutual Accident Co. v. Davis, supra, 213 U.S. (245) 254, 29 S.Ct. (445) 447, 53 L.Ed. 782; State of Washington v. Superior Court, 289 U.S. 361, 364, 365, 53 S.Ct. 624, 626, 627, 77 L.Ed. 1256. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. Smolik v. Philadelphia & Reading Co., D.C., 222 F. 148, 151. Henderson, The Position of Foreign Corporations in American Constitutional Law, 94, 95.

'* * * 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 defendant with which the state has no contacts, ties, or relations. Cf. Pennoyer v. Neff, supra (95 U.S. 714, 24 L.Ed. 565); Minnesota Commercial Assn. v. Benn, 261 U.S. 140, 43 S.Ct. 293, 67 L.Ed. 573.'

It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of

action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio. See International Shoe Co. v. Washington, supra, 326 U.S. at page 318, 66 S.Ct. at page 159.

The Ohio Court of Appeals summarized the evidence on the subject. 88 Ohio App. at pages 119—125, 95 N.E.2d at pages 6—9. From that summary the following facts are substantially beyond controversy: The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons. Consideration of the circumstances which, under the law of Ohio, ultimately will determine whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State. Without reaching that issue of state policy, we conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding.

After *Perkins*, the Court rarely addressed issues of general jurisdiction. One case where the Court did address the general jurisdiction issue was *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In *Helicopteros*, the Texas Supreme Court had apparently found general jurisdiction in a case where the "systematic and continuous contacts" amounted to one trip to Texas by a foreign corporation's chief executive officer, the acceptance of checks drawn on a Texas bank, the purchase of a helicopter and equipment from a Texas manufacturer, and subsequent trips to receive training. Giving the case full analysis, the US Supreme Court found that these did not rise to the level of ongoing contacts that would open the company to general jurisdiction.

While the Court drew a line of sorts in *Helicopteros*, the fact remains that lower courts were applying the "systematic and continuous" language of *International Shoe* straightforwardly to justify broad assertions of general jurisdiction. As a general matter, if a company maintained "systematic and continuous" operations in a state, the general operating conclusion (at least during my practice days) was that general jurisdiction could be established.

Lower courts at that time had found general jurisdiction where companies had made multiple sales of rare coins to customers in the state, used the highways of the state in connection with a trucking business, operated a seven employee office and had another employee who spent much of his working time in the state (all on activities unrelated to the claim), and where a rock promoter had run rock concerts in the state. A situation where a company maintained a large factory or a regional headquarters would not, at that time, have likely drawn a legal challenge on personal jurisdiction grounds. Such a broad understanding of general jurisdiction went far toward making the U.S. at least jurisdictionally open to all kinds of claims worldwide.

The practical impact of such a broad understanding was significant. General jurisdiction provides U.S. personal jurisdiction (and hence often a forum) for any dispute, worldwide, where general jurisdiction can be established in the US. Even for domestic companies, general jurisdiction offers additional forum shopping opportunities, with more chances to find a US locale hostile to the defendant. With globalization and the concentration of economic wealth in major corporations, a situation arose where many companies, domestic and foreign, engaged in systematic and continuous contacts in many locations, if not almost everywhere. Because general jurisdiction requires no connection to the dispute itself, this meant for many companies personal jurisdiction for disputes worldwide could be had in any number of U.S. locations. This breadth of jurisdiction put the US at odds with other countries whose assertions of jurisdiction were more narrow than any claim, worldwide, on any company doing substantial business in any US state.

As one scholar has put it, "Prior to *Goodyear*, the common understanding was that companies doing substantial business in all fifty states--Daimler, Goodyear, Walmart, and the like--would have been subject to general jurisdiction in every state." Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 N.W. L. REV. 1, 24 (2018). A foreign company doing substantial business in just one state, under the understanding of the time, would have been subject with regard to personal jurisdiction to claims worldwide in that state and hence in the United States.

In 2011, the Supreme Court indicated that perhaps general jurisdiction provided less in the way of jurisdictional breadth than lower courts and lawyers had come to assume. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), a lawsuit

was filed in North Carolina that arose from the deaths of two 13 year old North Carolina residents in a bus accident outside Paris. The accident allegedly was caused by defective tires manufactured by a Turkish subsidiary of Goodyear Dunlop Tires. The North Carolina state court found general jurisdiction over the foreign subsidiaries of Goodyear, even though none of them had operations in the state. The court based its finding of general jurisdiction on the regular (but not that large in volume) sale of tires made by the foreign subsidiaries in North Carolina. The Supreme Court reversed the lower court, holding that there was no personal jurisdiction. Although the North Carolina's court was outside the bounds of normal general jurisdiction, even as then understood, Justice Ginsburg's opinion took care to note that general jurisdiction was only proper in those locations where a company could be said to be "at home." The court gave state of incorporation and the state of the corporate headquarters of examples of being "at home," but did not attempt to draw the limits. That said, given that the result in *Goodyear* was unremarkable and the "at home" language somewhat cryptic, the breadth of the change that was coming was not apparent to all at that time.

As you read *Daimler*, pay attention to how the claim arose. Where did the actions that led to the tort claim take place? What Daimler subsidiary was allegedly involved? What was the theory for establishing general personal jurisdiction over both Daimler and the US subsidiary in California? Pay attention also to the scope of Daimler's business activities in California.

5.5.2 Daimler AG v. Bauman

134 S.Ct. 746 (2014)
DAIMLER AG, Petitioner
v.
Barbara BAUMAN et al.
No. 11-965.
Supreme Court of United States.
Argued October 15, 2013.
Decided January 14, 2014.

[750] Thomas H. Dupree, Jr., Washington, DC, for Petitioner.

Edwin S. Kneedler, Washington, DC, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Kevin Russell, Washington, DC, for Respondents.

Justs N. Karlsons, Matthew J. Kemner, David M. Rice, Troy M. Yoshino, Carroll, Burdick & McDonough LLP, San Francisco, Theodore B. Olson, Daniel W. Nelson, Thomas H. Dupree, Jr., Counsel of Record, Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, DC, Counsel for Petitioner.

Kevin K. Russell, Goldstein & Russell, P.C., Counsel of Record, Washington, DC, Pamela S. Karlan, Jeffrey L. Fisher, Stanford Law School, Supreme Court, Litigation Clinic, Stanford, Terrence P. Collingsworth, Christian Levesque, Conrad & Scherer, LLP, Washington, DC, for Respondents.

Justice GINSBURG delivered the opinion of the Court.

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents[1] filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft [751] (Daimler),[2] a German public stock company, headquartered in Stuttgart, that manufactures Mercedes-Benz vehicles in Germany. The complaint alleged that during Argentina's 1976-1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28-29. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held

that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id.,* at ___, 131 S.Ct., at 2851. Instructed by *Goodyear,* we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the [752] complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's alleged malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes-Benz vehicles in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.[3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes-Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

The relationship between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes-Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and sell[s] [vehicles] ... as an independent business for [its] own account." App. 179a. The agreement "does not make [MBUSA] ... a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any Daimler-Chrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company." *Ibid.*

After allowing jurisdictional discovery on plaintiffs' agency allegations, the District Court granted Daimler's motion to dismiss. Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation. *Bauman v. DaimlerChrysler AG,* No. C-04-00194 RMW (N.D.Cal., Nov. 22, 2005), App. to Pet. for Cert. 111a-112a, 2005 WL 3157472, *9-*10. Next, the court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent. *Id.,* at 117a, 133a, 2005 WL 3157472, *12, *19; *Bauman v. DaimlerChrysler AG,* No. [753] C-04-00194 RMW (N.D.Cal., Feb. 12, 2007), App. to Pet. for Cert. 83a-85a, 2007 WL 486389, *2.

The Ninth Circuit at first affirmed the District Court's judgment. Addressing solely the question of agency, the Court of Appeals held that plaintiffs had not shown the existence of an agency relationship of the kind that might warrant attribution of MBUSA's contacts to Daimler. *Bauman v. DaimlerChrysler Corp.,* 579 F.3d 1088, 1096-1097 (2009). Judge Reinhardt dissented. In his view, the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction. *Id.,* at 1098-1106. Granting plaintiffs' petition for rehearing, the panel withdrew its initial opinion and replaced it with one authored by Judge Reinhardt, which elaborated on reasoning he initially expressed in dissent. *Bauman v. Daimler-Chrysler Corp.,* 644 F.3d 909 (C.A.9 2011).

Daimler petitioned for rehearing and rehearing en banc, urging that the exercise of personal jurisdiction over Daimler could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011). Over the dissent of eight judges, the Ninth Circuit denied Daimler's petition. See *Bauman v. DaimlerChrysler Corp.,* 676 F.3d 774 (2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad. 569 U.S. ___, 133 S.Ct. 1995, 185 L.Ed.2d 865 (2013).

II

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See, *e.g., Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 464, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

III

In *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878), decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. See *id.,* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). See also *Shaffer v. Heitner,* 433 U.S. 186, 197, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (Under *Pennoyer,* "any attempt `directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." *Burnham v. Superior Court of Cal.,* [754] *County of Marin,* 495 U.S. 604, 617, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (opinion of SCALIA, J.). "The canonical opinion in this area remains *International Shoe [Co. v. Washington*], 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95 (1945)], 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] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2853 (quoting *International Shoe,* 326 U.S., at 316, 66 S.Ct. 154). Following *International Shoe,* "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer,* 433 U.S., at 204, 97 S.Ct. 2569.

International Shoe's conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." 326 U.S., at 317, 66 S.Ct. 154.[4] *International Shoe* recognized, as well, that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. *Id.,* at 318, 66 S.Ct. 154. Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), is today called "specific jurisdiction." See *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2853 (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L.Rev. 1121, 1144-1163 (1966) (hereinafter von Mehren & Trautman)).

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, as just described, and on the other, situations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S., at 318, 66 S.Ct. 154. As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so `continuous and systematic' as to render them essentially at home in the forum State." *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2851; see *id.,* at ___, 131 S.Ct., at 2853-2854; *Helicopteros,* 466 U.S., at 414, n. 9, 104 S.Ct. 1868.[5]

[755] Since *International Shoe,* "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2854 (quoting Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 628 (1988)). *International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum.[6] Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene." von Mehren & Trautman 1164.[7]

Our post-*International Shoe* opinions on general jurisdiction, by comparison, are few. "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction [756] appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2856 (internal quotation marks and brackets omitted). The defendant in *Perkins,* Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952). The

plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process. *Ibid.* That was so, we later noted, because "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780, n. 11, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984).[8]

The next case on point, *Helicopteros,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter's owner and operator, a Colombian corporation. That company's contacts with Texas were confined to "sending its chief executive officer to Houston for a [757] contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id.,* at 416, 104 S.Ct. 1868. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company's Texas connections did not resemble the "continuous and systematic general business contacts ... found to exist in *Perkins." Ibid.* "[M]ere purchases, even if occurring at regular intervals," we clarified, "are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.,* at 418, 104 S.Ct. 1868.

Most recently, in *Goodyear,* we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?" 564 U.S., at ___, 131 S.Ct. at 2850. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.,* at ___, 131 S.Ct., at 2855. Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.,* at ___, 131 S.Ct., at 2857. As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318, 66 S.Ct. 154. Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that State's courts. 564 U.S., at ___, 131 S.Ct., at 2857. See also *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. ___, ___, 131 S.Ct. 2780, 2797-2798, 180 L.Ed.2d 765 (2011) (GINSBURG, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

As is evident from *Perkins, Helicopteros,* and *Goodyear,* general and specific jurisdiction have followed markedly different trajectories post-*International Shoe.* Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond [758] limits traditionally recognized.[9] As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," *Shaffer,* 433 U.S., at 204, 97 S.Ct. 2569, *i.e.,* specific jurisdiction,[10] general jurisdiction has come to occupy a less dominant place in the contemporary scheme.[11]

IV

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA.[12] But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear,* MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U.S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then [759] attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary

"performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." 644 F.3d, at 920 (quoting *Doe v. Unocal Corp.,* 248 F.3d 915, 928 (C.A.9 2001); emphasis deleted).

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. Agencies, we note, come in many sizes and shapes: "One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." 2A C. J. S., Agency § 43, p. 367 (2013) (footnote omitted).[13] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do `by other means' if the independent contractor, subsidiary, or distributor did not exist." 676 F.3d, at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc).[14] The Ninth Circuit's agency theory [760] thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear.* 564 U.S., at ___, 131 S.Ct., at 2856.[15]

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.[16]

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." 564 U.S., at ___, 131 S.Ct., at 2853-2854 (citing Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L.Rev. 721, 728 (1988)). With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] ... bases for general jurisdiction." *Id.,* at 735. See also Twitchell, 101 Harv. L.Rev., at 633. Those affiliations have the virtue of being unique — that is, each ordinarily indicates only one place — as well as easily ascertainable. Cf. *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010) ("Simple jurisdictional rules ... promote greater predictability."). These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, [761] and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16-17, and nn. 7-8. That formulation, we hold, is unacceptably grasping.

As noted, see *supra,* at 753-754, the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S., at 317, 66 S.Ct. 154 (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on").[17] Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities.*" *Id.,* at 318, 66 S.Ct. 154 (emphasis added). See also Twitchell, Why We Keep Doing Business With Doing-Business Jurisdiction, 2001 U. Chi. Legal Forum 171, 184 (*International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever `continuous and systematic' contacts are found.").[18] Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so `continuous and systematic' as to render [it] essentially at home in the forum State." 564 U.S., at ___, 131 S.Ct., at 2851.[19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would [762] scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.,* 471 U.S., at 472, 105 S.Ct. 2174 (internal quotation marks omitted).

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.[20]

C

Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350. See 644 F.3d, at 927 ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have [763] rendered plaintiffs' ATS and TVPA claims infirm. See *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ___, ___, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Authority,* 566 U.S. ___, ___, 132 S.Ct. 1702, 1705, 182 L.Ed.2d 720 (2012) (only natural persons are subject to liability under the TVPA).

The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O.J. (L. 351) 7, 18. See also *id.,* Art. 7(5), 2012 O.J. 7 (as to "a dispute *arising out of the operations of a branch, agency or other establishment,*" a corporation may be sued "in the courts for the place where the branch, agency or other establishment is situated" (emphasis added)). The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." U.S. Brief 2 (citing Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, 161-162). See also U.S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U.S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that "doing business" basis for general jurisdiction has led to "international friction"). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe,* 326 U.S., at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.

Justice SOTOMAYOR, concurring in the judgment.

I agree with the Court's conclusion that the Due Process Clause prohibits the exercise of personal jurisdiction over Daimler in light of the unique circumstances of this case. I concur only in the judgment, however, because I cannot agree with the path the Court takes to arrive at that result.

The Court acknowledges that Mercedes-Benz USA, LLC (MBUSA), Daimler's wholly owned subsidiary, has considerable contacts with California. It has multiple facilities in the State, including a regional headquarters. Each year, it distributes in California tens of thousands of cars, the sale of which generated billions of dollars in the year this suit was brought. And it provides service and sales support to customers throughout the State. Daimler has conceded that California courts may exercise general jurisdiction over MBUSA on the basis of these contacts, and the Court assumes that MBUSA's contacts may be attributed to Daimler for the purpose of deciding whether Daimler is also subject to general jurisdiction.

Are these contacts sufficient to permit the exercise of general jurisdiction over [764] Daimler? The Court holds that they are not, for a reason wholly foreign to our due process jurisprudence. The problem, the Court says, is not that Daimler's contacts with California are too few, but that its contacts with other forums are too many. In other words, the Court does not dispute that the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers throughout a State would be enough to support the exercise of general jurisdiction over some businesses. Daimler is just not one of those businesses, the Court concludes, because its California contacts must be viewed in the context of its extensive "nationwide and worldwide" operations. *Ante,* at 762, n. 20. In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly "too big to fail"; today the Court deems Daimler "too big for general jurisdiction."

The Court's conclusion is wrong as a matter of both process and substance. As to process, the Court decides this case on a ground that was neither argued nor passed on below, and that Daimler raised for the first time in a footnote to its brief. Brief for Petitioner 31-32, n. 5. As to substance, the Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.

Regrettably, these errors are unforced. The Court can and should decide this case on the far simpler ground that, no matter how extensive Daimler's contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available. Because I would reverse the judgment below on this ground, I concur in the judgment only.

I

I begin with the point on which the majority and I agree: The Ninth Circuit's decision should be reversed.

Our personal jurisdiction precedents call for a two-part analysis. The contacts prong asks whether the defendant has sufficient contacts with the forum State to support personal jurisdiction; the reasonableness prong asks whether the exercise of jurisdiction would be unreasonable under the circumstances. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475-478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). As the majority points out, all of the cases in which we have applied the reasonableness prong have involved specific as opposed to general jurisdiction. *Ante,* at 762, n. 20. Whether the reasonableness prong should apply in the general jurisdiction context is therefore a question we have never decided,[21] and it is one on which I can appreciate [765] the arguments on both sides. But it would be imprudent to decide that question in this case given that respondents have failed to argue against the application of the reasonableness prong during the entire 8-year history of this litigation. See Brief for Respondents 11, 12, 13, 16 (conceding application of the reasonableness inquiry); Plaintiffs' Opposition to Defendant's Motion to Quash Service of Process and to Dismiss for Lack of Personal Jurisdiction in No. 04-00194-RMW (ND Cal., May 16, 2005), pp. 14-23 (same). As a result, I would decide this case under the reasonableness prong without foreclosing future consideration of whether that prong should be limited to the specific jurisdiction context.[22]

We identified the factors that bear on reasonableness in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987): "the burden on the defendant, the interests of the forum State," "the plaintiff's interest in obtaining relief" in the forum State, and the interests of other sovereigns in resolving the dispute. *Id.,* at 113-114, 107 S.Ct. 1026. We held in *Asahi* that it would be "unreasonable and unfair" for a California court to exercise jurisdiction over a claim between a Taiwanese plaintiff and a Japanese defendant that arose out of a transaction in Taiwan, particularly where the Taiwanese plaintiff had not shown that it would be more convenient to litigate in California than in Taiwan or Japan. *Id.,* at 114, 107 S.Ct. 1026.

The same considerations resolve this case. It involves Argentine plaintiffs suing a German defendant for conduct that took place in Argentina. Like the plaintiffs in *Asahi,* respondents have failed to show that it would be more convenient to litigate in California than in Germany, a sovereign with a far greater interest in resolving the dispute. *Asahi* thus makes clear that it would be unreasonable for a court in California to subject Daimler to its jurisdiction.

II

The majority evidently agrees that, if the reasonableness prong were to apply, it would be unreasonable for California courts to exercise jurisdiction over Daimler in this case. See *ante,* at 761-762 (noting that it would be "exorbitant" for California courts to exercise general jurisdiction over Daimler, a German defendant, in this "Argentina-rooted case" brought by "foreign plaintiffs"). But instead of resolving the case on this uncontroversial basis, the majority reaches out to decide it on a ground neither argued nor decided below.[23]

[766] We generally do not pass on arguments that lower courts have not addressed. See, *e.g., Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). After all, "we are a court of review, not of first view." *Ibid.* This principle carries even greater force where the argument at issue was never pressed below. See *Glover v. United States,* 531 U.S. 198, 205, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). Yet the majority disregards this principle, basing its decision on an argument raised for the first time in a footnote of Daimler's merits brief before this Court. Brief for Petitioner 32, n. 5 ("Even if MBUSA were a division of Daimler AG rather than a separate corporation, Daimler AG would still ... not be `at home' in California").

The majority's decision is troubling all the more because the parties were not asked to brief this issue. We granted certiorari on the question "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for Cert. i. At no point in Daimler's petition for certiorari did the company contend that, even if this attribution question were decided against it, its contacts in California would still be insufficient to support general jurisdiction. The parties' merits briefs accordingly focused on the attribution-of-contacts question, addressing the reasonableness inquiry (which had been litigated and decided below) in most of the space that remained. See Brief for Petitioner 17-37, 37-43; Brief for Respondents 18-47, 47-59.

In bypassing the question on which we granted certiorari to decide an issue not litigated below, the Court leaves respondents "without an unclouded opportunity to air the issue the Court today decides against them," *Comcast Corp. v. Behrend,* 569 U.S. ___, ___, 133 S.Ct. 1426, 1436, 185 L.Ed.2d 515 (2013) (GINSBURG and BREYER, JJ., dissenting). Doing so "does `not reflect well on the processes of the Court.'" *Ibid.* (quoting *Redrup v. New York,* 386 U.S. 767, 772, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) (Harlan, J., dissenting)). "And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen." 569 U.S., at ___, 133 S.Ct., at 1436.

The relevant facts are undeveloped because Daimler conceded at the start of this litigation that MBUSA is subject to general jurisdiction based on its California contacts. We therefore do not know the full extent of those contacts, though what little we do know suggests that Daimler was wise to concede what it did. MBUSA imports more than 200,000 vehicles into the United States and distributes many of them to independent dealerships in California, where they are sold. Declaration of Dr. Peter Waskönig in *Bauman v. DaimlerChrysler Corp.,* No. 04-00194-RMW (N.D.Cal.), ¶ 10, p. 2. MBUSA's California sales account for 2.4% of Daimler's worldwide sales, which were $192 billion in [767] 2004.[24] And 2.4% of $192 billion is $4.6 billion, a considerable sum by any measure. MBUSA also has multiple offices and facilities in California, including a regional headquarters.

But the record does not answer a number of other important questions. Are any of Daimler's key files maintained in MBUSA's California offices? How many employees work in those offices? Do those employees make important strategic decisions or oversee in any manner Daimler's activities? These questions could well affect whether Daimler is subject to general jurisdiction. After all, this Court upheld the exercise of general jurisdiction in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447-448, 72 S.Ct. 413, 96 L.Ed. 485 (1952) — which the majority refers to as a "textbook case" of general jurisdiction, *ante,* at 755-756 — on the basis that the foreign defendant maintained an office in Ohio, kept corporate files there, and oversaw the company's activities from the State. California-based MBUSA employees may well have done similar things on Daimler's behalf.[25] But because the Court decides the issue without a developed record, we will never know.

III

While the majority's decisional process is problematic enough, I fear that process leads it to an even more troubling result.

A

Until today, our precedents had established a straightforward test for general jurisdiction: Does the defendant have "continuous corporate operations within a state" that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"? *International Shoe Co. v. Washington,* 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945); see also *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (asking whether defendant had "continuous and systematic general business contacts").[26] In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts, not the relative magnitude of those contacts in comparison to the defendant's contacts with other States.

In *Perkins,* for example, we found an Ohio court's exercise of general jurisdiction [768] permissible where the president of the foreign defendant "maintained an office," "drew and distributed ... salary checks," used "two active bank accounts," "supervised... the rehabilitation of the corporation's properties in the Philippines," and held "directors' meetings," in Ohio. 342 U.S., at 447-448, 72 S.Ct. 413. At no point did we attempt to catalog the company's contacts in forums other than Ohio or to compare them with its Ohio contacts. If anything, we intimated that the defendant's Ohio contacts were *not* substantial in comparison to its contacts elsewhere. See *id.,* at 438, 72 S.Ct. 413 (noting that the defendant's Ohio contacts, while "continuous and systematic," were but a "limited... part of its general business").[27]

We engaged in the same inquiry in *Helicopteros.* There, we held that a Colombian corporation was not subject to general jurisdiction in Texas simply because it occasionally sent its employees into the State, accepted checks drawn on a Texas bank, and purchased equipment and services from a Texas company. In no sense did our analysis turn on the extent of the company's operations beyond Texas.

Most recently, in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), our analysis again focused on the defendant's in-state contacts. *Goodyear* involved a suit against foreign tire manufacturers by North Carolina residents whose children had died in a bus accident in France. We held that North Carolina courts could not exercise general jurisdiction over the foreign defendants. Just as in *Perkins* and *Helicopteros,* our opinion in *Goodyear* did not identify the defendants' contacts outside of the forum State, but focused instead on the defendants' lack of offices, employees, direct sales, and business operations within the State.

This approach follows from the touchstone principle of due process in this field, the concept of reciprocal fairness. When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. See *International Shoe,* 326 U.S., at 319, 66 S.Ct. 154 ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" such that an "obligatio[n] arise[s]" to respond there to suit); *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. ___, ___, 131 S.Ct. 2780, 2796-2797, 180 L.Ed.2d 765 (2011) (plurality opinion) (same principle for general jurisdiction). The majority's focus on the extent of a corporate defendant's out-of-forum contacts is untethered from this rationale. After all, the degree to which a company [769] intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere. An article on which the majority relies (and on which *Goodyear* relied as well, 564 U.S., at ___, 131 S.Ct., at 2853-2854) expresses the point well: "We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states.... [T]he amount of activity elsewhere seems virtually irrelevant to ... the imposition of general jurisdiction over a defendant." Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L.Rev. 721, 742 (1988).

Had the majority applied our settled approach, it would have had little trouble concluding that Daimler's California contacts rise to the requisite level, given the majority's assumption that MBUSA's contacts may be attributed to Daimler and given Daimler's concession that those contacts render MBUSA "at home" in California. Our cases have long stated the rule that a defendant's contacts with a forum State must be continuous, substantial, and systematic in order for the defendant to be subject to that State's general jurisdiction. See *Perkins,* 342 U.S., at 446, 72 S.Ct. 413. We offered additional guidance in *Goodyear,* adding the phrase "essentially at home" to our prior formulation of the rule. 564 U.S., at ___, 131 S.Ct. at 2851 (a State may exercise general jurisdiction where a defendant's "affiliations with the State are so `continuous and systematic' as to render [the defendant] essentially at home in the forum State"). We used the phrase "at home" to signify that in order for an out-of-state defendant to be subject to general jurisdiction, its continuous and substantial contacts with a forum State must be akin to those of a local enterprise that actually is "at home" in the State. See Brilmayer, *supra,* at 742.[28]
[770] Under this standard, Daimler's concession that MBUSA is subject to general jurisdiction in California (a concession the Court accepts, *ante,* at 758, 759) should be dispositive. For if MBUSA's California contacts are so substantial and the resulting benefits to MBUSA so significant as to make MBUSA "at home" in California, the same must be true of Daimler when MBUSA's contacts and benefits are viewed as its own. Indeed, until a footnote in its brief before this Court, even Daimler did not dispute this conclusion for eight years of the litigation.
B
The majority today concludes otherwise. Referring to the "continuous and systematic" contacts inquiry that has been taught to generations of first-year law students as "unacceptably grasping," *ante,* at 760, the majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's "nationwide and worldwide" activities. *Ante,* at 762, n. 20.[29]
Neither of the majority's two rationales for this proportionality requirement is persuasive. First, the majority suggests that its approach is necessary for the sake of predictability. Permitting general jurisdiction in every State where a corporation has continuous and substantial contacts, the majority asserts, would "scarcely permit out-of-state defendants `to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Ante,* at 762 (quoting *Burger King Corp.,* 471 U.S., at 472, 105 S.Ct. 2174). But there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one. The majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.
Nor is the majority's proportionality inquiry any more predictable than the approach it rejects. If anything, the majority's approach injects an additional layer of uncertainty because a corporate defendant must now try to foretell a court's analysis as to both the sufficiency of its contacts with the forum State itself, as well as the relative sufficiency of those contacts in light of the company's operations elsewhere. Moreover, the majority does not even try to explain just how extensive the company's in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.
The majority's approach will also lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. [771] Rather than ascertaining the extent of a corporate defendant's forum-state contacts alone, courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts. That considerable burden runs headlong into the majority's recitation of the familiar principle that "`[s]imple jurisdictional rules ... promote greater predictability.'" *Ante,* at 760-761 (quoting *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010)).
Absent the predictability rationale, the majority's sole remaining justification for its proportionality approach is its unadorned concern for the consequences. "If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California," the majority laments, "the same global reach would presumably be available in every other State in which MBUSA's sales are sizable." *Ante,* at 761.
The majority characterizes this result as "exorbitant," *ibid.,* but in reality it is an inevitable consequence of the rule of due process we set forth nearly 70 years ago, that there are "instances in which [a company's] continuous corporate operations within a state" are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154. In the era of *International Shoe,* it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. But that is as it should be. What has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy. Just as it was fair to say in the 1940's that an out-of-state company could enjoy the benefits of a forum State enough to make it "essentially at home" in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is "essentially at home" in each one.
In any event, to the extent the majority is concerned with the modern-day consequences of *International Shoe*'s conception of personal jurisdiction, there remain other judicial doctrines available to mitigate any resulting unfairness to large corporate

defendants. Here, for instance, the reasonableness prong may afford petitioner relief. See *supra,* at 764-765. In other cases, a defendant can assert the doctrine of *forum non conveniens* if a given State is a highly inconvenient place to litigate a dispute. See *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-509, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). In still other cases, the federal change of venue statute can provide protection. See 28 U.S.C. § 1404(a) (permitting transfers to other districts "[f]or the convenience of parties and witnesses" and "in the interests of justice"). And to the degree that the majority worries these doctrines are not enough to protect the economic interests of multinational businesses (or that our longstanding approach to general jurisdiction poses "risks to international comity," *ante,* at 762), the task of weighing those policy concerns belongs ultimately to legislators, who may amend state and federal long-arm statutes in accordance with the democratic process. Unfortunately, the majority short circuits that process by enshrining today's narrow rule of general jurisdiction as a matter of constitutional law.

C

The majority's concern for the consequences of its decision should have led it [772] the other way, because the rule that it adopts will produce deep injustice in at least four respects.

First, the majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries.[30] The majority does not dispute that a State can exercise general jurisdiction where a corporate defendant has its corporate headquarters, and hence its principal place of business within the State. Cf. *Hertz Corp.,* 559 U.S., at 93, 130 S.Ct. 1181. Yet it never explains why the State should lose that power when, as is increasingly common, a corporation "divide[s] [its] command and coordinating functions among officers who work at several different locations." *Id.,* at 95-96, 130 S.Ct. 1181. Suppose a company divides its management functions equally among three offices in different States, with one office nominally deemed the company's corporate headquarters. If the State where the headquarters is located can exercise general jurisdiction, why should the other two States be constitutionally forbidden to do the same? Indeed, under the majority's approach, the result would be unchanged even if the company has substantial operations within the latter two States (and even if the company has no sales or other business operations in the first State). Put simply, the majority's rule defines the Due Process Clause so narrowly and arbitrarily as to contravene the States' sovereign prerogative to subject to judgment defendants who have manifested an unqualified "intention to benefit from and thus an intention to submit to the[ir] laws," *J. McIntyre,* 564 U.S., at ___, 131 S.Ct., at 2787 (plurality opinion).

Second, the proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be. For instance, the majority holds today that Daimler is not subject to general jurisdiction in California despite its multiple offices, continuous operations, and billions of dollars' worth of sales there. But imagine a small business that manufactures luxury vehicles principally targeting the California market and that has substantially all of its sales and operations in the State — even though those sales and operations may amount to one-thousandth of Daimler's. Under the majority's rule, that small business will be subject to suit in California on any cause of action involving any of its activities anywhere in the world, while its far more pervasive competitor, Daimler, will not be. That will be so even if the small business incorporates and sets up its headquarters elsewhere (as Daimler does), since the small business' California sales and operations would still predominate when "apprais[ed]" in proportion to its minimal "nationwide and worldwide" operations, *ante,* at 762, n. 20.

Third, the majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. [773] 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), but a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well).

Finally, it should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions. Under the majority's rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States. See, *e.g., Meier v. Sun Int'l Hotels, Ltd.,* 288 F.3d 1264 (C.A.11 2002).[31] Similarly, a U.S. business that enters into a contract in a foreign country to sell its products to a multinational company there may be unable to seek relief in any U.S. court if the multinational company breaches the contract, even if that company has considerable operations in numerous U.S. forums. See, *e.g., Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos,* 712 F.Supp. 383 (S.D.N.Y.1989).[32] Indeed, the majority's approach would preclude the plaintiffs in these examples from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief. I cannot agree with the majority's conclusion that the Due Process Clause requires these results.

* * *

The Court rules against respondents today on a ground that no court has considered in the history of this case, that this Court did not grant certiorari to decide, and that Daimler raised only in a footnote of its brief. In doing so, the Court adopts a new rule of constitutional law that is unmoored from decades of precedent. Because I would reverse the Ninth Circuit's decision

on the narrower ground that the exercise of jurisdiction over Daimler would be unreasonable in any event, I respectfully concur in the judgment only.

[1] One plaintiff is a resident of Argentina and a citizen of Chile; all other plaintiffs are residents and citizens of Argentina.

[2] Daimler was restructured in 2007 and is now known as Daimler AG. No party contends that any postsuit corporate reorganization bears on our disposition of this case. This opinion refers to members of the Daimler corporate family by the names current at the time plaintiffs filed suit.

[3] At times relevant to this suit, MBUSA was wholly owned by Daimler-Chrysler North America Holding Corporation, a Daimler subsidiary.

[4] *International Shoe* was an action by the State of Washington to collect payments to the State's unemployment fund. Liability for the payments rested on in-state activities of resident sales solicitors engaged by the corporation to promote its wares in Washington. See 326 U.S., at 313-314, 66 S.Ct. 154.

[5] Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First,* if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction. See Tr. of Oral Arg. 11 (Daimler's counsel acknowledged that specific jurisdiction "may well be ... available" in such a case, depending on whether Daimler purposefully availed itself of the forum). *Second,* if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction. See *id.,* at 29 (on plaintiffs' view, Daimler would be amenable to such a suit in California).

[6] See *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) ("The immediate effect of [*International Shoe*'s] departure from *Pennoyer*'s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants."); *McGee v. International Life Ins. Co.,* 355 U.S. 220, 222, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."). For an early codification, see Uniform Interstate and International Procedure Act § 1.02 (describing jurisdiction based on "[e]nduring [r]elationship" to encompass a person's domicile or a corporation's place of incorporation or principal place of business, and providing that "any ... claim for relief" may be brought in such a place), § 1.03 (describing jurisdiction "[b]ased upon [c]onduct," limited to claims arising from the enumerated acts, *e.g.,* "transacting any business in th[e] state," "contracting to supply services or things in th[e] state," or "causing tortious injury by an act or omission in th[e] state"), 9B U.L.A. 308, 310 (1966).

[7] See, *e.g., Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" while also "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); *Calder v. Jones,* 465 U.S. 783, 789-790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (California court had specific jurisdiction to hear suit brought by California plaintiff where Florida-based publisher of a newspaper having its largest circulation in California published an article allegedly defaming the complaining Californian; under those circumstances, defendants "must `reasonably anticipate being haled into [a California] court'"); *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780-781, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (New York resident may maintain suit for libel in New Hampshire state court against California-based magazine that sold 10,000 to 15,000 copies in New Hampshire each month; as long as the defendant "continuously and deliberately exploited the New Hampshire market," it could reasonably be expected to answer a libel suit there).

[8] Selectively referring to the trial court record in *Perkins* (as summarized in an opinion of the intermediate appellate court), Justice SOTOMAYOR posits that Benguet may have had extensive operations in places other than Ohio. See *post,* at 769-770, n. 8 (opinion concurring in judgment) ("By the time the suit [in *Perkins*] was commenced, the company had resumed its considerable operations in the Philippines," "rebuilding its properties there" and "purchasing machinery, supplies and equipment." (internal quotation marks omitted)). See also *post,* at 767, n. 5 (many of the corporation's "key management decisions" were made by the out-of-state purchasing agent and chief of staff). Justice SOTOMAYOR's account overlooks this Court's opinion in *Perkins* and the point on which that opinion turned: All of Benguet's activities were directed by the company's president from within Ohio. See *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447-448, 72 S.Ct. 413, 96 L.Ed. 485 (1952) (company's Philippine mining operations "were completely halted during the occupation ... by the Japanese"; and the company's president, from his Ohio office, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and ... dispatched funds to cover purchases of machinery for such rehabilitation"). On another

day, Justice SOTOMAYOR joined a unanimous Court in recognizing: "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio...." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ___, ___, 131 S.Ct. 2846, 2856, 180 L.Ed.2d 796 (2011). Given the wartime circumstances, Ohio could be considered "a surrogate for the place of incorporation or head office." von Mehren & Trautman 1144. See also *ibid.* (*Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction" based on nothing more than a corporation's "doing business" in a forum). Justice SOTOMAYOR emphasizes *Perkins*' statement that Benguet's Ohio contacts, while "continuous and systematic," were but a "limited ... part of its general business." 342 U.S., at 438, 72 S.Ct. 413. Describing the company's "wartime activities" as "necessarily limited," *id.,* at 448, 72 S.Ct. 413, however, this Court had in mind the diminution in operations resulting from the Japanese occupation and the ensuing shutdown of the company's Philippine mines. No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities. But cf. *post,* at 768 ("If anything, [*Perkins*] intimated that the defendant's Ohio contacts were *not* substantial in comparison to its contacts elsewhere.").

[9] See generally von Mehren & Trautman 1177-1179. See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants."); Borchers, The Problem With General Jurisdiction, 2001 U. Chi. Legal Forum 119, 139 ("[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.").

[10] Remarkably, Justice SOTOMAYOR treats specific jurisdiction as though it were barely there. Given the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the "deep injustice" Justice SOTOMAYOR predicts as a consequence of our holding that California is not an all-purpose forum for suits against Daimler. *Post,* at 771. Justice SOTOMAYOR identifies "the concept of reciprocal fairness" as the "touchstone principle of due process in this field." *Post,* at 768 (citing *International Shoe,* 326 U.S., at 319, 66 S.Ct. 154). She overlooks, however, that in the very passage of *International Shoe* on which she relies, the Court left no doubt that it was addressing specific — not general — jurisdiction. See *id.,* at 319, 66 S.Ct. 154 ("The exercise of th[e] privilege [of conducting corporate activities within a State] may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (emphasis added)).

[11] As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so `continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." 564 U.S., at ___, 131 S.Ct., at 2851, *i.e.,* comparable to a domestic enterprise in that State.

[12] MBUSA is not a defendant in this case.

[13] Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. "[T]he corporate personality," *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), observed, "is a fiction, although a fiction intended to be acted upon as though it were a fact." *Id.,* at 316, 66 S.Ct. 154. See generally 1 W. Fletcher, Cyclopedia of the Law of Corporations § 30, p. 30 (Supp.2012-2013) ("A corporation is a distinct legal entity that can act only through its agents."). As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there. See, *e.g., Asahi,* 480 U.S., at 112, 107 S.Ct. 1026 (opinion of O'Connor, J.) (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 ("the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims). See also Brief for Petitioner 24 (acknowledging that "an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction"). It does not inevitably follow, however, that similar reasoning applies to *general* jurisdiction. Cf. *Goodyear,* 564 U.S., at ___, 131 S.Ct., at 2855 (faulting analysis that "elided the essential difference between case-specific and all-purpose (general) jurisdiction").

[14] Indeed, plaintiffs do not defend this aspect of the Ninth Circuit's analysis. See Brief for Respondents 39, n. 18 ("We do not believe that this gloss is particularly helpful.").

[15] The Ninth Circuit's agency analysis also looked to whether the parent enjoys "the right to substantially control" the subsidiary's activities. *Bauman v. DaimlerChrysler Corp.,* 644 F.3d 909, 924 (2011). The Court of Appeals found the requisite "control" demonstrated by the General Distributor Agreement between Daimler and MBUSA, which gives Daimler the right to oversee certain of MBUSA's operations, even though that agreement expressly disavowed the creation of any agency relationship. Thus grounded, the separate inquiry into control hardly curtails the overbreadth of the Ninth Circuit's agency holding.

[16] By addressing this point, Justice SOTOMAYOR asserts, we have strayed from the question on which we granted certiorari to decide an issue not argued below. *Post,* at 765-766. That assertion is doubly flawed. First, the question on which we granted certiorari, as stated in Daimler's petition, is "whether it violates due process for a court to exercise general personal

jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for Cert. i. That question fairly encompasses an inquiry into whether, in light of *Goodyear,* Daimler can be considered at home in California based on MBUSA's in-state activities. See also this Court's Rule 14.1(a) (a party's statement of the question presented "is deemed to comprise every subsidiary question fairly included therein"). Moreover, both in the Ninth Circuit, *see, e.g.,* Brief for Federation of German Industries et al. as *Amici Curiae* in No. 07-15386(CA9), p. 3, and in this Court, see, *e.g.,* U.S. Brief 13-18; Brief for Chamber of Commerce of United States of America et al. as *Amici Curiae* 6-23; Brief for Lea Brilmayer as *Amica Curiae* 10-12, *amici* in support of Daimler homed in on the insufficiency of Daimler's California contacts for general jurisdiction purposes. In short, and in light of our pathmarking opinion in *Goodyear,* we perceive no unfairness in deciding today that California is not an all-purpose forum for claims against Daimler.

[17] *International Shoe* also recognized, as noted above, see *supra,* at 753-754, that "some single or occasional acts of the corporate agent in a state ..., because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U.S., at 318, 66 S.Ct. 154.

[18] Plaintiffs emphasize two decisions, *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 18 S.Ct. 526, 42 L.Ed. 964 (1898), and *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), both cited in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), just after the statement that a corporation's continuous operations in-state may suffice to establish general jurisdiction. *Id.,* at 446, and n. 6, 72 S.Ct. 413. See also *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer*'s territorial thinking, see *supra,* at 753-754, should not attract heavy reliance today. See generally Feder, *Goodyear,* "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L.Rev. 671 (2012) (questioning whether "doing business" should persist as a basis for general jurisdiction).

[19] We do not foreclose the possibility that in an exceptional case, see, *e.g., Perkins,* described *supra,* at 755-757, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, see *infra,* at 763, quite another to expose it to suit on claims having no connection whatever to the forum State.

[20] To clarify in light of Justice SOTOMAYOR's opinion concurring in the judgment, the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." *Post,* at 767. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. See von Mehren & Trautman 1142-1144. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of ... activity" having no connection to any in-state activity. Feder, *supra,* at 694.

Justice SOTOMAYOR would reach the same result, but for a different reason. Rather than concluding that Daimler is not at home in California, Justice SOTOMAYOR would hold that the exercise of general jurisdiction over Daimler would be unreasonable "in the unique circumstances of this case." *Post,* at 763. In other words, she favors a resolution fit for this day and case only. True, a multipronged reasonableness check was articulated in *Asahi,* 480 U.S., at 113-114, 107 S.Ct. 1026, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. See also *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476-478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case. When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.

Justice SOTOMAYOR fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." *Post,* at 770-771. But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home. Justice SOTOMAYOR's proposal to import *Asahi*'s "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," and, in the international context, "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." 480 U.S., at 113-115, 107 S.Ct. 1026 (some internal quotation marks omitted). Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

[21] The Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 573 (C.A.2 1996) ("[E]very circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific"); see also, *e.g., Lakin v. Prudential Securities, Inc.,* 348 F.3d 704, 713 (C.A.8 2003); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208, 213-214 (C.A.4 2002); *Trierweiler v. Croxton & Trench Holding Corp.,* 90 F.3d 1523, 1533 (C.A.10 1996); *Amoco Egypt Oil Co. v. Leonis Navigation Co.,* 1 F.3d 848, 851, n. 2 (C.A.9 1993); *Donatelli v. National Hockey League,* 893 F.2d 459, 465 (C.A.1 1990); *Bearry v. Beech Aircraft Corp.,* 818 F.2d 370, 377 (C.A.5 1987). Without the benefit of a single page of briefing on the issue, the majority casually adds each of these cases to the mounting list of decisions jettisoned as a consequence of today's ruling. See *ante,* at 762, n. 20.
[22] While our decisions rejecting the exercise of personal jurisdiction have typically done so under the minimum-contacts prong, we have never required that prong to be decided first. See *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 121, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (Stevens, J., concurring in part and concurring in judgment) (rejecting personal jurisdiction under the reasonableness prong and declining to consider the minimum-contacts prong because doing so would not be "necessary"). And although the majority frets that deciding this case on the reasonableness ground would be "a resolution fit for this day and case only," *ante,* at 762, n. 20, I do not understand our constitutional duty to require otherwise.
[23] The majority appears to suggest that Daimler may have presented the argument in its petition for rehearing en banc before the Ninth Circuit. See *ante,* at 752 (stating that Daimler "urg[ed] that the exercise of personal jurisdiction ... could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)"). But Daimler's petition for rehearing did not argue what the Court holds today. The Court holds that Daimler's California contacts would be insufficient for general jurisdiction even assuming that MBUSA's contacts may be attributed to Daimler. Daimler's rehearing petition made a distinct argument — that attribution of MBUSA's contacts should not be permitted under an "`agency' theory" because doing so would "rais[e] significant constitutional concerns" under *Goodyear.* Petition for Rehearing or Rehearing En Banc in No. 07-15386(CA9), p. 9.
[24] See DaimlerChrysler, Innovations for our Customers: Annual Report 2004, p. 22, http://www.daimler.com/Projects/c2c/channel/documents/1364377_2004_DaimlerChrysler_Annual_Report.pdf (as visited on Jan. 8, 2014, and available in Clerk of Court's case file).
[25] To be sure, many of Daimler's key management decisions are undoubtedly made by employees outside California. But the same was true in *Perkins.* See *Perkins v. Benguet Consol. Min. Co.,* 88 Ohio App. 118, 124, 95 N.E.2d 5, 8 (1950) (*per curiam*) (describing management decisions made by the company's chief of staff in Manila and a purchasing agent in California); see also n. 8, *infra.*
[26] While *Helicopteros* formulated the general jurisdiction inquiry as asking whether a foreign defendant possesses "continuous and systematic general business contacts," 466 U.S., at 416, 104 S.Ct. 1868, the majority correctly notes, *ante,* at 760, that *International Shoe* used the phrase "continuous and systematic" in the context of discussing specific jurisdiction, 326 U.S., at 317, 66 S.Ct. 154. But the majority recognizes that *International Shoe* separately described the type of contacts needed for general jurisdiction as "continuous corporate operations" that are "so substantial" as to justify suit on unrelated causes of action. *Id.,* at 318, 66 S.Ct. 154. It is unclear why our precedents departed from *International Shoe*'s "continuous and substantial" formulation in favor of the "continuous and systematic" formulation, but the majority does not contend — nor do I perceive — that there is a material difference between the two.
[27] The majority suggests that I misinterpret language in *Perkins* that I do not even cite. *Ante,* at 756, n. 8. The majority is quite correct that it has found a sentence in *Perkins* that does not address whether most of the Philippine corporation's activities took place outside of Ohio. See *ante,* at 756, n. 8 (noting that *Perkins* described the company's "wartime activities" as "necessarily limited," 342 U.S., at 448, 72 S.Ct. 413). That is why I did not mention it. I instead rely on a sentence in *Perkins'* opening paragraph: "The [Philippine] corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business." *Id.,* at 438, 72 S.Ct. 413. That sentence obviously does convey that most of the corporation's activities occurred in "places other than Ohio," *ante,* at 756, n. 8. This is not surprising given that the company's Ohio contacts involved a single officer working from a home office, while its non-Ohio contacts included significant mining properties and machinery operated throughout the Philippines, Philippine employees (including a chief of staff), a purchasing agent based in California, and board of directors meetings held in Washington, New York, and San Francisco. *Perkins,* 88 Ohio App., at 123-124, 95 N.E.2d, at 8; see also n. 8, *infra.*
[28] The majority views the phrase "at home" as serving a different purpose — that of requiring a comparison between a defendant's in-state and out-of-state contacts. *Ante,* at 761, n. 20. That cannot be the correct understanding though, because among other things it would cast grave doubt on *Perkins* — a case that *Goodyear* pointed to as an exemplar of general jurisdiction, 564 U.S., at ___, 131 S.Ct., at 2855-2856. For if *Perkins* had applied the majority's newly minted proportionality test, it would have come out the other way.
The majority apparently thinks that the Philippine corporate defendant in *Perkins* did not have meaningful operations in places other than Ohio. See *ante,* at 755-756, and n. 8. But one cannot get past the second sentence of *Perkins* before realizing that is

wrong. That sentence reads: "The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business." 342 U.S., at 438, 72 S.Ct. 413. Indeed, the facts of the case set forth by the Ohio Court of Appeals show just how "limited" the company's Ohio contacts — which included a single officer keeping files and managing affairs from his Ohio home office — were in comparison with its "general business" operations elsewhere. By the time the suit was commenced, the company had resumed its considerable mining operations in the Philippines, "`rebuilding its properties'" there and purchasing "`machinery, supplies and equipment.'" 88 Ohio App., at 123-124, 95 N.E.2d, at 8. Moreover, the company employed key managers in other forums, including a purchasing agent in San Francisco and a chief of staff in the Philippines. *Id.,* at 124, 95 N.E.2d, at 8. The San Francisco purchasing agent negotiated the purchase of the company's machinery and supplies "`on the direction of the Company's Chief of Staff in Manila,'" *ibid.,* a fact that squarely refutes the majority's assertion that "[a]ll of Benguet's activities were directed by the company's president from within Ohio," *ante,* at 756, n. 8. And the vast majority of the company's board of directors meetings took place outside Ohio, in locations such as Washington, New York, and San Francisco. 88 Ohio App., at 125, 95 N.E.2d, at 8.
In light of these facts, it is all but impossible to reconcile the result in *Perkins* with the proportionality test the majority announces today. *Goodyear*'s use of the phrase "at home" is thus better understood to require the same general jurisdiction inquiry that *Perkins* required: An out-of-state business must have the kind of continuous and substantial in-state presence that a parallel local company would have.
[29] I accept at face value the majority's declaration that general jurisdiction is not limited to a corporation's place of incorporation and principal place of business because "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in the State." *Ante,* at 761, n. 19; see also *ante,* at 761. Were that not so, our analysis of the defendants' in-state contacts in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), and *Goodyear* would have been irrelevant, as none of the defendants in those cases was sued in its place of incorporation or principal place of business.
[30] States will of course continue to exercise specific jurisdiction in many cases, but we have never held that to be the outer limit of the States' authority under the Due Process Clause. That is because the two forms of jurisdiction address different concerns. Whereas specific jurisdiction focuses on the relationship between a defendant's challenged conduct and the forum State, general jurisdiction focuses on the defendant's substantial presence in the State irrespective of the location of the challenged conduct.
[31] See also, *e.g., Woods v. Nova Companies Belize Ltd.,* 739 So.2d 617, 620-621 (Fla.App. 1999) (estate of decedent killed in an overseas plane crash permitted to sue responsible Belizean corporate defendant in Florida courts, rather than Belizean courts, based on defendant's continuous and systematic business contacts in Florida).
[32] The present case and the examples posited involve foreign corporate defendants, but the principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State. Under the majority's rule, for example, a General Motors autoworker who retires to Florida would be unable to sue GM in that State for disabilities that develop from the retiree's labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida. See Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 670 (1988).

5.5.3 Daimler Notes

1. After D*aimler*, the rule on general jurisdiction is very clear. General jurisdiction exists 1) in the state where the company is headquartered, and 2) in the state under whose laws the corporation was formed. The Court indicates that there might be other situations, but given that the scope of Daimler's business activities in California, which were long-standing and relatively huge, did not even merit consideration with regard to the third category, it is clear that only truly extraordinary circumstances would meet the threshhold. Would *Perkins* be an example of those exceptional circumstances? Could there be others?
2. In *Daimler*, the defendants did not seriously argue that MBUSA was not subject to general jurisdiction in California; indeed, it seemed to be the assumption of all parties, even after *Goodyear*, that it was. The question presented to the Court in the petition for certiorari was whether MBUSA's contacts and status could be imputed to Daimler. Only in a passing mention in a reply brief and in an amicus brief submitted by the Solicitor General for the United States government was the issue raised. If the case were to come through again, do you think lawyers in the position of Daimler might vigorously contest general jurisdiction for a company in the position of MBUSA?
3. Non-US corporations typically are neither headquartered nor incorporated in US states. As a result, general jurisdiction generally will not exist for non-US companies no matter the scope of their activities in the US, setting aside a *Perkins* like exception. (Specific jurisdiction, of course, might exist, and we will spend plenty of time talking about that).

5.6 The Development of Specific Personal Jurisdiction

5.6.1 Following The Development of Specific Personal Jurisdiction After International Shoe

International Shoe announced a new approach to personal jurisdiction, but later cases were going to have to fill in the picture. We've seen how that happened with general jurisdiction, which for a given forum finds the contacts so substantial that lawsuits that arise anywhere in the world can be brought there. After decades of relative silence from the Supreme Court and expansive interpretation from lower courts, the Supreme Court made very clear in *Daimler* what the boundaries of general jurisdiction will be.

The story is less direct and less clear on the specific personal jurisdiction side of the *International Shoe* minimum contacts approach. While, at least arguably, one can chart a path through the specific personal jurisdiction cases where the results are consistent, the same cannot be said for the reasoning advanced. The Court, as we shall see, bounces back and forth on the policies and Constitutional doctrines underlying its interpretation, and sometimes finds itself unable to agree on a majority opinion.

As we read through the following cases, pay attention to several things:

1) The procedural posture of the case - did the case come from a state or federal court, was it a direct or collateral attack on personal jurisdiction, and how was the issue raised on appeal?

2) What were the nature of the contacts with the forum state on the part of the defendant?

3) What choice or choices did the defendant make, if any, that led to the contact with the forum state?

4) When the Court talks about the minimum contacts doctrine, what rationale or purpose do they idenfity for the doctrine?

5.6.2 McGee v. International Life Ins. Co.

McGee involves two lawsuits. In the first, the decedent's mother filed suit to collect on the insurance policy in California state court. The defendant did not appear and a default judgment was entered. In the second, the default judgment was taken to where the defendant had assets, and enforcement was sought pursuant to the Full Faith and Credit Clause. The insurance company challenged the validity of the judgment, claiming that no personal jurisdiction existed over it in California. The insurance company prevailed in the state courts on that argument, and the case then went to the Supreme Court.

355 U.S. 220 (1957)

McGEE

v.

INTERNATIONAL LIFE INSURANCE CO.

[…]

Supreme Court of United States[…]

[…]

[…]Opinion of the Court by MR. JUSTICE BLACK[…]

[…]

[…][…][…][…]

The material facts are relatively simple. In 1944, Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948 the respondent agreed with Empire Mutual to assume its insurance obligations. Respondent then mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he held with Empire Mutual. He accepted this offer and from tha[…]] time until his death in 1950 paid premiums by mail from his California home to respondent's Texas office. Petitioner, Franklin's mother, was the beneficiary under the policy. She sent proofs of his death to the respondent but it refused to pay claiming that he had committed suicide. It appears that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.

[…]*[…]*[…]*[…]*[…]

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transaction[…]3] 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 it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State[…][1] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a

severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum— thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality[…]4] Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process[…]3. There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear.
[…]
The judgment is reversed and the cause is remanded to the Court of Civil Appeals of the State of Texas, First Supreme Judicial District, for further proceedings not inconsistent with this opinion.
It is so ordered.
[…]
5.6.3 Hanson v. Denckla
In *Hanson v. Denckla*, a wealthy woman named Donner died, and her family ended up in litigation as to who would receive the money she left behind. While she was alive and living in Pennsylvania, she created a trust, using a Delaware bank as the trustee. Later, Mrs. Donner moved to Florida, which became her state of domicile, and she eventually died in Florida. The Delaware Trustee processed the existing trust after Mrs. Donner moved to Florida, but appears not to have sought or obtained additional business. After her death, her estate went to probate in Florida (probate being the process by which a state disposes of the assets of a person who had died). Ultimately, the Florida court held that it had jurisdiction over the Delaware trustee, and entered judgment disposing of the assets of the trust (the effect being to give extra money to Mrs. Donner's two surviving daughters and none to two granddaughters who were the daughters of a third daughter who had died before Mrs. Donner). Meanwhile, separate litigation began in Delaware, and it reached a result that would give the money in the trust to the two granddaughters. If the Florida court had proper jurisdiction over the trustee, its decision would control under the Full Faith and Credit Clause because its judgment had been reached first (and that lawsuit filed first). The two sets of litigation reached the Supreme Court together.
357 U.S. 235 (1958)
HANSON, EXECUTRIX, ET AL.
v.
DENCKLA ET AL[…]
[…]
Supreme Court of United States[…]
t.
[238] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.
[…]
[…]
[…]
Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity,[…]but the matter […]remained a question of state law over which this Court exercised no authority.[…] With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer* v. *Neff,* 95 U. S. 714. […]
[…] Appellees[…]urge that the circumstances of this case amount to sufficient affiliation with the State of Florida to empower its courts to exercise personal jurisdiction over this nonresident defendant. Principal reliance is placed upon *McGee* v. *International Life Ins. Co.,* 355 U. S. 220. In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. 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. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff[…]*, to the flexible standard of *International Shoe Co.* v. *Washington[…]*[…]But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts[…]. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington,* 326 U. S. 310, 319.

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail[…]3.
The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from *McGee* v. *International Life Ins. Co.[…]*. In *McGee,* the nonresident defendant solicited a reinsurance agreement with a resident of California.[…] The offer was accepted in that State, and the insurance premiums were mailed from there until the insured's death. […]In contrast, this action involves the validity of an agreement that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee.*[…]But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee.* Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.[…]
The execution in Florida of the powers of appointment under which the beneficiaries and appointees claim does not give Florida a substantial connection with the contract on which this suit is based[…]. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 319. […]The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.
It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so. As we understand its law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust.[…] It does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdictio[…][…]
e.
The judgment of the Delaware Supreme Court is affirmed, and the judgment of the Florida Supreme Court is reversed and the cause is remanded for proceedings not inconsistent with this opinion.
It is so ordered.
MR. JUSTICE BLACK, whom MR. JUSTICE BURTON and MR. JUSTICE BRENNAN join, dissenting.
I believe the courts of Florida had power to adjudicate the effectiveness of the appointment made in Florida by Mrs. Donner with respect to all those who were notified of the proceedings and given an opportunity to be heard without violating the Due Process Clause of the Fourteenth Amendmen[…][1] If this is correct, it follows that […] the Delaware courts erred in refusing to give the prior Florida judgment full faith and credit[…][…]
. It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have [259] power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer,* 311 U. S. 457, 463; *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316. So far as the nonresident defendants here are concerned I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all.[32] Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts. It chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question. Florida's interest in the validity of Mrs. Donner's appointment is made more emphatic by the fact that her will is being administered in that State. It has traditionally been the rule that the State where a person is domiciled at the time of his death is the proper place to determine the validity of his will, to construe its provisions and to marshal and distribute his personal property. Here Florida was seriously concerned with winding up Mrs. Donner's estate and with finally determining what property was to be distributed under her will. In fact this suit was brought for that very purpose.
The Court's decision that Florida did not have jurisdiction over the trustee (and inferentially the nonresident beneficiaries) stems from principles stated the better part [260] of a century ago in *Pennoyer* v. *Neff,* 95 U. S. 714. That landmark case was decided in 1878, at a time when business affairs were predominantly local in nature and travel between States was difficult, costly and sometimes even dangerous. There the Court laid down the broad principle that a State could not subject

nonresidents to the jurisdiction of its courts unless they were served with process within its boundaries or voluntarily appeared, except to the extent they had property in the State. But as the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on state jurisdiction announced in that case. In the course of this evolution the old jurisdictional landmarks have been left far behind so that in many instances States may now properly exercise jurisdiction over nonresidents not amenable to service within their border[…][3] Yet further relaxation seems certain. Of course we have not reached the point where state boundaries are without significance, and I do not mean to suggest such a view here. There is no need to do so. For we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.
[…]
[…]
y.

5.6.4 Notes on Hanson v. Denckla

Territorial Limits Revived. After *International Shoe*, there was a period when many observers thought the Court effectively was headed toward national service of process - put differently, toward such an expansive read of minimum contacts that courts could pull into their jurisdiction any case that had even a glancing connection with the forum. While some saw McGee as being consistent with that, we do not see that as being inherent in the facts of *McGee*, where after all the insurance company was happy to have an ongoing long term relationship with a resident of the state so long as it was collecting premiums rather than paying out on claims.
Hanson v. Denckla, decided in the same Supreme Court term as *McGee*, made clear that the court was not going in that direction. While the procedural history is a bit hard to untangle, we have dueling cases that reach the court from two different court systems. The motivating issue is who gets the decedent's money; the legal issue that dictates the result is whether a trustee of a Delaware trust can be made to participate in litigation in Florida. In saying that the trustee could not be made to go to a state that had a deep relationship with the controversy the Court made clear that territorial limits had not been made irrelevant by *International Shoe.*
Purposeful Availment. *Hanson v. Denckla* introduces the idea of "purposeful availment" when it discusses whether the trustee purposefully availed itself of a relationship with Florida. Grab hold of this concept and don't let it go, because in our view it arguably provides the only way to make sense of the Court's decisions on specific jurisdiction that follow. In *Hanson v. Denckla* the trustee never voluntarily formed a relationship of any kind with Florida - the decedent lived in Pennsylvania at the time the trust was formed, and the trustee had no control over whether she stayed in Pennsylvania, moved to Florida, or took up residence in yet some other state. Florida, as the dissent notes, had a stake in the litigation because in the end that is where the donor of the trust and the decedent went to live and die; it would be hard to identify a state that had a greater interest in the disposition of the decedent's estate than the state where in the end she lived and died. For the majority, the state's interest was not enough - it was unfair to force a trustee who never elected to do business with anyone in Florida to go there for litigation. Keep an eye on the purposeful availment issue in the cases that follow,
Facts in the Record. It's worth noting that while the trustee formed its relationship with the decedent before she moved to Florida, it's a good guess that many people who set up trusts in northern states, including many who set up trusts with this same trustee, ultimately move to Florida. In part because of the weather, which remains warm year-round, and in part because of a state tax system that imposes no inheritance tax at all, many retirees move to Florida, and many eventually die there, giving rise to the irreverent nickname "God's Waiting Room" for the state. That makes Florida a target rich environment for people who do estate planning of all kinds. It might be that the trustee, much like the insurance company in *McGee*, regularly and voluntarily engaged in business with Florida residents, updating, altering, and managing trusts. Such facts do not appear in the record, however, and for a court only those facts that appear in the court record can be considered. It's important to understand that facts in the record do not magically appear, but rather appear in the record because attorneys place evidence before the court that allows courts to take those facts into account.

5.6.5 Kulko v. Superior Court

The Kulkos were married and living in New York. They divorced, and the wife moved to California. The father was given custody of the two children - a son and a daughter. The daughter asked if she could move to California and live with her mother. The father consented. The son then went for a visit to his mother and, without his father's consent, chose to stay in California. The mother then moved in California court for full custody of the children and for a higher level of support payments. The father - appearing specially - filed a motion to quash the summons. When the Superior Court refused to quash the summons, he filed for a writ of mandamus, which was denied in the California courts.
[…]
Mr. Justice Marshall
delivered the opinion of the Court.

The issue before us is whether, in this action for child support, the California state courts may exercise *in personam* jurisdiction over a nonresident, nondomiciliary parent of minor children domiciled within the State. For reasons set forth below, we hold that the exercise of such jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.
[…]
The "purposeful act" that the California Supreme Court believed did warrant the exercise of personal jurisdiction over appellant in California was his "actively and fully consent [ing] to lisa living in California for the school year . . . and . . . sen [ding] her to California for that purpose." […]We cannot accept the proposition that appellant's acquiescence in lisa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.[…]
Nor can we agree with the assertion of the court below that the exercise of *in personam* jurisdiction here was warranted by the financial benefit appellant derived from his daughter's presence in California for nine months of the year. […] This argument rests on the premise that, while appellant's liability for support payments *95remained unchanged, his yearly expenses for supporting the child in New York decreased. But this circumstance, even if true, does not support California's assertion of jurisdiction here. Any diminution in appellant's household costs resulted, not from the child's presence in California, but rather from her absence from appellant's home. […]
In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an "effect" in California was misplaced. […] This "effects" test is derived from the American Law Institute's Restatement (Second) of Conflict of Laws § 37 (1971), which provides:
"A state has power to exercise .judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."[…]
While this provision is not binding on this Court, it does not in any event support the decision below. As is apparent from the examples accompanying § 37 in the Restatement, this section was intended to reach wrongful activity outside of the State causing injury within the State, see, *e. g.,* Comment *a,* p. 157 (shooting bullet from one State' into another), or commercial activity affecting state residents, *ibid.* Even in such situations, moreover, the Restatement recognizes that there might be circumstances that would render "unreasonable" the assertion of jurisdiction over the nonresident defen dant.
The circumstances in this case clearly render "unreasonable" California's assertion of personal jurisdiction. There is no claim that appellant has visited physical injury on either […]property or persons within the State of California. […] The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court; appellant's activities cannot fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State. […]
Finally, basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent.[…] Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away[…]

5.6.6 Special Appearance

You may have noted in Kulko that the father made a "special appearance" to contest personal jurisdiction. What is a special appearance? You remember from *Pennoyer* that a state has jurisdiction over persons within its borders. What happens when a person appears in court to contest personal jurisdiction? Whatever the situation had been before, are they not now 'present' in the state so that jurisdiction can be established through their presence? Doesn't that seem a bit unfair? In response, a procedural device called a special appearance was developed so that a party could appear in court for the limited purpose of contesting jurisdiction. Their presence for that purpose did not give rise to any other basis for personal jurisdiction, and therefore was special.

5.6.7 World-Wide Volkswagen Corp. v. Woodson

444 U.S. 286 (1980)

WORLD-WIDE VOLKSWAGEN CORP. ET AL.
v.
WOODSON, DISTRICT JUDGE OF CREEK COUNTY, OKLAHOMA, ET. AL[…]
8.
Supreme Court of United States[…]
k.
MR. JUSTICE WHITE delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahom[…]

I

Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway), in Massena, N. Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.[…]

The Robinsons[…]subsequently brought a products-liability action in the District Court for Creek County, Okla., claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer, Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearance[…][1] claiming that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendmen[…][4]

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New […] York. It distributes vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument[…]2, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

Despite the apparent paucity of contacts between petitioners and Oklahoma, the District Court rejected their constitutional claim and reaffirmed that ruling in denying petitioners' motion for reconsideration.[…]Petitioners then sought a writ of prohibition in the Supreme Court of Oklahoma to restrain the District Judge, respondent Charles S. Woodson, from exercising *in personam* jurisdiction over them. They renewed their contention that, because they had no "minimal contacts," […]with the State of Oklahoma, the actions of the District Judge were in violation of their rights under the Due Process Clause. The Supreme Court of Oklahoma denied the writ, […]holding that personal jurisdiction over petitioners was authorized[…][…] The court's rationale was contained in the following paragraph[…]:

"In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding [291] that the petitioners derive substantial revenue from goods used or consumed in this State."

We granted certiorari[…] to consider an important constitutional question with respect to state-court jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States.[…] We reverse.

II

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant[…]. A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere[…]. Due process requires that the defendant be given adequate notice of the suit[…]and be subject to the personal jurisdiction of the court[…]. In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts.

As has long been settled, and as we reaffirm today, 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. […] The concept of

minimum contacts, in turn, can be seen to perform two related, but […]distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend `traditional notions of fair play and substantial justice.'[…]. The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there.[…]7. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute[…]7); the plaintiff's interest in obtaining convenient and effective relief[…]7); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies[…].
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. As we noted in *McGee* v. *International Life Ins. Co.[…]*3] this trend is largely attributable to a fundamental transformation in the American economy:
"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 it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."
The historical developments noted in *McGee,* of course, have only accelerated in the generation since that case was decided. Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution[…]t.
Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,[…], we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government,[…]
."
Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[…]. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment[…][…]
II
Applying these principles to the case at han[…][0] we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.
It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson* v. *Denckla[…]a,* it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally […]exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko* v. *California Superior Court[…]*, it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.
If foreseeability were the criterion, […] Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel[…][…]
7] This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process 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[…].
The Due Process Clause, by ensuring the "orderly administration of the laws,[…], gives a degree of predictability to the legal

system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

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 customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not[…]exceed its powers 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[…]).

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N. Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.[…]3.

In a variant on the previous argument, it is contended that jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma[…]g.

This argument seems to make the point that the purchase of automobiles in New York, from which the petitioners earn substantial revenue, would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma. Respondents observe that the very purpose of an automobile is to travel, and that travel of automobiles sold by petitioners is facilitated by an extensive chain of Volkswagen service centers throughout the country, including some in Oklahom[…]9[…]. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

Because we find that petitioners have no "contacts, ties, or relations" with the State of Oklahoma[…]9, the judgment of the Supreme Court of Oklahoma is

Reversed.

MR. JUSTICE BRENNAN, dissentin[…][31]

[…][…]Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries, I dissent[…]

I

The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there[…] would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends "`traditional notions of fair play and substantial justice.'"[…] The clear focus in *International Shoe* was on fairness and reasonableness.[…]

.

Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations.[…].

[…][…][…][…]

That considerations other than contacts between the forum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant.[…] The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive view of *International Shoe,* several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum[…][…]

I

In each of these cases, I would find that the forum State has an interest in permitting the litigation to go forward, the litigation is connected to the forum, the defendant is linked to the forum, and the burden of defending is not unreasonable. Accordingly, I would hold that it is neither unfair nor unreasonable to require these defendants to defend in the forum State[…]

[…]

B

I[…]the interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and

evidence were in Oklahoma.[…] The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.
The petitioners are not unconnected with the forum. Although both sell automobiles within limited sales territories, each sold the automobile which in fact was driven to Oklahoma where it was involved in an accident[…] It may be true, as the Court suggests, that each sincerely intended to limit its commercial impact to the limited territory, and that each intended to accept the benefits and protection of the laws only of those States within the territory. But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield.[…][…]
An automobile simply is not a stationary item or one designed to be used in one place. An automobile is *intended* to be moved around. Someone in the business of selling large numbers of automobiles can hardly plead ignorance of their mobility or pretend that the automobiles stay put after they are sold. It is not merely that a dealer in automobiles foresees that they will move.[…]. The dealer actually intends that the purchasers will use the automobiles to travel to distant States where the dealer does not directly "do business." The sale of an automobile does *purposefully* inject the vehicle into the stream of interstate commerce so that it can travel to distant States.[…][…]
↓
The Court accepts that a State may exercise jurisdiction over a distributor which "serves" that State "indirectly" by "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[…]. It is difficult to see why the Constitution should distinguish between a case involving […]goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there.[…]In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.[…]
Furthermore, an automobile seller derives substantial benefits from States other than its own. A large part of the value of automobiles is the extensive, nationwide network of highways. Significant portions of that network have been constructed by and are maintained by the individual States, including Oklahoma. The States, through their highway programs, contribute in a very direct and important way to the value of petitioners' businesses. Additionally, a network of other related dealerships with their service departments operates throughout the country under the protection of the laws of the various States, including Oklahoma, and enhances the value of petitioners' businesses by facilitating their customers' traveling.
Thus, the Court errs in its conclusion,[…] that "petitioners have *no* `contacts, ties, or relations'" with Oklahoma. There obviously are contacts, and, given Oklahoma's connection to the litigation, the contacts are sufficiently significant to make it fair and reasonable for the petitioners to submit to Oklahoma's jurisdiction.
III
It may be that affirmance of the judgments in these cases would approach the outer limits of *International Shoe's* jurisdictional [308] principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated. As MR. JUSTICE MARSHALL wrote in *Shaffer* v. *Heitner,* 433 U. S., at 212: "`[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures. . . ."
International Shoe inherited its defendant focus from *Pennoyer* v. *Neff,* 95 U. S. 714 (1878), and represented the last major step this Court has taken in the long process of liberalizing the doctrine of personal jurisdiction. Though its flexible approach represented a major advance, the structure of our society has changed in many significant ways since *International Shoe* was decided in 1945. Mr. Justice Black, writing for the Court in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 222 (1957), recognized that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." He explained the trend as follows:
"In part this is attributable to the fundamental transformation of our national economy over the years. 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 it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.,* at 222-223.
As the Court acknowledges, *ante,* at 292-293, both the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957.[26] [309] The model of society on which the *International Shoe* Court based its opinion is no longer accurate. Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of a very few days.
In answering the question whether or not it is fair and reasonable to allow a particular forum to hold a trial binding on a particular defendant, the interests of the forum State and other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant. The "orderly administration of the laws" provides a firm basis for according some protection to the interests of plaintiffs and States as well as of defendants.[…]Certainly, I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience. […]

The conclusion I draw is that constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. Rather, as I wrote in dissent from *Shaffer* v. *Heitner, supra,* at 220 (emphasis added), minimum [310] contacts must exist "among the *parties,* the contested transaction, and the forum State."[28] The contacts between any two of these should not be determinate. "[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."[29] 433 U. S., at 225-226. Mr. Justice Black, dissenting in *Hanson* v. *Denckla,* 357 U. S., at 258-259, expressed similar concerns by suggesting that a State should have jurisdiction over a case growing out of a transaction significantly related to that State "unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as `traditional notions of fair play and substantial justice.'"[30] Assuming [311] that a State gives a nonresident defendant adequate notice and opportunity to defend, I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial[…]
[.]

In effect the Court is allowing defendants to assert the sovereign [312] rights of their home States. The expressed fear is that otherwise all limits on personal jurisdiction would disappear. But the argument's premise is wrong. I would not abolish limits on jurisdiction or strip state boundaries of all significance, see *Hanson, supra,* at 260 (Black, J., dissenting); I would still require the plaintiff to demonstrate sufficient contacts among the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial.[33]

I would also, however, strip the defendant of an unjustified veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances were slow and unpredictable and when notions of state sovereignty were impractical and exaggerated.[…]

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MR. JUSTICE MARSHALL, with whom MR. JUSTICE BLACKMUN joins, dissenting[…]

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5.6.8 Notes on World-Wide Volkswagen

1. State Sovereignty - In *World-Wide Volkswagen*, Justice White invokes concepts of federalism to limit the power of the Oklahoma courts to assert jurisdiction:

Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." International Shoe Co. v. Washington, 326 U.S., at 319, 66 S.Ct., at 159. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Soon thereafter, in another opinion by Justice White, the Court returned to the idea of whether issues of state sovereignty underlie personal jurisdiction doctrine. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Court took a different approach, asserting that personal liberty interests, and not state sovereignty underlie personal jurisdiction doctrine. *Insurance Corp. of Ireland* addressed the issue of whether a litigant could waive personal jurisdiction. If the issue is one of limitation on state power, it might seem that the litigants would not be free to waive personal jurisdiction, thereby allowing a court to assert power that rightly belongs to another state. Justice White's opinion addressed the issue in ways that might seem inconsistent with his opinion in *World-Wide Volkswagen*:

The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. [FN10] Thus, the test for personal jurisdiction requires that "the maintenance of the suit ... not offend 'traditional notions of fair play and substantial justice.' … Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."

In the footnote, Justice White went deeper, fixing personal jurisdiction doctrine under liberty interests:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. For example, in World-Wide Volkswagen Corp. … we stated: "[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. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (Citation omitted.) Contrary to the suggestion of Justice POWELL, … our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when

a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

As we go forward, continue to pay attention to the reasons the court advances for limiting personal jurisdiction. You will see what may appear to be inconsistent zig zags, and you will certainly see the Court struggle.

To frame that, think for a moment about the structure of U.S. federalism. On the one hand, federalism addresses the split of power between the federal government and the individual states. In what areas is the federal government precluded from acting because its limited powers do not reach those activities? What areas are still reserved exclusively to the states? You will see as you progress through STL, including in U.S. Constitutional law classes, that judicial interpretation has expanded the power of the federal government over the states. That kind of vertical federalism does not seem to be what Justice White is referring to.

There is another aspect of federalism in the U.S. governmental structural, known as horizontal federalism. It addresses the notion, as expressed in *Pennoyer*, that the power of the individual states is not limitless, but is limited by the state's borders. Another way to look at this is that a state is a political community, and there are political legitimacy issues that arise when it attempts to exercise its power on those outside its community, a community which is partly but not purely determined by geographic borders. This would seem to be more consistent with the approach taken in *International Shoe*. However one frames it, there is a general agreement that the power of any one state is not national, but is limited to the extent it impermissibly interferes with other states.

At the same time, *Pennoyer* aside, it turns out to be more rare than you might think for any one government - state or federal - to exercise sole jurisdiction over a person, an entity, or a set of circumstances. The 'compound Republic' of the United States gives rise to many kinds of overlapping jurisdiction that is sometimes referred to as 'polycentric' governance. Even in *Pennoyer*, we saw that a state could retain sovereignty over its citizen while another state would have sovereignty over the same citizen based on presence. Under *International Shoe*, it becomes clear that multiple jurisdictions could in some cases exercise jurisdiction over the parties to a lawsuit. The same logic applies in other areas - for example, if a criminal act has a connection to more than one state jurisdiction, each state can separately prosecute without violating the Double Jeopardy Clause.

As we go forward, pay attention to these issues. Especially, pay attention to the Court's invocation of liberty interests and its invocation of sovereignty, and its efforts to reconcile the two strands. You should also ask yourself whether the minimum contacts test, as it develops, is a good tool for drawing lines based on concerns rooted in horizontal federalism.

2. Why Was Personal Jurisdiction Worth Fighting About - You might wonder why the plaintiff wanted to keep in a local car dealer and somewhat local distributor when it had uncontested personal jurisdiction over the manufacturer and the U.S. distributor. Those two defendants would have deep pockets sufficient to pay any judgment. You might also wonder why the lawsuit proceeds against the Volkswagen entities rather than against the driver of the car that rear-ended the vehicle that caught on fire.

In this case, there seems little question that the driver of the car that collided with the plaintiff's vehicle was potentially liable. He had been drinking from an open bottle of bourbon whiskey as he drove, and was both well over the speed limit and intoxicated beyond the legal limit when he collided with the victims. He was also uninsured and without significant assets, and so another recovery worthy defendant with resources would have to be found if the victims were to receive any compensation. That leaves the question of why to bring in the New York based dealership and the three-state New York based distributor when, on a theory that the car was improperly prone to catching fire, the manufacturer and the distributor would seem to be both judgment worthy and more likely to be connected to the wrongdoing. The answer lies in forum selection (or 'forum shopping,' as it is sometime more pejoratively known). By bringing in the New York state defendants, the plaintiffs would have a line up of parties in the case that was not wholly diverse, and as a result the trial would have to be in state, not federal, court. (Don't worry - we will get to why that is so later in the course). The victims' lawyers felt that they were more likely to recover a large judgment from plaintiff friendly juries in a Creek County, Oklahoma, state court than federal court. As it turned out, their loss on the personal jurisdiction issue meant that the case did end up in federal court, where in the end they received a disappointing result. For more background on this case came to be, see Charles W. Adams, *World-Wide Volkswagen v. Woodson-The Rest of the Story*, **72 Neb. L. Rev. 1122** (1993), available via your Westlaw access or at https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1000&context=fac_pub.

5.6.9 Plaintiff Side Contacts - Keeton v. Hustler Magazine, Inc.

Must a plaintiff have certain “minimum contacts” with the forum in which a suit is brought for the exercise of personal jurisdiction to be proper? The Court unanimously answered that question in the negative in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

In Keeton, New York resident Kathy Keeton brought a suit against Hustler Magazine in New Hampshire alleging libel. Although Keeton had minimal personal links to New Hampshire, it was the only state in which her libel claims were not time-barred. The District Court for the District of New Hampshire dismissed the case for lack of personal jurisdiction and the Court of Appeals for the First Circuit affirmed, explaining "the New Hampshire tail is too small to way so large an out-of-state dog." The Supreme Court unanimously reversed finding no Due Process requirement that plaintiffs have "minimum contacts" with the forum state and further finding that the fact that the statute of limitations had run in all other jurisdictions was irrelevant to the personal jurisdiction analysis.

The Court summarized the parties' links to New Hampshire as follows: "Petitioner Keeton is a resident of New York. Her only connection with New Hampshire is the circulation there of copies of a magazine that she assists in producing. The magazine bears petitioner's name in several places crediting her with editorial and other work. Respondent Hustler Magazine, Inc., is an Ohio corporation, with its principal place of business in California. Respondent's contacts with New Hampshire consist of the sale of some 10 to 15,000 copies of Hustler magazine in that State each month."

The Court found these actions by Hustler unquestionably sufficient to subject it to personal jurisdiction in New Hampshire on the facts alleged: "Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on "minimum contacts" between the defendant and the State." Because New Hampshire's long-arm statute was co-extensive with the Due Process Clause, the Court found "all the prerequisites for personal jurisdiction over Hustler Magazine, Inc., in New Hampshire are present."

As for the concern about the plaintiff's minimum contacts, the Court explained that the proper inquiry is, per Shaffer, on "the relationship among the defendant, the forum, and the litigation," later elaborating: "[W]e have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking."

Hustler's protests that Keeton's forum-shopping was unfair given New Hampshire's especially long statute of limitations on libel were equally unavailing – at least as to the issue of personal jurisdiction. The Court was clear that "any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims."

5.6.10 Calder v. Jones

From the Court's official syllabus:

Syllabus

Respondent, a professional entertainer who lives and works in California and whose television career was centered there, brought suit in California Superior Court, claiming that she had been libeled in an article written and edited by petitioners in Florida and published in the National Enquirer, a national magazine having its largest circulation in California. Petitioners, both residents of Florida, were served with process by mail in Florida, and, on special appearances, moved to quash the service of process for lack of personal jurisdiction. The Superior Court granted the motion on the ground that First Amendment concerns weighed against an assertion of jurisdiction otherwise proper under the Due Process Clause of the Fourteenth Amendment. The California Court of Appeal reversed, holding that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to respondent in California.

[…]

Iain CALDER and John South, Appellants,

v.

Shirley JONES.

[…]

Decided March 20, 1984.

S[…]

Justice REHNQUIST delivered the opinion of the Court.

Respondent Shirley Jones […]

lives and works in California. She and her husband brought this suit against the National Enquirer, Inc., its local distributing company, and petitioners for libel, invasion of privacy, and intentional infliction of emotional harm.[…]The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California.[…] Respondent's and her husband's claims were based on an article that appeared in the Enquirer's October 9, 1979 issue. Both the Enquirer and the distributing company answered the complaint and made no objection to the jurisdiction of the California court.

Petitioner South is a reporter employed by the Enquirer. He is a resident of Florida, though he frequently travels to California on business.[…]South wrote the first draft of the challenged article, and his byline appeared on it. He did most of his research in Florida, relying on phone calls to sources in California for the information contained in the article.[…]Shortly before publication, South called respondent's […] home and read to her husband a draft of the article so as to elicit his comments upon it. Aside from his frequent trips and phone calls, South has no other relevant contacts with California.
Petitioner Calder is also a Florida resident. He has been to California only twice—once, on a pleasure trip, prior to the publication of the article and once after to testify in an unrelated trial. Calder is president and editor of the Enquirer. He "oversee[s] just about every function of the Enquirer." […]He reviewed and approved the initial evaluation of the subject of the article and edited it in its final form. He also declined to print a retraction requested by respondent. Calder has no other relevant contacts with California.
[…][…]
The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' […]In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." […]The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction,[…] but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises. […]
The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.[…]The article was drawn from California sources, […] and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-298, 100 S.Ct. 559, 567-568, 62 L.Ed.2d 490 (1980); Restatement (Second) of Conflicts of Law § 37.
Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity. The mere fact that they can "foresee" that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction. […] They do not "in effect appoint the [article their] agent for service of process." […]. Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer, […]should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.
Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of[…]that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. […] An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.
Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. […]In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.
We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. […]
Affirmed.
[…]

5.6.11 The Effects Test

1. You recall that in *Kulko* the court discussed an 'effects test' for jurisdiction proposed by the American Law Institute's Restatement (Second) of Conflict of Laws § 37 (1971), which provides:
"A state has power to exercise .judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."
In *Calder v. Jones*, the Court invoked effects within California to justify an assertion of personal jurisdiction over individual defendants living across the continent:

In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California..

In *Calder*, however, the alleged actions were intentional in nature, a point stressed by the Court.

Lower courts after Calder differed in their reading of Calder. Some gave it a broad interpretation, finding jurisdiction based solely on effects on the plaintiff within the forum state, even when the acts took place outside the forum. *See, e.g., Carteret Sav. Bank FA v. Shushan*, 954 F.2d 141 (3d Cir. 1992). Other lower courts required, at least, that the conduct was expressly aimed at the forum state with the foreknowledge that the plaintiff was likely to suffer harm. *See, e.g., Schwarzenegger v. Fred Martin Motor Co.*, 374 F. 3d 797 (9th Cir. 2004).

In *Walden v. Fiore*, 571 U.S. 277 (2014), the Court more recently addressed a situation where jurisdiction was urged on effects on the plaintiffs. In *Walden*, the plaintiffs were Las Vegas, Nevada, based professional gamblers, and were returning from Puerto Rico to Las Vegas with $97,000 in winnings in cash when they passed through the Atlanta airport. A drug sniffing dog responded to the bills, and the bills were seized by law enforcement officials at the airport. The same law enforcement officials allegedly drafted a fraudulent affidavit to allow permanent government seizure of the funds, but the U.S. Attorney in Atlanta rejected that and returned the funds to the plaintiffs. By that time, however, they had been without the funds for seven months, and filed a lawsuit against the law enforcement officers.

The Court considered an effects test argument:

The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. . . . Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, see id., § 558, the defendants' intentional tort actually occurred in California. . . . In this way, the "effects" caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to California, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.

The Court went on:

Relying on Calder, respondents emphasize that they suffered the "injury" caused by petitioner's allegedly tortious conduct (i.e., the delayed return of their gambling funds) while they were residing in the forum. This emphasis is likewise misplaced. As previously noted, Calder made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.

Respondents' claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had. Unlike the broad publication of the forum-focused story in Calder, the effects of petitioner's conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction.

Where does Walden v. Fiore leave the effects tesst? What would you advise a client?

2. Think about the effects test from a comparative perspective. While the language from the Hague Convention on Judgments does not use the word effects, you will remember that committing a tort in the court's jurisdiction provides 'white list' grounds for establishing jurisdiction that supports recognition of the judgment. In many national jurisdictions, the failure of a product within a jurisdiction - even if was designed and manufactured elsewhere - constitutes a tort within the jurisdiction, thereby providing a basis for jurisdiction. Is that different from the effects test of Calder and some of the broader readings of it? Is it consistent with the Court's language in *Walden v. Fiore*?

5.6.12 Burger King Corp. v. Rudzewicz - 'Contract Plus'

This case arose from a long term, relational contract between operators of a Burger King franchise and the parent corporation. The franchisees were licensed to use appellant's trademarks and service marks in leased standardized restaurant facilities for a period of 20 years. The governing contracts provided that the franchise relationship was established in Miami and governed by Florida law, and called for payment of all required monthly fees and forwarding of all relevant notices to the Miami headquarters. The Miami headquarters set policy and worked directly with the franchisees in attempting to resolve major problems. Day-to-day monitoring of franchisees, however, was conducted through district offices that in turn report to

the Miami headquarters. One of the franchisees had travelled to Florida for training in how to operate a Burger King franchise; the other had apparently never been to Florida at all in connection with this business.

When the economy hit a downturn, the franchisees stopped paying the required royalty payments to Burger King. Burger King demanded that they pay or close the restaurant. They refused. At that point, Burger King filed suit in federal court in Florida to compel closure and seek damages. The franchisees argued that there were no minimum contacts in Florida. The trial court disagreed, and entered judgment for Burger King. The 11th Circuit Court of Appeals, however, found that there was no basis for personal jurisdiction, and reversed.

At the Supreme Court, an opinion by Justice Brennan found that personal jurisdiction did exist.

And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. . . .

* * *

At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a "contact" for purposes of due process analysis. If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, International Shoe Co. v. Washington, supra, 326 U.S., at 319, 66 S.Ct., at 159, or on "conceptualistic ... theories of the place of contracting or of performance," *479 Hoopeston Canning Co. v. Cullen, 318 U.S., at 316, 63 S.Ct., at 604. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." Id., at 316–317, 63 S.Ct., at 604–605. It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami. Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a substantial connection with that State." McGee v. International Life Insurance Co., 355 U.S., at 223, 78 S.Ct., at 201 (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." Hanson v. Denckla, 357 U.S., at 253, 78 S.Ct., at 1239; Keeton v. Hustler Magazine, Inc., 465 U.S., at 774, 104 S.Ct., at 1478; World-Wide Volkswagen Corp. v. Woodson, 444 U.S., at 299, 100 S.Ct., at 568. Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

* * *

Moreover, we believe the Court of Appeals gave insufficient weight to provisions in the various franchise documents providing that all disputes would be governed by Florida law. The franchise agreement, for example, stated:

"This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida." App. 72. See also n. 5, supra. The Court of Appeals reasoned that choice-of-law provisions are irrelevant to the question of personal jurisdiction, relying on Hanson v. Denckla for the proposition that "the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction." 724 F.2d, at 1511–1512, n. 10, citing 357 U.S., at 254, 78 S.Ct., at 1240. This reasoning misperceives the import of the quoted proposition. The Court in Hanson and subsequent cases has emphasized that choice-of-law analysis —which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation

there. As Judge Johnson argued in his dissent below, Rudzewicz "purposefully availed himself of the benefits and protections of Florida's laws" by entering into contracts expressly providing that those laws would govern franchise disputes.
Burger King's analysis is sometimes referred to as "contract plus." Long term relational contracts are a special species of contracts, where the parties anticipate an ongoing mutual relationship. They differ in significant ways from, for example, one time contracts for the sale of goods.

5.6.13 Asahi Metal Industry Co. v. Superior Court of Cal. Solano Cty.

480 U.S. 102 (1987)
ASAHI METAL INDUSTRY CO., LTD.
v.
SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST[…]
3.
Supreme Court of United States[…]
e.
JUSTICE O'CONNOR announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS join, and an opinion with respect to Parts II-A and III, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA join.
This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend `traditional notions of fair play and substantial justice.' […]).
I
On September 23, 1978, on Interstate Highway 80 in Solano County, California, Gary Zurcher lost control of his Honda motorcycle and collided with a tractor. Zurcher was severely injured, and his passenger and wife, Ruth Ann Moreno, was killed. In September 1979, Zurcher filed a product liability action in the Superior Court of the State of[…]California in and for the County of Solano. Zurcher alleged that the 1978 accident was caused by a sudden loss of air and an explosion in the rear tire of the motorcycle, and alleged that the motorcycle tire, tube, and sealant were defective. Zurcher's complaint named, *inter alia,* Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. Cheng Shin in turn filed a cross-complaint seeking indemnification from its codefendants and from petitioner, Asahi Metal Industry Co., Ltd. (Asahi), the manufacturer of the tube's valve assembly. Zurcher's claims against Cheng Shin and the other defendants were eventually settled and dismissed, leaving only Cheng Shin's indemnity action against Asahi.
California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States.[…]. Asahi moved to quash Cheng Shin's service of summons, arguing the State could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment.
In relation to the motion, the following information was submitted by Asahi and Cheng Shin. Asahi is a Japanese corporation. It manufactures tire valve assemblies in Japan and sells the assemblies to Cheng Shin, and to several other tire manufacturers, for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.
[…] In 1983 an attorney for Cheng Shin conducted an informal examination of the valve stems of the tire tubes sold in one cycle store in Solano County. The attorney declared that of the approximately 115 tire tubes in the store, 97 were purportedly manufactured in Japan or Taiwan, and of those 97, 21 valve stems were marked with the circled letter "A", apparently Asahi's trademark. Of the 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes. The store contained 41 other Cheng Shin tubes that incorporated the valve assemblies of other manufacturers[…]. An affidavit of a manager of Cheng Shin whose duties included the purchasing of component parts stated: " `In discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.' […]. An affidavit of the president of Asahi, on the other hand, declared that Asahi " `has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.' […]4.

Primarily on the basis of the above information, the Superior Court denied the motion to quash summons, stating: "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale.[…]).
The Court of Appeal of the State of California issued a peremptory writ of mandate commanding the Superior Court to quash service of summons. The court concluded that "it[…]would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California.[…]6.
The Supreme Court of the State of California reversed and discharged the writ issued by the Court of Appeal[…]. The court observed: "Asahi has no offices, property or agents in California. It solicits no business in California and has made no direct sales [in California].[…]. Moreover, "Asahi did not design or control the system of distribution that carried its valve assemblies into California.[…]9. Nevertheless, the court found the exercise of jurisdiction over Asahi to be consistent with the Due Process Clause. It concluded that Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components. The court considered Asahi's intentional act of placing its components into the stream of commerce — that is, by delivering the components to Cheng Shin in Taiwan — coupled with Asahi's awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause.
We granted certiorari[…], and now reverse.
II
A
The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established `minimum contacts' in th[…]9] forum State.[…]. Most recently we have reaffirmed the oft-quoted reasoning of *Hanson* v. *Denckla[…]*, that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[…]. "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a `substantial connection' with the forum State.[…]).
Applying the principle that minimum contacts must be based on an act of the defendant, the Court in *World-Wide Volkswage[…]*0), rejected the assertion that a *consumer's* unilateral act of bringing the defendant's product into the forum State was a sufficient constitutional basis for personal jurisdiction over the defendant. It had been argued in *World-Wide Volkswagen* that because an automobile retailer and its wholesale distributor sold a product mobile by design and purpose, they could foresee being haled into court in the distant States into which their customers might drive. The Court rejected this concept of foreseeability as an insufficient basis for jurisdiction under the Due Process Clause[…]6. The Court disclaimed, however, the idea that "foreseeability is wholly irrelevant" to personal jurisdiction, concluding that "[t]he forum State does not exceed its powers 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.[…][…]
7.
In *World-Wide Volkswagen* itself, the state court sought to base jurisdiction not on any act of the defendant, but on the foreseeable unilateral actions of the consumer. Since *World-Wide Volkswagen,* lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State. Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen,* to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.
The reasoning of the Supreme Court of California in the present case illustrates the former interpretation of *World-Wide Volkswagen.* The Supreme Court of California held that, because the stream of commerce eventually brough[…]1] some valves Asahi sold Cheng Shin into California, Asahi's awareness that its valves would be sold in California was sufficient to permit California to exercise jurisdiction over Asahi consistent with the requirements of the Due Process Clause. The Supreme Court of California's position was consistent with those courts that have held that mere foreseeability or awareness was a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum State while still in the stream of commerce. Se[…]).
Other courts, however, have understood the Due Process Clause to require something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant. In the present case, for example, the State Court of Appeal did not read the Due Process Clause, as

interpreted by *World-Wide Volkswagen,* to allow "mere foreseeability that the product will enter the forum state [to] be enough by itself to establish jurisdiction over the distributor and retailer.[…]).
We now find this latter position to be consonant with the requirements of due process. The "substantial connection,[…]3, between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State[…]*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.
Assuming, *arguendo,* that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California[…]. There is no evidence that Asahi designed its product in anticipation of sales in California[…]. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of Californ[…][1] exceeds the limits of due process.
B
The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend " `traditional notions of fair play and substantial justice.' […]3.
We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[…]).
[114] A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.
Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.
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. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Tawainese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.
Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. The Supreme Court of California argued that the State had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards.[…]. The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safet[…]5] standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan.[…]. The possibility of being haled into a California court as a result of an accident involving Asahi's components undoubtedly creates an additional deterrent to the manufacture of unsafe components; however, similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.
World-Wide Volkswagen also admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an

alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." […][…]
Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.
III
Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
It is so ordered.
JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.
I do not agree with the interpretation in Part II-A of the stream-of-commerce theory, nor with the conclusion that Asahi did not "purposely avail itself of the California market.[…]. I do agree, however, with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with "fair play and substantial justice,[…]. This is one of those rare cases in which "minimum requirements inherent in the concept of `fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.[…]. I therefore join Parts I and II-B of the Court's opinion, and write separately to explain my disagreement with Part II-A.
Part II-A states that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed towar[…]] the forum State.[…]. Under this view, a plaintiff would be required to show "[a]dditional conduct" directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause[…]. I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduc[…][…]] The endorsement in Part II-A of what appears to be the minority view among Federal Courts of Appeals[4] represents a marked retreat from the analysis in *World-Wide Volkswage[…]*0). In that case, "respondents [sought] to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.[…]. The Court held that the possibility of an accident in Oklahoma, while to some extent foreseeable in light of the inherent mobility of the automobile, was not enough to establish [119] minimum contacts between the forum State and the retailer or distributor[…]. The Court then carefully explained:
"[T]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process 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.[…]7.
The Court reasoned that when a corporation may reasonably anticipate litigation in a particular forum, it cannot claim that such litigation is unjust or unfair, because it "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 its connection with the State.[…]*d.*
To illustrate the point, the Court contrasted the foreseeability of litigation in a State to which a consumer fortuitously transports a defendant's product (insufficient contacts) with the foreseeability of litigation in a State where the defendant's product was regularly *sold* (sufficient contacts). The Court stated:
"Hence if the *sale* of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly,* the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers 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 purchase[…]] by consumers* in the forum State.[…]).
The Court concluded its illustration by referring to *Gray* v. *American Radiato[…]*, a well-known stream-of-commerce case in which the Illinois Supreme Court applied the theory to assert jurisdiction over a component-parts manufacturer that sold no

components directly in Illinois, but did sell them to a manufacturer who incorporated them into a final product that was sold in Illinois[…]8.

The Court in *World-Wide Volkswagen* thus took great care to distinguish "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer. . . took them there.[…][…][…]

1] In this case, the facts found by the California Supreme Court support its finding of minimum contacts. The court found that "[a]lthough Asahi did not design or control the system of distribution that carried its valve assemblies into California, Asahi was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components.[…][1] Accordingly, I cannot join the determination in Part II-A that Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California is insufficient to establish minimum contacts with California.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

The judgment of the Supreme Court of California should be reversed for the reasons stated in Part II-B of the Court's opinion. While I join Parts I and II-B, I do not join Part II-A for two reasons. First, it is not necessary to the Court's decision. An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional[…]. Part II-B establishes, after considering the factors set forth in *World-Wide Volkswagen […]*, that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair.[…]. This finding alone requires reversal; this case fits within the rule that "minimum requirements inherent in the concept of `fair play and substantial justice' may defea[…]2] the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.[…]). Accordingly, I see no reason in this case for the plurality to articulate "purposeful direction" or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Second, even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case. The plurality seems to assume that an unwavering line can be drawn between "mere awareness" that a component will find its way into the forum State and "purposeful availment" of the forum's market[…]2. Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[t]he placement of a product into the stream of commerce, without more . . . .[…]. Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

[…]

[2] We 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 aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits. […]

[…]

[4] The Court of Appeals for the Eighth Circuit appears to be the only Court of Appeals to have expressly adopted a narrow construction of the stream-of-commerce theory analogous to the one articulated in Part II-A today, although the Court of Appeals for the Eleventh Circuit has implicitly adopted it. See *Humble* v. *Toyota Motor Co., Ltd.,* 727 F. 2d 709 (CA8 1984); *Banton Industries, Inc.* v. *Dimatic Die & Tool Co.,* 801 F. 2d 1283 (CA11 1986). Two other Courts of Appeals have found the theory inapplicable when only a single sale occurred in the forum State, but do not appear committed to the interpretation of the theory that the Court adopts today. *E. g., Chung* v. *NANA Development Corp.,* 783 F. 2d 1124 (CA4), cert. denied, 479 U. S. 948 (1986); *Dalmau Rodriguez* v. *Hughes Aircraft Co.,* 781 F. 2d 9 (CA1 1986). Similarly, the Court of Appeals for the Third Circuit has not interpreted the theory as JUSTICE O'CONNOR's opinion has, but has rejected stream-of-commerce arguments for jurisdiction when the relationship between the distributor and the defendant "remains in dispute" and "evidence indicating that [defendant] could anticipate either use of its product or litigation in [the forum State] is totally lacking," *Max Daetwyler Corp.* v. *R. Meyer,* 762 F. 2d 290, 298, 300, n. 13, cert. denied, 474 U. S. 980 (1985), and when the defendant's product was not sold in the forum State and the defendant "did not take advantage of an indirect marketing scheme," *DeJames* v. *Magnificence Carriers, Inc.,* 654 F. 2d 280, 285, cert. denied, 454 U. S. 1085 (1981).

[…]

[6] Moreover, the Court found that "at least 18 percent of the tubes sold in a particular California motorcycle supply shop contained Asahi valve assemblies," App. to Pet. for Cert. C-11, n. 5, and that Asahi had an ongoing business relationship with Cheng Shin involving average annual sales of hundreds of thousands of valve assemblies, *id.,* at C-2.

5.6.14 Notes on Asahi - Reasonableness, Stream of Commerce

1. Pay attention to how the Justices voted in *Asahi.* What is the basis of the Court's holding? The case is dismissed for lack of personal jurisdiction, but by? Is it because a majority follow Justice O'Connor's stream of commerce theory? Or is it because on the somewhat unusual facts of the case - where the plaintiff has settled out and one Asian defendant is seeking contribution from another Asian defendant - that it's not reasonable to have the lawsuit go forward in California?
2. While 'reasonbleness' has become something that courts turn to after examining minimum contacts, the number of cases in lower courts that are determined on that basis are relatively few. Of those, a high percentage involve non-U.S., alien defendants. Why do you think that would be so?
3. The court talks about the unique burden on foreign defendants in having to litigate in the U.S.. There is no question that the U.S. system is exceptional in many ways, and that litigating in the U.S. presents a burden for defendants not familiar with the U.S. process. But, doesn't the same thing work in reverse? If courts are too stingy with jurisdictional grants, does it not place a 'special burden' on a U.S. plaintiff to have to go litigate in foreign country? Also, to the extent U.S. litigation is not just about justice between the parties but enforcing a regulatory regime through litigation, can that happen when litigation is sent away to a different country with different laws?
4. At the end of personal jurisdiction, we will return to stream of commerce when we read the 5th Circuit's resolution of the Taishan defendants' personal jurisdiction defense.

5.6.15 J. McIntyre Machinery, Ltd. v. Nicastro

131 S.Ct. 2780 (2011)
J. McINTYRE MACHINERY, LTD., Petitioner,
v.
Robert NICASTRO,[…]
s.
Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.

Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of Cal.[…].*

Here, the Supreme Court of New Jersey, relying in part on *Asahi,* held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.[…]. Applying that test, the court concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the "stream of commerce" metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[…]. There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

[…]I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there. […]

At oral argument in this Court, Nicastro's counsel stressed three primary facts in defense of New Jersey's assertion of jurisdiction over J. McIntyre. […]

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines (the record suggests only one, see App. to Pet. for Cert. 130a), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.
In addition to these facts emphasized by petitioner, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technology[…]. It also noted that the U.S. distributor "structured [its] advertising and sales efforts in accordance with" J. McIntyre's "direction and guidance whenever possible," and that "at least some of the machines were sold on consignment to" the distributor.[…]).
In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner without contravention of the Due Process Clause. Jurisdiction was proper, in that court's view, because the injury occurred in New Jersey; because petitioner knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states"; and because petitioner failed to "take some reasonable step to prevent the distribution of its products in this State.[…]2.
Both the New Jersey Supreme Court's holding and its account of what it called "[t]he stream-of-commerce doctrine of jurisdiction,[…], were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.
II
The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. Cf. *Giaccio v. Pennsylvania,* 382 U.S. 399, 403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) (The Clause "protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land"). This is no less true with respect to the […]power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere. See *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("Jurisdiction is power to declare the law"). As a general rule, neither statute nor judicial decree may bind strangers to the State. Cf. *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 608-609, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (opinion of SCALIA, J.) (invoking "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*")
A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice.'" *[…]* Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,[…], though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."
A person may submit to a State's authority in a number of ways. There is, of course, explicit consent[…]. Presence within a State at the time suit commences through service of process is another example. See *Burnham, supra.* Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers[…]. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State[…]. These examples support exercise of the general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere[…]. By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.
There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state.[…]. Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its […] laws,[…], it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *[…]*
The imprecision arising from *Asahi,* for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment[…]. But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors "seek to serve" a given State's market[…]. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l]

itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[…]. Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

In *Asahi,* an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.[…]. It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The `substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of […]] product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.[…]).

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant[…]. As that opinion explained, "[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders.[…]. Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive.[…]

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power[…]. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[…]. For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate o[…]] particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi,* does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

III

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power[…][…]. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.
Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.[…]. These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.
It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case.[…]. The court nonetheless held that petitione[…]1] could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction.[…]. As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited "significant policy reasons" to justify its holding, including the State's "strong interest in protecting its citizens from defective products.[…]. That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.
* * *
Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is
Reversed.
Justice BREYER, with whom Justice ALITO joins, concurring in the judgment.
The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade.[…]. I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.
In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.
I
In asserting jurisdiction over the British Manufacturer, the Supreme Court of New Jersey relied most heavily on three primary facts as providing constitutionally sufficient "contacts" with New Jersey, thereby making it fundamentally fair to hale the British Manufacturer before its courts: (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.[…]. In my view, these facts do not provide contacts between the British firm and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.
[…] None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction[…]. And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place. […]
Here, the relevant facts found by the New Jersey Supreme Court show no "regular... flow" or "regular course" of sales in New Jersey; and there is no "something more," such as special state-related design, advertising, advice, marketing, or anything else.

Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer "purposefully avail[ed] itself of the privilege of conducting activities" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *[…]*
There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts. See *post,* at 2795-2796 (opinion of GINSBURG, J.) (describing the size and scope of New Jersey's scrap-metal business). But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them. *[…]*
Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.
II
I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because […] the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.
A
The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum.[…]. But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.
B
But though I do not agree with the plurality's seemingly strict no-jurisdiction rule, I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici.* Under that view, a producer is subject to jurisdiction for a products-liability action so long as it "knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.[…]. In the context of this case, I cannot agree.
For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between "the defendant, the *forum,* and the litigation," it is fair, in light of the defendant's contacts *with that forum,* to subject the defendant to suit there[…]. It would ordinarily rest jurisdiction instead upon no more than the occurrence of a product-based accident in the forum State. But this Court has rejected the notion that a defendant's amenability to suit "travel[s] with the chattel." *[…]*
For another, I cannot reconcile so automatic a rule with the constitutional demand for "minimum contacts" and "purposefu[l] avail[ment]," each of which rest upon a particular notion of defendant-focused fairness[…]. A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.
Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute[…] rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.
It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.[…]. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law. […]
C
At a minimum, I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances. Insofar as such

considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates. […]
This case presents no such occasion, and so I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.
Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.
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?
Under this Court's pathmarking precedent in *International Shoe […]* and subsequent decisions, one would expect the answer to be unequivocally, […] "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.[…]).
I
On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand[…]. Alleging that the machine was a dangerous product defectively made, Nicastro sought compensation from the machine's manufacturer, J. McIntyre Machinery Ltd. (McIntyre UK). Established in 1872 as a United Kingdom corporation, and headquartered in Nottingham, England, McIntyre UK "designs, develops and manufactures a complete range of equipment for metal recycling.[…]. The company's product line, as advertised on McIntyre UK's Web site, includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment and ... the world's best aluminium dross processing and cooling system.[…]. McIntyre UK holds both United States and European patents on its technology[…]a.
The machine that injured Nicastro, a "McIntyre Model 640 Shear," sold in the United States for $24,900 in 1995[…], and features a "massive cutting capacity,[…]. According to McIntyre UK's product brochure, the machine is "use[d] throughout the [w]orld.[…]. McIntyre UK represented in the brochure that, by "incorporat[ing] off-the-shelf hydraulic parts from suppliers with international sales outlets," the 640 Shear's design guarantees serviceability "wherever [its customers] may be based.[…]. The instruction manual advises "owner[s] and operators of a 640 Shear [to] make themselves aware of [applicable health and safety regulations]," including "the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment.[…]a.
Nicastro operated the 640 Shear in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey[…]9.
CSM's owner, Frank Curcio, "first heard of [McIntyre UK's] machine while attending an Institute of Scrap Metal Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor." […]ISRI "presents the world's largest scrap recycling industry trade show each year.[…]. The event attracts "owners [and] managers of scrap processing companies" and others "interested in seeing—and purchasing—new equipment." *[…]*According to ISRI, more than 3,000 potential buyers of scrap processing and recycling equipment attend its annual conventions, "primarily because th[e] exposition provides them with the most comprehensive industry-related shopping experience concentrated in a single, convenient location." *[…]* Exhibitors who are ISRI members pay $3,000 for 10' x 10' booth space. *[…]*
McIntyre UK representatives attended every ISRI convention from 1990 through 2005[…]. These annual expositions were held in diverse venues across the United States; in addition to Las Vegas, conventions were held 1990-2005 in New Orleans, Orlando, San Antonio, and San Francisco. *Ibid.* McIntyre UK's president, Michael Pownall, regularly attended ISRI conventions. *Ibid.* He attended ISRI's Las Vegas convention the year CSM's owner first learned of, and saw, the 640 Shear[…]. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach "anyone interested in the machine from anywhere in the United States." *[…]*
Although McIntyre UK's U.S. sales figures are not in the record, it appears that for several years in the 1990's, earnings from sales of McIntyre UK products in the United States "ha[d] been good" in comparison to "the rest of the world.[…]. In response to interrogatories, McIntyre UK stated that its commissioning engineer had installed the company's equipment in several States—Illinois, Iowa, Kentucky, Virginia, and Washington[…]a.
From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. (McIntyre America), "as its exclusive distributor for the entire United States."[…]Though similarly named, the two companies were separate and independent entities with "no commonality of ownership or management.[…]. In invoices and other written

communications, McIntyre America described itself as McIntyre UK's national distributor, "America's Link" to "Quality Metal Processing Equipment" from England. […]
In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States—and get paid![…]. Notably, McIntyre America was concerned about U.S. litigation involving McIntyre UK products, in which the distributor had been named as a defendant. McIntyre UK counseled McIntyre America to respond personally to the litigation, but reassured its distributor that "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something […]wrong with the machine.[…]. Answering jurisdictional interrogatories, McIntyre UK stated that it had been named as a defendant in lawsuits in Illinois, Kentucky, Massachusetts, and West Virginia. […]And in correspondence with McIntyre America, McIntyre UK noted that the manufacturer had products liability insurance coverage. […]
Over the years, McIntyre America distributed several McIntyre UK products to U.S. customers, including, in addition to the 640 Shear, McIntyre UK's "Niagara" and "Tardis" systems, wire strippers, and can machines[…]. In promoting McIntyre UK's products at conventions and demonstration sites and in trade journal advertisements, McIntyre America looked to McIntyre UK for direction and guidance[…]. To achieve McIntyre UK's objective, *i.e.,* "to sell [its] machines to customers throughout the United States,[…], "the two companies [were acting] closely in concert with each other,[…]. McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just noted, the manufacturer engaged McIntyre America to attract customers "from anywhere in the United States.[…]a.
In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.[…]On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?
II
A few points on which there should be no genuine debate bear statement at the outset. First, all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly "at home" in New Jersey[…]. The question, rather, is one of specific jurisdiction, which turns on an "affiliatio[n] […] between the forum and the underlying controversy.[…]4.
Second, no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim[…]).
Third, the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty. As the Court clarified in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[…]):
"The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* ... must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected." […][…]
Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably "presence" and "implied consent," should be discarded, for they conceal the actual bases on which jurisdiction rests[…]).
Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines,[…]the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful[…][…]
III
This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world.[…]A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves

defective and injures a user in the State where the user lives or works. Often, as here, the manufacturer will have liability insurance covering personal injuries caused by its products[…][…]
[…]When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer. For example, the State's statute might provide, as does New York's long-arm statute, for the "exercise [of] personal jurisdiction over any non-domiciliary ... who ...
"commits a tortious act without the state causing injury to person or property within the state, ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.[…][…]
Or, the State might simply provide, as New Jersey does, for the exercise of jurisdiction "consistent with due process of law.[…][…]
The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe,* gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury?[…]Do not litigational convenience[…] and choice-of-law considerations[…]point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?[12] Is not the burden on McIntyre[…]UK to defend in New Jersey fair, *i.e.,* a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?
McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States[…]). If McIntyre UK is answerable in the United States at all, is it not "perfectly appropriate to permit the exercise of that jurisdiction. . . at the place of injury"[…]).
In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself "of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. "Th[e] `purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of `random,' `fortuitous,' or `attenuated' contacts.[…]. Adjudicatory authority is appropriately exercised where "actions by the defendant *himself*" give rise to the affiliation with the forum[…]. How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market? […]
Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place withi[…]] the United States where the manufacturer's products caused injury[…][4]

IV

A

While this Court has not considered in any prior case the now-prevalent pattern presented here—a foreign-country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products—none of the Court's decisions tug against the judgment made by the New Jersey Supreme Court. McIntyre contends otherwise, citing *World-Wide Volkswagen,* and *Asahi Metal Industry Co[…]*).
World-Wide Volkswagen concerned a New York car dealership that sold solely in the New York market, and a New York distributor who supplied retailers in three States only: New York, Connecticut, and New Jersey[…]. New York residents had purchased an Audi from the New York dealer and were driving the new vehicle through Oklahoma en route to Arizona. On the road in Oklahoma, another car struck the Audi in the rear, causing a fire which severely burned the Audi's occupants[…]. Rejecting the Oklahoma courts' assertion of jurisdiction over the New York dealer and distributor, this Court observed that the defendants had done nothing to serve the market for cars in Oklahoma[…]. Jurisdiction, the Court held, could not be based on the *customer's* unilateral act of driving the vehicle to Oklahoma[…]).
Notably, the foreign manufacturer of the Audi in *World-Wide Volkswagen* did not object to the jurisdiction of the Oklahoma courts and the U.S. importer abandoned its initially stated objection[…]. And most relevant here, the Court's opinion indicates that an objection to jurisdiction by the manufacturer or national distributor would have been unavailing. To reiterate, the Court said in *World-Wide Volkswagen* that, when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable "to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury.[…]9.

Asahi arose out of a motorcycle accident in California. Plaintiff, a California resident injured in the accident, sued the Taiwanese manufacturer of the motorcycle's tire tubes, claiming that defects in its product caused the accident. The tube manufacturer cross-claimed against Asahi, the Japanese maker of the valve assembly, and Asahi contested the California courts' jurisdiction. By the time the case reached this Court, the injured plaintiff had settled his case and only the indemnity claim by the Taiwanese company against the Japanese valve-assembly manufacturer remained.
The decision was not a close call. The Court had before it a foreign plaintiff, the Taiwanese manufacturer, and a foreign defendant, […] the Japanese valve-assembly maker, and the indemnification dispute concerned a transaction between those parties that occurred abroad. All agreed on the bottom line: The Japanese valve-assembly manufacturer was not reasonably brought into the California courts to litigate a dispute with another foreign party over a transaction that took place outside the United States.
Given the confines of the controversy, the dueling opinions of Justice Brennan and Justice O'Connor were hardly necessary. How the Court would have "estimate[d]. . . the inconveniences,[…], had the injured Californian originally sued Asahi is a debatable question. Would this Court have given the same weight to the burdens on the foreign defendant had those been counterbalanced by the burdens litigating in Japan imposed on the local California plaintiff? […]
In any event, Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world. Moreover, Asahi was a component-part manufacturer with "little control over the final destination of its products once they were delivered into the stream of commerce.[…]. It was important to the Court in *Asahi* that "those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law.[…]. To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.[…]
B
The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred." […]The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the […] place of injury. […][…][…]
*
For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe.* […][…]

5.6.16 Notes on Nicastro

OVERALL
What is the binding holding in this case? No opinion in this case was joined by a majority of the justices. In *U.S. v. Marks*, 430 U.S. 188, 193 (1977), the Supreme Court stated, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..'" Applying that, what is the holding of the Court in this case? How might you use this case to predict the court's approach to future personal jurisdiction cases?
KENNEDY OPINION (Four Justices)
Who was suing whom and why?
In what court was the original action filed? Which court issued the ruling being reviewed by the Supreme Court here?
What contacts did J. McIntyre Machinery, Ltd., ("Manufacturer") have with the state of New Jersey? With the United States generally?
What was the relationship of Manufacturer with the distributor?
Can you explain how the 14th Amendment applies?
How do limitations on the power of the sovereign lead to a lack of personal jurisdiction? Does this court visualize state courts as having "exclusive" jurisdiction as the Pennoyer court did?
Can you explain the difference between an intent to serve the US market, which includes New Jersey, and purposeful availment of the New Jersey market?
BREYER OPINION (Two justices)
Do you think it is economically likely, given the costs of litigation, that a US plaintiff would sue a "small Egyptian shirt maker" in a US court on a products liability claim?
Can you deduce from Justice Breyer's opinion how he might rule in a similar case with slightly different facts? Can you predict which changed facts might matter to him?

GINSBURG DISSENT (Three justices)
Do Justice Ginsburg and Justice Kennedy have different views of the source and purpose of the limitation on a court's power expressed in personal jurisdiction doctrine?
Is there any place in the US where Nicastro could have sued McIntyre?
Is Justice Ginsburg's characterization of Justice Kennedy's use of state sovereignty fair? An accurate description of Kennedy's argument?

5.6.17 Bristol-Myers Squibb Co. v. Superior Court

137 S. Ct. 1773 (2017)
Opinion
Justice ALITO delivered the opinion of the Court.
More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol–Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.
I
A
BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Over 50 percent of BMS's work force in the United States is employed in those two States.
BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento.
One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. BMS instead engaged in all of these activities in either New York or New Jersey. But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. This amounts to a little over one percent of the company's nationwide sales revenue.
B
A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.
Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler* the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted."
The Court of Appeal then changed its decision on the question of general jurisdiction. Under *Daimler,* it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS.
The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State. *Ibid.*

*   *   *

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment.

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. Because "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause," which "limits the power of a state court to render a valid personal judgment against a nonresident defendant," The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State. Since our seminal decision in *International Shoe,* our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the *suit* " must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice."But the "primary concern" is "the burden on the defendant." Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State ... implie[s] a limitation on the sovereignty of all its sister States." And at times, this federalism interest may be decisive. As we explained in *World–Wide Volkswagen,* "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.' "

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction." This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted

research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.
Our decision in *Walden, supra,* illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." Because the "*relevant* conduct occurred entirely in Georgi[a] ... the mere fact that [this] conduct affected plaintiffs with connections to the forum State d [id] not suffice to authorize jurisdiction."
In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden,* all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction.
* * *
The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
It is so ordered.

Dissent
Justice Sotomayor, dissenting.
Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler*. Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.
I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.
* * *

5.6.18 Notes on Bristol Myers

1. Note that there was a sufficient relationship between California and the litigation overall - put differently, there was no question that Bristol Myers was going to be required to litigate in California with regard to some plaintiffs. The issue was whether given that level of connection it was proper to require them to litigate against plaintiffs whose claims had no ties to California.
2. By its nature, specific jurisdiction requires a finding for each individual claim in a lawsuit that specific jurisdiction related to that claim exists in the forum. If a plaintiff brings a lawsuit with two counts - one for a contract executed and to be performed in California, and another for an intentional tort that took place in Florida - the court will need to assess specific jurisdiction for each claim. (Note that this is not necessary where general jurisdiction is the basis for personal jurisdiction), *World-Wide Volkswagen* demonstrates that where there are multiple defendants, and the basis for personal jurisdiction is specific jurisdiction, a separate analysis has to be made for each defendant. There was no halo effect bringing the New York state plaintiffs into the case even though personal jurisdiction was conceded for the manufacturer and the national distributor. What does *Bristol Myers* tell us about whether we need to assess specific jurisdiction for each plaintiff separately when specific jurisdiction is the basis for personal jurisdiction?
3. At this stage, how would you summarize the test for specific personal jurisdiction? What must you look for? Is there a process where certain factors are considered, and then others? Hold these thoughts as we get to the Chinese Dry Wall decision.

5.6.19 Taishan Gypsum Co. v. Gross

In re CHINESE-MANUFACTURED DRYWALL PRODUCTS LIABILITY LITIGATION. Taishan Gypsum Company, Limited; Tai'An Taishan Plasterboard, Company, Limited, Defendants-Appellants v. David Gross; Cheryl Gross; Lois Velez, individually and on behalf of others similarly situated, Plaintiffs-Appellees. In re Chinese-Manufactured Drywall Products Liability Litigation. Taishan Gypsum Company, Limited, Defendant-Appellant v. Mitchell Company Incorporated, individually and on behalf of others similarly situated, Plaintiff-Appellee. In re Chinese-Manufactured Drywall Products Liability Litigation. Taishan Gypsum Company, Limited; Tai'An Taishan Plasterboard, Company, Limited, Defendants-Appellants v. Kenneth Wiltz, individually and on behalf of all others similarly situated, Barbara Wiltz, individually and on behalf of all others similarly situated, Plaintiffs-Appellees.
No. 12-31213.

United States Court of Appeals, Fifth Circuit.
May 20, 2014.
Frederick S. Longer, Arnold Levin, Lev-in, Fishbein, Sedran & Berman, Philadelphia, PA, Leonard Arthur Davis, Russ M. Herman, Esq., Senior Attorney, Herman Herman & Katz, L.L.C., Brooke C. Tigch-elaar, Stone Pigman Walther Wittmann, L.L.C., New Orleans, LA, Steven L. Nicholas, Esq., George M. Dent, III, David George Wirtes, Jr., Esq., Cunningham Bounds, L.L.C., Mobile, AL, Elizabeth Joan Cabraser, Lieff, Cabraser, Heimann & Bernstein, L.L.P., San Francisco, CA, Jonathan David Selbin, Lieff, Cabraser, Heimann, & Bernstein, L.L.P., New York, NY, for Plaintiff-Appellee.
Frank T. Spano, Courtney Lynne Colli-gan, Joe Cyr, Hogan Lovells US, L.L.P., New York, NY, Thomas Patrick Owen, Jr., Esq., Richard C. Stanley, Esq., Stanley, Reuter, Ross, Thornton & Alford, L.L.C., New Orleans, LA, for Defendants-Appellants.
Ervin Amado Gonzalez, Colson Hicks Eidson, Coral Gables, FL, Elliot H. Scherker, General Attorney, Greenberg Traurig, L.L.P., Miami, FL, for Amicus Curiae.
Before SMITH, DeMOSS, and HIGGINSON, Circuit Judges.
HIGGINSON, Circuit Judge:
This appeal encompasses three cases in the Chinese Drywall multidistrict litigation — Mitchell, Gross, and Wiltz. Picking up where we left off in Germano v. Taishan Gypsum Company, Ltd., 742 F.3d 576 (5th Cir.2014) (affirming as to a fourth), we hold that personal jurisdiction lies over Taishan Gypsum Company, Limited and Tafan Taishan Plasterboard Company, Limited, in their respective cases. We further hold that the district court did not abuse its discretion when it refused to vacate the preliminary default entered in Mitchell. We therefore AFFIRM.
I.
From 2005 to 2008, a housing boom coincided with the destruction of Hurricanes Katrina and Rita to sharply increase the demand for construction materials in the Gulf South and East Coast. In response, Chinese companies manufactured considerable quantities of gypsum wallboard ("Chinese drywall") and sold it to United States companies. Homeowners experienced problems with the drywall,[1] and affected parties sued entities involved in manufacturing, importing, and installing the Chinese drywall. The cases multiplied, and the Judicial Panel on Multidistrict Litigation transferred the cases to a single court in the Eastern District of Louisiana (the "MDL" court). The Honorable Eldon E. Fallon presides over the MDL.
Four cases in the MDL have reached our court: Germano, Mitchell, Gross, and Wiltz. Germano is a class action originally filed by Virginia homeowners in the United States District Court for the Eastern District of Virginia. Mitchell is a class action originally filed by homebuilders in the United States District Court for the Northern District of Florida. Gross and Wiltz are class actions on behalf of property owners and were directly filed in the MDL in the Eastern District of Louisiana.
Plaintiffs-Appellees are the class-action plaintiffs in each of the four cases. Defendants-Appellants are two Chinese companies that manufacture and sell drywall: Taishan Gypsum Company, Limited ("TG") and Tai'an Taishan Plasterboard Company, Limited ("TTP") (collectively "Taishan"). Both entities are defendants in Gross and Wiltz, but only TG is a defendant in Germano and Mitchell. TG and TTP appeal in their respective cases from the MDL court's omnibus September 4, 2012 order.
In Germano v. Taishan Gypsum Company, Ltd., 742 F.3d 576 (5th Cir.2014), our court affirmed the district court's decision finding personal jurisdiction over TG. We are tasked with the three remaining appeals: Mitchell, Gross, and Wiltz.
A. Mitchell, Gross, and Wiltz
1. Mitchell
The Mitchell Company ("Mitchell") is an Alabama construction company that has built homes and apartments in Alabama, Mississippi, Louisiana, Georgia, and Florida. On March 6, 2009, Mitchell sued TG, among others, in the United States District Court for the Northern District of Florida. Mitchell sued on behalf of itself and a class "composed of all persons and entities" in Alabama, Mississippi, Louisiana, Georgia, Texas, and Florida who "constructed an improvement to real estate using drywall manufactured or distributed by Defendants" and incurred expenses associated with repairing the drywall itself, repairing property damage that the drywall caused, and liability to property owners as a result of the damage.
Mitchell properly served TG on May 8, 2009. On June 15, 2009, the MDL panel transferred Mitchell to the Eastern District of Louisiana. TG failed to appear, and Mitchell moved for a default judgment. The Clerk entered a preliminary default against TG on September 22, 2009, and on June 10, 2010, TG made its first appearance. TG moved to vacate the preliminary default under Rule 55(c) and also moved to dismiss the case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The MDL court denied TG's motions in its omnibus September 4, 2012 order.
2. Gross
The Gross plaintiffs filed directly in the MDL court on October 7, 2009. The plaintiffs sued, among others, TG and TTP, on behalf of themselves and all United States homeowners who have defective drywall in their homes. They allege that defendants' drywall has caused them economic harm ¡from the costs of inspection, costs of repairs, and devaluation of their homes, and physical harm such as an increased risk of disease. Because plaintiffs concede that they have failed to "identify the manufacturer of the product that caused the harm," they urge liability for the defendants "in ratio to their proportionate share

of the relevant market."[2] After jurisdictional discovery, TG and TTP moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2). The district court denied the motion in its omnibus September 4, 2012 order.
3. Wiltz
The Wiltz plaintiffs also filed directly in the MDL court. They are suing, among others, TG and TTP, on behalf of themselves and all owners and residents of property containing defective Chinese drywall. After completing jurisdictional discovery, TG and TTP moved to dismiss Wiltz for lack of personal jurisdiction under Rule 12(b)(2). The district court denied the motion in its omnibus September 4, 2012 order.[3]
B. The Taishan Entities (TG and TTP)
TG is a Chinese corporation with its principal place of business in Ta'in City, Shandong Province, China. It began manufacturing drywall in 1992 and has grown to be one of the largest drywall manufacturers in China. In 2006, TG formed a wholly owned subsidiary, TTP. TTP stopped operating in 2008. TG and TTP are referred to collectively as "Taishan."
C. The District Court's Order
On September 4, 2012, the district court ruled on Taishan's motions in Germano, Mitchell, Gross, and Wiltz in a 142-page order. In Germano the district court determined that personal jurisdiction was proper over TG in Virginia. The district court also denied TG's motion to vacate the default judgment.[4] In Mitchell, the district court determined that personal jurisdiction was proper over TG in Florida. In so holding, the district court determined that TTP's contacts with Florida could be imputed to TG for the purposes of personal jurisdiction. The district court also denied TG's motion to vacate the preliminary default. In Gross and Wiltz,[5] the district court determined that personal jurisdiction was proper over TG and TTP in Louisiana. The district court again held that TTP's contacts could be imputed to TG for the purposes personal jurisdiction. The district court subsequently certified an interlocutory appeal under 28 U.S.C. § 1292(b), and this court granted permission to appeal.
II.
Whether personal jurisdiction can be exercised over a defendant is a question of law subject to de novo review. Patin v. Thoroughbred Poiver Boats Inc., 294 F.3d 640, 652 (5th Cir.2002) (citing Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331, 335 (5th Cir.1999)). A district court's jurisdictional findings of fact, however, are reviewed for clear error. Lonatro v. United States, 714 F.3d 866, 869 (5th Cir.2013). "The burden of establishing personal jurisdiction over a nonresident defendant lies with the plaintiff." Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 176 (5th Cir.), cert. denied, — U.S. -, 134 S.Ct. 644, 187 L.Ed.2d 420 (2013). Because the district court held an evidentiary hearing on personal jurisdiction, the plaintiffs must establish personal jurisdiction by a preponderance of the evidence. Germano, 742 F.3d at 585; see also Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co., 517 F.3d 235, 241-42 (5th Cir.2008).
Under Federal Rules of Civil Procedure 55(c) and 60(b), a district court may set aside an entry of default for "good cause." Lacy v. Sitel Corp., 227 F.3d 290, 291-92 (5th Cir.2000). The denial of such relief is reviewed for abuse of discretion and any factual determinations underlying the district court's decision are reviewed for clear error. Id.
III.
We begin with the Mitchell appeal, in which TG argues that the district court erred in finding specific jurisdiction over it in Florida. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." Walden v. Fiore, — U.S. -, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014) (internal quotations omitted). "This is in contrast to 'general' or 'all purpose' jurisdiction, which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (e.g., domicile)." Id. at n. 6; see also Daimler AG v. Bauman, — U.S.-, 134 S.Ct. 746, 757-58, 187 L.Ed.2d 624 (2014).
A. TTP's contacts may be imputed to TG
TG first argues that TTP's contacts with Florida may not be imputed to TG for purposes of personal jurisdiction. We hold that they can.
1. Choice of law
TG faults the district court for applying the forum state's law (Florida law) instead of Chinese law to the question of whether to impute TTP's Florida contacts to TG. TG concedes, however, that "Chinese law is not materially different on this issue from Florida law, and the outcome should be the same under either law." Accordingly, we need not choose because "if the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 839 n. 20, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Therefore, we apply Florida law.[6]
2. Imputation under Florida Law
Under Florida law, a foreign parent corporation is generally not "subject to the jurisdiction of a forum state merely because a subsidiary is doing business there." Meier ex rel. Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1272 (11th Cir.2002). But if:
the subsidiary is merely an agent through which the parent company conducts business in a particular jurisdiction or its separate corporate status is formal only and without any semblance of individual identity, then the subsidiary's business will be viewed as that of the parent and the latter will be said to be doing business in the jurisdiction through the subsid.-iary for purposes of asserting personal jurisdiction.

Id. (quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed.2002)). Indeed, Florida's long-arm statute recognizes that an agent's contacts with Florida can be imputed to its principal for jurisdictional purposes: "A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits ... to the jurisdiction of the courts of this state." Fla. Stat. Ann. § 48.193(l)(a) (emphasis added); see also Dev. Corp. of Palm Beach v. WBC Constr., LLC, 925 So.2d 1156, 1161 (Fla.Dist.Ct App.2006) ("While a parent corporation is not subject to jurisdiction in Florida solely because its subsidiary does business here, the control of a parent over a subsidiary may permit the conclusion that the subsidiary is acting as the agent of the parent, thus subjecting the parent to jurisdiction under section 48.193(1) and supporting 'minimum contacts.' " (internal citations omitted)).
"Essential to the existence of an actual agency relationship is (1) acknowledgment by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." Goldschmidt v. Holman, 571 So.2d 422, 424 n. 5 (Fla.1990). "The issue of control is critical to the determination of agency." State v. Am. Tobacco Co., 707 So.2d 851, 854 (Fla.Dist.Ct.App.1998). The parent's control "must be high and very significant." Enic, PLC v. F.F. S. & Co., Inc., 870 So.2d 888, 891 (Fla.Dist.Ct.App.2004). "[T]he parent corporation, to be liable for its subsidiary's acts under the ... agency theory, must exercise control to the extent the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." Id.
3. Imputation and Due Process
While Florida law contemplates the imputation of jurisdictional contacts between an agent and its principal, authority is split over whether imputation on the basis of an agency relationship comports with Federal Due Process. In Daimler AG v. Bauman, the Supreme Court was presented with the question of whether a principal can be subject to general jurisdiction based on its agent's contacts with the forum state. — U.S. -, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). The court recognized: "Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego." The court, however, then decided "we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained." Daimler, 134 S.Ct. at 759. As for agency imputation in specific jurisdiction cases, the Court noted:
Agency relationships, we have recognized, may be relevant to the existence of specific jurisdiction.... As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.... It does not inevitably follow, however, that similar reasoning applies to general jurisdiction.
Id. at 759 n. 13 (emphasis added). Daimler therefore embraces the significance of a principal-agent relationship to the specific-jurisdiction analysis, though it suggests that an agency relationship alone may not be dispositive. See id. at 759 ("Agencies ... come in many sizes and shapes ... [a] subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere.").7
Daimler1 s illustrative example of when the principal-agent relationship informs the specific-jurisdiction analysis of related entities is present here. The agency relationship between TG and TTP reflects TG's purposeful availment of the Florida forum. See Daimler, 134 S.Ct. at 759 n. 13. The record, as set forth by the district court, and assessed below, demonstrates that TG's parental control over its agent, TTP, pervaded TTP's dealings with the forum, and therefore allows TTP's contacts with Florida to be imputed to TG for the purpose of specific jurisdiction. See, e.g., Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516, 1521-23 (11th Cir.1985) (upholding finding of specific jurisdiction based on agency relationship); John Scott, Inc. v. Munford, Inc., 670 F.Supp. 344, 347 (S.D.Fla.1987) (assessing specific jurisdiction, and holding that "the contacts of ASIAN ARTS's agent MUNFORD, whose agency relationship has been established by prima facie evidence, may be attributed to ASIAN ARTS for the purposes of satisfying due process.").
4. TG and TTP
To find that TTP was acting as TG's agent in order to impute its contacts to TG, we must examine their corporate relationship. The district court based its factual findings on the entities' relationship on almost two years of jurisdictional discovery, multiple rounds of briefing, and a hearing. The district judge also personally attended depositions taken in Hong Kong. With the benefit of these efforts, we describe the entities' relationship.
a.TG creates TTP.
TG is a Chinese corporation with its principal place of business in Ta'in City, Shandong Province, China. TG began manufacturing drywall in 1992 and has become one of the largest drywall manufacturers in China. TG's former names include Shandong Taihe Taishan Plasterboard Main Factory (Group) and Shan-dong Taihe Dongxin Co., Ltd. ("Taihe"). Because TG uses recycled materials, it was exempt from the value added tax ("VAT"), but in 2006 the Chinese tax bureau informed TG that if it "wants to continue to enjoy the exemption for VAT tax, [it] cannot issue VAT invoices to these customers." Some of TG's customers, however, still required VAT invoices. Accordingly, in 2006, TG formed a wholly owned subsidiary, TTP, to execute its sales accompanied with VAT invoices.
b.TG employees sit on TTP's Board of Directors.

TTP appointed Peng Shiliang ("Peng"), Fu Tinghuan ("Fu"), and Wang Fengquin ("Wang") to its Board of Directors. All three directors of TTP "came from TG." Peng had offices at both TG and TTP. Fu did not receive compensation for his position on TTP's board, and was "only compensated by TG" for his position as TG's Deputy General Manager and Director of Sales. TTP held board meetings "irregularly, [but] usually once a year." TTP submitted written monthly reports to TG, and at times TTP's directors — specifically Peng — would report directly to TG. These reports would tell TG "the specifics of the production and also the volume of sales."

c.TG capitalizes, staffs, and deals with TTP.

TG provided TTP with a capital contribution, sold it equipment, and rented it a factory. TG's initial capital contribution was RMB 15,000,000, and TG provided a subsequent capital contribution of RMB 7,234,900. TTP purchased manufacturing equipment from TG, but TTP's financial records do not show how much TTP paid for the equipment. When TTP ceased operation, TG purchased back the equipment, offices, and factory it had sold or rented to TTP. TG's financial reports do not account for the amounts of the buy-back purchases.

TG's headquarters was located about 1,000 meters west of TTFs office, and TG and TTP maintained separate offices and factories. But TTP conducted "all of the export sales" previously executed by TG. TG also authorized TTP to "use the Taish-an name," i.e. the "brand name." TTP did not pay TG for the use of the Taishan brand, which is TG's trademark. Many of TTP's employees had previously worked for TG, and when TTP ceased operation, they "went back to work at TG." To staff TTP, TG instructed its employees to simply "volunteer." TTP's employees continued to use TG email addresses, and phone numbers; sign emails "Taihe Group"; and use TG business cards when dealing with customers. TTP employees also directed their customers and potential customers to TG's website at "www.taihegroup.com." When TTP salespeople gave an introduction to their company they would introduce their company as TG, would not mention TTP at all, and would include "Taihe Dongxin Co., Ltd." (TG) under their signature.

d. TTP holds itself out to be the same entity as TG.

TTP consistently held itself out as being synonymous with TG in its dealings with two American companies. In particular, it referred to itself as "Taihe." Guardian Building Supplies ("Guardian"), a South Carolina company, entered into dealings with an entity it knew only as "Taihe." When Guardian's representative, John Gunn, visited China, Taihe's representatives did not discuss TG or TTP. Gunn met with Taihe representative Apollo Yang, who told Gunn that he worked for Taihe and gave Gunn a business card that represented he worked for Taihe Dongxin. Tai-he, however, was the "only name [Gunn] knew." Guardian purchased drywall from Taihe, and Gunn "understood it was- buying Taihe drywall."

While Gunn's purchase order went to Taihe, Taian Taigo Trading Corporation ("TTT") served as the broker. At the time of the transaction, however, Gunn "had no idea of [TTT's] existence." When homeowners began to complain about the drywall, Guardian alerted Taihe and went to China to meet with them. When Gunn traveled to China in October 2006, he met with TTT, and "[t]his was the first time [he] realized there's someone else involved." Gunn testified that TTT "was a front set up by Taihe to distance ... Guardianf] from Taihe." Gunn traveled to China again in 2008 to work out a settlement with Taihe. In these discussions, however, Gunn was dealing with Taihe. Specifically, Gunn thought he was meeting with the General Manager of Taihe. Nevertheless, Guardian eventually settled with TTP.

Oriental Trading Company ("OTC"), a Florida company, had a similar experience. TTP's representatives never differentiated between TG and TTP, but instead consistently represented themselves to be "Tai-he." TTP and OTC entered into an agreement in which TTP agreed to sell OTC "DUN" brand drywall, and make OTC the sole sales agent of "DUN" drywall in the United States. Importantly, TG exclusively produced DUN drywall, and TG never formally authorized TTP to produce DUN brand drywall. But authorization was obvious: TTP sold OTC 60,000 pieces of DUN drywall. Moreover, OTC made a $100,000 deposit to TTP, but it was TG that worked to return that deposit to TTP at the end of their business relationship.

e. TG winds down TTP.

In 2008, the boards of directors of TG and TTP decided to have TTP discontinue producing drywall. TTP remains incorporated, though it has no income and TG or one of its subsidiaries pays TTP's remaining employees.

5. Imputation is Proper

The record demonstrates that TTP acted as TG's agent under Florida law when it conducted its Florida contacts. This principal-agent relationship allows for imputation of TTP's contacts to TG for the purposes of personal jurisdiction. See Pesaplastic, 750 F.2d at 1522-23. First, TG allowed TTP to act on its behalf, and TTP did act on TG's behalf. See, e.g., Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1361-63 (11th Cir.2006) (finding an agency relationship supporting imputation when, among other things, the agent "acted as an advertising and booking department" for the principal); Benson v. Seestrom, 409 So.2d 172, 173 (Fla.Dist.Ct.App.1982) ("Even where an agent's act is unauthorized, the principal is liable if the agent had the apparent authority to dp the act and that apparent authority was reasonably relied upon by the third party dealing with the agent."). For instance, TG authorized TTP to use TG's trademark in producing drywall but did not charge TTP for this authorization. TTP also sold the exclusive right to purchase TG's "DUN" brand of drywall even though TG did not formally authorize TTP to sell this brand. See id. at 173 ("While Paschall was not cloaked with authority to

execute contracts on appellant's behalf, he certainly had the apparent authority necessary to conduct negotiations between the parties.").

Second, TG and TTP held themselves out to be the same entity to customers such as OTC (a Florida company) and Guardian. See, e.g., John Scott, 670 F.Supp. at 346 (finding fact that entity acted on behalf of principal in negotiating contracts was a factor favoring agency relationship). TTP employees used TG email address, fax numbers, phone numbers, business cards, and websites when dealing with customers. See Stubbs, 447 F.3d at 1362 (finding an agency relationship supporting imputation when, among other things, the principal listed the agent's address on checks). Moreover, the entities settled each other's debts.

Third, TTP was formed to conduct a narrow function for TG and it acted only to serve TG. See, e.g., Stubbs, 447 F.3d at 1362-63 (noting that imputation was appropriate when the Florida subsidiary conducted business "solely for the nonresident corporation!]"); Meier, 288 F.3d at 1275 (finding that one factor to consider in determining imputation is whether the subsidiary "render[s] services on behalf of' the parent that are "sufficiently important" to the parent that the parent would "perform the equivalent services if [the subsidiary] did not exist"). For example, some of TTP's board members did not receive compensation from TTP, TG rented or sold to TTP offices, factories, and equipment, and TTP returned these properties to TG when it ceased operating; TG and TTP did not accurately report their dealings with each other in their financial reports,8 and TTP and TG were used interchangeably in contracts. See, e.g., PFM Air, Inc. v. Dr. Ing. hc. F. Porsche A.G., 751 F.Supp.2d 1264, 1276 (M.D.Fla.2010) (finding imputation appropriate when, among other things, the parent paid the salaries of the subsidiary's employees and the parent "controlled the warranty program" that issued in the subsidiary's name).

These factors demonstrate TG's control over TTP. As Lennar Homes summarized, "TTP had no independent purpose outside of servicing TG's needs and, as such, was its agent under Florida law." Lennar Homes, No. 09-7901 CA 42, at 5. Accordingly, because TTP acted as TG's agent when it executed its Florida contacts, those contacts can be imputed to TG for the purposes of personal jurisdiction.

B. The Florida Long-Arm Statute

"A federal district court sitting in diversity may exercise personal jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution." Ainsworth, 716 F.3d at 177 (quoting Latshaw v. Johnston, 167 F.3d 208, 211 (5th Cir.1999)). The first prong of this two-prong jurisdictional analysis asks "whether the long-arm statute of the forum state confers personal jurisdiction over the defendant." Stripling v. Jordan Prod. Co., LLC, 234 F.3d 863, 869 (5th Cir.2000). It is undisputed that Florida's long-arm statute — Fla. Stat. Ann. § 48.193 — applies. Florida's long-arm statute provides in relevant part:

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:

1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

2. Committing a tortious act within this state.

6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

a. The defendant was engaged in solicitation or service activities within this state; or

b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

§ 48.193. "Florida's long-arm statute is to be strictly construed," Sculptchair Inc. v. Century Arts, Ltd., 94 F.3d 623, 627 (11th Cir.1996) (citing Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 891 (11th Cir.1983)), and some courts interpreting Florida's statute have noted that it "confers less jurisdiction upon Florida courts than allowed by the Due Process Clause." Am. Investors Life Ins. Co. v. Webb Life Ins. Agency, Inc., 876 F.Supp. 1278, 1280 (S.D.Fla.1995); see also McRae v. J.D./M.D., Inc., 511 So.2d 540, 543 n. 4 (Fla.1987) ("It has been held by other courts that our long arm statute requires more activities or contacts than is mandated by the constitution." (citing Mallard v. Aluminum Co. of Canada, Ltd., 634 F.2d 236, 241 (5th Cir.1981))).

First we overlay Taishan's (TTP and TG's) contacts with Florida and then analyze their sufficiency under § 48.193(l)(a)(l).9

1. Taishan's contacts with Florida

Having concluded that TTP was TG's agent under Florida law allowing imputation of TTP's contacts to TG, we next ask whether the entities' contacts with Florida were sufficient to allow personal jurisdiction over TG in Florida. Again, we benefit from the district court's extensive factual findings on Taishan's contacts with Florida.

a. Taishan deals with OTC.

Taishan sold 200,000 sheets of its drywall to Florida customers or customers doing business in Florida and made almost $800,000 from these sales. Taishan's specific dealings with OTC, however, are particularly relevant to our jurisdictional analysis. TTP entered into a sole agency agreement with OTC — a Florida company — in which OTC agreed to purchase at least 20,000 sheets of TTP drywall between November 2006 and February 2007, and not less than 1,000,000 sheets in the following twelve months. The agreement with OTC was notarized under Florida law, OTC paid a $100,000 deposit to TTP under the agreement, and OTC purchased about 57,800 sheets of drywall for $208,711.20 from TTP.

Taishan knew through communications with OTC that its drywall would be shipped to Florida, as invoices and emails provided that shipments would be to Miami, Florida.10 TTP also issued export invoices on 44,490 pieces of drywall sold to OTC and shipped to Miami. OTC and Taishan discussed expanding the sales in the United States, and Taishan said it would help OTC market and sell the drywall.

Further, OTC requested that the drywall meet American Codes and Standards. Specifically, Taishan customized its drywall to meet American Society for Testing and Materials ("ASTM") standards and provided ASTM certificates. Taishan also manufactured its drywall in inches, altered its DUN brand colors to reflect the colors of the American flag, and shipped samples of its drywall to Florida. Moreover, Taishan hosted OTC's representative for a visit in China.

Taishan arranged shipments from China to Florida, and although the shipping was FOB China, Taishan handled and paid for the shipping of drywall to Florida.11 Taishan made suggestions as to which Florida port would be best for shipping,12 and all of OTC's shipments went to Florida. Taishan also complied with Florida Department of Transportation's regulations. After their business relationship ended, OTC and Taishan discussed a new business relationship, in which Taishan would provide electronics to OTC in the United States.

b. Taishan deals with B. America.

TTP also sold drywall to B. America Corporation through Onyx GBB Corporation — both Florida companies. B. America purchased 1,320 sheets of TTP drywall, compliant with ASTM standards, and delivered "CFR MIAMI." B. America wired half of the purchase price to TTP, but the deal fell through when the American market suffered. B. America tried to get a refund for the wire transfer, but TTP refused. As a result, B. America purchased the drywall from TTP and contacted R & R Building Materials ("R & R") to purchase this drywall from B. America. TTP prepared an invoice selling 660 sheets to B. America in exchange for $5,656.20 and noting that the delivery was "CIF [cost, insurance, freight] Miami Port." In communications to Onyx and B. America, Taishan wrote: "We will arrange the shipping to Miami Port at an early time." TTP took out insurance on its shipment to B. America, and the policy notes that the shipment is going to Florida. After the shipment reached Florida, Onyx sold it to R & R in Miami.

c.Taishan deals with Wood Nation.

Wood Nation, Inc. — another Florida company-also purchased drywall from TTP. Richard Hannam, the president of Wood Nation, visited TTP in China, and entered into a contract with TTP for the purchase of 333,000 sheets of TTP drywall. The contract provided that the port of discharge was Tampa, Florida and that Wood Nation was registered at Tampa, Florida. TTP provided Wood Nation with test reports showing that it qualified with ASTM standards. Wood Nation requested that TTP customize the drywall by putting "ASTM C 1396-04" on the back of each piece of drywall, and TTP stamped each board with "Tampa, Florida" as the contact location as well as a Florida phone number as the contact phone number.13 Wood Nation revised its contract to purchase only 26,000 sheets of drywall in order to accommodate a smaller order from its customer. Wood Nation handled shipping the drywall from China to Florida.

d. Taishan sells drywall to Devon.

A Pennsylvania company, Devon International Trading, was also interested in purchasing Chinese drywall. Devon's president toured Taishan's factory in China, and TG sent samples of its drywall to Devon. Devon and another company, North Pacific Group, entered a purchase order of 485,044 sheets of drywall to be sent to Pensacola, Florida. Devon requested to purchase drywall from TG to satisfy the North Pacific purchase order. The product was purchased through a trading company, Shanghai Yu Yuan Import & Export Company, and the Devon logo was stamped on each package. Each piece of drywall was also stamped with a guarantee that it met ASTM standards. In the course of the drywall's transit to Pensacola, Florida, about half of the drywall was damaged, and North Pacific only purchased a fraction of what it original ordered. Devon sold the left over drywall to distributors, wholesalers, and some individuals. Devon sold some drywall to Emerald Coast Building Supply, and Emerald Coast sold 840 boards of drywall to Right-way Drywall, who finally sold it to Mitchell — the named plaintiff. This drywall had the same markings requested by Devon, specifically, the drywall is stamped that it is "made in China" and "Meet[s] or exceeds ASTM C1396 04 standard." Mitchell then used the drywall to build homes in Florida.

e. Taishan sends Carn Construction samples in Florida.

Carn Construction Corporation, a Florida corporation, also contacted Taishan to purchase drywall after it discovered Taishan through Alibaba.com. Taishan represents on this website that it exports drywall on Alibaba.com, and when Carn contacted Taishan and informed Taishan that it was a Florida company, Taishan represented that it exported to the United States and said it was willing to "ship their products to [Carn] in Florida." Taishan sent drywall samples to Carn in Florida. "[F]or marketing purposes," Taishan would "give [Carn] the option in [the] order to mark a brand" on the drywall.14

2. Conducting business within Florida

Under § 48.193(l)(a)(l) TG is subject to jurisdiction in Florida for "any cause of action arising from ... [Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." In order to satisfy this provision, "[t]he activities of the [defendant] sought to be served ... must be considered collectively and show a general course of business activity in the State for pecuniary benefit." Sculptchair, 94 F.3d at 627 (quoting Dinsmore v. Martin Blumenthal Assocs., Inc., 314 So.2d 561, 564 (Fla.1975)); see also Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir.2000) (per curiam); Golant v. German Shepherd Dog Club of Am., Inc., 26 So.3d 60, 63 (Fla.Dist.Ct.App.2010) (noting the same); Citicorp Ins. Brokers (Marine), Ltd. v. Charman, 635 So.2d 79, 81 (Fla.Dist.Ct.App.1994) (noting the same).

Further, "[i]t is not necessarily the number of transactions, but rather the nature and extent of the transaction(s) that determines whether a person is 'carrying on a business venture' within the state." Joseph v. Chanin, 869 So.2d 738, 740 (Fla.Dist.Ct.App.2004). In Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162, 1167 (11th Cir.2005), the court highlighted "[factors relevant, but not dispositive" to this analysis. These include: (1) "the presence and operation of an office in Florida," (2) "the possession and maintenance of a license to do business in Florida," (3) "the number of Florida clients served," and (4) "the percentage of overall revenue gleaned from Florida clients." Id. (citing Florida cases utilizing each factor).

The third and fourth factors are relevant here. First, Taishan sold 200,000 sheets of drywall for about $800,000 in Florida.15 Second, Taishan negotiated with Florida companies, and arranged shipping to Florida. See Robert D. Harley Co. v. Global Force (U.K.) Ltd., No. 05-21177-CIV, 2007 WL 196854, at *4 (S.D.Fla. Jan. 23, 2007) (jurisdiction proper under Florida law because, among other reasons, defendant "shipped from [its] factories in Jordan and China directly to VF Corp's Tampa location"). Third, Taishan granted a Florida company the sole right to purchase a specific brand of its drywall. See Sierra v. A Betterway Rentt-A-Car, Inc., 863 So.2d 358, 360 (Fla.Dist.Ct.App.2003) (finding statute satisfied when defendants "were aware that its vehicles were driven in Florida," "did not discourage or prohibit its customers from driving in Florida," and advertised itself as a "global system of rental agencies, available for worldwide rental arrangements"). Fourth, Taishan specifically altered some boards by stamping "Tampa, Florida" and a Florida phone number; shipped samples to Florida; and insured its shipments to Florida.

These and the other Florida contacts "show a general course of business activity in the state for pecuniary benefits." Citi-corp Ins., 635 So.2d at 81 (deriving commissions of $600,000 over five years, "sending numerous letters and telefaxes back and forth to negotiate a deal with a Florida insurance broker," and responding to a request by the Florida Insurance broker to provide coverage for a vessel moored in Florida, all supported long-arm jurisdiction); see Lennar Homes, No. 09-07901 CA 42, at 8 (holding that "Taishan was 'carrying on business' in Florida and that the Court may assert jurisdiction over Taishan under Section 48.193(1)(a)(l) of the Florida long-arm statute."), aff'd sub nom., Taishan Gypsum Co. Ltd., 123 So.3d at 637.

3. "Arise-from" requirement

Florida's long-arm statute also requires that plaintiffs cause of action arise from the defendant's acts. TG argues that the statute is not satisfied because plaintiffs' causes of action do not arise from its contacts with Florida.16 As the Court in Lennar Homes recognized: "It is enough under the long-arm statute that the type of Taishan drywall that injured homeowners, and caused the damages sustained by plaintiffs, was otherwise available for purchase in Florida."17 The arise-from requirement is met because Mitchell's complaint alleges that the homebuilders incurred costs because they installed Taishan's drywall, the profile forms submitted by the parties demonstrate that the drywall at issue in Mitchell is traceable to Taishan, and testimony from Lennar — a Florida homebuilder — identifies 400 homes containing Taishan drywall.

Additional evidence supports tracing Taishan drywall to the Mitchell plaintiffs: Devon and North Pacific Group, entered a purchase order of 485,044 sheets of drywall to be sent to Pensacola, Florida. Devon requested to purchase drywall from TG to satisfy the North Pacific purchase order. The product was purchased through a trading company, Shanghai Yu Yuan Import & Export Company, and the Devon logo was stamped on each package. Devon sold some drywall to Emerald Coast Building Supply, and Emerald Coast sold 840 boards of drywall to Rightway Drywall, who finally sold it to Mitchell— the named plaintiff. Accordingly, the district court properly found the Florida long-arm statute satisfied.

C. Due Process

Having satisfied Florida's long-arm statute, Taishan's contacts must also support a finding of personal jurisdiction consistent with Due Process. For specific jurisdiction to be proper, Due Process requires (1) minimum contacts by the defendant purposefully directed at the forum state, (2) a nexus between the defendant's contacts and the plaintiffs claims, and (3) that the exercise of jurisdiction over the defendant be fair and reasonable. ITL Int'l, Inc. v. Constenla, S.A., 669 F.3d 493, 498 (5th Cir.2012). In sum, to satisfy Due Process, the defendant's connection with the forum state must be such that it "should reasonably anticipate being haled into court" in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

1. Choice of Law

As explained below, circuit authority varies in interpreting the Due Process requirements of personal jurisdiction. TG argues that the district court should have applied the Eleventh Circuit's more demanding minimum-contacts test instead of the Fifth Circuit's more permissive interpretation. As in Germano, "we need not reach the issue of which circuit's law should apply because regardless of which circuit's approach we use, the outcome is the same." Germano, 742 F.3d at 586. Even under the Eleventh Circuit's more demanding test, TG (through its agent TTP) has the requisite contacts -with Florida.
2. Minimum Contacts
a. Supreme Court Precedent
Fractured opinions in the Supreme Court have allowed for two different understandings of the quality of contacts a defendant must have with the forum state in order to satisfy Due Process. In Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cnty., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Court split over whether simply placing products in the stream of commerce could satisfy personal jurisdiction. Justice O'Connor's plurality opinion explained:
The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State ... [b]ut a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.
480 U.S. at 112, 107 S.Ct. 1026. Justice Brennan's concurrence disagreed with Justice O'Connor's "stream of commerce plus" test:
The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise....
Id. at 117, 107 S.Ct. at 1034 (Brennan, J., concurring). Most recently in J. McIntyre Machinery, Ltd. v. Nicastro, — U.S. -, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), the Court was divided still. Justice Kennedy's plurality opinion embraced the "stream of commerce plus" test:
Since Asahi was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.
McIntyre, 131 S.Ct. at 2789. Justice Breyer's concurring opinion, however, did not explicitly embrace Justice O'Connor's stream of commerce plus theory, but instead opined:
I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.... In my view, the outcome of this case is determined by our precedents.
Id. at 2791 (Breyer, J., concurring).
Circuit courts interpreting McIntyre have concluded that under Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), Justice Breyer's concurring opinion "furnished the narrowest grounds for the decision and controls." Ainsworth, 716 F.3d at 178; see also AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358, 1363 (Fed.Cir.2012). As this court noted in Ainsworth, the narrowest ground, as expressed in Justice Breyer's concurrence, is that the law remains the same after McIntyre, and that circuit courts may continue to attempt to reconcile the Supreme Court's competing articulations of the stream of commerce test. See Ainsworth, 716 F.3d at 178-79 (noting that "Justice Breyer's concurrence was explicitly based on Supreme Court precedent and on McIntyre's specific facts" and citing with approval the Federal Circuit's holding that the Supreme Court's framework had not changed and that it should apply its circuit precedent interpreting these decisions).
b. TG satisfies the stream of commerce plus test
Unlike the Fifth Circuit, see Ainsworth, 716 F.3d at 178, the Eleventh Circuit has not yet interpreted McIntyre; instead "[rjelevant Eleventh Circuit case law is unclear as to which test it would adopt," because "the Eleventh Circuit had applied, but had never explicitly adopted [the stream of commerce plus test], which arose from Justice O'Connor's plurality opinion in [Asahi]." Hatton v. Chrysler Canada, Inc., 937 F.Supp.2d 1356, 1365 (M.D.Fla.2013); Simmons v. Big No.1 Motor Sports, Inc., 908 F.Supp.2d 1224, 1228-29 (N.D.Ala.2012) ("It is unclear which of the two tests the Eleventh Circuit endorses."). But, even assuming that the Eleventh Circuit would conclusively embrace the stream of commerce plus test after McIntyre (or had done so prior to McIntyre), Taishan's contacts with Florida suffice.
The evidence demonstrates that Taishan engaged in "additional conduct such that it could be said to have 'purposefully availed' itself of the privilege of conducting business in" Florida. Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1549 (11th Cir.1993). Among other availments, Taishan entered into a sole agency agreement with a Florida company to sell its products and arranged the shipping of its drywall to Florida. See Vermeulen, 985 F.2d at 1548 (noting that defendant "created and controlled the distribution network that brought its products into the United States"). TTP agreed to sell OTC TG's

exclusive brand of drywall and make OTC — a Florida company — the sole sales agent of TG's drywall, which reflects TG's purposeful availment of Florida through its agency relationship with TTP. See Daimler, 134 S.Ct. at 759 n. 13 (recognizing that "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there"); id. (noting approvingly that "'marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State' may amount to purposeful availment." (quoting Asahi, 480 U.S. at 112, 107 S.Ct. 1026 (opinion of O'Connor, J.))).
Moreover, Taishan specifically altered its products to suit the forum state by marking its packaging "Tampa," stamping a Florida phone number on the packaging, and marking its drywall with a certification that it met or exceeded American standards. See Asahi, 480 U.S. at 112, 107 S.Ct. 1026 (noting that "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State"); Germano, 742 F.3d at 589 (holding the stream-of-commerce-plus test satisfied because "TG not only included the name of a Virginia company on its product, it also included a phone number with a Virginia area code. Through its own acts, TG connected its product to Virginia, and ensured that the product's end-users would identify its product with a Virginia resident."). Similarly here, Wenlong Peng testified: "We would stamp it for the customer." These actions go beyond merely placing a product in the stream of commerce and demonstrate purposeful availment.18
TG relies on Banton Indus., Inc. v. Dimatic Die & Tool Co., 801 F.2d 1283, 1284-85 (11th Cir.1986), which addressed whether "the due process sole contact with the forum state was an out-of-state sale of goods to a resident of the forum state." Id. at 1284. Jurisdiction did not lie, the court held, because
Dimatic is not an Alabama corporation and has no contacts with that state other than its sale of goods to an Alabama resident. Nor does Dimatic actively seek business in Alabama. In fact, the contract and sale upon which Banton bases its claim arose out of Banton's unsolicited order of goods from Dimatic. Furthermore, Dimatic tendered the goods to Banton in Omaha, Nebraska. At no time did any representative of Dimatic enter Alabama.
Id. at 1284.
Here, Taishan made more than a single sale to a Florida company and did actively seek business in Florida — it entered a sole sales agreement with a Florida company to sell TG drywall, arranged shipping to Florida ports on multiple occasions, expressed a willingness to expand shipping to Florida, and expressed a desire to expand its sales in the United States with OTC, a Florida company.19 Accordingly, even assuming that TG would benefit from the most stringent minimum-contacts test, jurisdiction would still be proper.
3. "Arise out of or relate to" requirement
The second prong of the Due Process specific-jurisdiction test asks if "the litigation results from alleged injuries that 'arise out of or relate to' those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The Supreme Court has yet to distinguish between the "arise out of' and "relate to" requirements. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n. 10, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) ("Absent any briefing on the issue, we decline to reach the questions (1) whether the terms 'arising out of and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.").
The Eleventh Circuit has held that "the defendant's contacts with the forum must relate to the plaintiffs cause of action or have given rise to it," and explained "[n]ec-essarily, the contact must be a 'but-for' cause of the tort, yet the causal nexus between the tortious conduct and the purposeful contact must be such that the out-of-state resident will have fair warning that a particular activity will subject [it] to the jurisdiction of a foreign sovereign." Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1220-21, 1223 (11th Cir.2009) (internal citations and quotation marks omitted); see also id. at 1224 ("While we do not suggest that our decision today establishes a definitive relatedness standard — as flexibility is essential to the jurisdictional inquiry — we do find that the fact-sensitive inquiry must hew closely to the foreseeability and fundamental fairness principles forming the foundation upon which the specific jurisdiction doctrine rests.").
and we were to pay, because they said that they could get a better price through their connections in China ... So, yes, it was free on board, the price they were giving us was free on board, but they were the ones hiring or making the arrangements for the shipping.
TG asks us to read the Mitchell complaint narrowly to require the plaintiffs to prove that the drywall it installed can be traced directly to Taishan's Florida related activities. Even assuming that this is required by the "arise from and relate to " test, a chain of transactions traces the Mitchell plaintiffs' drywall to Taishan's contact with Florida. Devon purchased drywall to be sent to Pensacola, Florida, and there is evidence showing a series of transactions placing the drywall with Mitchell. At this stage, Mitchell must only establish personal jurisdiction by a preponderance of the evidence, and in light of the evidence in the record, Mitchell has established that it is more likely than not that Taishan drywall connected from the Devon transaction ended up in Mitchell's hands and forms the basis of this action.
But Mitchell's complaint is not as narrow as Appellants represent. As the district court noted, Mitchell sues on behalf of homebuilders and alleges that Taishan has "continuously and systematically distributed and sold drywall to numerous purchasers in the State of Florida and Taishan's drywall is installed in numerous homes in Florida." These claims therefore,

arise out of and relate to Taishan's extensive Florida contacts. In Oldfield, the Eleventh Circuit focused on whether the defendant could foresee being haled into this forum to answer plaintiffs' claims. 558 F.3d at 1220-21. Here, Taishan sold allegedly faulty drywall to Florida companies, shipped drywall to Florida, entered into a sole agency agreement with a Florida company, and even marked some drywall boards with Florida phone numbers. It should come as no surprise to Taishan that it is defending suit in Florida. Accordingly, this test is also satisfied.

4. Fairness

The specific jurisdiction inquiry next asks whether jurisdiction "would comport with 'fair play and substantial justice.' " Licciardello v. Lovelady, 544 F.3d 1280, 1284 (11th Cir.2008) (quoting World-Wide Volkswagen, 444 U.S. at 292, 100 S.Ct. 559). In assessing fair play, courts balance (1) the defendant's burden; (2) the forum state's interests; (3) the plaintiffs interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the state's shared interest in furthering fundamental social policies. Burger King, 471 U.S. at 476-77, 105 S.Ct. 2174.

The district court found that TG would face burdens if subjected to jurisdiction, and that this factor cut strongest in TG's favor. Balanced, however, against TG's sophistication, Florida's interest in litigating against defendants that harmed its residents, the plaintiffs' interest in litigating in the United States as opposed to China, the judicial system's interest in resolving these cases (and TG's failure to appear), and the interests of comity, the district court nonetheless found jurisdiction proper. See Asahi, 480 U.S. at 114, 107 S.Ct. 1026 ("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."). The district court's balancing of these factors is consistent with cases upholding jurisdiction over foreign manufacturer defendants.

Mitchell is distinguishable from Asahi, where the claim was for "indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi," and "[t]he transaction on which the indemnification claim is based took place in Taiwan." Asahi, 480 U.S. at 114-15, 107 S.Ct. 1026. In contrast, Mitchell includes Florida-based plaintiffs alleging causes of action arising in Florida. Accordingly, the district court did not err in finding that notions of fair play and substantial justice were not offended by exercising jurisdiction over TG. See Germano, 742 F.3d at 593 ("For essentially the same reasons as given by the district court, we hold that this third and final prong of the Due Process analysis is met here.").

Personal jurisdiction is therefore proper over TG in Florida.

IV.

TG next argues that the district court abused its discretion when it denied TG's motion to set aside the entry of preliminary default under Rule 55(c).

A. Standard

Rule 55(c) provides: "The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." Fed. R.Civ.P. 55(c).[20] "In determining whether to set aside a default decree, the district court should consider whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." One Parcel of Real Prop., 763 F.2d at 183. Because the same factors identified in Rule 60(b) are "typically relevant," Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781, 783 (5th Cir.1988), courts may also consider:

whether the public interest was implicated, whether there was significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. The district court need not consider all of the above factors in ruling on a defendant's 60(b)(1) motion; the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of "good cause."

In re OCA, 551 F.3d 359, 369 (5th Cir.2008) (quotations omitted).

B. Application[21]

The district court did not find that TG's failure to appear was willful. Nevertheless, it declined to set aside the entry of default because (1) TG was served with the complaint in its native language, (2) TG was aware that it sold drywall to several Florida companies, (3) the plaintiffs had invested a significant amount of time and money to serve TG, (4) TG's defense is speculative, and (5) the public has an interest in seeing that plaintiffs harmed by defective foreign products be accorded re-lief for their damages. The district court also doubted whether TG acted expeditiously because TG did not appear in the MDL until it was notified of the default judgment in Germano, and even then TG only appeared on the last day possible to challenge that default judgment. The district court acknowledged, however, that TG would suffer significant financial losses.

"The decision to set aside a default decree lies within the sound discretion of the district court," One Parcel of Real Prop., 763 F.2d at 183, and the district court accounted for the relevant interests. Consistent with Germano, which held that the district court did not abuse its discretion by refusing to vacate the default judgment,[22] and Lennar Homes, which declined to vacate a default judgment against TG because "Taishan waited an inexplicably long time before moving to set aside the default, and has not put forth any evidence of exceptional circumstances justifying the delay,"[23] the district court did not abuse its discretion when it determined that TG did not show good cause to vacate the preliminary entry of default in Mitchell. Fed.R.Civ.P. 55(c).

V.

TG and TTP challenge the district court's finding of personal jurisdiction in Gross and Wiltz. Although the forum is different, the outcome is the same — specific jurisdiction is proper over TG and TTP in Louisiana.

A XTP's contacts may be imputed to TG

1. Choice of Law

Though it argues that the district court should have applied Chinese law rather than Louisiana law to test the appropriateness of imputation, Taishan, however, concedes that that "the outcome would be the same under the application" of either Chinese or Louisiana law. Accordingly, there is no conflict and we apply Louisiana law. See Shutts, 472 U.S. at 839 n. 20, 105 S.Ct. 2965.

2. Imputation under Louisiana Law

In Louisiana, courts may impute contacts between two entities under either an alter-ego or agency theory. See, e.g., Admins. of Tulane Educational Fund v. Ipsen, S.A., 450 Fed.Appx. 326, 330-33 (5th Cir.2011) (noting that imputation may stem from both theories); La.Rev.Stat. Ann. § 13:3201(A) ("A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent...."). Because Taisharis corporate relationship establishes alter-ego imputation under Louisiana law, we need not address the district court's alternate finding of an agency relationship. See Jackson v. Tanfoglio Giuseppe, S.R.L., 615 F.3d 579, 586 (5th Cir.2010) (recognizing that contacts can be imputed to alter-egos for the purpose of specific jurisdiction). This court has noted that "the alter ego test for attribution of contacts, ie., personal jurisdiction, is less stringent than that for liability." Stuart v. Spademan, 772 F.2d 1185, 1198 n. 2 (5th Cir.1985). Under Louisiana law, courts consider a number of factors when determining whether an entity should be considered an alter ego:

1. corporations with identity or substantial identity of ownership, that is, ownership of sufficient stock to give actual working control; 2. common directors or officers; 3. unified administrative control of corporations whose business functions are similar or supplementary; 4. directors and officers of one corporation act independently in the interest of that corporation; 5. corporation financing another corporation; 6. inadequate capitalization ("thin incorporation"); 7. corporation causing the incorporation of another affiliated corporation; 8. corporation paying the salaries and other expenses or losses of another corporation; 9. receiving no business other than that given to it by its affiliated corporations; 10. corporation using the property of another corporation as its own; 11. noncompliance with corporate formalities; 12. common employees; 13. services rendered by the employees of one corporation on behalf of another corporation; 14. common offices; 15. centralized accounting; 16. undocumented transfers of funds between corporations; 17. unclear allocation of profits and losses between corporations; and 18. excessive fragmentation of a single enterprise into separate corporations.

Green v. Champion Ins. Co., 577 So.2d 249, 257-58 (La.Ct.App.1991).

As discussed and considered above, the district court found facts implicating many of these factors. For instance, TG authorized TTP to use TG's trademark in producing drywall but did not charge TTP for this authorization, TG and TTP did not accurately report their dealings with each other in their financial reports, and some of TTP's board members did not receive compensation from TTP. See e.g., Green, 577 So.2d at 258-259. Appellants rely on Jackson, which found imputation improper because "there [was] no evidence of undocumented transfers of funds between various entities," "no evidence of unclear allocation of profits and losses between corporations," and no evidence that the entities paid another entities' employees. Jackson, 615 F.3d at 587. Jackson is inapposite because of the undocumented transfers between TG and TTP, as well as the evidence that TG paid TTP's employees; additionally, many of the factors that Jackson recognized as favoring imputation are present here:

For instance, the Tanfoglio entities appear to have been operated in a way that their brands and products appear identical and their business relationships are deeply intertwined. The Tanfoglio entities shared office space, phone numbers, and the Tanfoglio siblings were officers and directors of each of the Tanfoglio entities.... As well, the Tanfoglio entities were indebted to one another through a variety of business transactions.

Id. at 587. Accordingly, TG and TTP are alter egos under Louisiana law, and imputation is proper. Treated as one, each entity's Louisiana contacts reflect its collective availment of the forum.

B. Due Process

The Louisiana Supreme Court has held that "[t]he limits of the Louisiana Long-arm Statute and the limits of constitutional due process are now coextensive," accordingly, "the sole inquiry into jurisdiction over a nonresident is a one-step analysis of the constitutional due process requirements." Petroleum Helicopters, Inc. v. Avco Corp., 513 So.2d 1188, 1192 (La.1987). All parties agree that Gross and Wiltz are governed by Fifth Circuit law.

1. Taishan's Louisiana Contacts

The district court recognized that Taishan lacked direct physical contacts with Louisiana. Taishan has never manufactured drywall, advertised, or performed services in Louisiana. Taishan is not registered to do business, does not have an office, bank account, or an agent appointed to accept service of process in Louisiana. Taishan has never paid taxes nor had a mailing address or telephone in Louisiana.

Nevertheless, Taishan's Louisiana contacts are substantial. Taishan sold at least 45,756 sheets of drywall that ended up in Louisiana and earned Taishan $195,915.29. A potential customer emailed Taishan and informed it: "After Hurricane Katrina, the Great New Orleans area need rebuild[sic], and housing market in USA is very hot in these days. The both effects, we hope you and us can both take advantage from it." Taishan told its customers it was able and willing to sell its drywall to Louisiana.

OTC's representative explained that Taish-an was "very familiar with what port to use depending on what areas in the United States we were trying to sell to" and Taishan provided shipping information and rates for sending drywall to New Orleans. Taishan's dealings with American companies also show relevant contacts with Louisiana. Taishan sold drywall to Advanced Products International Corp. ("API") and GD Distributors, LLC ("GD Distributors"). GD Distributors, a Louisiana company, emailed Taishan about shipping drywall to the United States. They discussed "sizes of the sheetrock, how to get transported over," and the history of the company. GD Distributors' owner traveled to China to visit Taishan's factory. At the visit, the parties discussed the product, price, and ASTM certification. Taish-an provided GD Distributors with test reports asserting that its drywall met ASTM standards. Taishan provided a sample to GD Distributors. GD Distributors agreed to purchase 1,320 sheets of drywall in exchange for $11,601.22. The invoice for the purchase was "CIF NEW ORLEANS." Taishan arranged the shipment of the drywall to New Orleans. GD Distributors's owner testified that he "told them that I lived in New Orleans ... [and] I'm assuming that's why ... they set it up to come to the Port of New Orleans." According to GD Distributors, Taishan "absolutely" knew that the drywall was going to New Orleans.24 GD Distributors sold the drywall it purchased from Taishan to Helton Construction, another. Louisiana company.
TTP also sold 5,676 sheets of drywall for $24,123.00 to API, which is based in California. The invoices marked the sale as FOB China with a final destination of New Orleans, Louisiana. API made a second purchase of 5,760 sheets of drywall for $24,998.40 from TTP. The invoice provided that shipment was FOB China with final destination New Orleans, Louisiana. TTP did not ship this drywall. API handled the shipping arrangements from China to New Orleans. Another Louisiana company, Interior Exterior Building Supply, LP, purchased TTP drywall from Metro Resources Corporation. Taishan also sent samples of drywall to TP Construction, a Louisiana corporation. Finally, Taishan shipped 100,000 boards to New Orleans for an entity named Phoenix.
2. Minimum Contacts
In Ainsworth, we interpreted our law as unchanged after McIntyre. As such, in order to satisfy the minimum contacts requirements, plaintiffs must show that "the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state." Ainsworth, 716 F.3d at 177. "Under that test, mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce, but [t]he defendant's contacts must be more than random, fortuitous, or attenuated, or of the unilateral activity of another party or third person." Id. (internal quotations and citations omitted).
This test is more than satisfied in Gross and Wiltz because, again, there is evidence showing that Taishan "absolutely" knew that the drywall was going to New Orleans.25 Taishan sold drywall to Louisiana customers, facilitated the shipment of drywall to New Orleans, and received an email explaining that after Hurricane Katrina, there was an increased demand for construction materials in the New Orleans area. Moreover, Taishan did not conduct an isolated sale. Rather, Taishan sold at least 45,756 sheets of drywall, which ended up in Louisiana and earned Taishan $195,915.29. See McIntyre, 131 S.Ct. at 2791; Ainsworth, 716 F.3d at 179 ("This is not a case of a single, or even a few, isolated sales in Mississippi. The facts in the record establish that Moffett could have 'reasonably anticipated' being haled into court in Mississippi.").26 Accordingly, Taishan has the requisite minimum contacts with Louisiana.
3. "Arise out of or relate to" requirement
This court has framed the second prong of the due-process test as requiring that "the plaintiffs cause of action ... arise[ ] out of or result[] from the defendant's forum-related contacts." ITL, 669 F.3d at 500 (quoting Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir.2006)); see also Clemens v. McNamee, 615 F.3d 374, 378-79 (5th Cir.2010).
In Gross, the plaintiffs are asserting a market-share liability claim, which rests on the theory that Taishan drywall, among other defective drywall, was shipped to Louisiana and injured them. The plaintiffs' market-share theory arises from Taishan's Louisiana contacts — Taishan marketed, sold, and shipped drywall to Louisiana customers. For instance, Taishan sold drywall to GD Distributors, which in turn sold the drywall to another Louisiana company, Helton Construction. As the district court held,
The profile forms, TIP inspections, and photographic catalog, all Court-ordered and providing information on the type of drywall in homes, also demonstrate the presence of Taishan's drywall in the homes of Louisiana plaintiffs. The Court finds no law which supports Taishan's narrow reading of the "arise from" and "relate to" requirement for specific personal jurisdiction. Moreover, this record contrasts sharply with that in Irvin v. S. Snow Mfg., Inc., 517 Fed.Appx. 229 (5th Cir.2013). In Irvin, there was not an adequate nexus between the defendant's contacts and the plaintiffs claim based on an "arose-out-of' theory because "Southern Snow sold the machine to a Louisiana customer and had no knowledge that, years later, Irvin unilaterally transported it into Mississippi." Id. at 232. Additionally, we recognized:
Irvin's claims [do not] sufficiently "relate to" Southern Snow's Mississippi contacts. Although Irvin points to the allegedly large figure of sales by Southern Snow to various Mississippi-based customers, this number includes sales of syrup and other snowball-making accessories — which did not cause Irvin's injuries — and no evidence in the record allows a comparison of the amount of sales attributable to these types of accessories versus the sales attributable to actual snowball machines. Indeed,

on this record, we have no basis to determine how many snowball machines Southern Snow sends outside of Louisiana in general, or to Mississippi in particular.
Id. Conversely, a close nexus exists between Taishan's marketing and selling drywall to Louisiana customers and arranging shipping to Louisiana and plaintiffs' claims that Taishan's drywall was installed in their homes and injured them. While Taishan challenges the validity of the Gross plaintiffs' market-share theory, our inquiry is whether "the plaintiffs cause of action ... arise[s] out of or results] from the defendant's forum-related contacts," ITL, 669 F.3d at 500 (emphasis added), whatever the claims' ultimate merits. Accordingly, plaintiffs' claims — that Taishan sold drywall to the Louisiana market and injured them — arise out of or relate to Taishan's Louisiana contacts of marketing, selling, and shipping drywall to Louisiana customers. The Wiltz plaintiffs' claims also rest on the allegedly faulty Taishan drywall installed in their homes. These claims too arise from Taishan's manufacturing allegedly faulty drywall, marketing it to Louisiana customers, and shipping it to Louisiana. We need not express any view of the merits of plaintiffs' claims because at this preliminary jurisdictional inquiry the plaintiffs' burden is to prove the appropriateness of jurisdiction by a preponderance of the evidence. They have satisfied then-burden here as their claims arise from or relate to Taishan's Louisiana contacts.
4. Fairness
The same reasons that jurisdiction is fair and reasonable over TG in Florida are applicable to TG and TTP in Louisiana. Accordingly, personal jurisdiction lies over TG and TTP in Gross and Wiltz.
VI.
The record in this case reflects an intimate relationship between TG and TTP. By virtue of this relationship, they capitalized on a spike in demand for drywall in the Gulf South. As their dealings demonstrate, TG and TTP availed themselves of Florida and Louisiana — two of the market's focal points. We perceive no statutory or constitutional impediment to then-now defending suit there. We therefore AFFIRM the district court in Mitchell, Gross, and Wiltz.
1
. For example, they allege that the drywall "emits various sulfide gases," damages the structural, mechanical and plumbing systems of the home, and damages other appliances in the home. We express no view on these allegations.
2
.Two sets of plaintiffs intervened in the Gross action contending that they were absent class members: the Benes plaintiffs and the Jaen plaintiffs. Like Gross, both allege market-share liability theories with respect to the manufacturers of the defective drywall. Unlike Gross, the intervening plaintiffs have identified defendants in the chain of distribution. Appellants point out that many of the plaintiffs in the Gross action (including the intervening classes) do not reside in Louisiana. The district court held that this concern is resolved "by the PSC's [Plaintiffs' Steering Committee] suggestion to sever and transfer any non-Louisiana plaintiffs from Gross."
3
. The similarities between Gross and Wiltz allow for merged consideration of the personal jurisdiction issues in this appeal. As the district court noted, the key difference in the actions is that the Gross plaintiffs are alleging market-share liability because they cannot determine the appropriate defendants, while the Wiltz plaintiffs identify TG and TTP as the manufacturers of the drywall in their properties.
4
. As discussed, our court affirmed this ruling.
5
. The district court applied the same analysis to both cases.
6
. Applying Florida law is also consistent with Lennar Homes, LLC v. Knauf Gips KG, No. 09-07901 CA 42, 2012 WL 3800187 (Fla.Cir. Ct. Aug. 31, 2012). As noted in the district court opinion, Judge Fallon and Judge Farina coordinated their hearings because of the overlapping issues in TG's motions in the MDL court and those in the Florida court. In Lennar Homes, the court held that Florida law applied to the imputation question:
Here, Florida is not only the place of business for many of the parties, but it is also the place where the injuries that gave rise to the causes of action occurred. The property damage suffered by hundreds of Florida residents comprises the foundation of this litigation, and this factor weighs heavily in finding that Florida law should apply in determining whether TTP's actions can be attributed to TG under Florida principles of agency. Lennar Homes, No 09-07901 at 2. The Third District Court of Appeal in Florida summarily affirmed Judge Farina's decision. Taishan Gypsum Co. Ltd. v. Lennar Homes, LLC, 123 So.3d 637 (Fla.Dist.Ct.App.2013) (per curiam). In support of its affirmance, the court relied on the portion of Judge Fallon's September 4, 2012 Order discussing Mitchell, which applied Florida law to the imputation decision.
Lennar Homes is instructive because "when the supreme court of a state has not spoken to a particular issue, the well-established practice of this Circuit is to follow the opinion of the highest' court which has written on the matter." Birmingham Fire Ins. Co. of Pa. v. Winegardner & Hammons, Inc., 714 F.2d 548, 550 (5th Cir.1983); see also Temple v. McCall, 720 F.3d 301, 307 (5th Cir.2013).

7

. Even accepting that the principles of imputation translate to specific-jurisdiction analysis, there are material differences between the Ninth Circuit's agency test and Florida's (and the Eleventh Circuit's) agency test that mitigate concerns about imputation in this case. Daimler described the Ninth Circuit's test as "a less rigorous test" than alter-ego inquiries focusing on the parent's domination of the subsidiary. Daimler, 134 S.Ct. at 759. The Ninth Circuit's agency analysis "is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920 (9th Cir.2011), rev'd sub nom., Daimler AG v. Bauman, — U.S. -, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). An alter-ego finding in the Ninth Circuit, however, "is predicated upon a showing of parental control over the subsidiary." Id. As discussed, unlike the agency test in the Ninth Circuit, under Florida law an agency relationship is predicated on the parent's control of the subsidiary: "[T]he parent corporation, to be liable for its subsidiary's acts under the ... agency theory, must exercise control to the extent the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." Enic, 870 So.2d at 891. This control-focused inquiry overlaps with the alter-ego test adopted by most circuits. See Daimler, 134 S.Ct. at 759 (noting that several Courts of Appeals impute jurisdictional contacts when "when the former is so dominated by the latter as to be its alter ego."). Accordingly, the Eleventh Circuit (and the Fifth Circuit) recognize that imputation of jurisdictional contacts between an agent and its principal can comport with Due Process. See, e.g., Dickson Marine, 179 F.3d at 339 ("Therefore we are convinced that Dickson failed to carry the burden of establishing a prima facie showing of sufficient control to establish an alter-ego or agency relationship between Air Sea and Panalpina Gabon.").

8

. As the district court found: "[T]he financial records of the companies do not reflect the exact amount of these transactions" and "[tjhese rental and sales transactions were not accurately reflected in the financial records of either company."

9

. Though the district court found that jurisdiction was proper under § 48.193(l)(a)(l), (2), and (6), because we find § 48.193(l)(a)(l) satisfied, we do not need to address these alternative grounds for long-arm jurisdiction.

10

. Indeed OTC emailed TTP instructing, "I think the best thing to do right now is to let you operate the ocean freight and shipping from Qingdao to Miami, FI" and "Half of this order will have Miami, FL as a destination; the other half will go to Orlando, FL."

11

. As Ivan Gonima of OTC testified; "[T]hey were in charge of finding the shipping company, they were in charge of making the deal with the shipping company, and we were to pay, because they said that they could get a better price through their connections in China ... So, yes, it was free on board, the price they were giving us was free on board, but they were the ones hiring or making the arrangements for the shipping."

12

.Gonima explained that they would take care of the shipping and that "they also mentioned ... Jacksonville, Florida" as a possible port.

13

. Wenlong Peng testified, "We would stamp it for the customer."

14

. The district court also noted other contacts between Taishan and Florida. For instance, Taishan sold drywall to Beijing Building Materials Import and Export Co., Ltd., which sold the drywall to Rothchilt International, Ltd., which shipped it to La Suprema Enterprises, Inc. and La Suprema Trading, Inc., which finally sold it to Banner in Florida. Taishan also represented that it could ship to Florida when contacted by SCI Co., Ltd. Guardian also purchased diywall from Taish-an, which was subsequently shipped to Stock Building Supplies, which in turn sold it to builders in Florida.

15

. TG argues that the amounts attributed to TG were clearly erroneous and takes issue with Exhibit 1, which it objected to below. The district court overruled its objection. On appeal, TG argues that this exhibit was based on inadmissible evidence, but does not explain in any detail how the district court abused its discretion in admitting it beyond this assertion. Further, the district court computed its amounts by looking at multiple sources including testimony explaining that 30% of the $4,000,000 purchase order was paid up front.

16

. § 48.193.

17

. No. 09-07901 CA 42, at 10.

18
. As our court in Germano recognized, these facts do not present a traditional "stream-of-commerce" case: "most cases address contacts when a product only reaches the forum state after an out-of-state distributor sells the out-of-state defendant's product into the forum." Germano, 742 F.3d 576. As in Germano, that Taishan "knowingly sold its products directly to" Florida residents "is, on its own, a significant contact with the forum." Id. But we also "need not decide whether this contact alone would suffice to meet the first prong of the minimum contacts test because [Taishan] also designed its product for market ín [Florida], and because it was not an isolated sale." Id.
19
. Moreover, that some of Taishan's shipments were marked "FOB" does not vitiate its other contacts with Florida because Taish-an arranged the shipping to Florida despite the FOB notation. Even if Taishan faithfully followed the FOB notation, Taishan's other contacts with Florida would outweigh its shipping mark. OTC's representative explained:
[T]hey were in charge of finding the shipping company, they were in charge of making the deal with the shipping company,
20
. This circuit has "interpreted Rule 60(b)(1) as incorporating the Rule 55 'goodcause' standard applicable to entries of default." In re OCA, Inc., 551 F.3d 359, 369 (5th Cir.2008). "This inquiry follows a recognition in our previous holdings that courts apply essentially the same standard to motions to set aside a default and a judgment by default." Id. (citations and quotations omitted). This court has also held that "[although a motion to set aside a default decree under Fed. R.Civ.P. 55(c) is somewhat analogous to a motion to set aside a judgment under Fed. R.Civ.P. 60(b), the standard for setting aside a default decree is less rigorous than setting aside a judgment for excusable neglect." United States v. One Parcel of Real Prop., 763 F.2d 181, 183 (5th Cir.1985).
21
. TG argues that the district court did not have jurisdiction to enter the default. This issue is resolved above.
22
. See Germano, 742 F.3d at 595.
23
. No. 09-07901 CA 42, at 13-15.
24
. When asked if his understanding was "that they 100 percent knew the product was coming into New Orleans," Darrin Steber, owner of GD Distributors, testified "Oh, absolutely."
25
. "Q: It's your understanding that they 100 percent knew the product was coming into New Orleans, correct? A: Oh, absolutely."
26
. As Ainsworth recognized, "Our stream-of-commerce test, in not requiring that the defendant target the forum, is in tension with [.McIntyre's] plurality opinion." Ainsworth, 716 F.3d at 178. Nevertheless, the record evidences Taishan's purposeful availment of the Louisiana forum. Taishan sold to Louisiana customers and arranged shipments to Louisiana. Even under the McIntyre plurality's more demanding test, Taishan's contacts demonstrate that it "targeted]" Louisiana. McIntyre, 131 S.Ct. at 2788 (Kennedy, L).

5.7 Long Arms in Federal Court

5.7.1 FRCP 4(k)

http://www.law.cornell.edu/rules/frcp/rule_4

5.7.2 Cheat Sheet: Long Arms in Federal Court

Introduction

Just as in state court, there are both **constitutional** and **statutory** constraints on who may be subject to jurisdiction in federal court. As we will discuss in class, courts almost never reach the question of whether there are any true *constitutional* differences in limits in using long arms in federal versus state court. What we do have largely comes from lower courts and from dictum in cases. This should not be something you should worry about too much as you prepare for the exam in this course, or even to practice, but for those interested in constitutional law the issues raised are fascinating and you do see reference to it obliquely in some of our cases (e.g., *Nicastro*). By contrast, the *statutory* difference does come up in practice with some frequency, particularly if you practice in an area where one of the exceptions applies.

Constitutional Limits

In federal court, the Fifth Amendment—rather than the Fourteenth—provides the constitutional limits on personal jurisdiction.

Minimum Contacts Analysis

The prevailing view appears to be that a party need only have minimum contacts with the United States as a whole to be subject to personal jurisdiction under the Fifth Amendment. As Justice Stewart explained:

[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.

Stafford v. Briggs, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) (citation omitted); *accord, e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 n.10 (7th Cir. 2000).

Fairness Considerations

Courts are divided as to whether to consider any additional "fairness" factors in evaluating personal jurisdiction under the Fifth Amendment. Under the majority approach, a court ends its inquiry once it determines that the defendant has minimum contacts with the United States as a whole. At least some courts, however, have endorsed the view that the convenience of litigating in the forum state plays a role. For example, in *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974), the court examined:

the extent of the defendant's contracts with the place where the action was brought;

the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business;

judicial economy;

the probable location of discovery and the extent to which the discovery proceedings would otherwise take place outside the state of defendant's residence or place of business; and

the nature of the defendant's regulated activity in question and the extent of impact that defendant's activities have beyond the borders of his state of residence or business.

Id. at 203–04; *see also Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 945 (11th Cir. 1997) ("We discern no reason why these constitutional notions of 'fairness' and 'reasonableness' should be discarded completely when jurisdiction is asserted under a federal statute rather than a state long-arm statute." (citation omitted)); *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000) (same).

Statutory Limits

Strictly speaking, Rule 4 governs service of process. With the exception of two subsections, "Rule 4 does not deal directly" with personal jurisdiction. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1063 (3d ed. 2013). Rather, "[t]he court's jurisdictional power comes from the legal sources that are incorporated by reference in Rule 4." *Id.*

That said, Rule 4 is commonly viewed as the "statutory" basis for personal jurisdiction in federal courts. There are four relevant provisions: the general rule and three specific departures.

Rule 4(k)(1)(A). The General Rule. Under this rule, the federal district court will "pretend" that it is a state court of the state in which it is located for both the statutory and constitutional analysis. It will use the long-arm statute of the forum state.

Rule 4(k)(1)(B). Departure #1: The Bulge Rule. Under this rule, the court may assert personal jurisdiction over a party joined under Rule 14 or Rule 19 (more on this later) if the party is served in the United States within 100 miles of the court seeking to assert jurisdiction.

Rule 4(k)(1)(C). Departure #2: Congressional Statute. Sometimes Congress authorizes a particular type of service by statute (*e.g.*, the Anti-Terrorism Act and the RICO Act authorize nationwide service of process).

Rule 4(k)(2). Departure #3: By Necessity. When the case is a federal question case, *and* no state court would have jurisdiction, *and* jurisdiction does not violate the Constitution, a federal district court may assert personal jurisdiction.

5.8 In Rem and Quasi in Rem Personal Jurisdiction

5.8.1 Harris v. Balk

Harris v. Balk, 198 U.S. 215 (1905), is a pre-*International Shoe* case. In this case, Harris, who lived in North Carolina, owed $180 to Balk, who also was a citizen of North Carolina. Epstein, of Maryland, claimed that Balk owed him $344. Harris took a trip to Baltimore, Maryland, and was sued by Epstein. The claim was *quasi in rem*, seeking to collect the property of the debt Harris

owed Balk, which was deemed to travel with Harris. Balk received both personal notice and a notice was posted on the courthouse door. Harris paid the $180 to Epstein in a consent judgment.

Back in North Carolina, Balk sued Harris for the $180. Harris maintained that the debt had been discharged by his payment to Epstein. The North Carolina courts held that Maryland had no proper jurisdiction over Harris and that so the debt was not discharged by his payment to Epstein. The Supreme Court reversed. It held:

The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes, He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. * * * It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. * * * I t is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicil of the debtor. 195 U.S. at 222.

Just to be clear, the jurisdiction in *Harris v. Balk* was established because Balk's property was in Maryland. That property, an intangible debt, traveled to Maryland just because Harris, who owed money to Balk, had traveled to Maryland. In the pre-I*nternational Shoe* era, the *Harris v. Balk* court looked only to the presence of property, and did not consider fairness. The question that arises in *Shaffer* is whether, in the *International Shoe* era, the kinds of issues addressed in *International Shoe* need to be factors in *quasi-in-rem* actions as well as in *in personam* actions.

5.8.2 Shaffer v. Heitner

433 U.S. 186 (1977)

SHAFFER ET AL.

v.

HEITNE[…]

2.

Supreme Court of the United States[…]

7.

APPEAL FROM THE SUPREME COURT OF DELAWA[…]

y.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corp., a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines, Inc.,[1] and 28 present or former officers or directors of one or [190] both of the corporations. In essence, Heitner alleged that the individual defendants had violated their duties to Greyhound by causing it and its subsidiary to engage in actions that resulted in the corporations being held liable for substantial damages in a private antitrust su[…] and a large fine in a criminal contempt actio[…] The activities which led to these penalties took place in Oregon.

Simultaneously with his complaint, Heitner filed a motion for an order of sequestration of the Delaware property of the individual defendants pursuant to Del. Code Ann., Tit. 10, § 366 (1975[…] This motion was accompanied by a supporting [191] affidavit of counsel which stated that the individual defendants were nonresidents of Delaware. The affidavit identified the property to be sequestered as

"common stock, 3% Second Cumulative Preferenced Stock and stock unit credits of the Defendant Greyhound Corporation, a Delaware corporation, as well as all options and all warrants to purchase said stock issued to said individual Defendants and all contractural [*sic*] obligations, all rights, debts or credits due or accrued to or for the benefit of any of the said Defendants under any type of written agreement, contract or other legal instrument of any kind whatever between any of the individual Defendants and said corporation."

The requested sequestration order was signed the day the motion was file[…] Pursuant to that order, the sequestrator[6] [192] "seized" approximately 82,000 shares of Greyhound common stock belonging to 19 of the defendant[…] and options belonging to another 2 defendant[…] These seizures were accomplished by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corp. So far as the record shows, none of the certificates representing the seized

property was physically present in Delaware. The stock was considered to be in Delaware, and so subject to seizure, by virtue of Del. Code Ann., Tit. 8, § 169 (1975), which makes Delaware the situs of ownership of all stock in Delaware corporation[…][9]

All 28 defendants were notified of the initiation of the suit by certified mail directed to their last known addresses and by publication in a New Castle County newspaper. The 21 defendants whose property was seized (hereafter referred to as appellants) responded by entering a special appearance for [193] the purpose of moving to quash service of process and to vacate the sequestration order. They contended that the *ex parte* sequestration procedure did not accord them due process of law and that the property seized was not capable of attachment in Delaware. In addition, appellants asserted that under the rule of *International Shoe Co.* v. *Washington[…]*), they did not have sufficient contacts with Delaware to sustain the jurisdiction of that State's courts.

The Court of Chancery rejected these arguments in a letter opinion which emphasized the purpose of the Delaware sequestration procedure:

"The primary purpose of `sequestration' as authorized by 10 *Del. C.* § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, `sequestration' is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity[…][…]

7.

On appeal, the Delaware Supreme Court affirmed the judgment of the Court of Chancery[…]. Most of the Supreme Court's opinion was devoted to rejecting appellants' contention that the sequestration procedure is inconsisten[…]. The court based its rejection of that argument in part on its agreement with the Court of Chancery that the purpose of the sequestration procedure is to compel the appearance of the defendant[…]. The court also relied on what it considered the ancient origins of the sequestration procedure and approval of that procedure in the opinions of this Cour[…][1] Delaware's interest in asserting jurisdiction to adjudicate claims of mismanagement of a Delaware corporation, and the safeguards for defendants that it found in the Delaware statute[…][…]

9.

We noted probable jurisdiction[…][1] We revers[…]

6] II

The Delaware courts rejected appellants' jurisdictional challenge by noting that this suit was brought as a *quasi in rem* proceeding. Since *quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State, the courts considered appellants' claimed lack of contacts with Delaware to be unimportant. This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer* v. *Neff[…]*[…]

d.

From our perspective, the importance of *Pennoyer* is not its result, but the fact that its principles and corollaries derived from them became the basic elements of the constitutional [199] doctrine governing state-court jurisdiction[…]. As we have noted, under *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated *"in personam"* and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called *"in rem"* or *"quasi in rem."* The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the cour[…][7] In *Pennoyer*'s terms, the owner is affected only "indirectly" by an *in rem* judgment adverse to his interest in the property subject to the court's dispositio[…]

r.

The motorists' consent theory was easy to administer since it required only a finding that the out-of-state driver had used the State's roads. By contrast, both the fictions of implied consent to service on the part of a foreign corporation and of corporate presence required a finding that the corporation was "doing business" in the forum State. Defining the criteria for making that finding and deciding whether they were met absorbed much judicial energy. See, *e. g., International Shoe* [203] *Co.* v. *Washington,* 326 U. S., at 317-319. While the essentially quantitative tests which emerged from these cases purported simply to identify circumstances under which presence or consent could be attributed to the corporation, it became clear that they were in fact attempting to ascertain "what dealings make it just to subject a foreign corporation to local suit.[…]In *International Shoe[…]* […]

s, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdictio[…][1] The immediate effect of this departure from *Pennoyer*'s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants[…]8.

No equally dramatic change has occurred in the law governing jurisdiction *in rem*. There have, however, been intimations that the collapse of the *in personam* wing of *Pennoyer* has not left that decision unweakened as a foundation for *in rem* jurisdiction. Well-reasoned lower court opinions have questioned the proposition that the presence of property in a State gives that State jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum[…]. The overwhelming majority of commentators have also rejected *Pennoyer*'s premise that a proceeding "against" property is not a proceeding against the owners of that property. Accordingly, they urge that the "traditional notions of fair play and substantial justice" that govern a State's power to adjudicate *in personam* should also govern its power to adjudicate personal rights to property located in the State[…][…]
6] Although this Court has not addressed this argument directly, we have held that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action[…][…]. Moreover, in *Mullane* we held that Fourteenth Amendment rights cannot depend on the classification of an action as *in rem* or *in personam,* since that is
"a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." 339 U. S., at 312.
It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoye[…]*[] We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in persona[…]*
7] III
The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, `judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971) (hereafter Restatement[…][] This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing[…][] The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe.*
This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendan[…][] it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property [208] located in the State would normal[…][5] indicate that he expected to benefit from the State's protection of his interes[…][]
The State's strong interests in assuring the marketability of property within its borde[…][] and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the Stat[…][] The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownershi[…][2]
It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standar[…][] For the type of *quasi in rem* action typified by *Harris* v. *Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where [209] the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.
Since acceptance of the *International Shoe* test would most affect this class of cases, we examine the arguments against adopting that standard as they relate to this category of litigatio[…][] Before doing so, however, we note that this type of case also presents the clearest illustration of the argument in favor of assessing assertions of jurisdiction by a single standard. For in cases such as *Harris* and this one, the only role played by the property is to provide the basis for bringing the defendant into cour[…][] Indeed, the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearanc[…][] In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissibl[…]
] The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer
"should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.[…][…]
. This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the

underlying claim. At most, it suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedure[…][as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe[…]*. Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over hi[…][The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other State[…][…]
] It might also be suggested that allowing *in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard and assures a plaintiff of a for[…]7. We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high.
We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State. Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that proper[…][This history must be [212] considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process[…]), but it is not decisive. "[T]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage[…]. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progen[…][…]
] IV
The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware. Yet that property is not the subject matter of this litigation, nor is the underlying cause of action related to the property. Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists, that jurisdiction must have some other foundatio[…][0]
Appellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act related to his cause of action as having taken place in Delaware. Nevertheless, he contends that appellants' positions as directors and officers of a corporation chartered in Delaware[41][…], with that State to give its courts jurisdiction over appellants in this stockholder's derivative action. This argument is based primarily on what Heitner asserts to be the strong interest of Delaware in supervising the management of a Delaware corporation. That interest is said to derive from the role of Delaware law in establishing the corporation and defining the obligations owed to it by its officers and directors. In order to protect this interest, appellee concludes, Delaware's courts must have jurisdiction over corporate fiduciaries such as appellants.
This argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling. Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors[…], the authorizing statute evinces no specific concern with such actions. Sequestration can be used in any suit against a nonresiden[…], and reaches corporate fiduciaries only if they happen to own interests in a Delaware corporation, or other property in the State. But as Heitner's failure to secure jurisdiction over seven of the defendants named in his complaint demonstrates, there is no necessary relationship between holding a position as a corporate fiduciary and owning stock or other interests in the corporatio[…][If Delaware perceived its interest in securing jurisdiction over corporate fiduciarie[…]5] to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest.
Moreover, even if Heitner's assessment of the importance of Delaware's interest is accepted, his argument fails to demonstrate that Delaware is a fair forum for this litigation. The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and director[…][4] But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that disput[…]
5]

Appellee suggests that by accepting positions as officers or directors of a Delaware corporation, appellants performed the acts required by *Hanson* v. *Denckla*. He notes that Delaware law provides substantial benefits to corporate officers and directo[…][and that these benefits were at least in part [216] the incentive for appellants to assume their positions. It is, he says, "only fair and just" to require appellants, in return for these benefits, to respond in the State of Delaware when they are accused of misusing their power[…]5.

But like Heitner's first argument, this line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of appellants to Greyhound and its stockholders. It does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,[…], in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court. Delaware, unlike some State[…][
] has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State. And "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware `impliedly consents' to subject himself to Delaware's. . . jurisdiction on any cause of action.[…]. Appellants, who were not required to acquire interests in Greyhound in order to hold their positions, did not by acquiring those interests surrender their right to be brought to judgment only in States with which they had had "minimum contacts."
The Due Process Clause
"does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.[…]9.
Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on [217] state power. The judgment of the Delaware Supreme Court must, therefore, be reverse[…]
d.
MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.
MR. JUSTICE POWELL, concurring.
I agree that the principles of *International Sho[…]*, should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction in a state court. I also agree that neither the statutory presence of appellants' stock in Delaware nor their positions as directors and officers of a Delaware corporation can provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case.
I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common-law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "`traditional notions of fair play and substantial justice.'[…][…]
t.
MR. JUSTICE STEVENS, concurring in the judgment.
The Due Process Clause affords protection against "judgments without notice.[…]n.
The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign[…]
r.
One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. As a practical matter, the Delaware sequestration statute creates an unacceptable risk of judgment without notice. Unlike the 49 other States, Delaware treats the place of incorporation as the situs of the stock, even though both the owner and the custodian of the shares are elsewhere. Moreover, Delaware denies the defendant [219] the opportunity to defend the merits of the suit unless he subjects himself to the unlimited jurisdiction of the court. Thus, it coerces a defendant either to submit to personal jurisdiction in a forum which could not otherwise obtain such jurisdiction or to lose the securities which have been attached. If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the State of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation. I therefore agree with the Court that on the record before us no adequate basis for jurisdiction exists and that the Delaware statute is unconstitutional on its face.
How the Court's opinion may be applied in other contexts is not entirely clear to me. I agree with MR. JUSTICE POWELL that it should not be read to invalidate *quasi in rem* jurisdiction where real estate is involved. I would also not read it as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit. My uncertainty as to the reach of the opinion, and my fear that it purports to decide a great deal more than is necessary to dispose of this case, persuade me merely to concur in the judgment.
MR. JUSTICE BRENNAN, concurring in part and dissenting in part.
I join Parts I-III of the Court's opinion. I fully agree that the minimum-contacts analysis developed in *International Sho[…]*, represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoye[…]*8). It is precisely because [220] the inquiry into minimum contacts is now of such overriding importance, however, that I must respectfully dissent from Part IV of the Court's opinion.
I

The primary teaching of Parts I-III of today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum State. The Delaware Supreme Court could not have made plainer, however, that its sequestration statute[…], does not operate on this basis, but instead is strictly an embodiment of *quasi in rem* jurisdiction, a jurisdictional predicate no longer constitutionally viabl[…]
).
This state-court ruling obviously comports with the understanding of the parties, for the issue of the existence of minimum contacts was never pleaded by appellee, made the subject of discovery, or ruled upon by the Delaware courts. These facts notwithstanding, the Court in Part IV reaches the minimum-contacts question and finds such contacts lacking as applied to appellants. Succinctly stated, once having properly and persuasively decided that the *quasi in rem* statute that Delaware admits to having enacted is invalid, the Court then proceeds to find that a minimum-contacts law that Delaware expressly *denies* having enacted also could not be constitutionally applied in this case.
In my view, a purer example of an advisory opinion is not to be found. True, appellants do not deny having received actual notice of the action in question[…]] However, notice is but one ingredient of a proper assertion of state-court jurisdiction. The other is a statute authorizing the exercise of the State's judicial power along constitutionally permissible grounds—which henceforth means minimum contacts. As of today, § 366 is not such a la[…]| Recognizing that today's decision fundamentally alters the relevant jurisdictional ground rules, I certainly would not want to rule out the possibility that Delaware's courts might decide that the legislature's overriding purpose of securing the personal appearance in state courts of defendants would best be served by reinterpreting its statute to permit state jurisdiction on the basis of constitutionally permissible contacts rather than stock ownership. Were the state courts to take this step, it would then become necessary to address the question of whether minimum contacts exist here. But in the present posture of this case, the Court's decision of this important issue is purely an abstract ruling.
My concern with the inappropriateness of the Court's action is highlighted by two other considerations. First, an inquiry into minimum contacts inevitably is highly dependent on creating a proper factual foundation detailing the contacts between the forum State and the controversy in question. Because neither the plaintiff-appellee nor the state courts viewed such an inquiry as germane in this instance, the Court today is unable to draw upon a proper factual record in reaching its conclusion; moreover, its disposition denies appellee the normal opportunity to seek discovery on the contacts issue. Second, it must be remembered that the Court's ruling is a constitutional one and necessarily [222] will affect the reach of the jurisdictional laws of all 50 States. Ordinarily this would counsel restraint in constitutional pronouncements[…]. Certainly it should have cautioned the Court against reaching out to decide a question that, as here, has yet to emerge from the state courts ripened for review on the federal issue.
II
Nonetheless, because the Court rules on the minimum-contacts question, I feel impelled to express my view. While evidence derived through discovery might satisfy me that minimum contacts are lacking in a given case, I am convinced that as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State. Unlike the Court, I therefore would not foreclose Delaware from asserting jurisdiction over appellants were it persuaded to do so on the basis of minimum contacts.
It is well settled that a derivative lawsuit as presented here does not inure primarily to the benefit of the named plaintiff. Rather, the primary beneficiaries are the corporation and its owners, the shareholders. "The cause of action which such a plaintiff brings before the court is not his own but the corporation's. . . . Such a plaintiff often may represent an important public and stockholder interest in bringing faithless managers to book.[…]).
Viewed in this light, the chartering State has an unusually powerful interest in insuring the availability of a convenient forum for litigating claims involving a possible multiplicity of defendant fiduciaries and for vindicating the State's substantive policies regarding the management of its domestic corporations. I believe that our cases fairly establish that [223] the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action.
In this instance, Delaware can point to at least three interrelated public policies that are furthered by its assertion of jurisdiction. First, the State has a substantial interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct, even if the managerial decisions occurred outside the State[…]. Second, state courts have legitimately read their jurisdiction expansively when a cause of action centers in an area in which the forum State possesses a manifest regulatory interest[…]). Finally, a State like Delaware has a recognized interest in affording a convenient forum for supervising and overseeing the affairs of an entity that is purely the creation of that State's law[…]m.
To be sure, the Court is not blind to these considerations. It notes that the State's interests "may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors.[…]. But this, the Court argues, pertains to choice of law, not jurisdiction. I recognize that the jurisdictional and choice-of-law inquiries are not identical[…]. But I would not compartmentalize thinking in this area quite so rigidly as it seems to me the Court does today,

for both inquiries "are [225] often closely related and to a substantial degree depend upon similar considerations.[…]. In either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum State. While constitutional limitations on the choice of law are by no means settled[…], important considerations certainly include the expectancies of the parties and the fairness of governing the defendants' acts and behavior by rules of conduct created by a given jurisdiction[…]. These same factors bear upon the propriety of a State's exercising jurisdiction over a legal dispute. At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy.

Furthermore, I believe that practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries. Even when a court would apply the law of a different foru[…][1] as a general rule it will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law[…]. Obviously, such choice-of-law problems cannot entirely be avoided in a diverse legal system such as our own. Nonetheless, when a suitor [226] 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.

This case is not one where, in my judgment, this preference for jurisdiction is adequately answered. Certainly nothing said by the Court persuades me that it would be unfair to subject appellants to suit in Delaware. The fact that the record does not reveal whether they "set foot" or committed "act[s] related to [the] cause of action" in Delaware[…], is not decisive, for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum State[…]7. I have little difficulty in applying this principle to nonresident fiduciaries whose alleged breaches of trust are said to have substantial damaging effect on the financial posture of a resident corporatio[…][1] Further, I cannot understand how the existence of minimum contacts in a constitutional sense is at all affected by Delaware's failure statutorily to express an interest in controlling corporate fiduciaries[…]. To me this simply demonstrates that Delaware [227] did not elect to assert jurisdiction to the extent the Constitution would all[…][1] Nor would I view as controlling or even especially meaningful Delaware's failure to exact from appellants their consent to be sued[…]*f,* I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, expressed or implie[…][4]

I, therefore, would approach the minimum-contacts analysis differently than does the Court. Crucial to me is the fact that appellan[…][1] voluntarily associated themselves with the [228] State of Delaware, "invoking the benefits and protections of its laws,[…], by entering into a long-term and fragile relationship with one of its domestic corporations. They thereby elected to assume powers and to undertake responsibilities wholly derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials[…]. While it is possible that countervailing issues of judicial efficiency and the like might clearly favor a different forum, they do not appear on the meager record before u[…][1] and, of course, we are concerned solely with "minimum" contacts, not the "best" contacts. I thus do not believe that it is unfair to insist that appellants make themselves available to suit in a competent forum that Delaware might create for vindication of its important public policies directly pertaining to appellants' fiduciary associations with the State.

[1] Greyhound Lines, Inc., is incorporated in California and has its principal place of business in Phoenix, Ariz.

[2] A judgment of $13,146,090 plus attorneys' fees was entered against Greyhound in *Mt. Hood Stages, Inc.* v. *Greyhound Corp.,* 1972-3 Trade Cas. ¶ 74,824, aff'd, ___ F. 2d ___ (CA9 1977); App. 10.

[3] See *United States* v. *Greyhound Corp.,* 363 F. Supp. 525 (ND Ill. 1973) and 370 F. Supp. 881 (ND Ill.), aff'd, 508 F. 2d 529 (CA7 1974). Greyhound was fined $100,000 and Greyhound Lines $500,000.

[4] Section 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

"(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.
"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."
[5] As a condition of the sequestration order, both the plaintiff and the sequestrator were required to file bonds of $1,000 to assure their compliance with the orders of the court. App. 24.
Following a technical amendment of the complaint, the original sequestration order was vacated and replaced by an alias sequestration order identical in its terms to the original.
[6] The sequestrator is appointed by the court to effect the sequestration. His duties appear to consist of serving the sequestration order on the named corporation, receiving from that corporation a list of the property which the order affects, and filing that list with the court. For performing those services in this case, the sequestrator received a fee of $100 under the original sequestration order and $100 under the alias order.
[7] The closing price of Greyhound stock on the day the sequestration order was issued was $14 3/8. New York Times, May 23, 1974, p. 62. Thus, the value of the sequestered stock was approximately $1.2 million.
[8] Debentures, warrants, and stock unit credits belonging to some of the defendants who owned either stock or options were also sequestered. In addition, Greyhound reported that it had an employment contract with one of the defendants calling for payment of $250,000 over a 12-month period. Greyhound refused to furnish any further information on that debt on the ground that since the sums due constituted wages, their seizure would be unconstitutional. See *Sniadach* v. *Family Finance Corp.,*395 U. S. 337 (1969). Heitner did not challenge this refusal.
The remaining defendants apparently owned no property subject to the sequestration order.
[9] Section 169 provides:
"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."
[10] The court relied, 361 A. 2d, at 228, 230-231, on our decision in *Ownbey* v. *Morgan,* 256 U. S. 94 (1921), and references to that decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 610 (1975) (POWELL, J., concurring in judgment); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663, 679 n. 14 (1974); *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 613 (1974); *Fuentes* v. *Shevin,* 407 U. S. 67, 91 n. 23 (1972); *Sniadach* v. *Family Finance Corp., supra,* at 339. The only question before the Court in *Ownbey* was the constitutionality of a requirement that a defendant whose property has been attached file a bond before entering an appearance. We do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey*is consistent with more recent decisions interpreting the Due Process Clause.
Sequestration is the equity counterpart of the process of foreign attachment in suits at law considered in *Ownbey.* Delaware's sequestration statute was modeled after its attachment statute. See *Sands* v. *Lefcourt Realty Corp.,* 35 Del. Ch. 340, 344-345, 117 A. 2d 365, 367 (Sup. Ct. 1955); Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. 749, 751-754 (1973).
[11] The District Court judgment in *U. S. Industries* was reversed by the Court of Appeals for the Third Circuit. 540 F. 2d 142 (1976), cert. pending, No. 76-359. The Court of Appeals characterized the passage from the Delaware Supreme Court's opinion quoted in text as "cryptic conclusions." *Id.,* at 149.
[12] Under Delaware law, defendants whose property has been sequestered must enter a general appearance, thus subjecting themselves to *in personam* liability, before they can defend on the merits. See *Greyhound Corp.* v. *Heitner,* 361 A. 2d 225, 235-236 (1976). Thus, if the judgment below were considered not to be an appealable final judgment, 28 U. S. C. § 1257 (2), appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits. This case is in the same posture as was *Cox Broadcasting Corp.* v. *Cohn,*420 U. S. 469, 485 (1975): "The [Delaware] Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the [Delaware] court erroneously upheld the statute, there should be no trial at all."
Accordingly, "consistent with the pragmatic approach that we have followed in the past in determining finality," *id.,* at 486, we conclude that the judgment below is final within the meaning of § 1257.
[13] The statute also required that a copy of the summons and complaint be mailed to the defendant if his place of residence was known to the plaintiff or could be determined with reasonable diligence. 95 U. S., at 718. Mitchell had averred that he did not know and could not determine Neff's address, so that the publication was the only "notice" given. *Id.,* at 717.

[14] The Federal Circuit Court based its ruling on defects in Mitchell's affidavit in support of the order for service by publication and in the affidavit by which publication was proved. *Id.,* at 720. Mr. Justice Field indicated that if this Court had confined itself to considering those rulings, the judgment would have been reversed. *Id.,* at 721.
[15] The doctrine that one State does not have to recognize the judgment of another State's courts if the latter did not have jurisdiction was firmly established at the time of *Pennoyer*. See, *e. g., D'Arcy* v. *Ketchum,* 11 How. 165 (1851); *Boswell's Lessee* v. *Otis,* 9 How. 336 (1850); *Kibbe* v. *Kibbe,* 1 Kirby 119 (Conn. Super. Ct. 1786).
[16] Attachment was considered essential to the state court's jurisdiction for two reasons. First, attachment combined with substituted service would provide greater assurance that the defendant would actually receive notice of the action than would publication alone. Second, since the court's jurisdiction depended on the defendant's ownership of property in the State and could be defeated if the defendant disposed of that property, attachment was necessary to assure that the court had jurisdiction when the proceedings began and continued to have jurisdiction when it entered judgment. 95 U. S., at 727-728.
[17] "A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5-9." *Hanson* v. *Denckla,*357 U. S. 235, 246 n. 12 (1958).
As did the Court in *Hanson,* we will for convenience generally use the term *"in rem"* in place of "*in rem* and *quasi in rem.*"
[18] The Court in *Harris*limited its holding to States in which the principal defendant (Balk) could have sued the garnishee (Harris) if he had obtained personal jurisdiction over the garnishee in that State. 198 U. S., at 222-223, 226. The Court explained:
"The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it." *Id.,* at 226.
The problem with this reasoning is that unless the plaintiff has obtained a judgment establishing his claim against the principal defendant, see, *e. g., Baltimore & O. R. Co.* v. *Hostetter,* 240 U. S. 620 (1916), his right to "represent" the principal defendant in an action against the garnishee is at issue. See Beale, The Exercise of Jurisdiction *in Rem* to Compel Payment of a Debt, 27 Harv. L. Rev. 107, 118-120 (1913).
[19] As the language quoted indicates, the *International Shoe* Court believed that the standard it was setting forth governed actions against natural persons as well as corporations, and we see no reason to disagree. See also *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 222 (1957) (*International Shoe* culmination of trend toward expanding state jurisdiction over "foreign corporations and other nonresidents"). The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other.
[20] Nothing in *Hanson* v. *Denckla,* 357 U. S. 235 (1958), is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction "are a consequence of territorial limitations on the power of the respective States," *id.,* at 251, simply makes the point that the States are defined by their geographical territory. After making this point, the Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.
[21] Cf. Restatement (Second) of Conflict of Laws § 59, Comment a (possible inconsistency between principle of reasonableness which underlies field of judicial jurisdiction and traditional rule of *in rem* jurisdiction based solely on land in State); § 60, Comment a (same as to jurisdiction based solely on chattel in State); § 68, Comment c (rule of *Harris* v. *Balk* "might be thought inconsistent with the basic principle of reasonableness") (1971).
[22] "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." *Tyler* v. *Court of Registration,* 175 Mass. 71, 76, 55 N. E. 812, 814 (Holmes, C. J.), appeal dismissed, 179 U. S. 405 (1900).
[23] It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated. Cf. *Fuentes* v. *Shevin,* 407 U. S., at 88-90; n. 32, *infra.*
[24] This category includes true *in rem* actions and the first type of *quasi in rem* proceedings. See n. 17, *supra.*
[25] In some circumstances the presence of property in the forum State will not support the inference suggested in text. Cf., *e. g.,* Restatement § 60, Comments c, d; Traynor 672-673; Note, The Power of a State to Affect Title in a Chattel Atypically Removed to It, 47 Colum. L. Rev. 767 (1947).
[26] Cf. *Hanson* v. *Denckla,* 357 U. S., at 253.

[27] See, *e. g., Tyler* v. *Court of Registration, supra.*
[28] We do not suggest that these illustrations include all the factors that may affect the decision, nor that the factors we have mentioned are necessarily decisive.
[29] Cf. *Dubin* v. *Philadelphia,* 34 Pa. D. & C. 61 (1938). If such an action were brought under the *in rem* jurisdiction rather than under a long-arm statute, it would be a *quasi in rem* action of the second type. See n. 17, *supra.*
[30] Cf. Smit, The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer* v. *Neff,* 43 Brooklyn L. Rev. 600 (1977). We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness. See, *e. g.,* Traynor 660-661.
[31] Concentrating on this category of cases is also appropriate because in the other categories, to the extent that presence of property in the State indicates the existence of sufficient contacts under *International Shoe,* there is no need to rely on the property as justifying jurisdiction regardless of the existence of those contacts.
[32] The value of the property seized does serve to limit the extent of possible liability, but that limitation does not provide support for the assertion of jurisdiction. See n. 23, *supra.* In this case, appellants' potential liability under the *in rem* jurisdiction exceeds $1 million. See nn. 7, 8, *supra.*
[33] See *supra,* at 193, 194. This purpose is emphasized by Delaware's refusal to allow any defense on the merits unless the defendant enters a general appearance, thus submitting to full *in personam* liability. See n. 12, *supra.*
[34] See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975); *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969).
[35] The role of *in rem* jurisdiction as a means of preventing the evasion of obligations, like the usefulness of that jurisdiction to mitigate the limitations *Pennoyer* placed on *in personam* jurisdiction, may once have been more significant. Von Mehren & Trautman 1178.
[36] Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter. Cf. n. 18, *supra.*
[37] This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.
[38] To the contrary, in *Pennington* v. *Fourth Nat. Bank,*243 U. S. 269, 271 (1917), we said:
"The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm,* 174 U. S. 710. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk,* 198 U. S. 215. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam. Pennoyer* v. *Neff,* 95 U. S. 714. But garnishment or foreign attachment is a proceeding *quasi in rem. Freeman* v. *Alderson,* 119 U. S. 185, 187. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power."
See also *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U. S. 183, 193 (1941).
More recent decisions, however, contain no similar sweeping endorsements of jurisdiction based on property. In *Hanson* v. *Denckla,* 357 U. S., at 246, we noted that a state court's *in rem* jurisdiction is "[f]ounded on physical power" and that "[t]he basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." We found in that case, however, that the property which was the basis for the assertion of *in rem* jurisdiction was not present in the State. We therefore did not have to consider whether the presence of property in the State was sufficient to justify jurisdiction. We also held that the defendant did not have sufficient contact with the State to justify *in personam* jurisdiction.
[39] It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.
[40] Appellants argue that our determination that the minimum-contacts standard of *International Shoe* governs jurisdiction here makes unnecessary any consideration of the existence of such contacts. Brief for Appellants 27; Reply Brief for Appellants 9. They point out that they were never personally served with a summons, that Delaware has no long-arm statute which would authorize such service, and that the Delaware Supreme Court has authoritatively held that the existence of contacts is irrelevant to jurisdiction under Del. Code Ann., Tit. 10, § 366 (1975). As part of its sequestration order, however, the Court of Chancery directed its clerk to send each appellant a copy of the summons and complaint by certified mail. The record indicates that those mailings were made and contains return receipts from at least 19 of the appellants. None of the appellants has suggested that he did not actually receive the summons which was directed to him in compliance with a Delaware statute designed to provide jurisdiction over nonresidents. In these circumstances, we will assume that the procedures followed would be sufficient to bring appellants before the Delaware courts, if minimum contacts existed.

[41] On the view we take of the case, we need not consider the significance, if any, of the fact that some appellants hold positions only with a subsidiary of Greyhound which is incorporated in California.
[42] Sequestration is an equitable procedure available only in equity actions, but a similar procedure may be utilized in actions at law. See n. 10, *supra.*
[43] Delaware does not require directors to own stock. Del. Code Ann., Tit. 8, § 141 (b) (Supp. 1976).
[44] In general, the law of the State of incorporation is held to govern the liabilities of officers or directors to the corporation and its stockholders. See Restatement § 309. But see Cal. Corp. Code § 2115 (West Supp. 1977). The rationale for the general rule appears to be based more on the need for a uniform and certain standard to govern the internal affairs of a corporation than on the perceived interest of the State of incorporation. Cf. *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U. S. 518, 527-528 (1947).
[45] Mr. Justice Black, although dissenting in *Hanson,* agreed with the majority that "the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment . . . ." 357 U. S., at 258.
[46] See, *e. g.,* Del. Code Ann., Tit. 8, §§ 143, 145 (1975 ed. and Supp. 1976).
[47] See, *e. g.,* Conn. Gen. Stat. Rev. § 33-322 (1976); N. C. Gen. Stat. § 55-33 (1975); S. C. Code Ann. § 33-5-70 (1977).
[48] "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee,* 243 U. S. 90, 92.
[49] Indeed the Court's decision to proceed to the minimum-contacts issue treats Delaware's sequestration statute as if it were the equivalent of Rhode Island's long-arm law, which specifically authorizes its courts to assume jurisdiction to the limit permitted by the Constitution, R. I. Gen. Laws Ann. § 9-5-33 (1970), thereby necessitating judicial consideration of the frontiers of minimum contacts in every case arising under that statute.
[50] The *Mullane* Court held: "[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S., at 313.
[51] In this case the record does not inform us whether an actual conflict is likely to arise between Delaware law and that of the likely alternative forum. Pursuant to the general rule, I assume that Delaware law probably would obtain in the foreign court. Restatement § 309.
[52] I recognize, of course, that identifying a corporation as a resident of the chartering State is to build upon a legal fiction. In many respects, however, the law acts as if state chartering of a corporation has meaning. *E. g.,* 28 U. S. C. § 1332 (c) (for diversity purposes, a corporation is a citizen of the State of incorporation). And, if anything, the propriety of treating a corporation as a resident of the incorporating State seems to me particularly appropriate in the context of a shareholder derivative suit, for the State realistically may perceive itself as having a direct interest in guaranteeing the enforcement of its corporate laws, in assuring the solvency and fair management of its domestic corporations, and in protecting from fraud those shareholders who placed their faith in that state-created institution.
[53] In fact, it is quite plausible that the Delaware Legislature never felt the need to assert direct jurisdiction over corporate managers precisely because the sequestration statute heretofore has served as a somewhat awkward but effective basis for achieving such personal jurisdiction. See, *e. g., Hughes Tool Co.* v. *Fawcett Publications, Inc.,* 290 A. 2d 693, 695 (Del. Ch. 1972): "Sequestration is most frequently resorted to in suits by stockholders against corporate directors in which recoveries are sought for the benefit of the corporation on the ground of claimed breaches of fiduciary duty on the part of directors."
[54] Admittedly, when one consents to suit in a forum, his expectation is enhanced that he may be haled into that State's courts. To this extent, I agree that consent may have bearing on the fairness of accepting jurisdiction. But whatever is the degree of personal expectation that is necessary to warrant jurisdiction should not depend on the formality of establishing a consent law. Indeed, if one's expectations are to carry such weight, then appellants here might be fairly charged with the understanding that Delaware would decide to protect its substantial interests through its own courts, for they certainly realized that in the past the sequestration law has been employed primarily as a means of securing the appearance of corporate officials in the State's courts. N. 5, *supra.* Even in the absence of such a statute, however, the close and special association between a state corporation and its managers should apprise the latter that the State may seek to offer a convenient forum for addressing claims of fiduciary breach of trust.
[55] Whether the directors of the out-of-state subsidiary should be amenable to suit in Delaware may raise additional questions. It may well require further investigation into such factors as the degree of independence in the operations of the two corporations, the interrelationship of the managers of parent and subsidiary in the actual conduct under challenge, and the reasonable expectations of the subsidiary directors that the parent State would take an interest in their behavior. Cf. *United States* v. *First Nat. City Bank,* 379 U. S. 378, 384 (1965). While the present record is not illuminating on these matters, it appears that all appellants acted largely in concert with respect to the alleged fiduciary misconduct, suggesting that overall jurisdiction might fairly rest in Delaware.

[56] And, of course, if a preferable forum exists elsewhere, a State that is constitutionally entitled to accept jurisdiction nonetheless remains free to arrange for the transfer of the litigation under the doctrine of *forum non conveniens*. See, *e. g., Broderick* v. *Rosner,* 294 U. S. 629, 643 (1935); *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 504 (1947).

5.8.3 Notes on Shaffer

1. *In rem* of jurisdiction of all kinds depends on the presence of property in the forum. We are not applying a minimum contacts test to property. The property has to be in the forum and has to be attached at the outset of the litigation to establish jurisdiction. No exceptions.
2. Note that *Shaffer* is a q*uasi-in-rem* type two case - the property in the state was not the subject of the litigation. Note also that it is intangible property, and that most other states would differ in how they set the location of that intangible property.
3. Shaffer does not abolish *quasi in rem* jurisdiction but it makes it a good deal less useful. In cases like *Harris v. Balk*, quasi in rem jurisdiction would exist wherever the debtor traveled, which may be a place with no connections to the owner of the property, That expanded jurisdictional reach greatly, which was particularly handy in the *Pennoyer* era. After *Shaffer*, it's hard to imagine a situation where *quasi in rem* jurisdiction exists that meets *Shaffer*'s requirements that does not also give rise to *in personam* jurisdiction. As *in personam* jurisdiction has several advantages, such as the applicability of full faith and credit and recovery beyond the level of the attached property, it will rarely, if ever, make sense to bring an action as *quasi in rem*.
4. Shortly after *Shaffer* was decided, Delaware changed its law to provide that nonresidents who serve on the boards of Delaware corporations shall be deemed to have consented to personal jurisdiction. Later, that law was extended to high ranking corporate officers such as the CEO or treasurer.
5. One interesting application of in rem jurisdiction after *Shaffer* has to do with internet domain names, which are considered to be present where the domain name registry is located. In such cases, the domain owner may not even know where the registry is located, as domain names are usually purchased through intermediaries. Notwithstanding the lack of an actual connection beyond the nominal location of the property that is a domain name, a federal statute aimed at preventing cybersquatting (the registration of domain names that conflict with the trademarks of established companies) allows suits to proceed *in rem*, but only when the true identity of the registrant is unknown and the registration appears to have been in bad faith.
6. *Shaffer*'s language is very broad - it would appear to conflict with the holding you are about to read in *Burnham*, for example - but overly broad language that goes well beyond the issue actually decided does not confine future courts. (Do you know why? You should.) Ask yourself whether the actual holding in *Shaffer* can be reconciled with each of the opinions in *Burnham*. Notwithstanding the broad language in *Shaffer* about the applicability of *International Shoe*, the Court had little problem deciding that 'tag' jurisdiction based only on presence was still Constitutional, and conferred jurisdiction over cases with no connection with the forum other than the human defendant's transient presence.

5.9 Traditional Bases Revisited

5.9.1 Physical Presence and "Tag" Jurisdiction

5.9.1.1 Burnham v. Superior Court of Cal. County of Marin

495 U.S. 604 (1990)
BURNHAM
v.
SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN[…]
4.
Supreme Court of United States[…]
90
CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRI[…]
n.
JUSTICE SCALIA announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE KENNEDY join, and in which JUSTICE WHITE joins with respect to Parts I, II-A, II-B, and II-C.
The question presented is whether the Due Process Clause of the Fourteenth Amendment denies California courts jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State.
I
Petitioner Dennis Burnham married Francie Burnham in 1976 in West Virginia. In 1977 the couple moved to New Jersey, where their two children were born. In July 1987 the Burnhams decided to separate. They agreed that Mrs. Burnham, who intended to move to California, would take custody of the children. Shortly before Mrs. Burnham departed for California that same month, she and petitioner agreed that she would file for divorce on grounds of "irreconcilable differences."
In October 1987, petitioner filed for divorce in New Jersey state court on grounds of "desertion." Petitioner did not, however, obtain an issuance of summons against his wife and did not attempt to serve her with process. Mrs. Burnham, after

unsuccessfully demanding that petitioner adhere to [608] their prior agreement to submit to an "irreconcilable differences" divorce, brought suit for divorce in California state court in early January 1988.
In late January, petitioner visited southern California on business, after which he went north to visit his children in the San Francisco Bay area, where his wife resided. He took the older child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham's home on January 24, 1988, petitioner was served with a California court summons and a copy of Mrs. Burnham's divorce petition. He then returned to New Jersey.
Later that year, petitioner made a special appearance in the California Superior Court, moving to quash the service of process on the ground that the court lacked personal jurisdiction over him because his only contacts with California were a few short visits to the State for the purposes of conducting business and visiting his children. The Superior Court denied the motion, and the California Court of Appeal denied mandamus relief, rejecting petitioner's contention that the Due Process Clause prohibited California courts from asserting jurisdiction over him because he lacked "minimum contacts" with the State. The court held it to be "a valid jurisdictional predicate for *in personam* jurisdiction" that the "defendant [was] present in the forum state and personally served with process.[…]).
II
A
The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books[…]), and was made settled law by Lord Coke in *Case of the Marshalsea[…]*. Traditionally that proposition was embodied in the phrase *coram non judice,* [609] "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.* American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted[…]), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.
To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American court[…]. In what has become the classic expression of the criterion, we said in *International Shoe Co.* v. *Washington[…]*, that a state court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate " `traditional notions of fair play and substantial justice.' […]). Since *International Shoe,* we have only been called upon to decide whether these "traditional notions" permit [610] States to exercise jurisdiction over absent defendants in a manner that deviates from the rules of jurisdiction applied in the 19th century[…]. The question we must decide today is whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him.
B
Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter [611] judgment against him, no matter how fleeting his visit[…]. That view had antecedents in English common-law practice, which sometimes allowed "transitory" actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England[…]). Justice Story believed the principle, which he traced to Roman origins, to be firmly grounded in English tradition: "[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found," for "every nation may . . . rightfully exercise jurisdiction over all persons within its domains.[…]). Recent scholarship has suggested that English tradition was not as clear as Story thought[…]. Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted[…]
).
Decisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there[…][1] Although research has not revealed a case deciding the issue in every State's courts, that appears to be because the issue was so well settled that it went unlitigated[…]. Most States, moreover, had statutes or common-law rules that exempted from service of process individuals who were brought into the forum by force or fraud[…], or who were there as a party or witness in unrelated judicial proceedings[…]. These exceptions obviously rested upon the premise that service of process conferred jurisdiction[…]. Particularly striking is the fact that, as far as we have been able to determine, *not one* American case from the period (or, for that matter, not one American case [614] until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdictio[…][1]
Commentators were also seemingly unanimous [615] on the rule[…]).

This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government — if one disregards (as one must for this purpose) the few opinions since 1978 that have erroneously said, on grounds similar to those that petitioner presses here, that this Court's due process decisions render the practice unconstitutional[…]. We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction. Many recent cases reaffirm it.[…]).
C
Despite this formidable body of precedent, petitioner contends, in reliance on our decisions applying the *International Shoe* standard, that in the absence of "continuous and systematic" contacts with the forum[…], a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum. This argument rests on a thorough misunderstanding of our cases.
The view of most courts in the 19th century was that a court simply could not exercise *in personam* jurisdiction over a nonresident who had not been personally served with process in the forum[…], while renowned for its statement of the principle that the Fourteenth Amendment [617] prohibits such an exercise of jurisdiction, in fact set that forth only as dictum and decided the cas[…]) under "well-established principles of public law.[…]. Those principles, embodied in the Due Process Clause, require[…]d) that when proceedings "involv[e] merely a determination of the personal liability of the defendant, he must be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance.[…][…]
e. In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations[…]. States required, for example, that nonresident corporations appoint an in-state agent upon whom process could be served as a condition of transacting business within their borders[…]), and provided in-state "substituted service" for nonresident motorists who caused injury in the State and left before personal service could be accomplished,[…]. We initially upheld these laws under the Due Process Clause on grounds that they complied with *Pennoyer*'s rigid requirement of either "consent,[…]. As many observed, [618] however, the consent and presence were purely fictional[…]. Our opinion in *International Shoe* cast those fictions aside and made explicit the underlying basis of these decisions: Due process does not necessarily *require* the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*. The validity of assertion of jurisdiction over a nonconsenting defendant who is not present in the forum depends upon whether "the quality and nature of [his] activity" in relation to the forum[…], renders such jurisdiction consistent with " `traditional notions of fair play and substantial justice.' […]. Subsequent cases have derived from the *International Shoe* standard the general rule that a State may dispense with in-forum personal service on nonresident defendants in suits arising out of their activities in the State[…]. As *International Shoe* suggests, the defendant's litigation-related "minimum contacts" may take the place of physical presence as the basis for jurisdictio[…]
).
[619] Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence[…]
).
The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.
D
Petitioner's strongest argument, though we ultimately reject it, relies upon our decision in *Shaffer* v. *Heitner[…]*. In that case[…], Delaware could not hear the suit because the defendants' sole contact with the State (ownership of property there) was unrelated to the lawsuit[…]5.
It goes too far to say, as petitioner contends, that *Shaffer* compels the conclusion that a State lacks jurisdiction over an individual unless the litigation arises out of his activities in the State. *Shaffer,* like *International Shoe,* involved jurisdiction over an *absent defendant,* and it stands for nothing more than the proposition that when the "minimum contact" that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation. Petitioner wrenches out of its context our statement in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[…]
).
Shaffer was saying, in other words, not that all bases for the assertion of *in personam* jurisdiction (including, presumably, in-state service) must be treated alike and subjected to the "minimum contacts" analysis of *International Shoe;* but rather that *quasi in rem*

jurisdiction[…]" and *in personam* jurisdiction, are really one and the same and must be treated alike — leading to the conclusion that *quasi in rem* jurisdiction, *i. e.,* that form of *in personam* jurisdiction based upon a "property ownership" contact and by definition unaccompanied by personal, in-state service, must satisfy the litigation-relatedness requirement of *International Shoe.* The logic of *Shaffer*'s holding — which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact — does not compel the conclusion that physically present defendants must be treated identically to absent ones. As we have demonstrated at length, our tradition has treated the two classes of defendants quite differently, and it is unreasonable to read *Shaffer* as casually obliterating that distinction. *International Shoe* confined its "minimum contacts" requirement to situations in which the defendant "be not present within the territory of the forum,[…], and nothing in *Shaffer* expands that requirement beyond that.

It is fair to say, however, that while our holding today does not contradict *Shaffer,* our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing instate service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase "*traditional notions* of fair play and substantial justice" makes clear. *Shaffer* did conduct such an independent inquiry, asserting that " `traditional notions of fair play and substantial justice' can be as readily offended [622] by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.[…]. Perhaps that assertion can be sustained when the "perpetuation of ancient forms" is engaged in by only a very small minority of the State[…][4] Where, however, as in the present case, a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified." While in no way receding from or casting doubt upon the holding of *Shaffer* or any other case, we reaffirm today our time-honored approach[…]. For new procedures, hitherto unknown, the Due Process clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. *International Shoe,* 326 U. S., at 316. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

III

A few words in response to JUSTICE BRENNAN's opinion concurring in the judgment: It insists that we apply "contemporary notions of due process" to determine the constitutionality of California's assertion of jurisdiction[…]. But our analysis today comports with that prescription, at least if we give it the only sense allowed by our precedents. The "contemporary notions of due process" applicable to personal [623] jurisdiction are the enduring "*traditional* notions of fair play and substantial justice" established as the test by *International Shoe.* By its very language, that test is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States.

But the concurrence's proposed standard of "contemporary notions of due process" requires more: It measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just. Authority for that seductive standard is not to be found in any of our personal jurisdiction cases. It is, indeed, an outright break with the test of "traditional notions of fair play and substantial justice," which would have to be reformulated "*our* notions of fair play and substantial justice."

The subjectivity, and hence inadequacy, of this approach becomes apparent when the concurrence tries to explain *why* the assertion of jurisdiction in the present case meets its standard of continuing-American-tradition-*plus*-innate-fairness. JUSTICE BRENNAN lists the "benefits" Mr. Burnham derived from the State of California — the fact that, during the few days he was there, "[h]is health and safety [were] guaranteed by the State's police, fire, and emergency medical services; he [was] free to travel on the State's roads and waterways; he likely enjoy[ed] the fruits of the State's economy.[…]. Three days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is "fair" for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children. We daresay a contractual exchange swapping those benefits for that power would not survive the "unconscionability" provision of the Uniform Commercial Code. Even less persuasive are the other "fairness" factors alluded to by JUSTICE BRENNAN. It would create "an asymmetry," we are told, if Burnham were *permitted* (as he is) to appear [624] in California courts as a plaintiff, but were not *compelled* to appear in California courts as defendant; and travel being as easy as it is nowadays, and modern procedural devices being so convenient, it is no great hardship to appear in California courts[…]. The problem with these assertions is that they justify the exercise of jurisdiction over *everyone, whether or not* he ever comes to California. The only "fairness" elements setting Mr. Burnham apart from the rest of the world are the three days' "benefits" referred to above — and even those, do not set him apart from many other people who have enjoyed three days in the Golden State (savoring the fruits of its economy, the availability of its roads and police services) but who were fortunate enough not to be served with process while they were there and thus are not (simply by reason of that savoring) subject to the general jurisdiction of California's courts[…]. In other words, even if one agreed with JUSTICE BRENNAN's conception of an equitable bargain, the "benefits" we have been discussing would explain why it is "fair" to assert general jurisdiction over Burnham-returned-to-New-Jersey-after-service only at the expense of proving that it is also "fair" to assert general jurisdiction

over Burnham-returned-to-New-Jersey-*without*-service — which we *know* does not conform with "contemporary notions of due process."

There is, we must acknowledge, one factor mentioned by JUSTICE BRENNAN that *both* relates distinctively to the assertion of jurisdiction on the basis of personal in-state service *and* is fully persuasive — namely, the fact that a defendant voluntarily present in a particular State has a "reasonable expectatio[n]" that he is subject to suit there[…]7. By formulating it as a "reasonable expectation" JUSTICE BRENNAN makes that seem like a "fairness" factor; but in reality, of course, it is just tradition masquerading as "fairness." The only reason for charging Mr. Burnham with the reasonable expectation of being subject to suit is that the [625] States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for Mr. Burnham, who voluntarily entered California, to be sued there for divorce — at least "fair" in the limited sense that he has no one but himself to blame. JUSTICE BRENNAN's long journey is a circular one, leaving him, at the end of the day, in complete reliance upon the very factor he sought to avoid: The existence of a continuing tradition is not enough, fairness also must be considered; fairness exists here because there is a continuing tradition.

While JUSTICE BRENNAN's concurrence is unwilling to confess that the Justices of this Court can possibly be bound by a continuing American tradition that a particular procedure is fair, neither is it willing to embrace the logical consequences of that refusal — or even to be clear about what consequences (logical or otherwise) it does embrace. JUSTICE BRENNAN says tha*[…], as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process.[…]. The use of the word "rule" conveys the reassuring feeling that he is establishing a principle of law one can rely upon — but of course he is not. Since JUSTICE BRENNAN's only criterion of constitutionality is "fairness," the phrase "as a rule" represents nothing more than his estimation that, *usually,* all the elements of "fairness" he discusses in the present case will exist. But what if they do not? Suppose, for example, that a defendant in Mr. Burnham's situation enjoys not three days' worth of California's "benefits," but 15 minutes' worth. Or suppose we remove one of those "benefits" — "enjoy[ment of] the fruits of the State's economy" — by positing that Mr. Burnham had not [626] come to California on business, but only to visit his children. Or suppose that Mr. Burnham were demonstrably so impecunious as to be unable to take advantage of the modern means of transportation and communication that JUSTICE BRENNAN finds so relevant. Or suppose, finally, that the California courts lacked the "variety of procedural devices,[…], that JUSTICE BRENNAN says can reduce the burden upon out-of-state litigants. One may also make additional suppositions, relating not to the absence of the factors that JUSTICE BRENNAN discusses, but to the presence of additional factors bearing upon the ultimate criterion of "fairness." What if, for example, Mr. Burnham were visiting a sick child? Or a dying child[…]. Since, so far as one can tell, JUSTICE BRENNAN's approval of applying the in-state service rule in the present case rests on the presence of *all* the factors he lists, and on the absence of any others, every different case will present a different litigable issue. Thus, despite the fact that he manages to work the word "rule" into his formulation, JUSTICE BRENNAN's approach does not establish a rule of law at all, but only a "totality of the circumstances" test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence. It may be that those evils, necessarily accompanying a freestanding "reasonableness" inquiry, must be accepted at the margins, when we evaluate *non*traditional forms of jurisdiction newly adopted by the States[…]). But that is no reason for injecting them into the core of our American practice, exposing to such a "reasonableness" inquiry the ground of jurisdiction that has hitherto [627] been considered the very *baseline* of reasonableness, physical presence.

The difference between us and JUSTICE BRENNAN has nothing to do with whether "further progress [is] to be made" in the "evolution of our legal system.[…]. It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court. Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the "traditional notions of fairness" that this Court applies may change. But the States have overwhelmingly declined to adopt such limitation or abandonment, evidently not considering it to be progres[…][4] The question is whether, armed with no authority other than individual Justices' perceptions of fairness that conflict with both past and current practice, this Court can compel the States to make such a change on the ground that "due process" requires it. We hold that it cannot.

* * *

[628] Because the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process, the judgment is

Affirmed.

JUSTICE WHITE, concurring in part and concurring in the judgment.

I join Parts I, II-A, II-B, and II-C of JUSTICE SCALIA's opinion and concur in the judgment of affirmance. The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case,

on the ground that it denies due process of law guaranteed by the Fourteenth Amendment. Although the Court has the authority under the Amendment to examine even traditionally accepted procedures and declare them invalid[…], there has been no showing here or elsewhere that as a general proposition the rule is so arbitrary and lacking in common sense in so many instances that it should be held violative of due proces[…]d.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, concurring in the judgment.

I agree with JUSTICE SCALIA that the Due Process Claus[…]t generally permits a state [629] court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum Stat[…][1] I do not perceive the need, however, to decide that a jurisdictional rule that " `has been immemorially the actual law of the land,' […], automatically comports with due process simply by virtue of its "pedigree." Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto,* forever constitutional. Unlike JUSTICE SCALIA, I would undertake an "independent inquiry into the . . . fairness of the prevailing in-state service rule.[…]1. I therefore concur only in the judgment.

I

I believe that the approach adopted by JUSTICE SCALIA's opinion today — reliance solely on historical pedigree — is foreclosed by our decisions in *International Sho[…]*[2][…]. The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process[…]. I agree with this approach and continue to believe that "the minimum-contacts analysis developed in *International Shoe* . . . represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoye[…]*).

While our *holding* in *Shaffer* may have been limited to *quasi in rem* jurisdiction, our mode of analysis was not. Indeed, that we were willing in *Shaffer* to examine anew the appropriateness of the *quasi in rem* rule — until that time dutifully accepted by American courts for at least a century — demonstrates that we did not believe that the "pedigree" of a jurisdictional practice was dispositive in deciding whether it was consistent with due process[…]. If we could discard an "ancient form without substantial modern justification" in *Shaffer[…]*, we can do so agai[…][1] Lower court[…][1] commentator[…][1] and the American Law Institu[…][1] [632] all have interpreted *International Shoe* and *Shaffer* to mean that *every* assertion of state-court jurisdiction, even one pursuant to a "traditional" rule such as transient jurisdiction, must comport with contemporary notions of due process. Notwithstanding the nimble gymnastics of JUSTICE [633] SCALIA's opinion today, it is not faithful to our decision in *Shaffer.*

II

Tradition, though alone not dispositive, is of course *relevant* to the question whether the rule of transient jurisdiction is consistent with due proces[…][1] Tradition is salient not in the sense that practices of the past are automatically reasonable today; indeed, under such a standard, the legitimacy of transient jurisdiction would be called into question because the rule's historical "pedigree" is a matter of intense debate. The rule was a stranger to the common l[…][1] and was rather [634] weakly implanted in American jurisprudence "at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted.[…]. For much of the 19th century, American courts did not uniformly recognize the concept of transient jurisdictio[…][4] and it appears that the [635] transient rule did not receive wide currency until well after our decision in *Pennoye[…]*[5]

Rather, I find the historical background relevant because, however murky the jurisprudential origins of transient jurisdiction, [636] the fact that American courts have announced the rule for perhaps a century (first in dicta, more recently in holdings) provides a defendant voluntarily present in a particular State *today* "clear notice that [he] is subject to suit" in [637] the forum**[…]r common understanding *now,* fortified by a century of judicial practice, is that jurisdiction is often a function of geography. The transient rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with due process. "If I visit another State, . . . I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks.[…][6]

By visiting the forum State, a transient defendant actually "avail[s]" himself[…]6, of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and water-ways; [638] he likely enjoys the fruits of the State's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its cour[…]. Subject only to the doctrine of *forum non conveniens,* an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens. Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant[…]).

The potential burdens on a transient defendant are slight. " `[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself' " in a State outside his place of residence[…]. That the defendant has already journeyed [639] at least once before to the forum — as evidenced by the fact that he was served with process there —

is an indication that suit in the forum likely would not be prohibitively inconvenient. Finally, any burdens that do arise can be ameliorated by a variety of procedural device[…][1] For these reasons, as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due proces[…]*a.*

[640] In this case, it is undisputed that petitioner was served with process while voluntarily and knowingly in the State of California. I therefore concur in the judgment.

JUSTICE STEVENS, concurring in the judgment.

As I explained in my separate writing, I did not join the Court's opinion in *Shaffe[…]*, because I was concerned by its unnecessarily broad reach. *Id.,* at 217-219 (opinion concurring in judgment). The same concern prevents me from joining either JUSTICE SCALIA's or JUSTICE BRENNAN's opinion in this case. For me, it is sufficient to note that the historical evidence and consensus identified by JUSTICE SCALIA, the considerations of fairness identified by JUSTICE BRENNAN, and the common sense displayed by JUSTICE WHITE, all combine to demonstrate that this is, indeed, a very easy cas[…][1] Accordingly, I agree that the judgment should be affirmed.

[1] We have said that "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." *Helicopteros Nacionales de Colombia* v. *Hall,* 466 U. S., at 414. Our only holding supporting that statement, however, involved "regular service of summons upon [the corporation's] president while he was in [the forum State] acting in that capacity." See *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437, 440 (1952). It may be that whatever special rule exists permitting "continuous and systematic" contacts, *id.,* at 438, to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon "de facto power over the defendant's person." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945). We express no views on these matters — and, for simplicity's sake, omit reference to this aspect of "contacts"-based jurisdiction in our discussion.

[2] JUSTICE BRENNAN's assertion that some of these cases involved dicta rather than holdings, *post,* at 636-637, n. 10, is incorrect. In each case, personal service within the State was the exclusive basis for the judgment that jurisdiction existed, and no other factor was relied upon. Nor is it relevant for present purposes that these holdings might instead have been rested on other available grounds.

[3] Given this striking fact, and the unanimity of both cases and commentators in supporting the in-state service rule, one can only marvel at JUSTICE BRENNAN's assertion that the rule "was rather weakly implanted in American jurisprudence," *post,* at 633-634, and "did not receive wide currency until well after our decision in *Pennoyer* v. *Neff,*" *post,* at 635. I have cited pre-*Pennoyer* cases clearly supporting the rule from no less than nine States, ranging from Mississippi to Colorado to New Hampshire, and two highly respected pre-*Pennoyer* commentators. (It is, moreover, impossible to believe that the many other cases decided shortly after *Pennoyer* represented some sort of instant mutation — or, for that matter, that *Pennoyer* itself was not drawing upon clear contemporary understanding.) JUSTICE BRENNAN cites neither cases nor commentators from the relevant period to support his thesis (with exceptions I shall discuss presently), and instead relies upon modern secondary sources that do not mention, and were perhaps unaware of, many of the materials I have discussed. The cases cited by JUSTICE BRENNAN, *post,* at 634-635, n. 9, do not remotely support his point. The dictum he quotes from *Coleman's Appeal,* 75 Pa. 441, 458 (1874), to the effect that "a man shall only be liable to be called on to answer for civil wrongs in the forum of his home, and the tribunal of his vicinage," was addressing the situation where no personal service in the State had been obtained. This is clear from the court's earlier statements that "there is no mode of reaching by any process issuing from a court of common law, the person of a non-resident defendant not found within the jurisdiction," *id.,* at 456, and "[u]pon a summons, unless there is service within the jurisdiction, there can be no judgment for want of appearance against the defendant." *Ibid. Gardner* v. *Thomas,* 14 Johns. *134 (N. Y. 1817), and *Molony* v. *Dows,* 8 Abb. Pr. 316 (N. Y. Common Pleas 1859), are irrelevant to the present discussion. *Gardner,* in which the court declined to adjudicate a tort action between two British subjects for a tort that occurred on the high seas aboard a British vessel, specifically affirmed that jurisdiction did exist, but said that its exercise "must, on principles of policy, often rest in the sound discretion of the Court." *Gardner* v. *Thomas, supra,* at *137-*138. The decision is plainly based, in modern terms, upon the doctrine of *forum non conveniens. Molony* did indeed hold that in-state service could not support the adjudication of an action for physical assault by one Californian against another in California (acknowledging that this appeared to contradict an earlier New York case), but it rested that holding upon a doctrine akin to the principle that no State will enforce the penal laws of another — that is, resting upon the injury to the public peace of the other State that such an assault entails, and upon the fact that the damages awarded include penal elements. *Molony* v. *Dows, supra,* at 330. The fairness or propriety of exercising jurisdiction over the parties had nothing to do with the decision, as is evident from the court's acknowledgment that if the Californians were suing one another over a contract dispute jurisdiction would lie, no matter where the contract arose. 8 Abb. Pr., at 328. As for JUSTICE BRENNAN's citation of the 1880 commentator John Cleland Wells, *post,* at 635, n. 9, it suffices to quote what is set forth on the very page cited: "It is held to be a principle of the common law that any non-resident defendant voluntarily coming within the jurisdiction may be served with process, and compelled to answer." 1 J. Wells, Jurisdiction of Courts 76 (1880).

[4] *Shaffer* may have involved a unique state procedure in one respect: JUSTICE STEVENS noted that Delaware was the only State that treated the place of incorporation as the situs of corporate stock when both owner and custodian were elsewhere. See 433 U. S., at 218 (opinion concurring in judgment).
[5] I find quite unacceptable as a basis for this Court's decisions JUSTICE BRENNAN's view that "the *raison d'etre* of various constitutional doctrines designed to protect out-of-states, such as the Art. IV Privileges and Immunities Clause and the Commerce Clause," *post,* at 640, n. 14, entitles this Court to brand as "unfair," and hence unconstitutional, the refusal of all 50 States "to limit or abandon bases of jurisdiction that have become obsolete," *post,* at 639, n. 14. "Due process" (which is the constitutional text at issue here) does not mean that process which shifting majorities of this Court feel to be "due"; but that process which American society — self-interested American society, which expresses its judgments in the laws of self-interested States — has traditionally considered "due." The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious.
[6] I use the term "transient jurisdiction" to refer to jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State.
[7] Our reference in *International Shoe* to " `traditional notions of fair play and substantial justice,' " 326 U. S., at 316, meant simply that those concepts are indeed traditional ones, not that, as JUSTICE SCALIA's opinion suggests, see *ante,* at 621, 622, their specific *content* was to be determined by tradition alone. We recognized that contemporary societal norms must play a role in our analysis. See, *e.g.,* 326 U. S., at 317 (considerations of "reasonable[ness], in the context of our federal system of government").
[8] Even JUSTICE SCALIA's opinion concedes that *sometimes* courts may discard "traditional" rules when they no longer comport with contemporary notions of due process. For example, although, beginning with the Romans, judicial tribunals for over a millenium permitted jurisdiction to be acquired by force, see L. Wenger, Institutes of the Roman Law of Civil Procedure 46-47 (O. Fisk trans., rev. ed. 1986), by the 19th century, as JUSTICE SCALIA acknowledges, this method had largely disappeared. See *ante,* at 613. I do not see why JUSTICE SCALIA's opinion assumes that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago.
[9] Some lower courts have concluded that transient jurisdiction did not survive *Shaffer.* See *Nehemiah* v. *Athletics Congress of U. S. A.,* 765 F. 2d 42, 46-47 (CA3 1985); *Schreiber* v. *Allis-Chalmers Corp.,* 448 F. Supp. 1079, 1088-1091 (Kan. 1978), rev'd on other grounds, 611 F. 2d 790 (CA10 1979); *Harold M. Pitman Co.* v. *Typecraft Software Ltd.,* 626 F. Supp. 305, 310-314 (ND Ill. 1986); *Bershaw* v. *Sarbacher,* 40 Wash. App. 653, 657, 700 P. 2d 347, 349 (1985). Others have held that transient jurisdiction is alive and well. See *ante,* at 615-616. But even cases falling into the latter category have engaged in the type of due process analysis that JUSTICE SCALIA's opinion claims is unnecessary today. See, *e. g., Amusement Equipment, Inc.* v. *Mordelt,* 779 F. 2d 264, 270 (CA5 1985); *Hutto* v. *Plagens,* 254 Ga. 512, 513, 330 S. E. 2d 341, 342 (1985); *In re Marriage of Pridemore,* 146 Ill. App. 3d 990, 992, 497 N. E. 2d 818, 819-820 (1986); *Oxmans' Erwin Meat Co.* v. *Blacketer,* 86 Wis. 2d 683, 688-692, 273 N. W. 2d 285, 287-290 (1979); *Lockert* v. *Breedlove,* 321 N. C. 66, 71-72, 361 S. E. 2d 581, 585 (1987); *Nutri-West* v. *Gibson,* 764 P. 2d 693, 695-696 (Wyo. 1988); *Cariaga* v. *Eighth Judicial District Court,* 104 Nev. 544, 547, 762 P. 2d 886, 888 (1988); *El-Maksoud* v. *El-Maksoud,* 237 N. J. Super. 483, 489, 568 A. 2d 140, 143 (1989); *Carr,* v. *Carr,* 180 W. Va. 12, 14, and n. 5, 375 S. E. 2d 190, 192, and n. 5 (1988).
[10] Although commentators have disagreed over whether the rule of transient jurisdiction is consistent with modern conceptions of due process, that they have engaged in such a debate at all shows that they have rejected the methodology employed by JUSTICE SCALIA's opinion today. See Bernstine, *Shaffer* v. *Heitner:* A Death Warrant for the Transient Rule of In Personam Jurisdiction?, 25 Vill. L. Rev. 38, 47-68 (1979-1980); Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 748-755 (1988); Fyr, Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction, 26 Emory L. J. 739, 770-773 (1977); Lacy, Personal Jurisdiction and Service of Summons After *Shaffer* v. *Heitner,* 57 Ore. L. Rev. 505, 510 (1978); Posnak, A Uniform Approach to Judicial Jurisdiction After *Worldwide* and the Abolition of the "Gotcha" Theory, 30 Emory L. J. 729, 735, n. 30 (1981); Redish, Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation, 75 Nw. U. L. Rev. 1112, 1117, n. 35 (1981); Sedler, Judicial Jurisdiction and Choice of Law: The Consequences of *Shaffer* v. *Heitner,* 63 Iowa L. Rev. 1031, 1035 (1978); Silberman, *Shaffer* v. *Heitner:* The End of an Era, 53 N. Y. U. L. Rev. 33, 75 (1978); Vernon, Single Factor Bases of In Personam Jurisdiction — A Speculation on the Impact of *Shaffer* v. *Heitner,* 1978 Wash. U. L. Q. 273, 303; Von Mehren, Adjudicatory Jurisdiction: General Theories Compared and Evaluated, 63 B. U. L. Rev. 279, 300-307 (1983); Zammit, Reflections on *Shaffer* v. *Heitner,* 5 Hastings Const. L. Q. 15, 24 (1978).
[11] See Restatement (Second) of Conflict of Laws § 24, Comment *b,* p. 29 (Draft of Proposed Revisions, Apr. 15, 1986) ("One basic principle underlies all rules of jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it. With respect to judicial jurisdiction, this principle was laid down by the Supreme Court of the United States in International Shoe . . . ."); *id.,* at 30 ("Three factors are primarily responsible for existing rules of judicial jurisdiction. Present-day notions of fair play and substantial justice constitute the first factor"); *id.,* § 28, Comment *b,* at 41,

("The Supreme Court held in Shaffer v. Heitner that the presence of a thing in a state gives that state jurisdiction to determine interests in the thing only in situations where the exercise of such jurisdiction would be reasonable. . . . It must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory"); Restatement (Second) of Judgments § 8, Comment *a,* p. 64 (Tent. Draft No. 5, Mar. 10, 1978) (*Shaffer* establishes " `minimum contacts' in place of presence as the principal basis for territorial jurisdiction").
[12] I do not propose that the "contemporary notions of due process" to be applied are no more than "each Justice's subjective assessment of what is fair and just." *Ante,* at 623. Rather, the inquiry is guided by our decisions beginning with *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), and the specific factors that we have developed to ascertain whether a jurisdictional rule comports with "traditional notions of fair play and substantial justice." See, *e. g., Asahi Metal Industry Co.* v. *Superior Court of California, Solano County,* 480 U. S. 102, 113 (1987) (noting "several factors," including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief"). This analysis may not be "mechanical or quantitative," *International Shoe, supra,* at 319, but neither is it "freestanding," *ante,* at 626, or dependent on personal whim. Our experience with this approach demonstrates that it is well within our competence to employ.
[13] As JUSTICE SCALIA's opinion acknowledges, American courts in the 19th century erected the theory of transient jurisdiction largely upon Justice Story's historical interpretation of Roman and continental sources. JUSTICE SCALIA's opinion concedes that the rule's tradition "was not as clear as Story thought," *ante,*at 611; in fact, it now appears that as a historical matter Story was almost surely wrong. See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289, 293-303 (1956); Hazard, A General Theory of State-Court Jurisdiction, 1965 S. Ct. Rev. 241, 261 ("Story's system reflected neither decided authority nor critical analysis"). Undeniably, Story's views are in considerable tension with English common law — a "tradition" closer to our own and thus, I would imagine, one that in JUSTICE SCALIA's eyes is more deserving of our study than civil law practice. See R. Boote, An Historical Treatise of an Action or Suit at Law 97 (3d ed. 1805); G. Cheshire, Private International Law 601 (4th ed. 1952); J. Westlake, Private International Law 101-102 (1859); Note, British Precedents for Due Process Limitations on In Personam Jurisdiction, 48 Colum. L. Rev. 605, 610-611 (1948) ("The [British] cases evidence a judicial intent to limit the rules to those instances where their application is consonant with the demands of `fair play' and `substantial justice' ")
It seems that Justice Story's interpretation of historical practice amounts to little more than what Justice Story himself perceived to be "fair and just." See *ante,* at 611 (quoting Justice Story's statement that " `[w]here a party is within a territory, he may *justly* be subjected to its process' ") (emphasis added and citation omitted). I see no reason to bind ourselves forever to that perception.
[14] In *Molony* v. *Dows,* 8 Abb. Pr. 316 (N. Y. Common Pleas 1859), for example, the court dismissed an action for a tort that had occurred in California, even though the defendant was served with process while he was in the forum State of New York. The court rejected the plaintiff's contention that it possessed "jurisdiction of all actions, local and transitory, where the defendant resides, or is personally served with process," *id.,* at 325, with the comment that "an action cannot be maintained in this court, or in any court of this State, to recover a pecuniary satisfaction in damages for a wilful injury to the person, inflicted in another State, where, at the time of the act, both the wrongdoer and the party injured were domiciled in that State as resident citizens." *Id.,* at 326. The court reasoned that it could not "undertake to redress every wrong that may have happened in any part of the world, [merely] because the parties, plaintiff or defendant, may afterwards happen to be within [the court's] jurisdiction." *Id.,* at 327-328. Similarly, the Pennsylvania Supreme Court declared it "the *most important* principle of *all* municipal law of Anglo-Saxon origin, that a man shall only be liable to be called upon to answer for civil wrongs in the forum of his home, and the tribunal of his vicinage." *Coleman's Appeal,* 75 Pa. 441, 458 (1874) (emphasis added). And in *Gardner* v. *Thomas,* 14 Johns. *134 (N. Y. 1817), the court was faced with the question "whether this Court will take cognizance of a tort committed on the high seas, on board of a foreign vessel, both the parties being subjects or citizens of the country to which the vessel belongs," after the ship had docked in New York and suit was commenced there. The court observed that Lord Mansfield had appeared "to doubt whether an action may be maintained in *England* for an injury in consequence of two persons fighting in *France,* [even] when both are within the jurisdiction of the Court." *Id.,* at *137. The court distinguished the instant case as an action "for an injury on the high seas" — a location, "of course, without the actual or exclusive territory of any nation." *Ibid.* Nevertheless, the court found that while "our Courts may take cognizance of torts committed on the high seas, on board of a foreign vessel where both parties are foreigners, . . . it must, on principles of policy, often rest in the sound discretion of the Court to afford jurisdiction or not, according to the circumstances of the case." *Id.,* at *137-*138. In the particular case before it, the court found jurisdiction lacking. See *id.,* at *138. See also 1 J. Wells, Jurisdiction of Courts 76 (1880) (reporting that a state court had argued that "courts have jurisdiction of actions for torts as to property, even where the parties are non-resident, and the torts were committed out of the state, if the defendant is served with process within the state," but also noting that "*Clerke,*J., very vigorously dissented in the case, and, I judge, with good reason").
It is possible to distinguish these cases narrowly on their facts, as JUSTICE SCALIA demonstrates. See *ante,* at 614-615, n. 3. Thus, *Molony* could be characterized as a case about the reluctance of one State to punish assaults occurring in another, *Gardner*

as a *forum non conveniens* case, and *Coleman's Appeal* as a case in which there was no in-state service of process. But such an approach would mistake the trees for the forest. The truth is that the transient rule as we now conceive it had no clear counterpart at common law. Just as today there is an interaction among rules governing jurisdiction, *forum non conveniens,* and choice of law, see, *e. g., Ferens* v. *John Deere Co.,* 494 U. S. 516, 530-531 (1990); *Shaffer,* 433 U. S. 186, 224-226 (1977) (BRENNAN, J., concurring in part and dissenting in part); *Hanson* v. *Denckla,* 357 U. S. 235, 256 (1958) (Black, J., dissenting), at common law there was a complex interplay among pleading requirements, venue, and substantive law — an interplay which in large part substituted for a theory of "jurisdiction":

"A theory of territorial jurisdiction would in any event have been premature in England before, say, 1688, or perhaps even 1832. Problems of jurisdiction were the essence of medieval English law and remained significant until the period of Victorian reform. But until after 1800 it would have been impossible, even if it had been thought appropriate, to disentangle the question of territorial limitations on jurisdiction from those arising out of charter, prerogative, personal privilege, corporate liberty, ancient custom, and the fortuities of rules of pleading, venue, and process. The intricacies of English jurisdictional law of that time resist generalization on any theory except a franchisal one; they seem certainly not reducible to territorial dimension.

"The English precedents on jurisdiction were therefore of little relevance to American problems of the nineteenth century." Hazard, A General Theory of State-Court Jurisdiction, 1965 S. Ct. Rev. 241, 252-253 (footnote omitted).

See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 617 (1988). The salient point is that many American courts followed English precedents and restricted the place where certain actions could be brought, regardless of the defendant's presence or whether he was served there.

[15] One distinguished legal historian has observed that "notwithstanding dogmatic generalizations later sanctioned by the *Restatement* [of Conflict of Laws], appellate courts hardly ever in fact held transient service sufficient as such" and that "although the transient rule has often been mouthed by the courts, it has but rarely been applied." Ehrenzweig, 65 Yale L. J., at 292, 295 (footnote omitted). Many of the cases cited in JUSTICE SCALIA's opinion, see *ante,* at 612-613, involve either announcement of the rule in dictum or situations where factors other than in-state service supported the exercise of jurisdiction. See, *e. g., Alley* v. *Caspari,* 80 Me. 234, 236, 14 A. 12 (1888) (defendant found to be resident of forum); *De Poret* v. *Gusman,* 30 La. Ann., pt. 2, 930, 932 (1878) (cause of action arose in forum): *Savin* v. *Bond,* 57 Md. 228, 233 (1881) (both defendants residents of forum State); *Hart* v. *Granger,* 1 Conn. 154, 154-155 (1814) (suit brought against former resident of forum State based on contract entered into there); *Baisley* v. *Baisley,* 113 Mo. 544, 550, 21 S. W. 29, 30 (1893) (court ruled for plaintiff on grounds of estoppel because defendant had failed to raise timely objection to jurisdiction in a prior suit); *Bowman* v. *Flint,* 37 Tex. Civ. App. 28, 28-29, 82 S. W. 1049, 1049-1050 (1904) (defendant did business within forum State, and cause of action arose there as well). In *Picquet* v. *Swan,* 19 F. Cas. 609 (No. 11,134) (CC Mass. 1828), Justice Story found jurisdiction to be *lacking* over a suit by a French citizen (a resident of Paris) against an American citizen also residing in Paris. See also Hazard, *supra,* at 261 (criticizing Story's reasoning in *Picquet* as "at variance" with both American and English decisions).

[16] As the Restatement suggests, there may be cases in which a defendant's involuntary or unknowing presence in a State does not support the exercise of personal jurisdiction over him. The facts of the instant case do not require us to determine the outer limits of the transient jurisdiction rule.

[17] That these privileges may independently be required by the Constitution does not mean that they must be ignored for purposes of determining the fairness of the transient jurisdiction rule. For example, in the context of specific jurisdiction, we consider whether a defendant "has availed himself of the privilege of conducting business" in the forum State, *Burger King Corp.* v. *Rudzewicz,* 471 U. S. 462, 476 (1985), or has " `invok[ed] the benefits and protections of its laws,' " *id.,* at 475, quoting *Hanson* v. *Denckla,* 357 U. S., at 253, even though the State could not deny the defendant the right to do so. See also *Asahi Metal Industry Co.* v. *Superior Court of California, Solano County,* 480 U. S., at 108-109 (plurality opinion); *Keeton* v. *Hustler Magazine, Inc.,* 465 U. S. 770, 781 (1984); *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U. S. 286, 297 (1980).

[18] For example, in the federal system, a transient defendant can avoid protracted litigation of a spurious suit through a motion to dismiss for failure to state a claim or through a motion for summary judgment. Fed. Rules Civ. Proc. 12(b)(6) and 56. He can use relatively inexpensive methods of discovery, such as oral deposition by telephone (Rule 30(b)(7)), deposition upon written questions (Rule 31), interrogatories (Rule 33), and requests for admission (Rule 36), while enjoying protection from harassment (Rule 26(c)), and possibly obtaining costs and attorney's fees for some of the work involved (Rules 37(a)(4), (b)-(d)). Moreover, a change of venue may be possible. 28 U. S. C. § 1404. In state court, many of the same procedural protections are available, as is the doctrine of *forum non conveniens,* under which the suit may be dismissed. See generally Abrams, Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts, 58 Ind. L. J. 1, 23-25 (1982).

[19] JUSTICE SCALIA's opinion maintains that, viewing transient jurisdiction as a contractual bargain, the rule is "unconscionabl[e]," *ante,* at 623, according to contemporary conceptions of fairness. But the opinion simultaneously insists that because of its historical "pedigree," the rule is "the very *baseline* of reasonableness." *Ante,* at 627. Thus is revealed JUSTICE SCALIA's belief that tradition *alone*is completely dispositive and that no showing of unfairness can ever serve to

invalidate a traditional jurisdictional practice. I disagree both with this belief and with JUSTICE SCALIA's assessment of the fairness of the transient jurisdiction bargain.

I note, moreover, that the dual conclusions of JUSTICE SCALIA's opinion create a singularly unattractive result. JUSTICE SCALIA suggests that when and if a jurisdictional rule becomes substantively unfair or even "unconscionable," this Court is powerless to alter it. Instead, he is willing to rely on individual States to limit or abandon bases of jurisdiction that have become obsolete. See *ante,* at 627, and n. 5. This reliance is misplaced, for States have little incentive to limit rules such as transient jurisdiction that make it *easier* for their own citizens to sue out-of-state defendants. That States are more likely to expand their jurisdiction is illustrated by the adoption by many States of long-arm statutes extending the reach of personal jurisdiction to the limits established by the Federal Constitution. See 2 J. Moore, J. Lucas, H. Fink, & C. Thompson, Moore's Federal Practice ¶ 4.41-1[4], p. 4-336 (2d ed. 1989); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1068, pp. 336-339 (1987). Out-of-staters do not vote in state elections or have a voice in state government. We should not assume, therefore, that States will be motivated by "notions of fairness" to curb jurisdictional rules like the one at issue here. The reasoning of JUSTICE SCALIA's opinion today is strikingly oblivious to the *raison d'etre* of various constitutional doctrines designed to protect out-of-staters, such as the Art. IV Privileges and Immunities Clause and the Commerce Clause.

[20] Perhaps the adage about hard cases making bad law should be revised to cover easy cases.

* ["] [#163292] ** [Our] [#163321]

5.9.1.2 Notes on Burnham

1. How would you describe the theoretical bases of the various opinions in *Burnham*?

2. 'Tag' jurisdiction of the kind used in *Burnham* applies to individuals, but not to corporations. *See Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014), *cert. denied*, No. 14-835 (May 18, 2015) (personal jurisdiction cannot be obtained by service on an officer of a corporation who is present in the jurisdiction without minimum contacts for the corporation).

2. In *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959), the defendant was served while a passenger in an airplane that was in the air over Arkansas. The trial court upheld the exercise of jurisdiction. How would this case be analyzed under *Burnham*? Do you think being served in an airplane is traditional in the sense discussed in *Burnham*? Could it matter whether the original flight plan included passing over Arkansas versus a situation where the plane was diverted over Arkansas?

3. The exercise of 'tag' jurisdiction based on presence generally is not followed in civil law countries. At times, this has created tensions between the US and other countries that would not find personal jurisdiction in such circumstances.

5.9.2 Consent and Waiver

Note the directions for The Bremen v. Zapata Off-Shore Co.

5.9.2.1 Consent by Appearance in Court

Insurance Corp., of Ireland, Ltd. v,. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) , involved a case where a mining company in Guinee sued a Pennsylvania insurer and several foreign insurers in federal court in Pennsylvania. The companies made a special appearance to contest jurisdiction, but then failed to participate in discovery in order to determine whether, on the facts, personal jurisdiction could be established. The Court first noted that personal jurisdiction was a waivable right:

Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. * * * By submitting toe the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by the court's determination on the issue of jurisdiction.

Where plaintiff was unable to establish jurisdictional facts because the defendants failed to comply with discovery orders, the trial court was held to be within its rights in imposing discovery sanctions that included the establishment of personal jurisdiction.

You will note that under Rule 12 of the Federal Rules of Civil Procedure the defense of lack of personal jurisdiction needs to be affirmatively raised. Failure to raise the defense at a fairly early stage in the case will constitute a waiver.

5.9.2.2 State Registration Statutes

State registration statutes (sometimes referred to as 'domestication' statutes) deal with out of state corporations that want to do business in a state. For a variety of reasons, including taxation and regulation, states want to know what companies are active within their borders. These registration statutes provide a means to bring out of state corporations within state control. Typically, these kinds of statutes require the designation of an agent within the state to receive service of process.

Prior to *Daimler*, in the era when lower courts took an expansive view of general jurisdiction, these statutes were seen as convenient but not really necessary for exercising personal jurisdiction. When *Daimler* substantially narrowed what had been thought to be the scope of general personal jurisdiction, such statutes took on new relevance. In particular, the argument began to be made that such statutes conferred general jurisdiction over the company - that not only did the company consent to personal jurisdiction for activities undertaken in the state, but jurisdiction could be asserted over out of state conduct unrelated to the forum or forum residents.

It remains to be seen whether many states will actually try to assert such broad jurisdiction, and whether if they do whether such extracted consent will hold up. It's sufficiently clear that such statutes provide consent for corporate activities within the

state, without the need for finely detailed minimum contacts analysis. Whether they can go beyond that and provide general jurisdiction remains to be seen.
For example, in *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990), the court determined that compliance with Minnesota's registration statute "gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state." Id. at 1200.
By contrast, in *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971), the court rejected the (out-of-state) plaintiffs' efforts to sue the (out-of-state) defendant corporation in South Carolina court in order to take advantage of the state's favorable statute of limitations. According to the court, although the corporation had complied with South Carolina's registration statute and maintained five salesmen into the state, "[t]he principles of due process require a firmer foundation than mere compliance with state domestication statutes" in order to subject a defendant to personal jurisdiction.
See, *generally*, Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 **U.C. Davis L. Rev.** 207, 258-264(2014).

5.9.2.3 Consent By Contract

The defendant also can consent to personal jurisdiction through operation of a clause in a contract.
In *M/S Bremen v. Zapata Off-Shore Co.*, 407 US 1 (1972), plaintiff Zapata hired defendant to tow an offshore drilling rig from Louisiana to Italy. A storm arose while the rig was en route, damaging it and requiring it to be towed to Tampa, Florida.
The contract had a clause requiring all disputes to be litigated in the "London Court of Justice." Despite that, Zapata filed suit in federal court in Florida. The trial court and the court of appeals rejected the defendant's request that the action be dismissed or stayed pursuant to the forum selection clause.
The Supreme Court reversed, holding that the forum selection clause was valid and enforceable. The Court reasoned:
We hold * * * that far too little wieght and effect were tiven to the forum clause in resolving this controversy. * * * The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a paraochial concept that all disptues must be resolved under our laws and in our courts.
In Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), the plaintiffs purchased tickets for a seven day cruise on a ship operated by the defendant cruise line. They bought the ticket through a Washington state agent and made payment directly to the agent. When the tickets were forwarded to the plaintiffs, the tickets included a clause that stated:
8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.
In the course of the cruise, off the coast of Mexico, Mrs. Shute fell and was injured. Plaintiffs filed suit in federal district court in Washington. Defendants asserted the forum selection clause. The District Court found that defendant had insufficient minimum contacts. The Ninth Circuit Court of appeals reversed, finding that minimum contacts did exist and that the forum clause could not be enforced.
The U.S. Supreme Court resolved the case on the enforceability of the forum selection clause, choosing to not even address minimum contacts. The Court found that such clauses were not just enforceable between two sophisticated companies - as was the case in Zapata - but between large companies and individuals. The Court reasoned:
Including a resonable forum clause in a form contract of this kind may well be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it postentially could be subject to suit, Becuase a cruise ship tupically carries passengers from many locales, it is not unlikely that a mishap on a cruise couldsubject the cruise linte to litigation in several different fora. * * * Additionall, a clause establishing ex ante the forum for dispute resoltuion has the salutary effect of dispelling any confusion aobut where suits arising from the contrct must be brought and defended, sparing litigants the time and expense of pririal motions to determine the correct forum, an dconserving judiial resources that othewise would be be devoted to deciding those motions. * * * Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the forum of reduced fares refelcting the savings that the cruise line enjoys by limiting the fora in which it may be sued.
499 U.S. at 593.
The Court did hold that consumer forum-selection clauses were subject to scrutiny for 'fundamental fairness." In the *Carnival* case, the plaintiffs had already paid for their tickets when the forum selection clause was first revealed to them. Does that seem fundamentally fair to you?
In any event, forum selection clauses of the type used in *Carnival* are now very much the norm. In many cases, they are found online, where a clickthrough on the "Terms and Conditions" page of a website includes a forum selection clause. If you have an account with Apple, Yahoo, or Google, the odds are you have accepted just such a forum clause. See generally, Margaret Jane Radin, **Boilerplate: The Fine Print, Vanishing Rights, and The Rule of Law** 135 - 138 (2013).

5.9.3 Citizenship
Remember that citizenship also provides a basis for personal jurisdiction (remember *Milliken*?) Much as general jurisdiction provides a forum for lawsuits unrelated to the forum for corporate defendants, citizenship provides a forum for lawsuits unrelated to the forum for individuals.

5.10 Wrap Up - Personal Jurisdiction Reviewed
1. What bases for personal jurisdiction require a connection between the litigation and the forum state?
2. What bases for personal jurisdiction allow lawsuits unrelated to the forum state to proceed?
3. Are you clear on how long arm statutes work and how they related to minimum contacts analysis?

6 Preliminaries 1: Notice, Service of Process, Opportunity to be Heard
6.1 Constitutional Notice and Opportunity to Be Heard
6.1.1 The Concept of Notice
Notice is the term used for letting a defendant know that a lawsuit has been filed. As with personal jurisdiction, notice has both a Constitutional and a statutory dimension. Statutes and rules - such as Rule 4 under the Federal Rules of Civil Procedure and state long arm statutes - provide the statutory part. The Constitution has its own analysis, with the basic standard provided by the *Mullane c*ase that follows. As with personal jurisdiction, for the case to proceed both the statute and the Constitution have to be satisfied.
Again, as with personal jurisdiction, the sufficiency of notice can be challenged directly or collaterally. Put differently, it can be raised in the case where notice was attempted, or lack of notice can be used to challenge the validity of a prior judgment.
American courts traditionally have made service by personal delivery, as provided for in Rule 4. At times, however, other means of service make sense. For example, in some cases service may be made by mail. In the modern era, courts worldwide (and notice is a requirement that all legal systems face) are dealing with the issue of electronic and online service.
As you read the followin case ask yourself if the standard it sets forth is readily adaptable to changing technological environments.

6.1.2 Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306 (1950)
MULLANE, SPECIAL GUARDIAN,
v.
CENTRAL HANOVER BANK & TRUST CO., TRUSTEE, ET AL.
No. 378.
Supreme Court of United States.
Argued February 8, 1950.
Decided April 24, 1950.
APPEAL FROM THE COURT OF APPEALS OF NEW YOR[…]
e.
MR. JUSTICE JACKSON delivered the opinion of the Court.
This controversy questions the constitutional sufficiency of notice to notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the Fourteenth Amendment and that by allowance of the account beneficiaries were deprived of property without due process of law[…]3. The case is here on appea[…]7.
Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some [308] thirty states other than New York have permitted pooling small trust estates into one fund for investment administration.[1] The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.
Statutory authorization for the establishment of such common trust funds is provided in the New York Banking Law, § 100-c (c. 687, L. 1937, as amended by c. 602, L. 1943 and c. 158, L. 1944). Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits, [309] invest therein the assets of an unlimited

number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself or any affiliate. Provisions are made for accounting twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.
In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half *inter vivos* and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.
The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N. Y. Banking Law § 100-c (12): "After filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week [310] for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund." Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.
At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of § 100-c (9), had notified by mail each person of full age and sound mind whose name and address were then known to it and who was "entitled to share in the income therefrom. . . [or] . . . who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice." Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.
Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to § 100-c (12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.
[311] Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient[…]7. A final decree accepting the accounts has been entered, affirmed by th[…]he Court of Appeals of the State of New York[…]3.
The effect of this decree, as held below, is to settle "all questions respecting the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree[…]8.
We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one *in personam* in that the decree affects neither title to nor possession of any *res,* but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714, the Surrogate [312] is without jurisdiction as to nonresidents upon whom personal service of process was not made.
Distinctions between actions *in rem* and those *in personam* are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own[…]8. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem[…]*).
Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem,* or more indefinitely *quasi in rem,* or more vaguely still, "in the nature of a proceeding *in rem.*" It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in*

personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding [313] upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.
Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.
Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which [314] would place impossible or impractical obstacles in the way could not be justified.
Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U. S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents[…]s.
An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[…]8. The notice must be of such nature as reasonably to convey the required information[…]*a,* and it must afford a reasonable time for those interested to make their appearance[…]. But if with due regard for the practicalities and peculiarities of the case these conditions [315] are reasonably met, the constitutional requirements are satisfied[…]7.
But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess* v. *Pawloski,* 274 U. S. 352, with *Wuchter* v. *Pizzutti,* 276 U. S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.
[316] Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which

the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank* v. *Luckett,* 321 U. S. 233; *Security Savings Bank* v. *California,* 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized[…]9. As phrased long ago by Chief Justice Marshall in *The Mary,* 9 Cranch 126, 144, "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred [317] from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights[…]1.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the [318] name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and postoffice addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. *Cf. Wuchter* v. *Pizzutti, supra.* Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by [319] reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." *Blinn* v. *Nelson, supra,* 7.

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication.

Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan. In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with [320] less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee,* 243 U. S. 90, 91. We hold that the notice of judicial settlement of accounts required by the New York Banking Law § 100-c (12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.
Reversed.
MR. JUSTICE DOUGLAS took no part in the consideration or decision of this cas[…]
5.

6.1.3 Notes on Mullane and Constitutional Notice After Mullane

1. What exactly does *Mullane* hold? Which, if any, of the following states the Court's approach:
   a. Notice by publication never will be acceptable.
   b. Plaintiffs must take all possible steps to give actual notice to the defendant.
   c. So long as a notice statute is followed properly notice will be acceptable.
   d. So long as the defendant actually knows about lawsuit the Constitutional requirement of notice has been met.
   e. None of the above.
2. Constructive notice is notice such as a newspaper advertisement or public posting that a lawsuit has commenced, without actual physical delivery to the particular defendant. Under *Mullane*, when do you think constructive notice will be good enough?
3. The *Mullane* standard is both fact-specific in application and somewhat general in theory, so it can be hard to predict what level of notice the Court might find sufficient. That said, see if you can deduce some general rules from the results of the following cases where the Supreme Court has considered the notice issue:

Wuchter v. Pizzutti, 276 U.S. 13 (1928)- The failure of a statute to require either service in person or by mail rendered the statute unconstitutional, even though in the particular case the defendant was given actual notice.
Walker v. City of Hutchinson, 325 U.S. 112 (1956) - Notice by publication in a newspaper is insufficient in property condemnation proceedings.
Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) - Notice by publication and public posting did not meet due process standards, and personal service or mailed service were required, even though the mortgagee of a piece of real property may have known that a sale of the property for overdue taxes was likely.
Tulsa Professional Collection Services, Inc. v. Pope - When the identity of a creditor in a bankruptcy proceeding was known or 'reasonably ascertainable,' at least notice by mail was required.
Greene v. Lindsey, 456 U.S. 444 (1982) - Posting notice of eviction on a tenant's door was not sufficient and additional notice through the mails was required.
Dusenberry v. United States, 534 U.S. 161 (2002) - Notice by publication and certified mail to a prisoner in federal custory was adequate in forfeiture proceeding, even though prisoner alleged that while the prison mail roon received the notice it was never forwarded to him personally.
Jones v. Flowers, 547 U.S. 220 (2006) - Where notice was sent by certified mail to a homeowner of a pending property sale, but it was returned as not delivered, due process required that the government take "additional reasonable steps . . . if it is practicable to do so."
4. There are also issues about what information must be included in the notice given to the defendant.

Aguchak v. Montgomery Ward Co., Inc., 520 P.2d 1352 (Alaska 1974) - Summons to persons living in a remote area of Alaska was required to inform them that that they could appear by written pleading and that they could request a change in venue to a location more convenient for them. In this case, traveling to the area where the suit was filed would have been expensive.

Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) - A post-judgment garnishment proceeding was unconstitutional because it did not inform the recipient that the proceeds of her Social Security payments were exempt from garnishment under federal law.

6.1.4 Opportunity to be Heard

As we've seen, in some cases the attachment of property can come at the beginning of a case. In in rem and quasi-in-rem cases, the attachment of property establishes jurisdiction over the property. In in personam cases, property is sometimes attached at the outset so that a winning plaintiff can find in the jurisdiction to satisfy a judgment. Attaching property can have costs for the person whose property is attached. It may matter that the property cannot be moved, sold, or mortgaged.
The issue also arises when someone is a recipient of government benefits. In many cases, such benefits are the only support the individual has, and arbitrary deprivation of those rights without effective review by a government bureaucrat can be devastating. At the same time, the issue arises as to whether government administration can function efficiently if every government action is subject to an adversarial proceeding. When is it proper to take away or cancel benefits without first having some kind of notice and hearing?
The following two cases address the issue, first in the case of a government deprivation of property or benefits, and second when there is a private attachment of property aided by government process.

6.1.5 Mathews v. Eldridge

424 U.S. 319 (1976)
MATHEWS, S[…]v.
ELDRIDGE[…]
4.
Supreme Court of United States[…]
5.
Decided February 24, 197[…]
[1]
MR. JUSTICE POWELL delivered the opinion of the Court.
The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.
I
Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act[…][2] Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed [324] the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.
In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[3] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.
Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity [325] of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[4] 361 F. Supp. 520 (WD Va. 1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[5] The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural [326] due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg*[…]
I
A
Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits[…]. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process [333] that is constitutionally due before a recipient can be deprived of that interest.
This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest[…]. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner.[…]). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.
In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg* v. *Kelly,* 397 U. S., at 266-271, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *Sniadach* [334] v. *Family Finance Corp.,* 395 U. S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes* v. *Shevin,* 407 U. S., at 96-97, the Court said only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell* v. *Burson, supra,* at 540, held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 607 (1975). More recently, in *Arnett* v. *Kennedy, supra,* we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided[…]6.
These decisions underscore the truism tha[…]" `[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.[…]. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U. S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett* v. *Kennedy, supra,* at 167-168 (POWELL, J., concurring in part); *Goldberg* v. *Kelly, supra,* at 263-266; *Cafeteria Workers* v. *McElroy, supra,* at 895. More precisely, our prior decisions [335] indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g., Goldberg* v. *Kelly, supra,* at 263-27[…]
.
B
The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased[…]
] In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U. S. C. § 423 (d) (1) (A[…]
[5]
The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[16]
[337] The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail—in which case he is sent a detailed questionnaire—or by telephone, and requests information concerning his present

condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM § 6705.1; Disability Insurance State Manual (DISM) § 353.3 (TL No. 137, Mar. 5, 1975).[17]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM § 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician.[18] *Ibid.* Whenever the agency's tentative assessment of the beneficiary's condition differs from his [338] own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.[19] He also may respond in writing and submit additional evidence. *Id.,* § 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U. S. C. § 421 (c); CM §§ 6701 (b), (c).[20] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek *de novo* reconsideration by the state agency[…][1] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred[…]

] If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearin[…]. The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen[…][2]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U. S. C. § 404. Cf. § 423 (b); 20 CFR §§ 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances[…][1]

C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts [340] below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldber[…]*[4]

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

"The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U. S., at 264 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need.[25] Indeed, it is wholly unrelated to [341] the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,[26] tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . .[…]).

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process[…]. The potential deprivation here is generally likely to be less than in *Goldberg,* although the degree of difference can be overstated[…]s.

As we recognized last Term in *Fusari* v. *Steinberg,* 419 U. S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between [342] a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. *id.,* at 383-384, 386, and the typically modest resources of the family unit of the physically disabled worker,[27] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.[2][…]. In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative actio[…].

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 617 (1974); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U. S. C. § 423 (d) (3), that he is unable "to engage in any substantial gainful activity by reason of any *medically determinable* physical or mental impairment . . . ." § 423 (d) (1) (A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and [344] veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U. S., at 269.

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales,* 402 U. S., at 404, concerning a subject whom they have personally examined.[29] In *Richardson* the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." *Id.,* at 405, 407. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, [345] is substantially less in this context than in *Goldberg.*

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U. S., at 269. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law—Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access [346] to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg,* enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, *amici* point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%.[30] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since [347] the administrative review system is operated on an openfile basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% to 40% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible

recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantia[…]
8] Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited[…]
. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness[…]. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.[…]. All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg* v. *Kelly,* 397 U. S., at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals[…]). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. *Boddie* v. *Connecticut,* 401 U. S. 371, 378 (1971).
We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due proces[…]
d.
MR. JUSTICE STEVENS took no part in the consideration or decision of this case.
MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissentin[…]
, I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded [350] an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U. S. C. § 601 *et seq.* See *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.
[1] *J. Albert Woll, Laurence Gold,* and *Stephen P. Berzon* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae*urging affirmance.
David A. Webster filed a brief for Caroline Williams as *amicus curiae.*
[2] The program is financed by revenues derived from employee and employer payroll taxes. 26 U. S. C. §§ 3101 (a), 3111 (a); 42 U. S. C. § 401 (b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U. S. C. §§ 423 (c) (1) (A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. §§ 402 (b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. §§ 416 (i) (2) (D), 423 (a) (1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).
[3] Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.
[4] The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

[5] In *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U. S., at 266-271. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in *Goldberg.*

[6] The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the *Goldberg* requirements. See 45 CFR § 205.10 (a) (1975); n. 4, *supra.*

[7] The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in *Williams* v. *Weinberger,* 494 F. 2d 1191 (1974), cert. pending, No. 74-205.

[8]Title 42 U. S. C. § 405 (h) provides in full:

"(h) Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[9]Section 405 (g) further provides:

"Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . ."

[10] The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. *Salfi,* 422 U. S., at 763-764. As in *Salfi* no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h) (1), and they need not be considered here.

[11] If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. *Flemming* v. *Nestor,* 363 U. S. 603, 607 (1960).

[12] Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, *Cohen* v. *Beneficial Ind. Loan Corp.,* 337 U. S. 541, 546 (1949), when applying the finality requirements of 28 U. S. C. § 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U. S. C. § 1257, which empowers this Court to review only "final judgments" of state courts. See, *e. g., Harris* v. *Washington,* 404 U. S. 55 (1971); *Construction Laborers* v. *Curry,* 371 U. S. 542, 549-550 (1963); *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555, 557-558 (1963); *Cohen* v. *Beneficial Ind. Loan Corp., supra,* at 545-546. To be sure, certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here. Compare *Construction Laborers, supra,* at 550; *Mercantile Nat. Bank, supra,* at 558, with *McKart* v. *United States,* 395 U. S. 185, 193-195 (1969); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

[13] Given our conclusion that jurisdiction in the District Court was proper under § 405 (g), we find it unnecessary to consider Eldridge's contention that notwithstanding § 405 (h) there was jurisdiction over his claim under the mandamus statute, 28 U. S. C. § 1361, or the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

[14] In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U. S. C. § 701 *et seq.* (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H. R. Rep. No. 1698, 83d Cong., 2d Sess., 23-24 (1954).

[15] Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." § 423 (d) (2) (A).

[16] Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the

post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) § 6705.2 (c).
[17] Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.
[18] All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM § 353.4C.
[19] The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM § 7314. See also 20 CFR § 401.3 (a) (2) (1975). The Secretary informs us that this curious limitation is currently under review.
[20] The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.
[21] The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.
[22] Unlike all prior levels of review, which are *de novo,* the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U. S. C. § 405 (g).
[23] The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U. S. C. § 404 (b). See generally 20 CFR §§ 404.501-404.515 (1975).
[24] This, of course, assumes that an employee whose wages are garnished erroneously is subsequently able to recover his back wages.
[25] The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U. S. C. § 415 (1970 ed., Supp. III). See § 423 (a) (2).
[26] Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U. S. C. § 424a (1970 ed., Supp. III); 20 CFR § 404.408 (1975); see *Richardson* v. *Belcher,* 404 U. S. 78 (1971).
[27] *Amici* cite statistics complied by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets—*i. e.,* cash, stocks, bonds—of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets—*i. e.,* automobile, real estate, and the like. Brief for AFL-CIO et al. as *Amici Curiae* App. 4a. See n. 29, *infra.*
[28] *Amici* emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U. S. C. § 423 (d) (1) with § 1382c (a) (3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U. S. C. §§ 2013 (c), 2014 (b); 7 CFR § 271 (1975). Finally, in 1974 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U. S. C. § 1383 (c) (1970 ed., Supp. III); 20 CFR § 416.1336 (c) (1975); 40 Fed. Reg. 1512 (1975); see Staff Report 346.
[29] The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U. S. C. § 423 (d) (2) (A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. 1 K. Davis, Administrative Law Treatise § 7.06, p. 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.
[30] By focusing solely on the reversal rate for appealed reconsideration determinations *amici* overstate the relevant reversal rate. As we indicated last Term in *Fusari* v. *Steinberg,* 419 U. S. 379, 383 n. 6 (1975), in order fully to assess the reliability and

fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as *Amici Curiae* App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

6.1.6 Connecticut v. Doehr

501 U.S. 1 (1991)
CONNECTICUT ET AL.
v.
DOEHR.
No. 90-143.
Supreme Court of the United States.
Argued January 7, 1991.
Decided June 6, 1991.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCU[…]
1]

JUSTICE WHITE delivered an opinion, Parts I, II, and III of which are the opinion of the Court.[2]

This case requires us to determine whether a state statute that authorizes prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond, satisfies the Due Process Clause of the Fourteenth Amendment. We hold that, as applied to this case, it does not[…]

] I

On March 15, 1988, petitioner John F. DiGiovanni submitted an application to the Connecticut Superior Court for an attachment in the amount of $75,000 on respondent Brian K. Doehr's home in Meriden, Connecticut. DiGiovanni took this step in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The suit did not involve Doehr's real estate, nor did DiGiovanni have any pre-existing interest either in Doehr's home or any of his other property.

Connecticut law authorizes prejudgment attachment of real estate without affording prior notice or the opportunity for a prior hearing to the individual whose property is subject to the attachment. The State's prejudgment remedy statute provides, in relevant part:

"The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claims and (1) that the prejudgment remedy requested is for an attachment of real property . . . ." Conn. Gen. Stat. § 52-278e (1991).[3]

[6] The statute does not require the plaintiff to post a bond to insure the payment of damages that the defendant may suffer should the attachment prove wrongfully issued or the claim prove unsuccessful.

As required, DiGiovanni submitted an affidavit in support of his application. In five one-sentence paragraphs, DiGiovanni stated that the facts set forth in his previously submitted complaint were true; that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr"; that "[s]aid assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries"; and that "I have further expended sums of money [7] for medical care and treatment." App. 24A. The affidavit concluded with the statement, "In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." *Ibid.*

On the strength of these submissions the Superior Court Judge, by an order dated March 17, found "probable cause to sustain the validity of the plaintiff's claim" and ordered the attachment on Doehr's home "to the value of $75,000." The sheriff attached the property four days later, on March 21. Only after this did Doehr receive notice of the attachment. He also had yet to be served with the complaint, which is ordinarily necessary for an action to commence in Connecticut. *Young* v. *Margiotta,* 136 Conn. 429, 433, 71 A. 2d 924, 926 (1950). As the statute further required, the attachment notice informed Doehr that he had the right to a hearing: (1) to claim that no probable cause existed to sustain the claim; (2) to request that the attachment be vacated, modified, or dismissed or that a bond be substituted; or (3) to claim that some portion of the property was exempt from execution. Conn. Gen. Stat. § 52-278e(b) (1991).

Rather than pursue these options, Doehr filed suit against DiGiovanni in Federal District Court, claiming that § 52-278e (a)(1) was unconstitutional under the Due Process Clause of the Fourteenth Amendment.[4] The District Court upheld the statute and granted summary judgment in favor of DiGiovanni. *Pinsky* v. *Duncan,* 716 F. Supp. 58 (Conn. 1989). On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed. *Pinsky* v. *Duncan,* 898 F. 2d 852 (1990).[5] Judge

Pratt, who wrote the opinion [8] for the court, concluded that the Connecticut statute violated due process in permitting *ex parte* attachment absent a showing of extraordinary circumstances. "The rule to be derived from *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U. S. 337 (1969), and its progeny, therefore, is not that postattachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present." *Id.,* at 855. This conclusion was deemed to be consistent with our decision in *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), because the absence of a preattachment hearing was approved in that case based on the presence of extraordinary circumstances.

A further reason to invalidate the statute, the court ruled, was the highly factual nature of the issues in this case. In *Mitchell,* there were "uncomplicated matters that len[t] themselves to documentary proof" and "[t]he nature of the issues at stake minimize[d] the risk that the writ [would] be wrongfully issued by a judge." *Id.,* at 609-610. Similarly, in *Mathews* v. *Eldridge,* 424 U. S. 319, 343-344 (1976), where an evidentiary hearing was not required prior to the termination of disability benefits, the determination of disability was "sharply focused and easily documented." Judge Pratt observed that in contrast the present case involved the fact-specific event of a fist fight and the issue of assault. He doubted that the judge could reliably determine probable cause when presented with only the plaintiff's version of the altercation. "Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process." 898 F. 2d, at 856. Judge Pratt went on to conclude that in his view, the statute was also constitutionally infirm for its failure [9] to require the plaintiff to post a bond for the protection of the defendant in the event the attachment was ultimately found to have been improvident[…]

I

With this case we return to the question of what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure. Our cases reflect the numerous variations this type of remedy can entail. In *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U. S. 337 (1969), the Court struck down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing to the wage earner. In *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), the Court likewise found a due process violation in state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk and the posting of a bond. Conversely, the Court upheld a Louisiana *ex parte* procedure allowing a lienholder to have disputed goods sequestered in *Mitchell* v. *W. T. Grant Co., supra. Mitchell,* however, carefully noted that *Fuentes* was [10] decided against "a factual and legal background sufficiently different . . . that it does not require the invalidation of the Louisiana sequestration statute." *Id.,* at 615. Those differences included Louisiana's provision of an immediate postdeprivation hearing along with the option of damages; the requirement that a judge rather than a clerk determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder's interest in preventing waste or alienation of the encumbered property. *Id.,* at 615-618. In *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975), the Court again invalidated an *ex parte* garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt postdeprivation hearing. *Id.,* at 606-608.

These cases "underscore the truism that `"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews* v. *Eldridge, supra,* at 334 (quoting *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U. S. 886, 895 (1961)). In *Mathews,* we drew upon our prejudgment remedy decisions to determine what process is due when the government itself seeks to effect a deprivation on its own initiative. 424 U. S., at 334. That analysis resulted in the now familiar threefold inquiry requiring consideration of "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and lastly "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.,* at 335.

Here the inquiry is similar, but the focus is different. Prejudgment remedy statutes ordinarily apply to disputes between private parties rather than between an individual and [11] the government. Such enactments are designed to enable one of the parties to "make use of state procedures with the overt, significant assistance of state officials," and they undoubtedly involve state action "substantial enough to implicate the Due Process Clause." *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478, 486 (1988). Nonetheless, any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other's property. See *Fuentes* v. *Shevin, supra,* at 99-101 (WHITE, J., dissenting). For this type of case, therefore, the relevant inquiry requires, as in *Mathews,* first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews,* principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

We now consider the *Mathews* factors in determining the adequacy of the procedures before us, first with regard to the safeguards of notice and a prior hearing, and then in relation to the protection of a bond.
III
We agree with the Court of Appeals that the property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. Nor does Connecticut deny that any of these consequences occurs.
[12] Instead, the State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages. See *Sniadach, supra,* at 340; *Mitchell,* 416 U. S., at 613. But the Court has never held that only such extreme deprivations trigger due process concern.[…]. To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process."[…][1]
We also agree with the Court of Appeals that the risk of erroneous deprivation that the State permits here is substantial. By definition, attachment statutes premise a deprivation of property on one ultimate factual contingency—the award of damages to the plaintiff which the defendant may not be able to satisfy.[…] For attachments [13] before judgment, Connecticut mandates that this determination be made by means of a procedural inquiry that asks whether "there is probable cause to sustain the validity of the plaintiff's claim." Conn. Gen. Stat. § 52-278e(a) (1991). The statute elsewhere defines the validity of the claim in terms of the likelihood "that judgment will be rendered in the matter in favor of the plaintiff." Conn. Gen. Stat. § 52-278c(a)(2) (1991);[…]. What probable cause means in this context, however, remains obscure. The State initially took the position, as did the dissent below, that the statute requires a plaintiff to show the objective likelihood of the suit's success.[…] At oral argument, the State shifted its position to argue that the statute requires something akin to the plaintiff stating a claim with sufficient facts to survive a motion to dismiss.
We need not resolve this confusion since the statute presents too great a risk of erroneous deprivation under any of these interpretations. If the statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, requirement of a complaint and a factual affidavit would permit a court to make these minimal determinations. But neither inquiry adequately reduces the risk of erroneous deprivation. Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations [14] that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.
Even if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case. As the record shows, and as the State concedes, only a skeletal affidavit need be, and was, filed.[…]. And as the Court of Appeals said, in a case like this involving an alleged assault, even a detailed affidavit would give only the plaintiff's version of the confrontation. Unlike determining the existence of a debt or delinquent payments, the issue does not concern "ordinarily uncomplicated matters that lend themselves to documentary proof." *Mitchell,* 416 U. S., at 609.[…]
Connecticut points out that the statute also provides an "expeditiou[s]" postattachment adversary hearing, [15] § 52-278e(c);[7] notice for such a hearing, § 52-278e(b); judicial review of an adverse decision, § 52-2781(a); and a double damages action if the original suit is commenced without probable cause, § 52-568(a)(1). Similar considerations were present in *Mitchell,* where we upheld Louisiana's sequestration statute despite the lack of predeprivation notice and hearing. But in *Mitchell,* the plaintiff had a vendor's lien to protect, the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof, 416 U. S., at 609-610, and the plaintiff was required to put up a bond. None of these factors diminishing the need for a predeprivation hearing is present in this case. It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented. […]
] Finally, we conclude that the interests in favor of an *ex parte* attachment, particularly the interests of the plaintiff, are too minimal to supply such a consideration here. The plaintiff had no existing interest in Doehr's real estate when he sought the attachment. His only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action. Yet there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. See *Mitchell, supra,* at 609;[…] Absent such allegations, however, the

plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.
No interest the government may have affects the analysis. The State's substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves. Here the plaintiff's interest is *de minimis.* Moreover, the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate postdeprivation hearing. Conn. Gen. Stat. §§ 52-278e(b) and (c) (1991); *Fermont,* 178 Conn., at 397-398, 423 A. 2d, at 83.
Historical and contemporary practices support our analysis. Prejudgment attachment is a remedy unknown at common law. Instead, "it traces its origin to the Custom of London, under which a creditor might attach money or goods of the defendant either in the plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court." *Ownbey,* 256 U. S., at 104. Generally speaking, attachment measures in both England and this [17] country had several limitations that reduced the risk of erroneous deprivation which Connecticut permits. Although attachments ordinarily did not require prior notice or a hearing, they were usually authorized only where the defendant had taken or threatened to take some action that would place the satisfaction of the plaintiff's potential award in jeopardy. See C. Drake, Law of Suits by Attachment, §§ 40-82 (1866) (hereinafter Drake); 1 R. Shinn, Attachment and Garnishment § 86 (1896) (hereinafter Shinn). Attachments, moreover, were generally confined to claims by creditors. Drake §§ 9-10; Shinn § 12. As we and the Court of Appeals have noted, disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits. Tort actions, like the assault and battery claim at issue here, do not. See *Mitchell, supra,* at 609-610. Finally, as we will discuss below, attachment statutes historically required that the plaintiff post a bond. Drake §§ 114-183; Shinn § 153.
Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place. See Appendix to this opinion. Twenty-seven States, as well as the District of Columbia, permit attachments only when some extraordinary circumstance is present. In such cases, preattachment hearings are not required but postattachment hearings are provided. Ten States permit attachment without the presence of such factors but require prewrit hearings unless one of those factors is shown. Six States limit attachments to extraordinary circumstance cases, but the writ will not issue prior to a hearing unless there is a showing of some even more compelling condition.[8] Three States always require a [18] preattachment hearing. Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests. Even those States permit *ex parte* deprivations only in certain types of cases: Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond. Conversely, the States for the most part no longer confine attachments to creditor claims. This development, however, only increases the importance of the other limitations.
We do not mean to imply that any given exigency requirement protects an attachment from constitutional attack. Nor do we suggest that the statutory measures we have surveyed are necessarily free of due process problems or other constitutional infirmities in general. We do believe, however, that the procedures of almost all the States confirm our view that the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.
IV
A
Although a majority of the Court does not reach the issue, JUSTICES MARSHALL, STEVENS, O'CONNOR, and I deem it appropriate to consider whether due process also requires the plaintiff to post a bond or other security in addition to requiring a hearing or showing of some exigency.[9]
[19] As noted, the impairments to property rights that attachments effect merit due process protection. Several consequences can be severe, such as the default of a homeowner's mortgage. In the present context, it need only be added that we have repeatedly recognized the utility of a bond in protecting property rights affected by the mistaken award of prejudgment remedies.[…]
. The need for a bond is especially apparent where extraordinary circumstances justify an attachment with no more than the plaintiff's *ex parte* assertion of a claim. We have already discussed how due process tolerates, and the States generally permit, the otherwise impermissible chance of erroneously depriving the defendant in such situations in light of the heightened interest of the plaintiff. Until a postattachment hearing, however, a defendant has no protection against damages sustained where no extraordinary circumstance in fact existed or the plaintiff's likelihood of recovery was nil. Such protection is what a bond can supply. Both the Court and its individual Members have repeatedly found the requirement of a bond to play an essential role in reducing what would have been too great a degree of risk in precisely this type of circumstance. *Mitchell,* [20] *supra,* at 610, 619;[…].
But the need for a bond does not end here. A defendant's property rights remain at undue risk even when there has been an adversarial hearing to determine the plaintiff's likelihood of recovery. At best, a court's initial assessment of each party's case

cannot produce more than an educated prediction as to who will win. This is especially true when, as here, the nature of the claim makes any accurate prediction elusive.[…] All but a handful of States require a plaintiff's bond despite also affording a hearing either before, or (for the vast majority, only under extraordinary circumstances) soon after, an attachment takes place.[…].

The State stresses its double damages remedy for suits that are commenced without probable cause. Conn. Gen. Stat. § 52-568(a)(1).[10] This remedy, however, fails to make [21] up for the lack of a bond. As an initial matter, the meaning of "probable cause" in this provision is no more clear here than it was in the attachment provision itself. Should the term mean the plaintiff's good faith or the facial adequacy of the complaint, the remedy is clearly insufficient. A defendant who was deprived where there was little or no likelihood that the plaintiff would obtain a judgment could nonetheless recover only by proving some type of fraud or malice or by showing that the plaintiff had failed to state a claim. Problems persist even if the plaintiff's ultimate failure permits recovery. At best a defendant must await a decision on the merits of the plaintiff's complaint,[…].

Nor is there any appreciable interest against a bond requirement. Section 52-278e(a)(1) does not require a plaintiff to show exigent circumstances nor any pre-existing interest in the property facing attachment. A party must show more than the mere existence of a claim before subjecting an opponent to prejudgment proceedings that carry a significant risk of erroneous deprivation.[…]

B

Our foregoing discussion compels the four of us to consider whether a bond excuses the need for a hearing or other safeguards altogether. If a bond is needed to augment the protections afforded by preattachment and postattachment hearings, it arguably follows that a bond renders these safeguards unnecessary. That conclusion is unconvincing, however, for it ignores certain harms that bonds could not undo but that hearings would prevent. The law concerning attachments has rarely, if ever, required defendants to suffer an encumbered title until the case is concluded without any prior opportunity to show that the attachment was unwarranted. Our cases have repeatedly emphasized the importance of providing a prompt postdeprivation hearing at the very least.[…].

The necessity for at least a prompt postattachment hearing is self-evident because the right to be compensated at the end of the case, if the plaintiff loses, for all provable injuries caused by the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held. An individual with an immediate need or opportunity to sell a property can neither do so, nor otherwise satisfy that need or recreate the opportunity. The same applies to a parent in need of a home equity loan for a child's education, an entrepreneur seeking to start a business on the strength of an otherwise strong credit rating, or simply a homeowner who might face the disruption of having a mortgage placed in technical default. The extent of these harms, moreover, grows with the length of the suit. Here, oral argument indicated that civil suits in Connecticut commonly take up to four to seven years for completion. Tr. of Oral Arg. 44. […]

If a bond cannot serve to dispense with a hearing immediately after attachment, neither is it sufficient basis for not providing a preattachment hearing in the absence of exigent circumstances even if in any event a hearing would be provided a few days later. The reasons are the same: a wrongful attachment can inflict injury that will not fully be redressed by recovery on the bond after a prompt postattachment hearing determines that the attachment was invalid[…]

, the judgment of the Court of Appeals is affirmed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered[…]

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CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I agree with the Court that the Connecticut attachment statute, "as applied to this case," *ante,* at 4, fails to satisfy the Due Process Clause of the Fourteenth Amendment. I therefore join Parts I, II, and III of its opinion. Unfortunately, the remainder of the opinion does not confine itself to the facts of this case, but enters upon a lengthy disquisition as to what combination of safeguards are required to satisfy due process in hypothetical cases not before the Court. I therefore do not join Part IV.

As the Court's opinion points out, the Connecticut statute allows attachment not merely for a creditor's claim, but for a tort claim of assault and battery; it affords no opportunity for a predeprivation hearing; it contains no requirement that there be "exigent circumstances," such as an effort on the part of the defendant to conceal assets; no bond is required from the plaintiff; and the property attached is one in which the plaintiff has no pre-existing interest. The Court's opinion [27] is, in my view, ultimately correct when it bases its holding of unconstitutionality of the Connecticut statute as applied here on our cases of *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975). But I do not believe that the result follows so inexorably as the Court's opinion suggests. All of the cited cases dealt with personalty—bank deposits or chattels —and each involved the physical seizure of the property itself, so that the defendant was deprived of its use. These cases, which represented something of a revolution in the jurisprudence of procedural due process, placed substantial limits on the methods by which creditors could obtain a lien on the assets of a debtor prior to judgment. But in all of them the debtor

was deprived of the use and possession of the property. In the present case, on the other hand, Connecticut's prejudgment attachment on real property statute, which secures an incipient lien for the plaintiff, does not deprive the defendant of the use or possession of the property.

The Court's opinion therefore breaks new ground,[…] I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisturbed possession.[…]

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Today's holding is a significant development in the law; the only cases dealing with real property cited in the Court's opinion, *Peralta* v. *Heights Medical Center, Inc.,* 485 U. S. 80, 85 (1988), and *Hodge* v. *Muscatine County,* 196 U. S. 276, 281 (1905), arose out of lien foreclosure sales in which the question was whether the owner was entitled to proper notice.[…]

It is both unwise and unnecessary, I believe, for the plurality to proceed, as it does in Part IV, from its decision of the case before it to discuss abstract and hypothetical situations not before it. This is especially so where we are dealing with the Due Process Clause which, as the Court recognizes, "`"unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,""" *ante,* at 10. And it is even more true in a case involving constitutional limits on the methods by which the States may transfer or create interests in real property; in other areas of the law, dicta may do little damage, but those who insure titles or write title opinions often do not enjoy the luxury of distinguishing between dicta and holding.

The two elements of due process with which the Court concerns itself in Part IV—the requirements of a bond and of "exigent circumstances" — prove to be upon analysis so vague that the discussion is not only unnecessary, but not particularly useful. Unless one knows what the terms and conditions of a bond are to be, the requirement of a "bond" in the abstract means little. The amount to be secured by the bond and the conditions of the bond are left unaddressed —is there to be liability on the part of a plaintiff if he is ultimately unsuccessful in the underlying lawsuit, or is it instead to be conditioned on some sort of good-faith test? The "exigent circumstances" referred to by the Court are admittedly equally vague; nonresidency appears to be enough in some States, an attempt to conceal assets is required in others, an effort to flee the jurisdiction in still others. We should await concrete cases which present questions involving bonds and exigent circumstances before we attempt to decide when and if the Due Process Clause of the Fourteenth Amendment requires them as prerequisites for a lawful attachment[…]

6.1.7 Notes on Opportunity to Be Heard

1. The *Goldberg v. Kelly* case referenced in the *Matthews v. Eldridge* case represented an innovation in several respects. It treated government benefits as a kind of property entitled to protections. This tracked a concept called "the New Property" which recognized that in an administrative state government benefits could as important to a recipient as traditional private property had been in earlier eras.

From the outset, the case was controversial. It was hailed by many as substantial step forward, and criticized by others as encrusting governmental operations with poorly thought out adversarial procedures.

After a transitional period in which the Court (which was also undergoing significant changes in personnel) struggled with where to go with the kind of rights recognized in *Goldberg v. Kelly*, the *Matthews v. Eldridge* decision represented a resolution of the Court's position on the issue. One thing to note is that the *Matthews v. Eldridge* involves a balancing test that is highly dependent upon specific facts, and the Supreme Court generally grants *certiorari* in cases to announce rules of general application rather than to rebalance individual, fact-bound decisions. The net is that the burden on the Court to chart the way through this kind of issue was much reduced by the kind of test it announced in *Matthews v. Eldridge.*

2. Can you state the *Matthews v. Eldridge* test? The *Doehr* test?