

The Timing of Minimum Contacts

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INTRODUCTION

Over the course of a thirteen-year period from 1977 to 1990, the Supreme Court decided thirteen major cases on the issue of personal jurisdiction.¹ This outpouring of opinions generated a burst of scholarly interest in the subject of personal jurisdiction and a raft of articles highly critical of the Court's inability to enunciate a coherent theory of precisely why the Due Process Clause imposes limitations on the states' exercises of personal jurisdiction.² In all the years since 1990,

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¹ See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

² See, e.g., Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995) (“[J]urisdiction in the United States is a mess.”); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (“[Personal jurisdiction doctrine] is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined.”); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995) (“American jurisdictional law is a mess [The Court is unable] to devise a satisfactory approach to the simple question of where a civil action may be brought.”); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) (“Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court’s personal jurisdiction doctrine.”); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 529–30 (1991) (“Despite its apparent interest in the subject, the Court has been unable to develop a coherent doctrine.”); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600 (1993) (describing personal jurisdiction doctrine as “an unsatisfactory body of law that is extremely difficult for jurisdiction scholars to organize, synthesize, and comprehend”); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 105 (1991) (noting that, despite the many personal jurisdiction cases decided by the Supreme Court in the 1980s, “doctrine in the personal jurisdiction area is less clear, less tied to the stated theoretical underpinnings than when the decade began”); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850

the Supreme Court has not returned to the subject of personal jurisdiction and has left the lower courts on their own to try to make sense of a doctrine without any clear foundation. That has not, however, deterred scholars, some of whom have bravely ventured to bring order to chaos and provide a theory about how the Due Process Clause relates to limits on personal jurisdiction,³ and others of whom have struggled to address how personal jurisdiction doctrine is affected by changes in technology like the development of the Internet.⁴ The Su-

(1989) (“[T]he Supreme Court . . . has failed to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens.”); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991) (“Jurisdictional doctrine is in chaos.”).

³ See, e.g., Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007); see also Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343 (2005); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004).

⁴ Some commentators have argued that current personal jurisdiction law is not suited to deal with the Internet. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575 (1998). Others contend that current jurisdictional doctrine can be adapted to deal with the Internet. See Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT’L LAW. 1167 (1998) [hereinafter Stein, *Unexceptional*]. The problem has generated considerable academic commentary. See, e.g., Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 475, 492 (2004) (focusing on the confluence of Internet jurisdiction and libel jurisdiction and concluding that the consequence has been “inconsistency in results and uncertainty in application” and that the best solution would be state or federal legislation); Joseph S. Burns & Richard A. Bales, *Personal Jurisdiction and the Web*, 53 ME. L. REV. 29, 31–32 (2001) (summarizing the “spider web” approach to personal jurisdiction over the Internet, where “the operator of a Web site is deemed to be jurisdictionally ‘present’ at every location from which her site is accessed” and the “‘highway approach,’ [under which] the operator of a Web site is jurisdictionally present in a foreign state only if the operator has somehow ‘reached out’ to a person or entity in the foreign state, such as by soliciting information from or selling a product over the Web to a person or entity in the foreign state”); Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL’Y 4 (1999); Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 494 (2004) (proposing a “Trusted Systems” approach to Internet personal jurisdiction issues that addresses the “flaws of previous Internet-specific jurisdictional frameworks” by providing “firmer grounding” in traditional jurisdiction doctrine and minimum contacts analysis “for the future evolution of jurisdiction precedent in cases involving alleged harms arising out of new media”); Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455 (2004) (discussing the implications of current personal jurisdiction doctrine as it impacts sovereignty considerations); Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667 (1999) (discussing the various approaches taken by courts when as-

preme Court has left much room for scholars to explore what the connection between due process and personal jurisdiction is all about.

This Article approaches the issue differently, following the lead of Stephen Jay Gould, who for years wrote about important issues of science by looking at small and seemingly insignificant parts of the natural world and drawing from them lessons about much larger issues, like the theory of evolution.⁵ This Article takes a similar approach by analyzing the relatively small and oft-overlooked constitutional issue of the timing of minimum contacts—that is, the relevant time period during which a defendant’s contacts with the forum state may subject it to personal jurisdiction within that state on a particular lawsuit. Under the modern doctrine of personal jurisdiction law, the Supreme Court has required that a defendant have certain “minimum contacts” with the forum state that make it permissible for the state to enter a binding judgment against that defendant.⁶ If the defendant’s contacts with the forum state are sufficiently continuous and systematic, the state may exercise general jurisdiction over any claim against the defendant, regardless of where it arose.⁷ If the defendant’s contacts with the forum state are isolated and sporadic, the state may exercise specific jurisdiction over only those claims that arise out of the defendant’s contacts with the forum state.⁸ In each

sessing Internet contacts in personal jurisdiction inquiries); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 411–13 (2004) [hereinafter Stein, *Personal Jurisdiction and the Internet*] (pointing out that although the Internet has increased the “quantity” of jurisdictional occurrences, “it has not created problems that are qualitatively more difficult” and arguing that personal jurisdiction in cases involving Internet activities should be limited to cases in which the forum had a valid *ex ante* regulatory interest in the defendant’s behavior); Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 370–75 (1997) (describing the “spider web” approach to personal jurisdiction on the Internet); Ryan Yagura, *Does Cyberspace Expand the Boundaries of Personal Jurisdiction?*, 38 IDEA 301 (1998); Carly Henek, Note, *Exercises of Personal Jurisdiction Based on Internet Web Sites*, 15 ST. JOHN’S J. LEGAL COMMENT. 139, 163 (2000) (“examining the level of interactivity and the commercial nature of the exchange of information that occurs through a Web site,” which remains true to the “spirit of the minimum contacts test”); Katherine Neikirk, Note, *Squeezing Cyberspace into International Shoe: When Should Courts Exercise Personal Jurisdiction over Noncommercial Online Speech?*, 45 VILL. L. REV. 353 (2000); Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1823 (2003) (arguing that taking a strict proximate cause approach to the “relatedness prong” in personal jurisdiction analysis is the best way to tackle personal jurisdiction on the Internet).

⁵ See, e.g., STEPHEN JAY GOULD, *EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY* (1977); STEPHEN JAY GOULD, *I HAVE LANDED: THE END OF A BEGINNING IN NATURAL HISTORY* (2002).

⁶ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁷ See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16 (1984).

⁸ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–82 (1985) (discussing the

type of case, a court may have to determine the time period during which contacts are relevant to the determination whether the court may exercise personal jurisdiction. For example, in both general jurisdiction and specific jurisdiction cases, a court may have to decide whether the required contacts must exist at the time the claim arose, at the time the lawsuit was filed, or at the time the court is asked to determine whether it has personal jurisdiction.⁹

The Supreme Court has given very little guidance to help the lower courts decide these issues. The Court has never directly addressed the issue of the timing of minimum contacts in any of its personal jurisdiction decisions. More importantly, from 1877, when the Court first announced in *Pennoyer v. Neff* that the limitations on personal jurisdiction that had previously been a product of federal common law were thenceforth required as a matter of due process,¹⁰ up through the Court's most recent case on the matter,¹¹ the Court has failed to enunciate a clear rationale for why the Due Process Clause imposes any limitations on the exercise of personal jurisdiction.¹²

Given the absence of any clear principles upon which to ground decisions about the timing of minimum contacts, one might expect the lower court cases to be shallow, thinly reasoned, and inconsistent with one another. In fact, that is exactly what one finds. The lower courts cannot reach a consensus on these questions, and the opinions are weakly reasoned. In the absence of meaningful principles established by the Supreme Court, the lower courts search for the significance of the Supreme Court's caselaw in snippets and phrases taken out of context and then used as the basis for the courts' opinions.

contacts requirement concerning a breach of contract case); *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (discussing the contacts requirement concerning an intentional tort case).

⁹ See, e.g., *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569–70 (2d Cir. 1996) (setting forth a standard for the timing of contacts in a general jurisdiction case), *cert. denied*, 519 U.S. 1007, and 519 U.S. 1006 (1996); *Steel v. United States*, 813 F.2d 1545, 1549–50 (9th Cir. 1987) (setting forth standards for the timing of contacts in a specific jurisdiction case).

¹⁰ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

¹¹ *Burnham v. Superior Court*, 495 U.S. 604 (1990).

¹² See Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1589 (1992) (stating that Supreme Court caselaw has “not given us a coherent philosophical foundation for the constitutional restrictions they recognize”); *Perdue*, *supra* note 2, at 530–31 (noting the Supreme Court has never explained what the due process problem with personal jurisdiction is); *Trangsrud*, *supra* note 2, at 850 (“[T]he Supreme Court . . . has failed to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens.”); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) (stating that the Supreme Court's personal jurisdiction doctrine is a “body of rules without reasons”).

Ultimately, the lesson to be drawn from the disarray among the lower courts on the timing of minimum contacts is that there is a major price to pay for the inadequacy of the Supreme Court's decisions on personal jurisdiction. The failure to ground the Court's opinions on clearly enunciated constitutional principles leaves the lower courts to search in vain for guidance on how to resolve personal jurisdiction cases. As a result, while the Supreme Court has ignored the question of personal jurisdiction over the past eighteen years, the lower courts have struggled to deal with the unresolved issues of personal jurisdiction law. The only way to solve the problem is for the Court to listen to the critics and provide some explanation for why any contacts with the forum state are required by the Due Process Clause.

This Article considers the issues discussed above in three Parts. In Part I, the Article takes a brief look at the minimum contacts standard and the Supreme Court caselaw governing both general and specific jurisdiction. In Part II, the Article analyzes the lower court cases on the timing of minimum contacts and critiques the logic and thoroughness of their analysis. Finally, in Part III, the Article offers some suggestions for how the lower courts could address the timing of minimum contacts in the absence of better guidance from the Supreme Court.

I. A BRIEF HISTORY OF MINIMUM CONTACTS

Before looking at the cases on the timing of minimum contacts, it is necessary to lay out some of the basics of personal jurisdiction law. The Supreme Court began to establish federal personal jurisdiction law in the beginning of the nineteenth century in order to decide whether to enforce judgments under the Full Faith and Credit Clause of the Constitution.¹³ It was not, however, until the Supreme Court decided *Pennoyer v. Neff* in 1877 that the Court connected rules of personal jurisdiction with the Due Process Clause of the Fourteenth Amendment of the Constitution.¹⁴ In the majority opinion in that case, Justice Field concluded that a state court could exercise jurisdiction over a defendant only if that person were served with process within the state, or if that person owned property within the state (and that property was attached at the beginning of the litigation), or if that

¹³ See Trangsrud, *supra* note 2, at 858–84; James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1 (1992); see, e.g., *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

¹⁴ See generally Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction in Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

person was a citizen of the state, or if that person consented to the jurisdiction of the state court.¹⁵ In dictum,¹⁶ Justice Field asserted that these rules of personal jurisdiction were not simply common law rules created by the Court in order to determine when judgments would be enforced under the Full Faith and Credit Clause, but were rules mandated by the Fourteenth Amendment's Due Process Clause.¹⁷ After *Pennoyer v. Neff*, it would violate the Due Process Clause for a court to enforce a judgment rendered without satisfying the personal jurisdiction principles laid down by Justice Field.¹⁸ Justice Field did not, however, explain why personal jurisdiction was a matter of due process or why the Due Process Clause mandated these particular rules of personal jurisdiction.

In the years following *Pennoyer v. Neff*, the limited reach of the territorial jurisdiction rules adopted therein became too narrow to deal with an increasingly mobile society and the increasingly interstate nature of corporate business. The Supreme Court dealt with this problem first by expanding the doctrine of consent to include statutorily imposed implied consent. For example, in *Hess v. Pawloski*,¹⁹ the Supreme Court upheld a Massachusetts statute that allowed personal jurisdiction over a nonresident defendant in cases arising out of accidents on Massachusetts roads. Even though the consent was a legal fiction, the Court justified jurisdiction based on the state's interest in providing a forum for accidents arising out of the inherent dangers of motor vehicles used on the state's roads.²⁰

It also proved to be particularly difficult to apply the *Pennoyer* rules of personal jurisdiction to the interstate actions of corporations.

¹⁵ *Pennoyer*, 95 U.S. at 722.

¹⁶ This part of the Court's discussion was dictum because the Fourteenth Amendment did not take effect until 1868, two years after the 1866 judgment was rendered in the case under consideration in *Pennoyer v. Neff*.

¹⁷ *Pennoyer*, 95 U.S. at 733 (dictum).

¹⁸ Commentators have disagreed on how quickly *Pennoyer*'s dictum became established law. Patrick Borchers has argued that the Court was not clear on whether the Due Process Clause actually provided the content of personal jurisdiction rules. See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 38-51 (1990). John Oakley has disagreed with Borchers's analysis. See John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 595 (1995). Both commentators agree, however, that the due process basis for the rule was implicitly recognized in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915), in which the Court treated the issue as a well-established rule, *id.* at 193. See Borchers, *supra*, at 51; Oakley, *supra*, at 595.

¹⁹ *Hess v. Pawloski*, 274 U.S. 352 (1927).

²⁰ *Id.* at 356.

Because a corporation is a fictional entity created by the laws of its state of incorporation, the Supreme Court had originally held that jurisdiction over corporations existed only in that state of incorporation.²¹ As corporations increasingly began to do major amounts of business outside of their states of incorporation, states tried to extend their own courts' jurisdiction over claims arising out of corporate activity within the state.²² The Supreme Court expanded the scope of personal jurisdiction over corporations by ruling that if a corporation was doing business within the forum state, it was present for the purposes of the territorial rule of personal jurisdiction.²³ The problem with this formulation, however, was that, as Judge Learned Hand famously wrote, presence in the form of doing business was simply a conclusory term which did "no more than put the question to be answered."²⁴

In 1945 the Supreme Court finally recognized that the rigid territorial rules of *Pennoyer v. Neff* were too inflexible to govern the modern reality of interstate corporate business. In *International Shoe Co. v. Washington*,²⁵ the Supreme Court established a much more flexible standard for analyzing personal jurisdiction, but one that was still linked to the Due Process Clause. Rather than requiring courts to analyze whether corporations were "present" in the forum state by virtue of "doing business," the Court stated:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.²⁶

Chief Justice Stone wrote that the demands of due process may be met "by such contacts of the corporation with the . . . forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there."²⁷ In determining whether a defendant has sufficient contact with the forum, a court must analyze the "quality and nature of the activity in relation to the fair and orderly

²¹ *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

²² See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 620–22 (1988).

²³ See *St. Louis Sw. Ry. v. Alexander*, 227 U.S. 218, 226–27 (1913).

²⁴ *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930).

²⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁶ *Id.* at 316 (internal quotation marks omitted).

²⁷ *Id.* at 317.

administration of the laws.”²⁸ This test was ultimately clarified by the Court as involving two separate elements: first, the minimum contacts requirement, and second, the fairness requirement, which requires a court to balance five separate factors in order to determine whether personal jurisdiction over the defendant would be reasonable.²⁹

With respect to the character of the defendant’s contacts with the forum state, the *International Shoe* Court identified two issues that a court must address as a threshold matter. The first is whether the contact with the forum state is continuous and systematic or isolated and sporadic, while the second is whether the defendant’s claim arises out of the contact with the forum state.³⁰ If a defendant’s contact with the forum is sufficiently continuous and systematic, then a court may exercise jurisdiction regardless whether the claim arises out of the defendant’s contact with the forum state. Jurisdiction based on this type of contact with the forum eventually became known as general jurisdiction.³¹ On the other hand, if the defendant’s contacts with the forum state are isolated and sporadic, then the claim must arise out of the defendant’s contact with the forum state.³² This type of jurisdiction, known as specific jurisdiction, also requires that the defendant’s contact with the forum state be purposeful and intentional, rather than merely fortuitous or unintended.³³

The Supreme Court has only barely begun to sketch out the kinds of contacts that would be sufficient to satisfy the requirements for general jurisdiction.³⁴ In *Perkins v. Benguet Consolidated Mining Co.*,³⁵ the Court upheld general jurisdiction over a corporation that

²⁸ *Id.* at 319.

²⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

³⁰ *Int’l Shoe Co.*, 326 U.S. at 317–20.

³¹ See, e.g., *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). The designation of the two types of personal jurisdiction (general jurisdiction and specific jurisdiction) derived from an influential article by Arthur T. von Mehren and Donald Trautman. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–63 (1966).

³² *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

³³ See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

³⁴ See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988) (“Spelling out the difference [between general and specific jurisdiction] . . . is no easy matter.”); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter Brilmayer, *Related Contacts*]. See generally Twitchell, *supra* note 22 (discussing how the Court in *Helicopteros* provided no guidance for determining the scope of general jurisdiction).

³⁵ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

had its temporary corporate headquarters in the forum state.³⁶ At the other end of the spectrum, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,³⁷ the Court decided that a collection of separate contacts with the forum state, which included the purchase of helicopters, the training of pilots, the visit of the defendant's chief executive officer to negotiate a contract, and the receipt of checks for its services drawn on a Texas bank were insufficient to constitute the continuous and systematic contact required for general jurisdiction.³⁸ Where the line is drawn between those considerably distant poles the Supreme Court has yet to indicate.³⁹ Indeed, the Supreme Court has never expressly indicated that extensive sales in the forum state (as opposed to some physical presence like a corporate headquarters) would be sufficient to establish general jurisdiction.⁴⁰ Based upon the lack of guidance from the Supreme Court, it is not surprising that there are substantial differences among the lower courts with respect to the amount of contact necessary to support general jurisdiction⁴¹ and that some courts

³⁶ *Id.* at 447–49.

³⁷ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

³⁸ *Id.* at 416–19.

³⁹ See Twitchell, *supra* note 22, at 612 (stating that, in *Helicopteros*, “the Court gave no guidance as to how courts are to determine the scope of general jurisdiction in the future”).

⁴⁰ In *Helicopteros*, the Court did assess whether a series of contacts (none of which involved physical presence) would be sufficient to establish general jurisdiction. Although the Court held that the contacts were insufficient to establish general jurisdiction, the Court did not suggest that physical presence would be required or that, as a categorical matter, the kinds of contacts present in that case would always be insufficient to establish general jurisdiction. See *Helicopteros*, 466 U.S. at 416–18. In lower court cases, as Professor Mary Twitchell has noted, substantial activities outside the state that affect forum residents are less likely to result in general jurisdiction than is physical activity within the state's borders; thus a corporate defendant that runs a very small office within the forum is more likely to be subject to general jurisdiction than a defendant whose contacts, although perhaps more extensive, lack this physical “presence” component.

Twitchell, *supra* note 22, at 633–34.

⁴¹ Compare *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state), *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (holding a defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan), and *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to 0.083% of its total loan portfolio, plus other contacts, were sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued), with *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1198–200 (4th Cir. 1993) (rejecting general jurisdiction where 2% of total sales were in the forum; rejecting specific jurisdiction because the product liability suit did not “arise out of the defendant's activities in the forum”), *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction where about 13% of total revenues occurred in the forum; specific jurisdiction not argued), and *Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052–53 (W.D. Wash. 1994), *aff'd*, 78 F.3d 602 (Fed. Cir. 1996)

have complained that the caselaw is so confused that discussion of the cases is pointless.⁴²

The Supreme Court has addressed the question of specific jurisdiction much more frequently but no more clearly. In the context of a specific jurisdiction case, in which the claim must arise out of the defendant's contact with a forum state, the Court has required some purposeful connection between the defendant and the forum state.⁴³ This purposeful connection may take the form of wrongful conduct that is directed at individuals in the forum state⁴⁴ or the intentional receipt of some significant benefit from the forum state.⁴⁵ Other than these general principles, however, there is little consistency or clarity among the Court's decisions with respect to specific jurisdiction.⁴⁶

Surprisingly, the Supreme Court has never articulated a coherent rationale for why the Due Process Clause should impose *any* limits on state court jurisdiction. Just as Justice Field had failed to explain why the Due Process Clause mandated territorial limits on personal juris-

(rejecting general jurisdiction where 3% of total sales occurred in the forum; rejecting specific jurisdiction over patent infringement claim where the defendant sent letters into the forum threatening litigation for infringement in part because the letters had no substantive bearing on the infringement issue).

⁴² See, e.g., *Aquascutum of London, Inc. v. S.S. Am. Champion*, 426 F.2d 205, 211 (2d Cir. 1970) ("The problem of what contacts with the forum state will suffice to subject a foreign corporation to suit there on an unrelated cause of action is such that the formulation of useful general standards is almost impossible and even an examination of the multitude of decided cases can give little assistance."); *Rutherford v. Sherburne Corp.*, 616 F. Supp. 1456, 1459-60 (D.N.J. 1985).

⁴³ See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁴⁴ See *Calder v. Jones*, 465 U.S. 783 (1984) (holding specific jurisdiction was allowed over a libel claim against a writer who had no other contact with the forum state other than writing an article that the writer knew would harm the plaintiff in the forum state).

⁴⁵ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (holding specific jurisdiction was allowed based upon benefits received from the forum state arising out of a contract that had significant connection to the forum state).

⁴⁶ See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (Court deeply split over the issue whether an upstream manufacturer could be subject to personal jurisdiction based upon the stream of commerce theory); *Burger King Corp.*, 471 U.S. at 478-80 (court has personal jurisdiction based upon contractual contacts that provided sufficient minimum contacts); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (court has personal jurisdiction based upon the defendant's contacts with the forum state, even if the plaintiff has no connection with the state); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (by contesting personal jurisdiction, the defendant consents to the court's determination of the personal jurisdiction issue, including the right to order discovery on the issue); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (no jurisdiction over out-of-state car dealer because of the absence of intentional contact with the forum state, but express approval in dictum of a stream of commerce theory); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (no personal jurisdiction over divorced father based upon his sending his children to live with his former wife in the forum state).

diction, so too has the Supreme Court, in the years since *International Shoe*, failed to explain why the Due Process Clause should require any particular kind of contact between the defendant and the forum state. In *Hanson v. Denckla*,⁴⁷ the Court suggested that the limitations on personal jurisdiction were more than protections against inconvenient litigation:

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.⁴⁸

But the Court went no further than that to explain what the territorial restrictions on state power were or why they should be connected to the Due Process Clause.

The closest the Supreme Court ever came to explaining the purpose of a minimum contacts requirement was in the *World-Wide Volkswagen* case.⁴⁹ In that case, Justice White suggested in his majority opinion for the Court that the minimum contacts standard was designed to implement the principle of interstate federalism, in which the sovereignty of individual states implies limitations on the sovereignty of other states.⁵⁰ Justice White acknowledged that, since *Pennoyer*'s time, interstate business had increased dramatically and the inconvenience of litigating in distant states had been greatly reduced. But, he cautioned:

[W]e 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. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a “free trade unit” in which the States are debarred from acting as separable economic entities. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sov-

⁴⁷ *Hanson v. Denckla*, 357 U.S. 235 (1958).

⁴⁸ *Id.* at 251.

⁴⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁵⁰ *Id.* at 292.

ereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.⁵¹

Because of these limits on the scope of state sovereignty, Justice White concluded, the scope of a state court's jurisdiction is limited no matter how convenient the forum:

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.⁵²

After much criticism of this aspect of *World-Wide Volkswagen*,⁵³ however, the Court backed off even this limited explanation of the minimum contacts requirement in its very next decision on personal jurisdiction, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.⁵⁴ In that case, Justice White acknowledged that the minimum contacts requirement “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”⁵⁵ Justice White conceded that the Due Process Clause is the “only source of the personal jurisdiction requirement” and the Clause “makes no mention of federalism concerns.”⁵⁶ This conclusion was further reinforced by the fact that the personal jurisdiction requirement could be waived, which would not have been allowed if it involved issues of structural federalism beyond the rights of the individual defendant.⁵⁷

Justice White took a more modest stab at identifying an additional underlying principle for the minimum contacts requirement in *World-Wide Volkswagen*. In that case, the plaintiff had argued that the defendants could have foreseen that the car they sold to the plaintiffs in New York State could find its way to Oklahoma, the forum state. The defendants certainly received some benefit from being able

⁵¹ *Id.* at 293 (citation omitted).

⁵² *Id.* at 294.

⁵³ See, e.g., Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 109 (1983); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114–15 (1981).

⁵⁴ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

⁵⁵ *Id.* at 702.

⁵⁶ *Id.* at 702 n.10.

⁵⁷ *Id.*

to sell an automobile with the capacity to travel all the way to Oklahoma. The Court, however, rejected the idea that it was enough that the defendants could foresee that their product would eventually reach the forum state.⁵⁸ Instead, it “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.”⁵⁹ This oft-repeated phrase, however, has done little more than confuse generations of law students and countless lower courts. When should a defendant reasonably anticipate being haled into court in a particular state? The answer to that question depends entirely upon the meaning of the term “reasonably.” Unfortunately, the Court did not provide an answer to the question of what makes it reasonable for a defendant to expect to be haled into a particular state’s court. Thus, the statement of the principle does nothing more than restate the original question: why should it matter that the defendant have any contact with the forum state and what kinds of contacts would be sufficient to permit personal jurisdiction?

Moreover, the Court has never explained why the due process limitations on personal jurisdiction should be stricter than the “modest”⁶⁰ due process restrictions that the Court has imposed on a state’s decision to apply its own law to a defendant. In *Allstate Insurance Co. v. Hague*,⁶¹ the Court rejected a due process attack on a state court’s decision to apply its own law, even though the “connection between the forum and the controversy [was] much too tenuous to support an assertion of judicial jurisdiction.”⁶² Given the fact that, by choosing its own law, a state is decreeing the substantive rules by which it will judge a defendant’s conduct, one would expect that the contrary would be true and that there would be greater restrictions on a state’s power to impose its law on a defendant than on its power to assert jurisdiction over a defendant.⁶³ As Professor Linda Silberman famously argued, “[t]o believe that a defendant’s contacts with the fo-

⁵⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

⁵⁹ *Id.* at 297.

⁶⁰ *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985).

⁶¹ *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

⁶² Weinstein, *supra* note 3, at 241–42.

⁶³ *See* EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 3.21, at 151 n.7 (4th ed. 2004) (“There is much reason to suggest that the test should be stricter for choice-of-law purposes than for jurisdiction.” (citation omitted)); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879–80 (1980) (“From the defendant’s perspective, the differing treatment of contacts in the jurisdiction and choice-of-law cases turns things on their head. . . . Thus from the defendant’s perspective, it seems irrational to say that due process requires minimum con-

rum state should be stronger under the due process clause [sic] for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.”⁶⁴

Not only has the Supreme Court failed to provide any satisfactory rationale for why the Due Process Clause should require contacts between the defendant and the forum state, it has failed even to discuss, much less resolve, the question whether the contacts requirement is a matter of substantive or procedural due process.⁶⁵ Scholars analyzing the question have come to widely varying conclusions, with the majority favoring substantive due process,⁶⁶ a few others favoring procedural due process,⁶⁷ while other scholars throw up their hands and call it

tacts . . . merely to hale him into the forum’s court while allowing more tenuous contacts to upset the very outcome of the case.”).

⁶⁴ Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

⁶⁵ The Supreme Court has obliquely hinted, although it has not stated specifically, that the minimum contacts branch of personal jurisdiction is a matter of substantive due process. For example, in *Burger King Corp. v. Rudzewicz*, the Court stated that “[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful [internal] ‘contacts, ties, or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985). Similarly, in *Insurance Corp. of Ireland*, the Court stated that the personal jurisdiction requirement “recognizes and protects an individual liberty interest” and that the need for personal jurisdiction “must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.” *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982). The Court has not, however, been more explicit than this in discussing the nature of the personal jurisdiction requirement and its link with the Due Process Clause.

⁶⁶ See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 566–67 (14th ed. 2001); Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1506 (2006); Scott Fruehwald, *Judge Weinstein on Personal Jurisdiction in Mass Tort Cases: A Critique*, 70 TENN. L. REV. 1047, 1087–93 (2003); Scott Fruehwald, *The Boundary of Personal Jurisdiction: The “Effects Test” and the Protection of Crazy Horse’s Name*, 38 J. MARSHALL L. REV. 381, 422–23 (2004); Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 966 (1995); Perdue, *supra* note 14, at 508–10; Rhodes, *supra* note 3, at 570; Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 588 (1998); Allen R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597, 599 n.13 (1991); Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 672 (1991); Weinstein, *supra* note 3, at 231 n.239.

⁶⁷ 2 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.8, at 252 n.10 (3d ed. 1986); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 822 (1991). Some courts have explicitly addressed the minimum contacts requirement as an element of procedural due process. See *Crawford v. Minutemen Gourmet Foods, Inc.*, 489 F. Supp. 181, 182 (M.D. Ala. 1980) (finding that “[the court] may exercise personal jurisdiction . . .

“jurisdictional due process”⁶⁸ or something beyond either procedural or substantive due process.⁶⁹ A surprising number of scholars, in the absence of any guidance from the Supreme Court on this question, try to finesse the issue by failing to discuss at all whether the contacts requirement is a matter of substantive due process or procedural due process.⁷⁰ At the very least, it seems clear that the minimum contacts requirement cannot be simply a matter of procedural due process.⁷¹ The minimum contacts requirement means that the forum state may not exercise personal jurisdiction over a defendant if that defendant does not have the requisite contacts with the forum state, regardless of how convenient it would be for the defendant to litigate in the forum state. Without the required contacts, a defendant cannot be required

without exceeding the limits of procedural due process”); *Coe & Payne Co. v. Wood-Mosaic Corp.*, 195 S.E.2d 399, 401 (Ga. 1973) (adopting Illinois’s interpretation of its similarly worded long-arm statute and noting “that the Long Arm Statute [of Illinois] contemplates that jurisdiction shall be exercised over non-resident parties to the maximum extent permitted by procedural due process”). *But see In re G. Weeks Sec., Inc.*, 5 B.R. 220, 225 (Bankr. W.D. Tenn. 1980) (discussing personal jurisdiction under the Fifth Amendment as a matter of substantive due process).

⁶⁸ See Borchers, *supra* note 18, at 90.

⁶⁹ See Weinstein, *supra* note 3, at 237 (“That personal jurisdiction doctrine cannot be comfortably conceptualized as procedural due process, but imposes far more rigorous scrutiny than substantive due process jurisprudence warrants, supports the thesis that the source of authority for limitations on state court jurisdiction is *sub silentio* something other than the Due Process Clause of the Fourteenth Amendment.”).

⁷⁰ See, e.g., Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313 (2005); Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003); Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97 (1992); Casad, *supra* note 12; C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601 (2006); Walter W. Heiser, *A “Minimum Interest” Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915 (2000); Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 NW. J. INT’L L. & BUS. 267 (2006); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990); McMunigal, *supra* note 2; Parrish, *supra* note 3; Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998); Stein, *Personal Jurisdiction and the Internet*, *supra* note 4.

⁷¹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (stating that the rules regarding personal jurisdiction are “more than a guarantee of immunity from inconvenient . . . litigation” (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958))); see also Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 21–22 (1982); Redish, *supra* note 53, at 1137. *But see* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 416 (1981) (the minimum contacts test is a guideline for estimating convenience and reasonableness); Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 711–12 (1983) (same).

to travel even ten miles to the forum state's courthouse if such travel involves crossing a state line. Thus, the minimum contacts requirement seems to have nothing to do with the ability of a defendant to adequately represent his or her own interest and defend against the plaintiff's case.⁷² Instead, it seems to have something to do with the right of a person not to be required to defend a case in a state with which it has no relationship. This kind of limitation is a limitation on the substantive power of the state to assert its power over a defendant, regardless of how procedurally easy it is for the defendant to represent his or her own rights.

Even assuming this conclusion to be correct, the commentators have reached widely varying conclusions on exactly why the Due Process Clause should impose such a substantive limitation on the power of the states. Probably the theory with the widest popularity, most notably championed by Lea Brilmayer, is that the connection between the Due Process Clause and the minimum contacts requirement derives from a political theory about the nature of governmental power and legitimacy.⁷³ In particular, Brilmayer posits that, in order for a state's exercise of power to be legitimate, there must be some relationship between a defendant and the forum state that allows the state to assert its power over the defendant. This relationship creates a form of social contract in which the state is empowered to act coercively because the defendant has taken some intentional action to affiliate itself with the forum. Other scholars have elaborated on this theory and provided further support for incorporating social contract theory into the minimum contacts doctrine,⁷⁴ but the Court has never expressly acknowledged this theory.

⁷² See Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1303–12 (1983); Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYU L. REV. 1043, 1058–59; Perdue, *supra* note 14, at 509–10; Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 708 (1987).

⁷³ See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 86–87 [hereinafter Brilmayer, *How Contacts Count*]; Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 391 (1987).

⁷⁴ See Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 19 (1989); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 378 (1985). Professor Roger Trangsrud has argued for a similar philosophical foundation for personal jurisdiction law, but he has suggested that it should be implemented as a matter of federal common law under the Full Faith and Credit Clause and not the Due Process Clause. Trangsrud, *supra* note 2, at 884–85.

Other scholars have offered different explanations for why there should be territorial restrictions on personal jurisdiction. Some have suggested that, notwithstanding the Court's apparent abandonment of interstate federalism as the touchstone for the minimum contacts requirement, the principle of interstate federalism still properly underlies the requirements of territorial jurisdiction.⁷⁵ Other commentators have suggested that Commerce Clause–related principles justify territorial limitations on personal jurisdiction in order to prevent states from discriminatorily imposing costs on noncitizens.⁷⁶ Finally, some authors maintain that, notwithstanding the Supreme Court's protestations to the contrary, the territorial limitations on personal jurisdiction are intended to be at least a rough approximation for estimating the convenience and fairness of litigation.⁷⁷

The lack of any explanation as to why the Due Process Clause imposes any limits on personal jurisdiction has led to a number of well-documented disasters in the Supreme Court's own caselaw on personal jurisdiction. Two examples will suffice: *Asahi Metal Industry Co. v. Superior Court*,⁷⁸ in which the Supreme Court was irreconcilably divided on whether an upstream manufacturer would be subject to personal jurisdiction in the state where the product into which its component was incorporated was eventually sold, and *Burnham v. Superior Court*,⁷⁹ in which the Supreme Court unanimously agreed that service upon the defendant while the defendant was temporarily in the forum state sufficed to establish personal jurisdiction, but disagreed sharply on the rationale for why such jurisdiction was permissible.

In *Asahi*, the Court unanimously held that the California courts could not exercise personal jurisdiction over the defendant. Eight members of the Court concluded that the case did not satisfy the requirement of the second prong of the specific jurisdiction test—the fairness or procedural due process factors first set forth in the *Kulko*

⁷⁵ See, e.g., Spencer, *supra* note 3, at 619; Weinstein, *supra* note 3, at 283 (arguing that interstate federalism is “infused into the jurisdictional calculus” by the “constitutional structure that permits (and sometimes even commands) that the Supreme Court formulate a rule of decision”).

⁷⁶ See Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 234 (1967). Some older Supreme Court cases cited the Commerce Clause as a reason to invalidate expansive assertions of personal jurisdiction. See *Mich. Cent. R.R. v. Mix*, 278 U.S. 492, 494–96 (1929); *Atchison, Topeka & Santa Fe Ry. v. Wells*, 265 U.S. 101, 103 (1924); *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 315–16 (1923).

⁷⁷ See Clermont, *supra* note 71, at 416; Lewis, *supra* note 71, at 711–12.

⁷⁸ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁷⁹ *Burnham v. Superior Court*, 495 U.S. 604 (1990).

case.⁸⁰ The Court split sharply, however, on whether the defendant had the required minimum contacts with the forum state. The case presented the first occasion for the Supreme Court to rule on the so-called “stream of commerce” theory first enunciated in *Gray v. American Radiator & Standard Sanitary Corp.*⁸¹ Under this theory, the Illinois Supreme Court upheld jurisdiction over an Ohio corporation that shipped its valves to a Pennsylvania corporation, which incorporated them into a water heater that was eventually sold by the second corporation in Illinois. The Illinois court ruled that the minimum contacts test was satisfied for the first manufacturer because it benefitted from the protection of Illinois law, which governed the eventual sale of the product.⁸²

In *Asahi*, Justice O’Connor’s opinion for the Court could only garner three additional Justices in support of her conclusion that the benefits derived by an upstream manufacturer from the sale of a product in the forum state were insufficient, by themselves, to satisfy the minimum contacts part of the specific jurisdiction test.⁸³ Justice O’Connor argued that the defendant’s contacts must be “more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.”⁸⁴ Justice O’Connor did not explain, however, why the Due Process Clause required “an act purposefully directed toward the forum state”⁸⁵ rather than just the knowing receipt of benefits from the forum state.

Justice Brennan, however, writing for himself and three other members of the Court, found that a defendant had the required minimum contacts if it placed its product into the “regular and anticipated flow of products from manufacture to distribution to retail sale.”⁸⁶ As long as the defendant was aware that its products were sold in the forum state, the defendant had the minimum contacts required by the Due Process Clause. But like Justice O’Connor’s opinion, Justice Brennan’s opinion failed to link his theory of minimum contacts with any set of principles derived from the Due Process Clause.⁸⁷

Justice Stevens, although disclaiming any need to consider minimum contacts given the Court’s ruling on the fairness part of the spe-

⁸⁰ *Asahi*, 480 U.S. at 114, 116; see *Kulko v. Superior Court*, 436 U.S. 84, 92–93 (1978).

⁸¹ *Gray v. Am. Radiator & Std. Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

⁸² *Id.* at 766.

⁸³ *Asahi*, 480 U.S. at 105 (plurality opinion).

⁸⁴ *Id.* at 110.

⁸⁵ *Id.* at 112.

⁸⁶ *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

⁸⁷ *Id.*

cific jurisdiction analysis,⁸⁸ nevertheless went on to conclude that the minimum contacts part of the test had been satisfied in this case.⁸⁹ Justice Stevens stated his agreement with Justice Brennan's stream of commerce theory, as long as the defendant's products ultimately sold into the forum state were of sufficient value, volume, and hazardous character.⁹⁰ Justice Stevens provided no explanation as to why a court should consider these three factors to decide whether the Due Process Clause was satisfied.

The irreconcilable opinions in *Asahi* owe their differences to the Court's unwillingness or inability to explain why the Due Process Clause requires contacts of any kind between the defendant and the forum state. In the absence of such an explanation, Justice O'Connor was forced to parse the phrase "purposeful availment," used in a case thirty years before *Asahi*,⁹¹ as though it were contained in the text of the Fourteenth Amendment itself.⁹² Justice Brennan was unable to explain why the contacts required by Justice O'Connor were unnecessary and why the passive receipt of a benefit from the sale of a final product in the forum state was sufficient to create jurisdictional power over an upstream manufacturer.⁹³ Finally, the absence of any clear connection between the minimum contacts requirement and the Due Process Clause led Justice Stevens to pluck three almost random factors concerning the defendant's product and, without any explanation of their relationship to due process, make them the touchstone for the opinion that provided the fifth vote for the sufficiency of the defendant's contacts with the forum state.⁹⁴

Not surprisingly, the lower courts have responded to *Asahi* with a wide array of confusing, and confused, opinions. Some have appeared to follow Justice Brennan's opinion allowing jurisdiction based solely on the stream of commerce theory.⁹⁵ Other courts have appeared to follow Justice O'Connor's opinion,⁹⁶ and at least one court utilized Justice Stevens's opinion in resolving the issue of stream of commerce

⁸⁸ *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment).

⁸⁹ *Id.* at 122.

⁹⁰ *Id.*

⁹¹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁹² *See Asahi*, 480 U.S. at 109–12 (plurality opinion).

⁹³ *See id.* at 117.

⁹⁴ *See id.* at 122.

⁹⁵ *See Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385–86 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989).

⁹⁶ *See Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479–80 (6th Cir.), *cert. denied*, 540 U.S. 948 (2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945–46 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83

jurisdiction.⁹⁷ Thus, the lack of a theory as to why minimum contacts are required by the Due Process Clause has led to the splintering of the Court, which, in turn, has led to the splintering of lower court decisions and confusion for scholars who are trying to interpret and apply the law.

The Supreme Court was similarly fractured in *Burnham v. Superior Court*,⁹⁸ in which the Court addressed the continuing viability of jurisdiction based upon service on an individual within the territory of the forum state. Once again, no opinion captured a majority of the Court. Justice Scalia announced the judgment of the Court, but his opinion was joined by only three other Justices.⁹⁹ Justice Scalia's rationale for upholding in-state service as a basis for personal jurisdiction rested on its acceptance shortly after the adoption of the Fourteenth Amendment in *Pennoyer v. Neff* and its continued acceptance by all fifty states, which made it "one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice."¹⁰⁰

Justice Scalia did not, however, explain how his rather static notion of due process allowed, on the one hand, for no contraction of the traditional bases of jurisdiction, but allowed, on the other hand, for substantial expansion beyond them, as happened in *International Shoe*. Moreover, by failing to address the source of the connection between due process and personal jurisdiction, Justice Scalia failed to consider whether changes in technology and American society affected the continuing validity of in-state service of process as a basis for personal jurisdiction. Just as an example, let's take one suggested theory for requiring a connection between the defendant and forum state: the neo-Lockean notion that a state has no power to assert its sovereign authority over an individual unless that individual has established a relationship with the state that makes such assertion appropriate.¹⁰¹ Even if that principle never changes, the ultimate rules that flow from that principle may change over time as society and technol-

(1st Cir. 1992); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990).

⁹⁷ See *Abuan v. Gen. Elec. Co.*, 735 F. Supp. 1479, 1485-86 (D. Guam 1990), *aff'd on other grounds*, 3 F.3d 329 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994).

⁹⁸ *Burnham v. Superior Court*, 495 U.S. 604 (1990).

⁹⁹ *Id.* at 607.

¹⁰⁰ *Id.* at 619 (internal quotation marks omitted).

¹⁰¹ See Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 6 (1989); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304-06 (1989); see also Brilmayer, *How Contacts Count*, *supra* note 73, at 86-87.

ogy change. It may be that, in the nineteenth century, because state-to-state travel was relatively difficult and required a substantial investment of time and resources, physical presence in a state established enough of a relationship between a person and the state to warrant the exercise of personal jurisdiction. Because modern methods of transportation have made it so easy to travel from state to state for brief periods of time, physical presence in a state may no longer establish the same kind of relationship that it once did, with the result that such presence no longer satisfies the requirements of due process.

It is not enough for Justice Scalia, as a believer in original meaning, simply to assert that, if the rule of in-state service was acceptable in 1877, then it must be acceptable now. That assertion begs the question of what rule the Due Process Clause established. One cannot say that the Due Process Clause requires territorial presence as a basis of personal jurisdiction without some intervening step, which is the elaboration of some principle of due process upon which that rule depends. It may be that even an originalist like Justice Scalia would find that, although the basic principle established by the Due Process Clause with respect to personal jurisdiction remains the same, the rules that flow from that principle might change over time as changes in technology and society cause the application of the principle to have a different effect. Because Justice Scalia never identifies the underlying principle upon which personal jurisdiction rules are based, however, he neglects the most important question to be answered in *Burnham*.

Justice Brennan's opinion for himself and three other members of the Court is, if anything, even less coherent than Justice Scalia's opinion. Justice Brennan concluded that personal jurisdiction based upon in-state service of process, at least under the facts presented by *Burnham*, satisfies the requirements of *International Shoe*.¹⁰² Justice Brennan argued that by visiting the forum state, "a transient defendant actually 'avail[s]' himself of significant benefits provided by the State."¹⁰³ Justice Brennan failed to explain, however, how Mr. Burnham's three-day visit to the forum state provided sufficient benefits to allow California to assert what amounted to the equivalent of general jurisdiction over Mr. Burnham (jurisdiction over any claim, regardless of whether it arises out of the defendant's contact with a forum state). As Justice Scalia aptly noted in his opinion, the benefits received by Mr. Burnham's three-day stay in California do not distinguish him

¹⁰² *Burnham*, 495 U.S. at 637 (Brennan, J., concurring in the judgment).

¹⁰³ *Id.* (alteration in original) (citation omitted).

from other persons who have enjoyed similar visits 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.”¹⁰⁴ Although it should have been obvious to Justice Brennan that his analysis was flatly inconsistent with the *International Shoe* rubric, his analytical mistake was abetted by the Court’s previous failures to identify the due process foundation for requiring a connection between the defendant and the forum state. In the absence of such a clearly enunciated rationale, it was easier for Justice Brennan to manipulate the language from earlier opinions because there was no underlying principle against which to test his opinion.

Given the absence of a foundational principle upon which to base personal jurisdiction law, it is not surprising that the lower courts have struggled with personal jurisdiction problems. The next Part explores one particular facet of personal jurisdiction law: the identification of appropriate time parameters for the contacts that count in a personal jurisdiction analysis. As the cases show, the absence of a foundational principle has made it almost impossible for courts to define coherent principles that govern the timing of minimum contacts.

II. THE CASES ON THE TIMING OF MINIMUM CONTACTS

As noted above, the personal jurisdiction rubric of *International Shoe* requires courts to identify the defendant’s contacts with the forum state in order to establish a basis of personal jurisdiction. In general jurisdiction cases, these contacts must be continuous and systematic, while in specific jurisdiction cases, lesser contacts may suffice if the claim arises out of those contacts. In either category, a court may be required to establish both ends of a relevant timeframe for the required contacts. That is, a court may have to define how far back in time a plaintiff may search in order to find relevant contacts between the defendant and the forum state and identify the point in time beyond which contacts are no longer relevant to the personal jurisdiction analysis. This Part considers first how the lower courts have addressed the timing issue concerning general jurisdiction and then examines the specific jurisdiction cases.

A. *The Timing of Minimum Contacts in General Jurisdiction Cases*

Given the very limited guidance provided by the Supreme Court on the scope of general jurisdiction, it is unsurprising that the Court

¹⁰⁴ *Id.* at 624.

has not said much about the timing of minimum contacts in those cases. As we see below, several lower courts have attempted to draw inferences from *Helicopteros*, but it is hard to find anything definitive in that case on the issue of timing. In *Helicopteros*, the Court considered whether it had general jurisdiction over a Colombian corporation that owned and operated a helicopter service in South America.¹⁰⁵ After one of the company's helicopters crashed in Peru, the families of the U.S. citizens killed in the crash sued the company in Texas state court.¹⁰⁶ Because the claim did not arise out of the defendant's contacts with the forum state, the plaintiffs were forced to rely on a general jurisdiction theory to establish personal jurisdiction.¹⁰⁷ The contacts discussed by the Court "consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training."¹⁰⁸ The Court easily dismissed the one negotiating trip as an isolated contact, and it determined that the checks drawn on a Texas bank were not a relevant contact at all.¹⁰⁹ As to the purchases, the Court (relying on a pre-*International Shoe* case¹¹⁰) held that "mere purchases, even if occurring at regular intervals, are not enough to warrant" general jurisdiction.¹¹¹ Finally, with respect to the training of the defendant's pilots in Texas, the Court ruled that "[t]he brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in *Rosenberg*."¹¹²

In no part of the opinion is there any direct discussion of timing, but the Court did note that the helicopter purchases were made in Texas "[d]uring the years 1970–1977."¹¹³ Based upon this fact, the

¹⁰⁵ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 408 (1984).

¹⁰⁶ *Id.* at 409–10.

¹⁰⁷ *Id.* at 415–16.

¹⁰⁸ *Id.* at 416.

¹⁰⁹ *Id.* at 416–17.

¹¹⁰ *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923). Arguably, *Rosenberg* was a specific jurisdiction case under the Court's modern analysis, but the Court expressly disclaimed ruling on the continuing validity of the decision as it might bear on assertions of specific jurisdiction. See *Helicopteros*, 466 U.S. at 418 n.12. But see *id.* at 421 n.1 (Brennan, J., dissenting).

¹¹¹ *Helicopteros*, 466 U.S. at 418.

¹¹² *Id.*

¹¹³ *Id.* at 411.

Second Circuit later concluded that the Supreme Court “examined the defendant’s contacts with the forum state over a seven-year period to determine whether it met the ‘continuous and systematic’ minimum contacts test.”¹¹⁴ This seems to be stretching the significance of *Helicopteros* beyond reason. The Court mentioned the time period during its initial presentation of the facts of the case and never mentioned the timing of the contacts again during the analytical portion of the opinion. From this analytical portion of the opinion, it is clear that the Court was ruling that the types of contacts alleged were insufficient without regard to anything related to the time over which they occurred. The Court simply was not thinking of the timing issue, and it is not a fair reading of the case to suggest that the Court intended to address it in any way. Had the Court found the contacts to be sufficient, then one might infer that the time period was reasonable, even if the Court had not expressly mentioned it. But in *Helicopteros*, the Court never got that far because the contacts were so inadequate.

The absence of Supreme Court guidance has left the lower courts to struggle with the appropriate time period for minimum contacts on their own. The commentators have been little help on the issue. As previously noted, no articles have been published on the subject. The leading treatise on personal jurisdiction does not mention the issue.¹¹⁵ Wright and Miller address it only briefly by suggesting that, because general jurisdiction focuses on whether there are continuous and systematic contacts between the defendant and the forum, rather than on the connection between the cause of action and the forum, “a court should consider all of a defendant’s contacts with the forum state prior to the filing of the lawsuit, rather than just those contacts that are related to the particular cause of action the plaintiff asserts.”¹¹⁶ The authors do not explain more than that. This limited analysis fails even to examine the essential predicate issue: whether, and to what extent, courts should give significant meaning to the term “continuous,” which seems to suggest that contacts must be connected and unbroken rather than discontinuous and separate. Given the Supreme Court’s own failure to address this issue, however, the omission is not surprising.

¹¹⁴ *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir.), *cert. denied*, 519 U.S. 1007 (1996).

¹¹⁵ See generally ROBERT C. CASAD & WILLIAM B. RICHMAN, *JURISDICTION IN CIVIL ACTIONS* (3d ed. 1998) (discussing the question of minimum contacts in depth, but failing to discuss the time period for minimum contacts).

¹¹⁶ 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.5 (3d ed. 2002).

The lower courts have been greatly influenced by one of the leading cases on the timing issue, *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*¹¹⁷ In that case, the plaintiff, MetLife, alleged that the defendant had negligently and in breach of contract supplied defective exterior walls for a building owned by MetLife in Miami, Florida.¹¹⁸ MetLife filed suit against the defendant in federal district court in Vermont, and the defendant moved to dismiss the complaint for lack of personal jurisdiction.¹¹⁹ In response to the motion to dismiss, MetLife filed a notice that it would depose corporate representatives of the defendant on forty-nine topics relating to their business operations in Vermont, as well as a request to produce all relevant documents without any date restrictions or limitations.¹²⁰ After the defendant filed a motion for a protective order on the ground that MetLife's discovery request was overbroad and not limited to any particular time period, the district court limited the discovery request to the six years prior to the filing of the complaint.¹²¹ Based on its discovery, MetLife argued that during the six-year period, the defendant had enough contact with the forum state to warrant general jurisdiction. The defendant, on the other hand, argued that only the year during which MetLife filed its suit was relevant for the determination of general jurisdiction.¹²² The district court agreed with the defendant and dismissed the lawsuit for lack of personal jurisdiction.¹²³

On appeal, the Second Circuit acknowledged that “[f]ew cases discuss explicitly the appropriate time period for assessing whether a defendant’s contacts with the forum state are sufficiently ‘continuous and systematic’” to establish general jurisdiction.¹²⁴ The court relied on the fact that the Supreme Court in *Helicopteros* had discussed contacts that had arisen over a seven-year period.¹²⁵ As noted above, this seems to be reading far more into *Helicopteros* than the case warrants.¹²⁶ The court also discussed several other cases in which courts had examined the defendant’s contacts over a period longer than a

¹¹⁷ *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir.), *cert. denied*, 519 U.S. 1007 (1996).

¹¹⁸ *Id.* at 564–65. MetLife apparently filed suit in Vermont in order to take advantage of the generous statute of limitations governing actions in that state. *Id.* at 564.

¹¹⁹ *Id.* at 564–65.

¹²⁰ *Id.* at 565.

¹²¹ *Id.*

¹²² *Id.* at 565–66.

¹²³ *Id.* at 566.

¹²⁴ *Id.* at 569.

¹²⁵ *Id.*

¹²⁶ *See supra* text following note 114.

single year.¹²⁷ In none of these cases, however, had the court explicitly analyzed the issue of what time period was appropriate for the measurement of continuous and systematic contacts for the purpose of establishing general jurisdiction. Nevertheless, the Second Circuit concluded that, “[b]ecause the phrase continuous and systematic necessarily requires that courts evaluate the defendant’s contact with the forum state over time,” the district court erred in limiting its jurisdictional analysis to contacts from the year the suit was filed.¹²⁸ The court concluded that in general jurisdiction cases, “district courts should examine a defendant’s contacts with the forum state over a period that is reasonable under the circumstances—up to and including the date the suit was filed” in order to determine whether the defendant’s contacts meet the requirements for general jurisdiction.¹²⁹ The court left the determination of what time period would be “reasonable”¹³⁰ to the discretion of the district court.¹³¹ The court did not, however, explain further why the district court’s selection of a one-year period for the purposes of its decision was an abuse of this discretion, nor did it explain why the period should end earlier, at the point when suit was filed rather than when the claim arose, or later, when the defendant filed its motion to dismiss.¹³²

¹²⁷ See *Metro. Life Ins. Co.*, 84 F.3d at 569. In other circuits, courts had assessed the defendants’ contacts over a five-year period, *Wilson v. Belin*, 20 F.3d 644, 650–51 (5th Cir.), cert. denied, 513 U.S. 930 (1994); *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 372 (5th Cir. 1987), and a three-year period, *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1329–31 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985).

¹²⁸ *Metro. Life Ins. Co.*, 84 F.3d at 569 (internal quotation marks omitted).

¹²⁹ *Id.*

¹³⁰ Contacts for general jurisdiction purposes are assessed within a reasonable time prior to the filing of a complaint. See, e.g., *Mold-Ex, Inc. v. Mich. Technical Reps., Inc.*, No. 304CV307MCRMD, 2005 WL 2416824, at *5 (N.D. Fla. Sept. 30, 2005) (“[C]ontacts are commonly assessed over a period of years prior to the filing of a complaint.”); *Young v. Hair*, No. 7:02-CV-212-F1, 2004 WL 1084331, at *3 n.1 (E.D.N.C. Jan. 26, 2004) (“[T]he defendants purposefully availed themselves of North Carolina by directing all their sales to this state some five months prior to the commencement of the lawsuit.”); *United States v. Subklew*, No. 003518CIV-GRAHAM, 2001 WL 896473, at *3–4 (S.D. Fla. June 5, 2001) (“[D]istrict courts considering general jurisdiction cases should examine a defendant’s contacts with a forum state over a period that is reasonable under the circumstances—up to and including the date the suit was filed [T]he Court finds that it is unreasonable to consider [the defendant’s] contacts with [the forum state] over a thirteen year period.” Rather, the Court based its decision on the five years prior to the filing of the action.).

¹³¹ *Metro. Life Ins. Co.*, 84 F.3d at 570; see also *Porina v. Marward Shipping Co.*, 521 F.3d 122, 128 (2d Cir. 2008) (citing *Metropolitan Life* for the conclusion that, in general jurisdiction cases, courts “examine a defendant’s contacts with the forum state over a period that is reasonable under the circumstances—up to and including the date the suit was filed”).

¹³² Other courts have also considered contacts for some period prior to the filing of the complaint in order to determine whether a defendant had systematic and continuous contact

Although *Metropolitan Life* is the most thoughtful and well-reasoned opinion on the timing of minimum contacts in general jurisdiction cases, it is flawed in several ways. First, the court does not explain why it would be improper to consider contacts with the forum state arising after the lawsuit was filed. As discussed below, there is no reason why, as a matter of due process, a court should not consider all contacts with the forum up to the time the court decides the personal jurisdiction issue.¹³³ Second, the court did not provide much guidance to lower courts by ruling that trial judges could consider contacts within a “reasonable” timeframe, without any indication of what might be reasonable, other than its conclusion that a one-year period was not reasonable. The paucity of explanation and analysis is typical of the cases on the timing of minimum contacts. With so little guidance from the Supreme Court on the principles upon which the minimum contacts requirement is based, it is not surprising that the lower courts have so little to say when addressing the issue.

The court in *Metropolitan Life* did not provide much additional guidance when it analyzed the sufficiency of a defendant’s contacts in order to establish general jurisdiction. It looked at the following factors in deciding whether it had general jurisdiction over a case filed on August 31, 1993: (1) nearly \$4 million in sales between 1989 and 1993; (2) the defendant’s relationship with five in-state dealers of one line of products and four in-state “authorized builders” for another line of products; (3) product support to companies selling its line of products, including toll-free phone service; (4) advertising and marketing in catalogs and direct-mail campaigns that reached the forum state, and direct marketing to at least three in-state architectural firms; and (5) the visits of the defendant’s employees and engineers to the forum state on 150 occasions between 1987 and 1993, and the fact that one of the defendant’s employees resided and maintained an office in the forum

with the forum state. See *Noonan v. Winston Co.*, 135 F.3d 85, 93 & n.8 (1st Cir. 1998) (stating that a foreign corporation’s contacts with the forum state for a two-year period prior to the filing of the complaint would be considered in assessing minimum contacts for general jurisdiction); *Wilson*, 20 F.3d at 650–51 (considering all of the defendant’s contacts with the forum state over a five-year period in assessing general jurisdiction); *Bearry*, 818 F.2d at 372 (considering the defendant’s contacts with the forum state over a five-year period prior to the time the complaint was filed); *Gates Learjet Corp.*, 743 F.2d at 1329–31 (considering the defendant’s contacts with the forum state over a three-year period prior to the time the complaint was filed); *Haas v. A.M. King Indus., Inc.*, 28 F. Supp. 2d 644, 648–49 (D. Utah 1998) (noting “[t]he important time for assessing this type of presence is at the time of suit, not years earlier, or years later” and stating that “the appropriate time period for assessing [the defendant’s] contacts with [the forum state] is several years prior to and including the time the complaint was filed”).

¹³³ See *infra* Part III.B.2.

state from 1989–90.¹³⁴ The court then explained that these contacts should be examined in the aggregate rather than separately in order to determine whether they amount to the continuous and systematic contact required for general jurisdiction.¹³⁵

Ultimately, the court concluded that the \$4 million in sales between 1987 and 1993, although perhaps insufficient on its own, when combined with the relationship with dealers selling its products and with authorized builders, as well as visits to the forum state, was sufficient to establish the continuous and systematic conduct of the company required for general jurisdiction.¹³⁶ Interestingly, the court nevertheless held that there was no personal jurisdiction over the defendant because an analysis of the five fairness factors led to the conclusion that personal jurisdiction over the defendant would be unreasonable.¹³⁷ The court did not discuss, however, how these factors related to any underlying principle of personal jurisdiction under the Due Process Clause, nor did it attempt to explain how the types of contacts analyzed over the time period during which they occurred made it reasonable to subject the defendant to personal jurisdiction on a claim unconnected with the forum state.¹³⁸

The *Metropolitan Life* case exemplifies not only the thin analysis that plagues the lower courts' decisions on the timing of minimum contacts, but also the weak reasoning in the lower court cases on the entire issue of general jurisdiction. As Professor Mary Twitchell has noted:

The absence of policy analysis in cases that purport to find general jurisdiction suggests that courts are unsure about what policies support this exercise of jurisdiction. Very little of contemporary jurisdiction theory has trickled into general jurisdiction decisions; most courts simply list the defendant's contacts and conclude that they are, or are not, sufficient.¹³⁹

The lower courts understandably struggle when there is so little guidance on both the purpose of the minimum contacts requirement and the manner in which to apply it in general jurisdiction cases.

The First Circuit indulged in a similarly vague analysis of the timing of minimum contacts in *Harlow v. Children's Hospital*.¹⁴⁰ In that

¹³⁴ *Metro. Life Ins. Co.*, 84 F.3d at 570.

¹³⁵ *Id.* at 570–71.

¹³⁶ *Id.* at 573.

¹³⁷ *Id.* at 575.

¹³⁸ *See id.*

¹³⁹ Twitchell, *supra* note 22, at 637.

¹⁴⁰ *Harlow v. Children's Hosp.*, 432 F.3d 50 (1st Cir. 2005).

case, the court considered whether the state of Maine would have personal jurisdiction over a malpractice claim brought by a Maine citizen against a Massachusetts hospital.¹⁴¹ The plaintiff asserted personal jurisdiction based on both general jurisdiction and specific jurisdiction.¹⁴² In discussing the timing of minimum contacts with respect to general jurisdiction, the court disagreed with the defendant's argument that it should not consider any contacts with the forum state after the claim arose.¹⁴³ The court principally relied on the fact that, in *Helicopteros*, the Supreme Court had discussed contacts occurring after the time the claim arose, even though there is no discussion of that fact in *Helicopteros*.¹⁴⁴ The court also went on to conclude that, because general jurisdiction focuses on all of the defendant's contacts with the forum state, not just those related to the plaintiff's claim, it should consider the defendant's contacts up to the time the complaint is filed, but not thereafter.¹⁴⁵ The court did not, however, indicate how far back in time a court might go in evaluating whether the defendant had continuous and systematic contact with the forum state. The First Circuit's analysis was even less well developed than the Second Circuit's in *Metropolitan Life*, and it provides little help for those looking for a more substantial analysis of the timing problem.

The Eighth Circuit has adopted a more flexible, although inadequately explained, rule regarding the timing of minimum contacts in general jurisdiction cases. That circuit has held that the required contacts "must exist either at the time the [claim] arose, the time the suit is filed, or within a reasonable period of time immediately prior to the filing of the lawsuit."¹⁴⁶ This standard can lead to some odd results. For example, in *Pecoraro v. Sky Ranch for Boys, Inc.*,¹⁴⁷ the Eighth Circuit considered whether it could exercise general jurisdiction over a foundation that supported a ranch for boys whose director was accused of abusing the plaintiff.¹⁴⁸ The court upheld general jurisdiction based upon fundraising events held in the forum state during the time period when the plaintiff's claim arose, even though it acknowledged

¹⁴¹ *Id.* at 53–55.

¹⁴² *Id.* at 56.

¹⁴³ *Id.* at 64.

¹⁴⁴ *Id.* at 65; see *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 410–11 (1984).

¹⁴⁵ *Harlow*, 432 F.3d at 65; see also *Noonan v. Winston Co.*, 135 F.3d 85, 93 n.8 (1st Cir. 1998).

¹⁴⁶ See *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 562 (8th Cir. 2003) (citing *Clune v. Alimak AB*, 233 F.3d 538, 544 n.8 (8th Cir. 2000)).

¹⁴⁷ *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558 (8th Cir. 2003).

¹⁴⁸ *Id.* at 561.

that the foundation's forum-state activity at the time the suit was filed was minimal.¹⁴⁹ Indeed, during the year preceding the filing of the lawsuit, the foundation's only connection with the forum state was contribution requests it mailed to thirty-one residents of the forum state.¹⁵⁰ The Eighth Circuit was apparently untroubled by the absence of any connection between the defendant foundation and the forum state at the time the claim was litigated, even though the lawsuit was filed thirty-seven years after the claim arose.¹⁵¹ The court offered no explanation for its timing rule and did not explain how such ancient contacts warranted jurisdiction over any claim against the defendant, regardless of where the claim arose.

Other courts have also measured the continuous and systematic contact required for general jurisdiction only up to the time the claim arose. In *Modern Mailers, Inc. v. Johnson & Quin, Inc.*,¹⁵² a district court considered whether it had general jurisdiction over a defendant based upon its sales of products in the forum state.¹⁵³ The defendant argued that the court should consider only those sales that occurred from December 1992 to the summer of 1993 because "general jurisdiction may only be based on those contacts that occurred at the same time as the activities which gave rise to the lawsuit."¹⁵⁴ The trial court determined, however, that although "general jurisdiction must exist at the time the cause of action arises, the court's examination of forum contacts is not limited to those that coincided with the activities that gave rise to the lawsuit."¹⁵⁵ The court reasonably concluded that determining whether a defendant has continuous and systematic contacts with the forum state requires the court "to look at the defendant's activities within the state over a period of time."¹⁵⁶ The court concluded that it would not be possible to "accurately determine whether the corporation conducted continuous and systematic business within Pennsylvania by looking solely at the contacts of one day. A court must examine the contacts over a reasonable period of time

¹⁴⁹ *Id.* at 562.

¹⁵⁰ *Id.* at 562 & n.2.

¹⁵¹ *See id.* at 560–61; *see also* *Wilson v. Qorvis Commc'ns, LLC*, No. CIV-07-0792-HE, 2007 WL 4171567, at *3 (W.D. Okla. Nov. 20, 2007) (finding general jurisdiction based upon the existence of continuous and systematic contacts with the forum state at the time the claim arose even though the defendant did not have contacts with the forum state at the time the lawsuit was filed).

¹⁵² *Modern Mailers, Inc. v. Johnson & Quin, Inc.*, 844 F. Supp. 1048 (E.D. Pa. 1994).

¹⁵³ *Id.* at 1052–54.

¹⁵⁴ *Id.* at 1052.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

to determine whether general jurisdiction existed when the action arose.”¹⁵⁷ Therefore, the court could consider contacts over a four-year period prior to the time the claim arose.¹⁵⁸ The court offered no analysis of why the date the claim arose was the proper time for assessing the required contacts in a general jurisdiction case.

The Second Circuit has expressly rejected the concept of general jurisdiction based on the contacts between the defendant and the forum state at the time the claim arose and instead mandated that contacts be sufficient at the time the lawsuit was filed. In *Klinghoffer v. S.N.C. Achille Lauro*,¹⁵⁹ the Second Circuit considered whether the state of New York could exercise general jurisdiction over the Palestine Liberation Organization (“PLO”).¹⁶⁰ The court concluded that, although the contacts in the record were sufficient to establish general jurisdiction over the PLO at the time the claim arose, the record was unclear whether the contacts continued up to the time that the complaints were filed.¹⁶¹ In particular, the court found that the passage of the Anti-Terrorism Act of 1987¹⁶² might have caused the PLO to cease its nondiplomatic activities in New York.¹⁶³ Therefore, the Second Circuit remanded the case to the district court to determine whether “the PLO’s non-[United Nations]-related contacts with New York provided a sufficient basis for jurisdiction at the time each of the complaints was filed.”¹⁶⁴

The cases on the timing of minimum contacts in general jurisdiction cases have not satisfactorily resolved the major questions regarding when contacts should be counted. The only point on which the cases agree is that they reject the consideration of any contacts with the forum state after the complaint is filed, although none of the cases provides any clear explanation for why they do so. The majority of cases considers contacts up to the time that the complaint is filed, although there are cases that either *insist* that the required contacts exist at the time the claim arose or *permit* general jurisdiction based upon contacts with the forum at the time the claim arose. The courts gener-

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1053.

¹⁵⁹ *Klinghoffer v. S.N.C. Achille Lauro ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991).

¹⁶⁰ *Id.* at 50.

¹⁶¹ *Id.* at 52.

¹⁶² Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201–5203 (2006). The Anti-Terrorism Act had the effect of outlawing any nondiplomatic activity by the PLO. *See id.* § 5202.

¹⁶³ *Klinghoffer*, 937 F.2d at 52.

¹⁶⁴ *Id.*

ally allow the consideration of contacts back in time for some “reasonable” period, which has ranged from three to seven years. The one thing that all of the cases have in common is the absence of any significant analysis of the timing rules that they adopt. The lower courts struggle when they have to address significant personal jurisdiction issues where an understanding of the purpose of the minimum contacts requirement is essential to the analysis.

B. The Timing of Minimum Contacts in Specific Jurisdiction Cases

The lower courts have received equally limited guidance in addressing the timing issue concerning specific jurisdiction cases. As is true with respect to general jurisdiction, the Supreme Court has never addressed the issue of the timing of minimum contacts in a specific jurisdiction case. The commentators have been similarly silent in law reviews and treatises.¹⁶⁵ *Moore’s Federal Practice* states that “[t]he proper focus in the specific jurisdiction analysis is on those contacts leading up to and surrounding the accrual of the cause of action. Later events are not considered.”¹⁶⁶ *Moore’s* does not, however, provide any enlightenment on why this rule is the proper one to adopt in specific jurisdiction cases.

As is true with the analysis of cases involving general jurisdiction, it is important to distinguish when a court is discussing whether a particular cutoff is a minimum or a maximum time requirement. In other words, a court may be considering whether the filing of a complaint is the proper cutoff for determining minimum contacts, but it may be doing it in two different contexts: one in which a party is asking to introduce contacts that occurred after the filing of the complaint, and another in which the party is asking to introduce contacts that occurred after the claim arose but before the complaint was filed. Different principles govern the resolution of these two distinct questions.

The lower courts are even more deeply split about the issue of the timing of minimum contacts in specific jurisdiction cases than they are in general jurisdiction cases. Some courts hold that the relevant time is the date on which the claim arose,¹⁶⁷ while other courts consider

¹⁶⁵ See generally CASAD & RICHMAN, *supra* note 115 (discussing specific jurisdiction but failing to describe the issue of timing of minimum contacts).

¹⁶⁶ 16 JAMES WILLIAM MOORE, *MOORE’S FEDERAL PRACTICE* § 108.42[2][a], at 108-55 to 108-56 (3d ed. 2010).

¹⁶⁷ Among the courts to have adopted this rule are the Fourth Circuit and its district courts, see, e.g., *Stein v. Horwitz*, 191 F.3d 448, 1999 WL 710355, at *2 (4th Cir. Sept. 13, 1999) (unpublished opinion); *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 n.2 (4th Cir. 1987); *Glynn v. EDO Corp.*, 536 F. Supp. 2d 595, 606 n.15 (D. Md. 2008); *Hardnett v. Duquesne Univ.*,

contacts up to the time when the complaint is served on the defendant.¹⁶⁸ Other cases allow the use of contacts arising after the claim arose when the basis for jurisdiction is a stream of commerce theory in order to determine “whether the defendant merely placed his product in the stream of commerce, or whether his action was more purposefully directed at the forum state.”¹⁶⁹ Finally, there are a number of specific jurisdiction cases in the Eighth Circuit that, without much analysis, cite *Clune v. Alimak AB*¹⁷⁰ (and the following line of cases), an Eighth Circuit decision involving general jurisdiction and a stream of commerce theory for specific jurisdiction, for the conclusion that “minimum contacts must occur at the time the cause of action arose, the time the suit is filed, or a reasonable period of time prior to the filing of the lawsuit.”¹⁷¹

897 F. Supp. 920, 923 (D. Md. 1995), the Ninth Circuit and its district courts, *see, e.g.*, *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987); *see also, e.g.*, *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990) (citing *Steel*); *Falcon Enters., Inc. v. Centurion Ltd.*, No. C07-0065RSL, 2007 WL 3046201, at *2 (W.D. Wash. Oct. 18, 2007) (citing *Steel*); *Hoff v. IRS*, No. 2:06-CV-0748-RCJ-PAL, 2007 WL 295611, at *2 (D. Nev. Jan. 29, 2007) (citing *Steel*); *Hudnall v. Panola County*, No. 2:06-cv-0490-RCJ-LRL, 2007 WL 81928, at *4 (D. Nev. Jan. 5, 2007); *Carolan v. Cardiff Univ.*, No. C-01-3330 MMC, 2002 WL 73228, at *3 (N.D. Cal. Jan. 8, 2002) (citing *Steel*); *Tomar Elecs., Inc. v. Whelen Techs., Inc.*, 819 F. Supp. 871, 876 (D. Ariz. 1992) (citing *Steel*), and various district courts in other circuits, *see, e.g.*, *Van Natta v. Doherty*, No. 07-CV-2064-LRR, 2008 WL 686915, at *4 (N.D. Iowa Mar. 10, 2008); *Wilson v. Qorvis Commc'ns, LLC*, No. CIV-07-0792-HE, 2007 WL 4171567, at *3 (W.D. Okla. Nov. 20, 2007); *Tecre Co. v. Buttonpro, Inc.*, 387 F. Supp. 2d 927, 930–31 (E.D. Wis. 2005); *Gen. Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 663 (E.D. Mich. 1996); *Nielsen v. Sioux Tools, Inc.*, 870 F. Supp. 435, 440 (D. Conn. 1994).

¹⁶⁸ Among the courts adopting this rule are those in the Seventh Circuit, *see, e.g.*, *Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49, 53 (7th Cir. 1996); *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213, 1219 (7th Cir. 1990); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904, 909 (N.D. Ill. 1999), as well as those of the Third Circuit, *see, e.g.*, *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223–24 (3d Cir. 1992); *McMullen v. European Adoption Consultants, Inc.*, 109 F. Supp. 2d 417, 419–20 (W.D. Pa. 2000), and various district courts, *see, e.g.*, *Capitol Fed. Sav. Bank v. E. Bank Corp.*, 493 F. Supp. 2d 1150, 1159 (D. Kan. 2007); *Conn. Aircraft Corp. v. Smith*, 574 F. Supp. 626, 630 (D. Conn. 1983); *Lachman v. Bank of La. in New Orleans*, 510 F. Supp. 753, 757 (N.D. Ohio 1981).

¹⁶⁹ *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 n.6 (7th Cir. 1992) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion)); *see also Clune v. Alimak AB*, 233 F.3d 538, 544 n.8 (8th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

¹⁷⁰ *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir. 2000); *see also supra* text accompanying note 146.

¹⁷¹ *Clune*, 233 F.3d at 544 n.8; *see, e.g.*, *Ottis v. Fischer Price*, 627 F. Supp. 2d 1040, 1045 (D. Neb. 2008); *Capitol Fed. Sav. Bank v. E. Bank Corp.*, 493 F. Supp. 2d 1150, 1159 (D. Kan. 2007); *Lindsay v. Attebury*, No. 06-2066, 2006 WL 2246231, at *3 (W.D. Ark. Aug. 4, 2006); *Global Media Group, Inc. v. Express Tax Serv., Inc.*, No. 4:05 CV 956 DDN, 2005 WL 2452542, at *5 (E.D. Mo. Oct. 4, 2005); *Lindgren v. GDT, LLC*, 312 F. Supp. 2d 1125, 1129 (S.D. Iowa 2004); *SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC*, No. Civ. 03-3302 (RHK/FLN), 2004 WL 415257, at *2 (D. Minn. Mar. 2, 2004).

Typical of the reasoning behind the cases that limit the relevant contacts for specific jurisdiction to those occurring prior to the time the claim arose is *Steel v. United States*.¹⁷² In *Steel*, the Ninth Circuit considered whether it had personal jurisdiction over a declaratory judgment action to establish the priority of a divorce judgment that the plaintiff obtained in California over a different judgment obtained by her former husband in Virginia.¹⁷³ The Ninth Circuit explained the reason for its determination that the relevant period for determining contacts was when the claim arose as follows:

Mindful that the Due Process Clause requires that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, courts must examine the defendant's contacts with the forum at the time of the events underlying the dispute when determining whether they have jurisdiction. When a court is exercising specific jurisdiction over a defendant, arising out of or related to the defendant's contacts with the forum, the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred. In the declaratory judgment suit at hand, the minimum contacts that might give [the husband] fair warning of suit arise not out of [the wife's] filing of a declaratory judgment action, but out of the marriage and separation that led to the conflicting divorce judgments.¹⁷⁴

The court noted that, despite the apparent anomaly of the husband who was a citizen of Virginia for purposes of diversity jurisdiction being amenable to suit in California because of his former residence there,

[a]s a matter of due process, the determination of amenability to suit takes place at the time of the relevant contacts. One may create diversity jurisdiction by a move to a different state, but one cannot defeat personal jurisdiction by a move away from the state in which the underlying events took place.¹⁷⁵

The court concluded that "the fair warning given [the husband] by his contacts with California does not expire simply because of his lack of later contacts with the state."¹⁷⁶ In this particular case, the

¹⁷² *Steel v. United States*, 813 F.2d 1545 (9th Cir. 1987).

¹⁷³ *Id.* at 1546.

¹⁷⁴ *Id.* at 1549 (internal quotation marks and citations omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1549–50.

court determined that the claim arose out of the couple's marriage, separation, and subsequent suits for divorce.¹⁷⁷ Therefore, the facts that gave the California court jurisdiction over the husband in the wife's initial California divorce suit also supported personal jurisdiction over the wife's later suit to assert the priority of the California judgment.¹⁷⁸ Interestingly, the court justified the rule as a protection for defendants by not allowing consideration of contacts with the forum state after the claim arose, even though it applied the rule to allow personal jurisdiction over a defendant who no longer had any connection with the forum state.

Other courts have cited *Steel* and its "fair warning" thesis as grounds for preventing a court from considering additional contacts between the defendant and the forum state after the claim arose.¹⁷⁹ This fair warning rationale is based upon a few isolated and unsupported statements in some of the Supreme Court's personal jurisdiction decisions. For reasons that are discussed in much more detail below,¹⁸⁰ the fair warning rationale seems poorly analyzed and weakly supported, and it ought not to be used as a foundation for decisions on the timing of minimum contacts.

The First Circuit has ruled that the time for determining minimum contacts in a specific jurisdiction case is the date on which the cause of action arose, so that neither the defendant's later lessening of contacts with the forum,¹⁸¹ nor a defendant's increased contacts with the forum,¹⁸² have any effect on the specific jurisdiction analysis. The First Circuit explained the reasons for this rule in *Harlow v. Children's Hospital*, which considered whether the state of Maine would have personal jurisdiction over a malpractice claim against a Massachusetts hospital.¹⁸³ The court stated that "three key themes of specific jurisdiction analysis" required the court to focus solely on the events leading up to and involving the events that gave rise to the cause of action.¹⁸⁴ The themes identified by the court were that "there be fair

¹⁷⁷ *Id.* at 1549.

¹⁷⁸ *Id.* at 1550.

¹⁷⁹ *See, e.g.*, *Falcon Enters., Inc. v. Centurion Ltd.*, No. C07-0065RSL, 2007 WL 3046201, at *2 (W.D. Wash. Oct. 18, 2007) ("Because the due process clause [sic] requires that a person have fair warning that his conduct within the forum may subject him to litigation there, such post-filing contacts cannot constitute purposeful availment and clearly do not give rise to this case.").

¹⁸⁰ *See infra* notes 262–76 and accompanying text.

¹⁸¹ *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, 295 F.3d 59, 66 (1st Cir. 2002).

¹⁸² *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005).

¹⁸³ *Id.* at 54.

¹⁸⁴ *Id.* at 61.

notice to the defendant, that the defendant must have purposefully availed itself of the forum state, and that the forum-based activity be truly related to the cause of action.”¹⁸⁵ The court went on to argue that these concepts are all designed to ensure that exercises of jurisdiction comport with due process. The Due Process Clause requires fair warning as to where an individual’s conduct will subject them to suit, and for purposes of specific jurisdiction, “this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.”¹⁸⁶

Some courts have cited other reasons to justify limiting the relevant minimum contacts to those occurring up to and including the events giving rise to the litigation, although none of the explanations is particularly persuasive. For example, in cases involving insurance companies,¹⁸⁷ courts have justified the limitation on the ground that “[s]ignificant consideration of post-accident investigation and settlement contacts would deter good faith attempts by insurers to settle.”¹⁸⁸ This problem does not, however, require a general rule that no post-claim contacts may count because the courts’ concerns could be addressed by a more targeted rule—that contacts involving efforts to settle outstanding claims will not be counted in assessing minimum contacts. Still, other courts utilize the time the cause of action arose rather than the time the plaintiff filed the complaint in order to establish a rule that “prevents a defendant from escaping personal jurisdiction by removing itself from the forum after having inflicted damage on the plaintiff.”¹⁸⁹ But this rationale does not require a rule that post-claim contacts are irrelevant; it only requires a rule that contacts will satisfy due process if they are sufficient *either* at the time the claim arose *or* at the time the court decides the jurisdictional issue. Other courts have indirectly adopted such a rule by rejecting the defendant’s assertion that, in addition to having minimum contacts at the time the claim arose in a specific jurisdiction case, the court must also establish that there are continuing contacts with a forum at the time the suit is filed.¹⁹⁰

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)) (internal quotation marks omitted).

¹⁸⁷ See *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990); *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987).

¹⁸⁸ *Farmers Ins. Exch.*, 907 F.2d at 913; accord *Rossmann*, 832 F.2d at 287 n.2.

¹⁸⁹ *Tecre Co. v. Buttonpro, Inc.*, 387 F. Supp. 2d 927, 930–31 (E.D. Wis. 2005).

¹⁹⁰ See, e.g., *Nielsen v. Sioux Tools, Inc.*, 870 F. Supp. 435, 440 (D. Conn. 1994); *Steege*

The courts that allow consideration of post-claim contacts with the forum state focus on the relevance of these contacts to the claim. For example, in *Logan Productions, Inc. v. Optibase, Inc.*,¹⁹¹ the Seventh Circuit reversed a district court's conclusion that there was no personal jurisdiction over a defendant who manufactured a compact disc encoding machine that it sold to a Wisconsin video production company.¹⁹² The plaintiff sued the Texas-based defendant in Wisconsin in September 1994 for breach of contract, common law fraud, and consumer fraud under a Wisconsin statute.¹⁹³ In response to the defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff relied not only on the defendant's contacts with it that led up to the sale of the defendant's machine, but also on actions taken by the defendant to market its products in Wisconsin, including a number of post-claim and some post-complaint contacts.¹⁹⁴ In order to decide the personal jurisdiction issue, the court thought it was essential to determine whether the defendant "intentionally served the Wisconsin market."¹⁹⁵ If it did, then the defendant "purposefully established sufficient minimum contacts to subject it to personal jurisdiction in Wisconsin."¹⁹⁶ The defendant argued that, because the case was a specific jurisdiction case, only those contacts directly arising out of its deal with the plaintiff were relevant to the personal jurisdiction question.¹⁹⁷ The court, however, disagreed with the defendant's narrow focus and decided to "consider the overall relationship between [the defendant], Wisconsin, and the litigation."¹⁹⁸ In analyzing this relationship, the court decided that the defendant's post-sale contacts with the forum state were significant in determining whether the defendant intended to serve the forum state's market.¹⁹⁹

Similarly, in *Daniel J. Hartwig Associates, Inc. v. Kanner*,²⁰⁰ the Seventh Circuit considered whether there was personal jurisdiction over an attorney in connection with a lawsuit filed by an environmen-

Corp. v. Ravenal, 830 F. Supp. 42, 48 (D. Mass. 1993); *McDaniel v. Armstrong World Indus.*, 603 F. Supp. 1337, 1344 (D.D.C. 1985); *Boeing Co. v. Spar Aerospace Prods. Ltd.*, 380 F. Supp. 101, 105 (E.D. Pa. 1974).

¹⁹¹ *Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49 (7th Cir. 1996).

¹⁹² *Id.* at 54.

¹⁹³ *Id.* at 52.

¹⁹⁴ *Id.* at 51-52.

¹⁹⁵ *Id.* at 53.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213 (7th Cir. 1990).

tal consulting firm that had provided consulting and expert witness services to the defendant.²⁰¹ The defendant attorney maintained law offices in Philadelphia and New Jersey, while the plaintiff had its sole office in Wisconsin and, therefore, filed suit there.²⁰² The defendant had never visited the state of Wisconsin in connection with its business relationship with the plaintiff, but had solicited the plaintiff's services for several cases.²⁰³

In deciding the personal jurisdiction question, the court stated that the purpose of the minimum contacts requirement was to protect "the defendant's interest in not being subject to the binding judgments of a forum state in which the defendant has not established meaningful contact, ties or relations."²⁰⁴ These contacts, the court stated "must be such that he could reasonably anticipate being subjected to suit there. Thus, the main factor in the due process analysis is foreseeability of being subjected to suit in the forum state."²⁰⁵ The court thus took the Supreme Court's admonition that the defendant must "reasonably anticipate" being subjected to suit in the forum state and turned it into an analysis in which the main factor was "foreseeability of being subjected to suit in the forum state," thus leaving out the key word in the Supreme Court's formulation ("reasonably").²⁰⁶ The court ultimately concluded that the defendant could foresee being subjected to suit in a Wisconsin court because it solicited the plaintiff's services on a number of occasions, which created a continuing relationship between the defendant and the forum state.²⁰⁷ This continuing relationship persisted beyond the initial contacts that first gave rise to the plaintiff's claim, and was enough to allow the court to conclude that the defendant's contacts were not "random, fortuitous or attenuated," and that the defendant could foresee being subjected to the jurisdiction of the Wisconsin court.²⁰⁸

In *United Phosphorus, Ltd. v. Angus Chemical Co.*,²⁰⁹ the court gave a longer-than-unusual explanation for its ruling on the timing of minimum contacts. The case was an antitrust action filed by an American company against several foreign corporations on the ground that

²⁰¹ *Id.* at 1215.

²⁰² *Id.* at 1216.

²⁰³ *Id.* at 1216, 1218.

²⁰⁴ *Id.* at 1218 (internal quotation marks omitted).

²⁰⁵ *Id.* (internal quotation marks and citations omitted).

²⁰⁶ *See id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1219.

²⁰⁹ *United Phosphorous, Ltd. v. Angus Chem. Co.*, 43 F. Supp. 2d 904 (N.D. Ill. 1999).

the defendants had conspired to prevent the plaintiff from entering the markets for two particular chemicals.²¹⁰ Two of the defendants moved to dismiss on personal jurisdiction grounds. The first issue the court addressed was whether the defendants' contacts with the forum state after the filing of the complaint were relevant to the issue whether the court had specific jurisdiction over the plaintiff's claim.²¹¹ The court stated that "[c]rucial to the minimum contacts analysis is showing that the defendant should reasonably anticipate being haled into court in the forum state because the defendant has purposefully availed itself of the privilege of conducting activities there."²¹² The court concluded that post-complaint contacts were irrelevant because

[t]he focus on whether a defendant has purposefully availed itself of the privilege of conducting activities in the forum state necessarily implies that only conduct prior to the accrual of the cause of action or, at the very latest, the filing of the lawsuit is relevant. In other words, "purposeful availment" implies that the defendant, as shown by its activities, intended to be amenable to suit in the forum state. Conduct post-dating the filing of a complaint by definition cannot show that, when the defendant engaged in the post-complaint acts purportedly supporting jurisdiction, it intentionally exposed itself to the possibility of an event which had already occurred (the filing of a complaint in the forum state).²¹³

The court explained its difference with the majority of the lower courts that considers only those contacts up to the time the cause of action arises on the ground that "additional contacts (*i.e.*, contacts above and beyond the transaction underlying the litigation) may be considered when determining whether the defendant merely placed his product in the stream of commerce, or whether his action was more purposefully directed at the forum state."²¹⁴ Because the Supreme Court has never definitively resolved the issue of whether such contacts are relevant, it is not surprising that commentators and courts disagree on the extent to which contacts that are related, but not causally connected, to the claim should count when it comes to establishing specific jurisdiction.²¹⁵

²¹⁰ *Id.* at 907.

²¹¹ *Id.* at 908.

²¹² *Id.* (internal quotation marks and citation omitted).

²¹³ *Id.*

²¹⁴ *Id.* at 909 (internal quotation marks omitted).

²¹⁵ See Brilmayer, *How Contacts Count*, *supra* note 73, at 80–82 (crafting a definition for a

The court did not, however, consider contacts occurring after the filing of the complaint.²¹⁶ The court concluded that “jurisdiction attaches (or does not attach) as of the time that an action is filed.”²¹⁷ The court based its conclusion on the fact that “the rules regarding personal jurisdiction are founded on the Due Process Clause, which requires that an individual have ‘fair warning’ that a particular activity may subject it to the jurisdiction of the forum state.”²¹⁸ The court found that pre-suit activities can give fair warning to the defendant, while “post-suit activities cannot serve to warn the defendant of an event that has already occurred.”²¹⁹ In addition, the court found that this rule was supported by the “analogous areas of subject matter and appellate jurisdiction” where courts had ruled that jurisdiction must exist at the time the suit is filed.²²⁰

In *Mellon Bank (East) PSFS, National Ass’n v. Farino*,²²¹ the Third Circuit considered whether Pennsylvania would have personal jurisdiction over a bank’s claim that the defendants breached certain guarantee and suretyship agreements.²²² The defendants argued that the court should not consider any contacts they had with Pennsylvania after the loans to which the agreements related went into default and the plaintiff’s claim accrued.²²³ The court rejected this argument on the ground that “Supreme Court precedent in this area commands

“related contact”); Brilmayer, *Related Contacts*, *supra* note 34, at 1452 (same); Simard, *supra* note 3, at 373–81 (arguing for a framework based on episodic and systematic contacts); William M. Richman, Review Essay, 72 CAL. L. REV. 1328, 1345 (1984) (reviewing CASAD & RICHMAN, *supra* note 114) (arguing for a sliding scale approach); Mark M. Maloney, Note, *Specific Personal Jurisdiction and the “Arise from or Relate to” Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265 (1993) (arguing for the adoption of the “but for” test); Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The “But for” Test*, 82 CAL. L. REV. 1545 (1994) (endorsing a rule of relatedness based on whether the defendant’s contacts are relevant to the substantive elements of the plaintiff’s claim); *see also* Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) (“Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state’s jurisdiction than a more tenuous link in the chain of causation. Certainly, jurisdiction that is premised on a contact that is a legal cause of the injury underlying the controversy—*i.e.*, that forms an important, or at least material, element of proof in the plaintiff’s case—is presumably reasonable, assuming, of course, purposeful availment.” (internal quotation marks and citation omitted)); *Alexander v. Circus Circus Enters., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991), *rev’d on other grounds*, 972 F.2d 261 (9th Cir. 1992).

²¹⁶ *United Phosphorus, Ltd.*, 43 F. Supp. 2d at 910.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 910–11.

²²¹ *Mellon Bank (E.) PSFS, Nat’l Ass’n v. Farino*, 960 F.2d 1217 (3d Cir. 1992).

²²² *See id.* at 1219.

²²³ *Id.* at 1223–24.

that such an inquiry is not to be limited in such an arbitrary way.”²²⁴ The court relied on the fact that the Supreme Court in *Burger King Corp. v. Rudzewicz* had ruled that, as to a contract case, a court should consider, among other factors, “contemplated future consequences” and “the parties’ actual course of dealing” in evaluating the defendant’s contacts with a forum state.²²⁵ In applying these factors, the court concluded that it was required to “take into account the defendants’ contacts with the Commonwealth before, during, and *after* the dates the loans were made and the guaranties were executed.”²²⁶

Other courts have reached a similar conclusion on the timeframe for minimum contacts in specific jurisdiction cases without even engaging in the limited analysis of the cases discussed above.²²⁷ Indeed, some courts seem to throw up their hands and adopt an it-all-depends-on-the-facts approach to the issue: “The absence of a bright-line rule establishing a temporal framework for the minimum contacts analysis strongly reinforces the fact-specific, case-by-case nature of all jurisdictional analysis. We are persuaded that a broader timeframe, encompassing the time the complaint was filed, is appropriate here.”²²⁸

The specific jurisdiction cases on the timing of minimum contacts have done an even poorer job than the general jurisdiction cases in resolving the significant questions relating to the timing of minimum contacts. A majority of the cases finds that the proper time to assess minimum contacts is the date on which the claim arises,²²⁹ but a significant minority of cases uses the date on which the lawsuit is filed.²³⁰ As with general jurisdiction cases, there seems to be general agreement not to count contacts arising after the case is filed. In reaching these varying conclusions, the courts strain to find guidance in the Supreme Court’s personal jurisdiction caselaw but manage to find little that is truly helpful. The guiding principles that the courts do find, such as the fair warning theory discussed below, make little sense and prove not to be principles that support any coherent resolution of the timing questions. Similarly, analogies to subject matter jurisdiction

²²⁴ *Id.* at 1224.

²²⁵ *Id.* (emphasis omitted) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985)).

²²⁶ *Id.*

²²⁷ *See, e.g.*, *McMullen v. European Adoption Consultants, Inc.*, 109 F. Supp. 2d 417, 420 (W.D. Pa. 2000); *Conn. Aircraft Corp. v. Smith*, 574 F. Supp. 626, 630 (D. Conn. 1983); *Lachman v. Bank of La. in New Orleans*, 510 F. Supp. 753, 757 (N.D. Ohio 1981).

²²⁸ *McMullen*, 109 F. Supp. 2d at 420.

²²⁹ *See supra* notes 172–90 and accompanying text.

²³⁰ *See supra* notes 191–228 and accompanying text.

cases are also inapposite since the constitutional principles that underlie the doctrines are so different. Once again, the Supreme Court's failure to establish the foundational principles for connecting limits on territorial jurisdiction to the Due Process Clause leaves the lower courts in disarray as they labor to resolve issues like the timing of minimum contacts.

III. HOW COURTS CAN BETTER ADDRESS THE TIMING OF MINIMUM CONTACTS

The Sections above argue that the problems with the decisions concerning the timing of minimum contacts stem from the failure of the Supreme Court to provide any guidance on the reasons why the Due Process Clause limits the exercise of personal jurisdiction. If this conclusion is correct, then it will not be possible to resolve these issues until the Court provides such an explanation. The same absence of foundational principles that afflicts the courts interferes with anyone who wishes to come up with a better resolution of these issues. Nevertheless, it is possible to do better than the courts have in dealing with the timing issues.

A. *The Timing of Minimum Contacts in General Jurisdiction Cases*

In analyzing the timing issues in general jurisdiction cases, it is important to parse carefully the different questions raised in these cases. Three issues seem most crucial: (1) Is it sufficient for the defendant to have the required contacts at the time the claim arose, or is it necessary for the required contacts to exist at the time of the lawsuit? (2) In assessing the contacts at the time of the lawsuit, is a court limited to contacts that exist at the time the lawsuit is filed, or may a court consider the contacts up to the time the motion to dismiss is filed? (3) How far back in time may a court go in examining contacts for the purposes of general jurisdiction?

1. *The Time of the Lawsuit or When the Claim Arose?*

This issue is probably the easiest to resolve because it rests on principles about which the Court has provided better guidance. General jurisdiction is premised on the idea that the defendant's contacts with the forum are so pervasive that it is reasonable to require the defendant's appearance on any claim, regardless of where it arose. This form of jurisdiction is "claim independent"—or, as Professor Mary Twitchell has explained, "dispute-blind"—and therefore facts relating to the claim are not relevant to the determination of jurisdic-

tion.²³¹ Because the claim is irrelevant to the determination of jurisdiction, it should not matter whether the required continuous and systematic contacts exist at the time the claim arose. Rather, as a majority of the lower courts agree, the critical time is the time at which the claim is litigated.

Consider, for example, the following hypothetical: A small corporation has its corporate headquarters in the forum state. During that time, a claim arises against the corporation in another state. Before the claim is filed, the corporation moves its entire operation to a third state. Two years after the corporation has severed all ties with the forum state, the plaintiff files a lawsuit against the corporation in the forum state. Should general jurisdiction apply to the claim and allow the forum state to assert its authority over a defendant who no longer has any connection to the state? The answer has to be no because the basis for the court's assertion of jurisdictional power is the continuous and systematic contacts of the defendant, and they no longer exist at the time the court asserts its authority.

Imagine, alternatively, that a claim arises against the defendant at a time that it has no connection with the forum state. Two years after the claim accrues, the defendant moves its corporate headquarters to the forum state, and one year after that, the plaintiff sues the defendant in the forum state. Because the jurisdictional basis is claim-independent, the lack of contacts with the forum state at the time the claim arose is irrelevant to the assertion of jurisdictional power. Instead, the relevant time is the time when the court asserts its jurisdictional power. And to decide precisely when that is, we must move on to the second question.

2. *When the Lawsuit Is Filed or When the Court Decides the Issue of Jurisdiction?*

Here, we must be more precise about the time when the court asserts its jurisdictional power. Does that happen when the lawsuit is filed or when the court decides that it has personal jurisdiction over the defendant? At first blush, the courts' unanimous instincts to disregard contacts with the forum state after the lawsuit is filed seems to be a reasonable conclusion. After all, once the plaintiff files the complaint, the defendant is obliged to file an answer or motion to dismiss as required by the procedural rules of the court in which the case is filed. Thus, one might think that the date the complaint is filed is

²³¹ See Twitchell, *supra* note 22, at 627.

when the court asserts its power to demand that the defendant litigate in the forum state.

But the answer to this timing question depends on the precise nature of the right that is protected by the Due Process Clause. Does the Clause protect the defendant against having to litigate in a forum without personal jurisdiction, or does the Clause simply protect the defendant against having a judgment entered against it by a court that lacks jurisdiction? If it is the former, then the required contacts must certainly exist on the date that the complaint is filed. If it is the latter, however, then as long as the required contacts exist at the time the court issues its judgment, the defendant's due process rights have not been violated.

Interestingly, notwithstanding the general failure of the Supreme Court to discuss the precise nature of the link between personal jurisdiction and the Due Process Clause, the Court has answered this particular question.²³² In *Van Cauwenberghe v. Biard*,²³³ the Court addressed the issue whether a district court's denial of a defendant's motion to dismiss for lack of personal jurisdiction was immediately appealable under the collateral order doctrine,²³⁴ which is an exception to the usual rule that a federal case may not be appealed until the district court issues a final judgment.²³⁵ In *Coopers & Lybrand v. Livesay*,²³⁶ the Court held that to trigger the exception, the order must satisfy three conditions: it "must [(1)] conclusively determine the disputed question, [(2)] resolve an important issue completely separate from the merits of the action, and [(3)] be effectively unreviewable on appeal from a final judgment."²³⁷ The principal issue in *Van Cauwenberghe* was whether the denial of a motion to dismiss on the ground that the defendant was immune from service of process was effectively unreviewable on appeal because the defendant's right was not just the right not to be subjected to a final judgment, but the right not to have to litigate in a court that had no legitimate power over the defendant.²³⁸

²³² Unfortunately, not a single lower court that has considered the timing issue appears to be aware that the Court has decided this issue, nor has any court discussed the case in which it was decided.

²³³ *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

²³⁴ For cases deciding questions involving the collateral order doctrine, see *Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

²³⁵ See 28 U.S.C. § 1291 (2006).

²³⁶ *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

²³⁷ *Id.* at 468.

²³⁸ *Van Cauwenberghe*, 486 U.S. at 524. The defendant relied principally upon *Mitchell v.*

The Court first ruled that rules of international law did not give the defendant the right not to stand trial and then considered “whether such a right is entailed in the mere assertion that the district court lacks personal jurisdiction because of immunity from service of process.”²³⁹ It determined that “the defense of a civil suit does not significantly restrict a defendant’s liberty.”²⁴⁰ As a result, the Court ruled that, “[i]n the context of due process restrictions on the exercise of personal jurisdiction, this Court has recognized that the individual interest protected is in ‘not being subject to the binding judgments of a forum with which [the defendant] has established no meaningful contacts, ties, or relations.’”²⁴¹ Thus, the defendant possessed no right to be protected against having to defend the case. The Court held, “[b]ecause the right not to be subject to a binding judgment may be effectively vindicated following final judgment . . . the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order.”²⁴²

If the harm against which the Due Process Clause protects a defendant is only the right to avoid a judgment being entered by a court with which it does not have the required contacts, then a court should take into account all of the defendant’s contacts with the forum state up to the time the court resolves the defendant’s motion to dismiss. If the defendant has the required minimum contacts at that point, then the court has not violated any of the defendant’s due process rights.

Other decisions of the Supreme Court provide an additional reason for a court to consider contacts arising after the date of the complaint. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,²⁴³ several defendants asserted a personal jurisdiction defense that eventually became one of the grounds for their motion for summary judgment.²⁴⁴ The plaintiff sought discovery from the defendants in order to establish that the defendant had the required minimum

Forsyth, 472 U.S. 511 (1985), in which the Court held that the denial of the Attorney General’s motion to dismiss on qualified immunity grounds was immediately appealable as a collateral order because the qualified immunity embodied not only the right to be free from a judgment entered against the Attorney General, but also the right to be free from having to defend the case at all. *Id.* at 524–30. If the Attorney General had to wait to appeal the denial of his qualified immunity motion, then a substantial part of the right would be lost. *See id.*

²³⁹ *Van Cauwenberghe*, 486 U.S. at 526.

²⁴⁰ *Id.*

²⁴¹ *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)) (additional internal quotation marks omitted).

²⁴² *Id.* at 527.

²⁴³ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

²⁴⁴ *Id.* at 698.

contacts with the forum state.²⁴⁵ After the defendants failed to provide material the trial court had ordered them to produce, the court sanctioned the defendants by finding that “for the purpose of this litigation the [defendants] are subject to the in personam jurisdiction of this Court due to their business contacts with Pennsylvania.”²⁴⁶

In the Supreme Court, the defendants argued that the trial court did not have the authority to establish personal jurisdiction over the defendants as a sanction for failing to produce the discovery material.²⁴⁷ The Court rejected the defendants’ argument by sharply distinguishing between the issues of subject matter and personal jurisdiction. Unlike subject matter jurisdiction, which rests on constitutional principles of federalism and which, therefore, may not be waived, the limits on a court’s personal jurisdiction are based upon an individual’s right that may be waived.²⁴⁸ A defendant has the option not to appear to defend against a complaint and to later challenge the subsequent default judgment in a collateral attack.²⁴⁹ But if the defendant chooses to appear in the case, it consents to the court’s adjudication of the issue of personal jurisdiction, and, “[b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court’s determination on the issue of jurisdiction: [t]hat decision will be res judicata on that issue in any further proceedings.”²⁵⁰ Moreover, because “the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding,” the defendant’s consent to the court’s determination of the personal jurisdiction issue is also consent to the procedures necessary to make that determination.²⁵¹

The implications of *Insurance Corp. of Ireland* for the timing issue are clear. By choosing to appear and defend the jurisdictional issue in response to the complaint, a defendant consents to the power of the court to determine the jurisdictional issue. Thus, any judicial assertion of power prior to the determination of the personal jurisdiction issue is based upon the defendant’s consent, and there is no need for minimum contacts to establish the power of the court to proceed through the resolution of the personal jurisdiction motion. Thus, even

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 699 (internal quotation marks omitted).

²⁴⁷ *Id.* at 701.

²⁴⁸ *Id.* at 701–02.

²⁴⁹ *Id.* at 706.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 707.

if, contrary to what the Court established in *Van Cauwenberghe*,²⁵² a defendant had a due process right not to be subjected to a judicial proceeding, that right would not require the existence of minimum contacts until the trial court had ruled on the issue of personal jurisdiction. Prior to that point, personal jurisdiction would be justified on the basis of consent. As a result, the time when there must be minimum contacts in order to provide a basis for jurisdiction is the time when the trial court decides the personal jurisdiction motion, and any contacts up to that point are jurisdictionally timely.

3. *How Far Back in Time May a Court Look for Contacts?*

The question of how far back in time a court may look in order to establish the minimum contacts required for general jurisdiction actually involves two separate issues. The first issue is how chronologically distant the contacts may be to establish “continuous and systematic” contact at the time of the litigation. The second issue is how far back a trial court should allow the plaintiff to search through discovery of the defendant’s connections with the forum state. It is important to distinguish these two issues because the first issue should not be resolved by making a chronological dividing line, while the second issue must be resolved that way.

The first issue need not and should not be resolved with precise chronological parameters. If one assumes that general jurisdiction is based on the assumption that, at the time of the lawsuit, the defendant has such significant contacts with the forum state that it is reasonable for the forum court to assert personal jurisdiction over any claim, regardless of where it arises, then for a contact to be relevant it must tend to show such presence at the time of the lawsuit. If the contacts are corporate headquarters or other corporate operations, then this determination is easy; the facility must be present in the forum at the time of the lawsuit. But what if the assertion of general jurisdiction is based upon sales in the forum state or other contacts that occur over time? Although the Supreme Court has never expressly approved of general jurisdiction based upon repeated contacts, lower courts have frequently used such contacts as a basis for general jurisdiction.²⁵³

²⁵² See *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526–27 (1988).

²⁵³ See, e.g., *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state); *Mich. Nat’l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465–66 (6th Cir. 1989) (holding the defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan); *Provident Nat’l Bank v. Cal. Fed. Sav. & Loan Ass’n*, 819 F.2d 434, 436–38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to

In general jurisdiction cases based on repeated contacts, such as sales, a court must make a determination about the period during which such repeated contacts are relevant. Unlike general jurisdiction based upon physical presence, general jurisdiction based upon repeated contacts cannot be assessed based upon one point in time, but by its very nature occurs over some period of time. It is impossible, however, to identify a particular time period, because the relevant factors for a court to consider are the amount and the constancy of such contact. The relevant time period for the data points that make up this analysis will necessarily differ from case to case. Most lower courts have implicitly recognized this by specifying that a court may consider contacts over a “reasonable” period of time.²⁵⁴ The problem with these cases, however, is that they give no guidance on what a reasonable period of time might be and what factors a court should consider in determining what time period is reasonable. This uncertainty and ambiguity are directly attributable to the lack of guidance on what constitutes sufficient minimum contacts to establish general jurisdiction. The vagueness of these decisions is, in turn, a clear indictment of the imprecision and lack of foundational principles in the Supreme Court’s caselaw on general jurisdiction. Thus, the lower courts (and the Supreme Court, if it ever decides to address the issue) should spend less time worrying about the time period and more time identifying the kinds of contacts that establish general jurisdiction.

The courts do have to worry about the precise time period when it comes to the issue of discovery, however. If the defendant moves to dismiss for lack of personal jurisdiction, the plaintiff may need to conduct discovery to determine the kinds of contacts the defendant has with the forum state. It may, however, be unduly burdensome to require the defendant to disclose these contacts into the indefinite past. In such a case, the court should resort to the usual balancing that is

0.083% of its total loan portfolio, plus other contacts, were sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued).

²⁵⁴ See, e.g., *Mold-Ex, Inc. v. Mich. Technical Reps., Inc.*, No. 304CV307MCRMD, 2005 WL 2416824, at *5 (N.D. Fla. Sept. 30, 2005) (“[C]ontacts are commonly assessed over a period of years prior to the filing of a complaint.”); *Young v. Hair*, No. 7:02-CV-212-F1, 2004 WL 1084331, at *3 n.1 (E.D.N.C. Jan. 26, 2004) (“[T]he defendants purposefully availed themselves of North Carolina by directing *all* their sales to this state some five months prior to the commencement of the lawsuit.”); *United States v. Subklew*, No. 003518CIVGRAHAM, 2001 WL 896473, at *3–4 (S.D. Fla. June 5, 2001) (“[D]istrict Courts considering general jurisdiction cases should examine a defendant’s contacts with a forum state over a period that is *reasonable* under the circumstances—up to and including the date the suit was filed [T]he Court finds it is unreasonable to consider [the defendant’s] contacts with [the forum state] over a thirteen year period.” Rather, the court based its decision on the five years prior to the filing of the action.).

required by the Federal Rules of Civil Procedure. In particular, Rules 26(b)(2)(C)²⁵⁵ and 26(c)²⁵⁶ allow a court to issue a protective order to limit the scope of discovery if the burden on the defendant outweighs the likely benefit to the plaintiff. Thus, the court must weigh the likelihood that discovery beyond a certain timeframe will produce evidence that is relevant to the issue of general jurisdiction against the expense of producing such information. The balance will likely vary in different cases since both the burden and the nature of the contacts will depend on the facts of each case. In general, though, the lower courts seem to have reached a reasonable accommodation of the plaintiff's and defendant's interests by allowing discovery over five-year²⁵⁷ or six-year²⁵⁸ periods.

B. The Timing of Minimum Contacts in Specific Jurisdiction Cases

As an initial matter, one must acknowledge that if the Supreme Court were to clarify the rationale underlying the minimum contacts requirement, it would be far easier to come up with a coherent set of principles on the timing of minimum contacts. If the minimum contacts requirement is based upon a social contract theory that requires a relationship between the forum state and the defendant before the defendant may be subjected to the jurisdiction of the state's court sys-

²⁵⁵ FED. R. CIV. P. 26(b)(2)(C) states in relevant part:

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

....

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

²⁵⁶ FED. R. CIV. P. 26(c) states in relevant part:

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

....

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters

²⁵⁷ See, e.g., *Wilson v. Belin*, 20 F.3d 644, 650–51 (5th Cir.), cert. denied, 513 U.S. 930 (1994).

²⁵⁸ See, e.g., *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir.), cert. denied, 519 U.S. 1007 (1996).

tem,²⁵⁹ then it would seem appropriate to measure contacts at the time the claim arose; in specific jurisdiction cases, that is the time when the defendant's actions create the basis for the reciprocal relationship between the defendant and the forum state. If the requirement is really an element of interstate federalism,²⁶⁰ then the date of the complaint seems to be the most relevant time; that is the time that the state first asserts its authority over the defendant in a manner that may offend the proper division of authority between the states. Finally, if the minimum contacts requirement is really just a rough proxy for convenience,²⁶¹ then the date when a court decides the personal jurisdiction motion is the key time because, if by that time the defendant has sufficient contacts with the forum state to make litigation fair and convenient, then there is no reason for the court not to proceed.

Even without resolving the foundational issue concerning the purpose of the minimum contacts requirement, it is possible to answer a number of questions about the timing of minimum contacts in specific jurisdiction cases. Three issues seem most critical: (1) Does a fair warning principle require a court not to count the contacts the defendant has with the forum state after the time the claim arose? (2) May a court consider related, but not causally connected, contacts up to the time the issue of personal jurisdiction is decided? (3) May a court consider contacts that have ceased by the time the claim has arisen?

1. Does a Fair Warning Principle Require a Court Not to Count the Contacts Defendant Has with the Forum State After the Time the Claim Arose?

As previously noted, the majority of courts that have considered the timing of minimum contacts in specific jurisdiction cases has used the date the claim arose as the proper time for assessing the contacts.²⁶² One of the principal reasons for using this cutoff is the assertion that the Due Process Clause requires notice to the defendant that it may be subject to personal jurisdiction and that this notice must be provided at the time the claim arises. As the Ninth Circuit stated:

Mindful that the Due Process Clause require[s] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, courts must examine the defendant's contacts with the forum

²⁵⁹ See *supra* text accompanying notes 73–74.

²⁶⁰ See *supra* text accompanying note 75.

²⁶¹ See Clermont, *supra* note 71, at 416; Lewis, *supra* note 71, at 711–12.

²⁶² See cases cited *supra* note 167.

at the time of the events underlying the dispute when determining whether they have jurisdiction. When a court is exercising specific jurisdiction over a defendant arising out of or related to the defendant's contacts with the forum, the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred.²⁶³

There are several problems with this formulation. First, as previously noted, the courts that utilize this principle rely on two quotations from Supreme Court cases that are given far more weight than they deserve.²⁶⁴ The original quotation comes from Justice Stevens's concurring opinion in *Shaffer v. Heitner*.²⁶⁵ Leaving to one side the fact that the opinion is merely a concurring opinion of one Justice, the statement appears as a complete ipse dixit without any support or explanation as to why the Due Process Clause should require such notice. Justice Stevens, after noting the constitutional requirement of notice of a lawsuit, simply states: "[t]he 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."²⁶⁶ This appears as a bald assertion without citation, and, in fact, it has no support in previous caselaw. A similar idea appeared in *World-Wide Volkswagen*, where the Court, in disclaiming any significance to the fact that the defendant could foresee that the car it sold might wind up in the forum state where its malfunction could give rise to a cause of action, stated:

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

²⁶³ *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) (internal quotation marks and citations omitted).

²⁶⁴ See *supra* note 114 and accompanying text.

²⁶⁵ *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment).

²⁶⁶ *Id.*

where that conduct will and will not render them liable to suit.²⁶⁷

According to the Court, a defendant, realizing, based upon the clarity of the Court's personal jurisdiction decisions, that it will be subject to jurisdiction in a certain state's courts, "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."²⁶⁸ This concept was later picked up by Justice Brennan and, combined with Justice Stevens's idea from *Shaffer*, used in *Burger King* to explain that "this 'fair warning' requirement is satisfied if the defendant has 'purposely directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."²⁶⁹ Thus is a "fair warning" requirement made.

The first problem with the idea of a fair warning requirement is that it is at most dictum in the Supreme Court cases in which it is discussed. The requirement never serves as the basis for any of the Court's decisions.²⁷⁰ The second problem is that the requirement has no historical foundation in any of the Court's prior caselaw on the subject of personal jurisdiction or the Due Process Clause. The third problem is that the formulation seems to confuse the requirement that a defendant have notice of a lawsuit with the issue whether a defendant must have notice that she is subject to personal jurisdiction in a particular state.²⁷¹ The fourth problem is that the Court's assumption

²⁶⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted).

²⁶⁸ *Id.*

²⁶⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted).

²⁷⁰ See *World-Wide Volkswagen Corp.*, 444 U.S. at 295 (finding that the petitioners carried on no activity in the forum state, nor did they avail themselves of the benefits of the forum state); *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring in the judgment).

²⁷¹ As Professor James Weinstein has written:

Justice Stevens's attempt to explain limits on personal jurisdiction in terms of the notice requirement is unpersuasive, for his argument conflates two very different types of notice: notice that a lawsuit has been filed against a defendant, and notice that engaging in certain activity will subject one to the jurisdiction of the courts of a particular state. The first type of notice is the one addressed in *Mullane*, and is a well-established requirement of procedural due process. The second type of notice, however, lest it be entirely circular, must contain a core substantive norm protecting unconsenting defendants from assertions by unaffiliated sovereigns. To this end, the Court has never said that it is sufficient for purposes of personal jurisdiction that a defendant need only "anticipate" being haled into a state's legal system (anticipation that could be created merely by sufficient publicity of a state's desire to assert jurisdiction in a particular class of cases). Rather, a defendant must be

that defendants plan their behavior on where they will be subject to personal jurisdiction is simply not credible. It is hard to believe that a defendant would forego a potentially lucrative market or transaction because it might subject her to the personal jurisdiction of a particular state. It is also far from clear that defendants purchase insurance based upon where they may be subject to personal jurisdiction. Both of these claims are merely unsupported assertions by the Court, made without any foundation or evidence. It is far more likely that a defendant's marketing decisions and insurance arrangements would be affected by which state's substantive law will govern a case. Yet, as previously noted, the Court does not require any particular connection between the defendant and the forum state for the forum state to apply its own law in a particular case.²⁷² Moreover, the chaotic state of the Supreme Court's personal jurisdiction precedents hardly gives any potential defendant fair warning that she will be subject to the personal jurisdiction of a particular state's courts. It is almost laughable that the Court in *World-Wide Volkswagen* talks about how the Due Process Clause "gives a degree of predictability to the legal system."²⁷³

The fifth problem is that, as a basis for the connection between the Due Process Clause and the limits on a state's judicial jurisdiction, it is entirely circular.²⁷⁴ The fair warning principle does not support any particular theory of personal jurisdiction; it only supports the idea that the scope of a state's judicial jurisdiction should be certain and understandable. The Supreme Court could notify every potential defendant much more clearly than it now does by simply declaring that defendants are subject to suit anywhere in the United States. Then defendants would be on certain notice as to where they could be sued, and assuming potential defendants ever take such things into account, they could plan their affairs accordingly.²⁷⁵ There is little doubt that

able to "reasonably anticipate" being haled into the courts of that state before personal jurisdiction can attach.

Weinstein, *supra* note 3, at 235 n.255 (citations omitted).

²⁷² See *supra* text accompanying notes 60–64.

²⁷³ *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

²⁷⁴ See Stewart Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429, 443–44 (1981); David H. Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U. L.Q. 273, 305 ("It is tautological to argue that 'broad' jurisdiction exists in states with which defendants have relatively permanent contacts because defendants reasonably should anticipate [it].").

²⁷⁵ The bizarre idea that the Supreme Court's current decisions make the prospect of personal jurisdiction predictable is repeated in Justice Brennan's opinion in *Burnham v. Superior Court*, in which he suggests that "[t]he transient rule is consistent with reasonable expectations

such a rule would be vastly more predictable than the current set of rules, which is anything but predictable and which encourages excessive litigation to resolve the uncertainty of personal jurisdiction over the defendant.²⁷⁶

Finally, even if it were correct that the Due Process Clause establishes some sort of fair warning principle, such a principle would not warrant a rule that requires that minimum contacts be assessed at the time the claim arises. Assume that at the time the claim arises, the defendant does not have sufficient contacts with the forum state to warrant specific jurisdiction. If, thereafter, the defendant takes actions that create sufficient minimum contacts, the defendant reasonably should know, under the fair warning thesis, that those acts could give rise to personal jurisdiction in the forum state. At that point, the defendant already knows that a claim has arisen and that any further contacts with the forum state might give rise to personal jurisdiction. Thus, even if one accepts the fair warning principle, it does not support a limitation on the timing of minimum contacts to the date the claim arose.

and is entitled to a strong presumption that it comports with due process" because when one travels to another state, one "knowingly assume[s] some risk that the State will exercise its [jurisdictional] power . . . while there" and that this contact "gives rise to predictable risks." *Burnham v. Superior Court*, 495 U.S. 604, 637 (1990) (internal quotation marks omitted). How predictable is it that if one travels to California for three days, one will be caught by a process server? I suppose that the existence of the risk is predictable, but the amount of the risk certainly is not.

²⁷⁶ See *Casad*, *supra* note 12, at 1593 ("Because outcomes are often difficult to predict, parties are inclined to litigate the question of personal jurisdiction in every case where the issue is not crystal clear. Hence, we get more and more conflicting decisions."); see also *Borchers*, *supra* note 18, at 102–04 (complaining about the lack of predictability that has resulted from the Court's approach to personal jurisdiction questions); Bruce Posnak, *The Court Doesn't Know Its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 885–86 (1990) (arguing that the Supreme Court's personal jurisdiction decisions create unpredictable results). For examples of identical facts giving rise to different results, compare *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470, 476 (N.D. Ill. 1987), where *Carnival Cruise Lines, Inc.* was subject to jurisdiction in Illinois, with *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986), where *Carnival Cruise Lines* was not subject to jurisdiction in Kansas, and *Oloff v. Kiamesha Concord, Inc.*, 254 A.2d 330, 333 (N.J. Super. Ct. Law Div. 1969), a case that found a New York resort hotel subject to jurisdiction in New Jersey, with *Miller v. Kiamesha-Concord, Inc.*, 218 A.2d 309, 313–14 (Pa. 1966), where the same New York resort hotel was not subject to jurisdiction in Pennsylvania. For another example, see also Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 473 (1981), which discusses two antitrust cases against the same defendant arising out of the same facts with similar contacts in each case in which one district court upheld jurisdiction. See *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 668 (D.N.H. 1977) (upholding jurisdiction); *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1025 (D. Minn. 1976) (denying jurisdiction).

For all of these reasons, it is simply unsupportable to use a fair warning principle as the basis for a decision to use the date that a cause of action accrues as the proper time to assess minimum contacts in specific jurisdiction cases. Courts must find the answer someplace else.

2. *May a Court Consider Contacts up to the Time the Issue of Personal Jurisdiction Is Decided?*

If one accepts that the fair warning principle does not support a clear time boundary for minimum contacts in specific jurisdiction cases, then one is led inexorably to the conclusion that the search for a specific time at which to determine minimum contacts simply begs the question of what kinds of contacts are constitutionally significant. Should a court consider only the contacts with the forum state in which the claim arises or are additional related contacts also relevant to the personal jurisdiction analysis? Until one answers this question, it is impossible to resolve the question of the timing of minimum contacts.

As a result, the lower courts' decisions on the timing of minimum contacts have a peculiarly circular logic. The lower courts seek to define time limits in order to determine which contacts are relevant, but they cannot fix appropriate time limits without first deciding which kinds of contacts are relevant in specific jurisdiction cases. Thus, the lower courts that use the date the claim arose as the basis for their timing decisions do so based in large part upon the conclusion that the only relevant contacts are those out of which the claim arises.²⁷⁷ Many of the courts that allow contacts beyond the date on which the claim arises do so because they find that it is permissible to take into account certain related contacts in specific jurisdiction cases even if the claim does not directly arise out of them.²⁷⁸ Thus, ultimately the issue of the timing of minimum contacts in specific jurisdiction cases is simply a mask for the more fundamental issue of what kinds of contacts count.

Because the Supreme Court has given so little guidance on the question of which contacts count, the lower courts have been left to struggle on their own to divine meaning from random facts and statements in the Court's precedents, which has led to decidedly inconsistent results. At times the Court has seemed to suggest that only those

²⁷⁷ See cases cited *supra* note 167.

²⁷⁸ See cases cited *supra* note 168.

contacts out of which the claim arose are relevant,²⁷⁹ while at other times the Court has suggested that contacts that are related to (but not the basis of) the claim may be relevant to the establishment of specific jurisdiction.²⁸⁰ In *Helicopteros*, the Court acknowledged the issue, but expressly disclaimed ruling on it:

Respondents have made no argument that their cause of action either arose out of or is related to [the defendant's] contacts with the State of Texas. 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. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.²⁸¹

This is where the lower courts are stymied by the failure of the Supreme Court to address key foundational questions about the nature of the territorial limitations of personal jurisdiction. Without knowing what kinds of contacts are relevant to the establishment of specific jurisdiction, the lower courts cannot satisfactorily resolve the questions surrounding the timing of minimum contacts. Without knowing what due process principles require territorial limits on the scope of a court's jurisdiction to adjudicate, it is difficult to resolve the question of what kinds of contacts count.

For instance, if only those contacts out of which a claim arises count for the purposes of establishing specific jurisdiction, then, almost by definition, the relevant contacts must exist at the time the claim arises. Any contacts after the claim arises cannot be causally connected to the claim and therefore would not count in the assessment of minimum contacts. If, on the other hand, a court may count contacts that are related to the claim but not causally connected to it, then it may be permissible to count contacts up to the point when the court decides the issue of personal jurisdiction.

²⁷⁹ See *Hanson v. Denckla*, 357 U.S. 235, 251–52 (1958).

²⁸⁰ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985).

²⁸¹ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984).

In order to give this issue a sharper focus, let us think about what kinds of contacts might count, even if the claim did not arise directly out of those contacts. Justice O'Connor addressed this question in her plurality opinion in *Asahi*, in which she discussed the importance of contacts that affiliate a defendant with the forum state, even though the claim might not be said to arise from those contacts.²⁸² Justice O'Connor suggested that an upstream manufacturer who sold a product to another manufacturer outside of the forum state might be subject to specific jurisdiction if the upstream manufacturer had certain affiliating contacts with the forum state, even if the claim was not causally connected to those contacts in any way.²⁸³ According to Justice O'Connor, even though placement of a product into the stream of commerce with the knowledge that it would ultimately be sold in the forum state was insufficient to establish the required minimum contacts,

[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, 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.²⁸⁴

If *Asahi* had established those kinds of contacts with the state of California, and they could be considered in assessing minimum contacts, what would be the appropriate temporal boundaries of such contacts? If there is no need for these contacts to have given rise to the claim, then there is no reason not to count them all the way up to the point in time when a court decides the question of personal jurisdiction. Suppose that *Asahi* had begun an advertising campaign aimed at California tire manufacturers after the lawsuit had been filed and, at the same time, had retained a California distributor to help market its valves in California. Then, at the time the court was considering personal jurisdiction, *Asahi* would have established the kinds of affiliating contacts that Justice O'Connor deemed to be relevant to the satisfaction of the minimum contacts requirement. As long as the contacts are sufficiently related to the claim to count, then there is no more reason to bar them on temporal grounds than there would be in

²⁸² See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987) (plurality opinion).

²⁸³ *Id.*

²⁸⁴ *Id.* at 112.

assessing the contacts that count for general jurisdiction. Indeed, Justice O'Connor's opinion in *Asahi* discusses contacts that were assessed after the complaint was filed.²⁸⁵

This conclusion, of course, might vary depending on the purposes that underlie the minimum contacts requirement. If the purpose of the requirement is to ensure that the defendant has established a relationship with the forum state that involves reciprocal benefits and burdens, then such a relationship certainly exists at the time the court determines the jurisdictional issue. Different foundational principles might result in a different analysis of the timing issue as well as of the issue whether related contacts count.

3. *May a Court Consider Contacts that Have Ceased by the Time the Claim Has Arisen?*

The foregoing analysis answers the question of how far forward in time contacts may count, but it does not answer the question of how far forward in time contacts must *extend* in order to count. What if, for example, *Asahi* had established the related contacts with California, but had terminated all of those contacts by the time the claim arose? Should those former contacts with the forum state count in the minimum contacts analysis? If only causally connected contacts count, then this question answers itself. If the contacts ceased before the claim arose and did not themselves give rise to the claim, then they would not be counted as part of the minimum contacts analysis. If related, but causally unconnected, contacts may be counted, then the question is more difficult. If the related, but causally unconnected, contacts have ceased before the claim arose, then it is relatively easy to conclude that they should not be counted. They did not give rise to the claim, and by the time claim arose, the defendant had ceased the intentional affiliation with the forum that could give rise to a reciprocal obligation to answer to the jurisdiction of the state's courts.

But what if the contacts ceased after the claim arose, but before the complaint was filed? Should those contacts count in the analysis? The answer to this question lies in the nature of specific jurisdiction and the relationship between the related contacts and the claim itself. Unlike general jurisdiction, where the contacts by definition require no connection at all to the claim, in a specific jurisdiction case, the contacts must at least be related to the events that give rise to the

²⁸⁵ *Id.* at 105, 107.

claim. If Asahi had been marketing its product in California at the time the claim arose, then the affiliation created by the intentional contacts and the events giving rise to the claim would have imposed a duty on Asahi to defend the claim in California's courts. The related contacts fuse with the events giving rise to the claim to give California jurisdiction over that claim that cannot be divested, even if the related contacts cease.

For the purposes of this discussion, it is not necessary to attempt to resolve the question whether related contacts count toward the establishment of specific jurisdiction even if the claim does not arise out of the contacts. It is sufficient for these purposes to argue that the issue of the timing of minimum contacts must be answered by resolving the issue of related contacts first, and not the other way around. It is not the timing of the contacts that counts, but rather the nature of the contacts' connection to the claim and whether that connection is sufficiently close for the contacts to matter in establishing specific jurisdiction. In any event, the Supreme Court must address and resolve this issue before the lower courts can coherently address the issue of the timing of minimum contacts in specific jurisdiction cases.

CONCLUSION

The decisions on the timing of minimum contacts tell us much about the state of personal jurisdiction law. First, they show how the Supreme Court's failure to enunciate any clear rationale for why there should be a minimum contacts requirement has confused the lower courts. The Court's inadequate guidance has led to lower court decisions that are weakly reasoned and that search for meaning where none can be found. Second, the failure of the Court to establish foundational principles for the law of personal jurisdiction has created confusion and uncertainty about what kinds of contacts count when trying to establish either general or specific jurisdiction. This confusion has led lower courts to try to impose some structure on the chaos of personal jurisdiction litigation by defining temporal limits on the relevant minimum contacts.

The result of the lack of Supreme Court guidance has been shallow, poorly reasoned lower court decisions on the timing of minimum contacts that are widely inconsistent and give little coherent guidance to litigants. Thus, the lens of the timing cases gives us a good look at the cost of the Supreme Court's muddled caselaw, and it appears that the cost is significant indeed, both to the efficiency of the lower courts

and to the effective guidance of litigants looking for clear principles on the scope of personal jurisdiction.

Ultimately, to resolve the timing issues, it is first necessary to decide questions about what kinds of contacts count, both in general and specific jurisdiction cases. Until those predicate decisions are made, it is difficult to resolve many of the timing issues that the lower courts have been attempting to address. Yet it is hard to make those predicate decisions wisely without any indication from the Supreme Court about why any territorial contacts are necessary to satisfy the Due Process Clause.

The absence of foundational principles for the minimum contacts requirement does not, however, prevent us from reaching a number of important conclusions about the lower court cases on the timing of minimum contacts. In both general jurisdiction and specific jurisdiction cases, the courts have made significant mistakes by imposing unwarranted time constraints on minimum contacts based upon unsupported conclusions drawn from murky Supreme Court precedent. In general jurisdiction cases, the courts have unwisely refused to consider contacts after a complaint has been filed. There are good reasons to permit courts to consider relevant contacts up to the time the court decides a motion on personal jurisdiction.

In specific jurisdiction cases, the courts should not base timing rules on the assumption that the purpose of the minimum contacts requirement is to provide fair notice to defendants that they may be subject to the jurisdiction of a particular state's courts. The fair warning thesis makes no sense as a basis for the minimum contacts requirement, and it would not warrant the rules the courts have adopted even if it did. Even if the Court does not explain the rationale for the minimum contacts requirement, it could simplify the timing issue by resolving the issue whether related—but not causally connected—facts are relevant to the determination of specific jurisdiction. Finally, resolving the status of related contacts would also answer the question whether a court should consider contacts that terminate either before the claim arose or before the suit is filed. Thus, even if the Court cannot manage to address the foundational issue concerning the purpose of the minimum contacts requirement, it can make the job of the lower courts easier by answering questions about the relevance of related contacts to the determination of specific jurisdiction.