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CIVIL PROCEDURE—BE MORE SPECIFIC: VAGUE PRECEDENTS AND THE DIFFERING STANDARDS BY WHICH TO APPLY "ARISES OUT OF OR RELATES TO" IN THE TEST FOR SPECIFIC PERSONAL JURISDICTION

I. INTRODUCTION

The 14th Amendment grants potential defendants the right to avoid subjection to binding judgments from forums with which they have no minimum contacts.[1] Current case law, however, hinders potential defendants' ability to anticipate, and thereby to avoid, binding judgments without avoiding the forum altogether. This hindrance is a result of ambiguity in the Supreme Court of the United States's decisions in *International Shoe Co. v. Washington*[2] and its progeny.

In *International Shoe*, the Court moved away from *Pennoyer v. Neff*,[3] redefining the standard for specific personal jurisdiction by moving away from a strictly-territorial, state-sovereignty-driven jurisdiction.[4] The Court said that due process requires only that defendants "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[5] In *Hanson v. Denckla*, the Court explained that, for minimum contacts to exist, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[6] Finally, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court highlighted another specific jurisdiction requirement: the plaintiff's cause of action must "arise out of or relate to" the defendant's contacts with the forum state.[7] The federal circuit courts have used the language from these cases to formulate a three-part test for specific-personal jurisdiction.

This note addresses the split in the circuit courts over what is required to satisfy the second element. Specifically, the Court has never set a standard for determining whether a plaintiff's cause of action "arise[s] out of or relate[s]" to a defendant's forum contacts.[8] As a result, the federal circuits have developed several different understandings of the "arise out of or relate to" language from *International Shoe* and *Helicopteros*.[9] The existence of these differing standards defies the purpose of due process and the minimum contacts requirement by diminishing predictability. The Court in *Burger King Corp. v. Rudzewicz* explained that the Due Process Clause makes the legal system predictable by giving potential defendants fair warning that certain contacts may subject them to jurisdiction in a foreign forum.[10] Therefore, defendants can tailor their conduct to avoid jurisdiction. This fair warning is frustrated if different forums apply different standards in assessing whether specific personal jurisdiction exists.

This note begins with a historical discussion of personal jurisdiction, especially specific jurisdiction. Then it describes the five distinct standards by which the circuit courts have interpreted "arise out of or relate to" and the justifications for each. Lastly, this note argues that, of the five tests, the substantive-relevance test best adheres to the policies set out by the Court in *International Shoe* and its progeny, namely due-process fairness and state sovereignty.

II. BACKGROUND

A. Overview of Personal Jurisdiction

1. *From Strict Territorial Restrictions to the More Relaxed "Minimum Contacts" Requirement*

Traditionally, American courts could only exercise personal jurisdiction over defendants who were physically present in the forum state.[11] Many judges adopted this limitation in the early republic, but the Court approved its constitutionality in 1887.[12] The landmark case, *Pennoyer v. Neff*, involved an Oregon attorney, Mitchell, who sued a California resident, Neff, in Oregon for unpaid legal fees of less than $300.[13] Mitchell constructively served summons on Neff via publication in an Oregon newspaper.[14] When Neff failed to answer the complaint, Mitchell obtained an in personam default judgment.[15] Because Neff could not be found in Oregon, the court ordered the sheriff to sell a piece of Oregon property that Neff owned, worth about $15,000, and pay Mitchell out of the proceeds.[16] Pennoyer purchased Neff's land, and Neff brought an action in ejectment against him in the Oregon federal court.[17] The action made its way to the Court, which declared that because the Oregon court did not have personal jurisdiction over Neff and did not attach the property at the beginning of the suit, Neff's claim of title was superior to Pennoyer's.[18]

In *Pennoyer*, the Court articulated a territorial test for personal jurisdiction that would serve as the standard for more than half a century.[19] The Court said that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[20] This territoriality principle limited in personam jurisdiction to defendants who were "brought within [the forum state's] jurisdiction by personal service or voluntary appearance."[21] The Court's decision reflected the popular nineteenth-century view of the states as separate territorial sovereigns, much like independent nations participating in a common constitutional scheme.[22] However, this popular view waned with the progression of the industrial era.[23]

2. *The Evolution of the "Minimum Contacts" Standard*

Mass manufacturing and ease of interstate travel brought by the Industrial Revolution increased the states' need for personal jurisdiction over nonresident defendants.[24] While several High Court decisions in this time period hinted at a change to the strict territoriality of *Pennoyer*, the true change did not arrive until 1945.[25] In *International Shoe Co. v. Washington*, the Court held as follows:

> [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]

Using this "minimum contacts" standard, the Court held that the State of Washington could exercise personal jurisdiction over International Shoe Co. in a case involving the company's failure to contribute to Washington's unemployment compensation fund.[27] Washington could not have obtained jurisdiction under *Pennoyer*'s territoriality standard because International Shoe Co. did not have an office in Washington, made no contracts for sale there, and maintained no stock of merchandise there.[28] However, the company employed about a dozen salesmen who resided in Washington and solicited yearly commissions of more than $31,000 over four years.[29] The Court held that this contact with Washington was enough to satisfy due process, stating that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[30]

A series of decisions after *International Shoe* signaled a discernible trend toward increasing each state's jurisdictional reach over out-of-state corporations and other nonresidents.[31] Yet, the Court also said that the "minimum contacts" analysis did not imply the beginning of limitless personal jurisdiction of state courts.[32] In *Hanson v. Denckla*, the Court explained that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[33]

Also, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court observed that personal jurisdiction is divided into general and specific jurisdiction.[34] The Court explained that general jurisdiction exists where the de-

fendant's minimum contacts are "continuous and systematic."[35] In that circumstance, a court may exercise personal jurisdiction even when the plaintiff's cause of action does not "arise out of or relate to" to the defendant's contacts.[36] However, when the defendant's forum contacts are *not* continuous and systematic, a court may exercise specific jurisdiction (so named because it is based on a specific contact or set of contacts with the forum state), but only when the plaintiff's cause of action arises out of or relates to the defendant's contacts with the forum.[37] The lower federal courts have woven the language from *International Shoe*, *Hanson*, and *Helicopteros* into a three-part test for specific personal jurisdiction.[38] First, the nonresident defendant must "purposefully avail[] itself of the privilege of conducting [its] activities within the forum state."[39] Second, the plaintiff's cause of action must "arise out of or relate to" the defendant's contacts.[40] Third, permitting the forum state to exercise jurisdiction cannot offend traditional notions of fair play and substantial justice.[41]

The "relatedness" requirement of the second prong has received the least amount of attention from both the Court and the federal circuit courts.[42] One commentator has called it the "least developed prong of the due process inquiry" and observed that in the few cases in which the Court has applied the relatedness requirement, it has provided minimal guidance.[43] In *Helicopteros*, the Court briefly discussed the relatedness requirement and specific jurisdiction, but it ultimately limited its analysis to general jurisdiction because the parties "concede[d] that respondents' claims against Helicol did not 'arise out of,' [or relate to] Helicol's activities within Texas."[44] As another commentator opined, "[t]he fact that the opinion in *Helicopteros* went so far as to state several questions it *would not* answer makes the Court's declination all the more frustrating."[45] It is especially frustrating considering the fact that the relatedness requirement "is the essence of specific personal jurisdiction because it defines the necessary relationship between the defendant and the forum state," and therefore "a misapplication of 'arise from or relate to' is tantamount to a misapplication of due process."[46] Courts have, however, applied five different tests to the relatedness requirement.[47]

B. The Five Tests for the Relatedness Requirement

With little guidance from the Court, the federal circuit courts have split in their interpretations and applications of the relatedness requirement.[48] The lower courts' disagreement revolves around a superficially simple question of how closely related the plaintiff's cause of action must be to the defendant's forum contacts.[49] In reality, this has become a quite complicated question. The courts have developed five distinct tests, as well as some subvariations.[50] The next section outlines the five-way split in the courts.

1. *The "But-For" Test*

The but-for test is the least-restrictive standard that any circuit employs.[51] It is based on the tort concept of but-for causation, which says that a "defendant's conduct is a cause of the event if the event would not have occurred but for that conduct."[52] In the but-for context, a plaintiff can satisfy the relatedness requirement of specific-person jurisdiction by showing that the defendant's actions within the forum state were in the "chain of events leading up to the cause of action and" that they contributed to this chain.[53]

Justice Brennan's dissent in *Helicopteros* supports the idea of the but-for test.[54] Brennan advocated a disjunctive reading of the phrase arise from or relate to.[55] Brennan argued that restricting the Court's analysis to claims that formally arise out of the defendant's forum contacts "would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State."[56] Essentially, Brennan thought that the substantive relevance test, as discussed *infra*, was overly restrictive, and he wanted to broaden the analysis to include claims that are directly related to the defendant's forum contacts.[57] Stated another way, Brennan wanted to consider "contacts that 'give rise' to the underlying cause of action."[58] This language calls for a standard that is at least as expansive as the but-for test, if not more expansive.[59]

The District of Columbia Court of Appeals[60] as well as the United States Courts of Appeals for the Fifth, [61] Sixth, [62] Seventh, [63] and Ninth[64] Circuits have, at various times, adopted expansive standards like Brennan's "give rise" test or the but-for test, but the Ninth Circuit has most consistently used the but-for test. That court places the relatedness requirement on two axes; on one axis lies the defendant's contacts with the forum, while on the other lies the degree of relatedness between the plaintiff's suit and those contacts.[65] A strong showing on the forum-contacts axis permits a weaker showing on the relatedness axis, and vice versa.[66] In *Shute v. Carnival Cruise Lines*, the Ninth Circuit reversed the district court's decision to dismiss for lack of personal jurisdiction when Carnival Cruise Lines, Inc., a Panamanian company with its principle place of business in Miami, Florida, had advertised its cruises in Washington through travel agents.[67] Eulula Shute arranged a cruise via such a travel agency, and Carnival issued the tickets for Shute and her husband in Florida.[68] During the cruise, Shute slipped on a deck mat and injured herself; she subsequently filed suit in Washington, alleging negligence.[69] The district court dismissed the suit, but the Ninth Circuit reversed, choosing to view the relatedness requirement through a lens that encompassed the entirety of the events surrounding the plaintiff's claim.[70] Even though the extent of Carnival's forum-contacts was relatively tenuous, those contacts "put the parties within 'tortious striking distance' of one another."[71] Thus, a strong showing of relatedness, through but-for causation, permitted a lesser showing of extent.[72]

Not only does the Ninth Circuit's opinion in *Shute* provide a clear example of the but-for test, but also several justifications for its use. Specifically, the court said that the but-for test is consistent with the relatedness requirement because it distinguishes specific from general jurisdiction by providing a bright-line separation of related and unrelated forum contacts.[73] Furthermore, the third element of the test for specific personal jurisdiction, reasonableness, limits the expansive nature of the but-for test (considered a fatal flaw by its opponents) by disallowing unreasonable assertions of jurisdiction that are based on attenuated forum-contacts.[74] Lastly, a more restrictive interpretation of the relatedness requirement would unfairly "preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment through continuing efforts to solicit business, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum."[75] Other advocates of the but-for test typically provide the same or similar justifications.[76] Advocates of the next test argue for a much more restrictive test, stating that the but-for test essentially destroys the relatedness requirement.

2. *The "Substantive-Relevance" Test*

The "substantive-relevance" test is the clearest and most restrictive test that any of the circuit courts apply.[77] It uses the elements of the cause of action underlying a plaintiff's claim to define the forum state's jurisdictional authority; the defendant's forum contacts must provide evidence of at least one element of the underlying cause of action.[78] To illustrate, suppose a Massachusetts resident, Benjamin, sues an Arkansas resident, Thomas, for common law negligence that occurred in Massachusetts. Benjamin files in the federal district court in Massachusetts. Further suppose that Thomas's contacts with Massachusetts are not continuous and systematic. Benjamin obtains specific personal jurisdiction over Thomas at the trial court, but on appeal, the United States Court of Appeals for the First Circuit applies the substantive-relevance test to determine whether this was the correct outcome. In applying the substantive-relevance test, the First Circuit would consider only those contacts that support a finding of the elements for the tort of negligence: duty, breach, proximate cause, or damages. All other contacts would be excluded from the court's analysis. In other words, the "applicable rules of law actually make the contact in question one of substantive relevance."[79]

The substantive-relevance test is commonly associated with the "proximate-cause" test, which grants jurisdiction if the defendant's forum contacts are the proximate cause of the injury that gives rise to the plaintiff's cause of action.[80] Generally, a "proximate-cause" analysis concerns whether a defendant's actions are the "legal cause" of a result, but such an analysis

can be quite vague in the abstract.[81] Hence, courts that examine proximate cause in the context of the relatedness requirement look to the elements of the cause of action to determine what forum contacts can give rise to such a cause. The First Circuit phrased it as "when the litigation itself is founded directly on [the defendant's forum-based] activities."[82] Such an analysis resembles the substantive-relevance test.[83] In fact, most commentators refer to the two tests as a singular "substantive relevance/proximate cause" test.[84]

The United States Courts of Appeals for the First and Eighth Circuits have traditionally been credited with adopting the substantive-relevance test, although the test is most established in the Unites States Court of Appeals for the First Circuit.[85] In *Nowak v. Tak How Investments, Ltd.*, the First Circuit held that "jurisdiction that is premised on a contact that is a legal cause of the injury underlying the controversy—*i.e.*, that 'form[s] an important, or [at least] material, element of proof in the plaintiff's case,' is presumably reasonable, assuming, of course, purposeful availment."[86] However, the First Circuit provided a narrow exception to this strict standard.[87] The court said that the but-for test is sufficient for a tort that is part of a contractual or business relationship.[88] The court employed this exception in *Nowak*, where the defendant, a Hong Kong corporation called Tak How Investments, Ltd. ("Tak How"), solicited the employees of Kiddie Products, Inc. to stay at its hotel during their annual trips to Hong Kong.[89] The decedent's husband, Mr. Nowak, worked for Kiddie Products, Inc. in Massachusetts and took the decedent to Hong Kong on one of his business trips.[90] The decedent drowned in the hotel pool during the trip, and the Nowaks brought a wrongful death action in a Massachusetts state court that was removed to a federal district court.[91] Tak How did not answer the complaint, but instead, moved to dismiss for lack of personal jurisdiction and moved for certification on the jurisdiction issue.[92] The First Circuit refused to stay the district court proceeding pending appeal, but Tak How still refused to answer the Nowaks' complaint.[93] Accordingly, the district court entered a default judgment for the Nowaks, and Tak How appealed.[94]

On appeal, the First Circuit acknowledged its support for the substantive relevance test, but it held that the district court had personal jurisdiction over Tak How.[95] Even though Tak How had not proximately caused the decedent's death by soliciting a business relationship with her husband's company, the court justified its holding by saying,

> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus

> between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.[96]

The court then reiterated its general support for the substantive-relevance test, finding that this exception is but a narrow overlap between it and the but-for test.[97] However, the language quoted above suggests a wider exception than the First Circuit intended. This language would encompass any corporation's ongoing, successful advertising or marketing effort.

In sum, the substantive-relevance test determines whether the defendant's forum contacts substantively relate to one or more of the elements of the plaintiff's cause of action.[98] The court ignores any contacts that do not meet this standard, except in the First Circuit's allegedly narrow exception for tort claims that arise out of contractual or business relationships.[99] Courts and commentators that support this test generally point to its relative clarity and ease of application.[100] Its detractors point out its overbearing rigidity.[101] Proponents of the next test attempt to strike a middle ground by incorporating elements of both the substantive-relevance and but-for tests.

3. *The "Hybrid" Test*

Some courts that find the substantive-relevance test too restrictive and the but-for test too expansive have developed a middle-ground, or "hybrid," test. The Third Circuit explicitly adopted this test in *O'Connor v. Sandy Lane Hotel Co., Ltd.*,[102] and the Fifth Circuit has hinted at requiring more than but-for causation in some of its opinions.[103] In *O'Connor*, the plaintiff-appellant accidentally injured himself in a situation similar to those in *Nowak* and *Shute*.[104] The Sandy Lane Hotel Co., a Barbadian corporation operating exclusively in St. James, Barbados, advertised its hotel through a travel agency in Pennsylvania.[105] Patrick and Marie O'Connor used the travel agency to book a five-night stay at Sandy Lane, in response to which Sandy Lane mailed them a brochure that encouraged them to book spa treatments in advance of the trip.[106] The O'Connors purchased and scheduled the treatments as advised, traveled to Barbados, and while there, Patrick O'Connor went to an appointed massage.[107] During the process, Mr. O'Connor was instructed to take a shower and wash himself off.[108] Unfortunately, his feet were still coated in massage oils, and there were no mats on the shower floor, which caused him to fall and tear his rotator cuff.[109] The O'Connors filed suit in a district court in Pennsylvania, but the court dismissed for lack of personal jurisdiction over Sandy Lane.[110]

On appeal, the Third Circuit discussed the relatedness requirement in detail, citing its earlier rejection of the substantive-relevance test in *Miller Yacht Sales, Inc. v. Smith*[111] and dismissing the but-for test as overly expansive.[112] The court adopted a test that required more than but-for causation but somewhat less than proximate causation.[113] Applying this test to the

facts, the court first held that Sandy Lane's contacts with Pennsylvania were "a but-for cause of Mr. O'Connor's injury" because O'Connor would not have torn his rotator cuff but for Sandy Lane's solicitation in Pennsylvania.[114] Next, the court pointed out that Sandy Lane formed a binding contract with the O'Connors in Pennsylvania in which it promised to "exercise due care in performing the services required."[115] Even though O'Connor's claim arose in tort, not contract, the court's analysis did not require substantive relevance between the claim and Sandy Lane's forum contacts; therefore, the contract provided "a meaningful link . . . between a legal obligation that arose in the forum and the substance of" O'Connor's claim.[116] The court reasoned, "So intimate a link justifies the exercise of specific jurisdiction as a quid pro quo for Sandy Lane's enjoyment of the right to form binding contracts in Pennsylvania."[117]

The Third Circuit's application of the hybrid test in *O'Connor* exemplifies the justification for the test. Specifically, it avoids the extremes of the substantive-relevance and but-for tests.[118] By focusing on the reciprocity principle, the quid pro quo between the defendant and the forum, the test requires a fact-intensive analysis that insures specific personal jurisdiction is foreseeable, but not overly restricted.[119]

4. *The "Sliding-Scale" Test*

Another approach, promulgated largely by commentators and, in at least one instance, the Second Circuit,[120] abandons the traditional causation analysis of the relatedness requirement and places specific and general jurisdiction at opposite ends of a spectrum so as to employ a sliding-scale test.[121] One commentator suggested this test after determining an "attempt to determine the precise degree of relatedness required for specific jurisdiction is wasted effort."[122] He argues that there are too many possible variations of relatedness between specific and general jurisdiction to apply a singular approach.[123] Rather, he says, courts should apply a sliding scale to encompass those innumerable variations because "[t]here is little justification for a sharp divide between general and specific jurisdiction or for insisting that a proper exercise of jurisdiction must satisfy one paradigm or the other and cannot fall between the two stools."[124] Under this test, a plaintiff need only show adequate minimum contacts, i.e., purposeful availment, and the analysis shifts to reasonableness (traditionally the third element of the test).[125] The sliding-scale test for the relatedness requirement is then considered as another factor in the traditionally five-part reasonableness element.[126]

The Supreme Court of California applied a similar sliding-scale test in *Vons Cos., Inc. v. Seabest Foods, Inc.*[127] In *Vons*, eighty-five Jack-in-the-Box franchisees sued Vons Companies, Inc., among others, for negligence, breach of implied warranty, breach of contract, and other claims.[128] The actions arose when several Jack-in-the-Box restaurants served hamburger

meat that was contaminated with Escherichia coli, or E. coli.[129] Rumors of E. coli harmed Jack-in-the-Box sales nationwide.[130] Vons, based in El Monte, California, processed and shipped hamburger patties for Jack-in-the-Box restaurants.[131] Vons cross-complained in California state court against, among others, Seabest Foods, Inc., a Jack-in-the-Box franchisee in Washington State whose store had served contaminated meat. Vons claimed that Seabest Foods failed to follow proper cooking procedures to ensure the safety of the meat.[132] Seabest appeared specially in California and "moved to quash service of process on the ground of lack of personal jurisdiction."[133] The trial court granted the motion, and the court of appeals affirmed, even though most of Seabest's franchise, lease, and security agreements were signed in California, Seabest conducted some business in California by mail and telephone, and the franchise agreements for Seabest's Washington restaurants provided that contract disputes "would be litigated in California under California Law."[134]

On appeal, the Supreme Court of California distinguished general from specific jurisdiction, acknowledging that Vons sought to establish specific jurisdiction over Seabest.[135] However, the court then set the purposeful availment and relatedness requirements in the disjunctive, saying

> [T]he cause of action must arise out of an act done or transaction consummated in the forum, or [the] defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend.[136]

The court explained this by saying that the amount of forum contacts is "inversely related" to the connection of the plaintiff's claim to those contacts.[137] Essentially, a greater amount of purposeful availment will permit a lesser amount of relatedness. This is a sliding-scale test, despite the fact that the court labels it a substantial connection test.[138] The court said, "When, as here, the defendants sought out and maintained a continuing commercial connection with a California business, it is not necessary that the claim arise directly from the defendant's contacts in the state."[139]

The *Vons* court offered several justifications for its inverse relationship, sliding-scale test.[140] First, it said that such a test is suggested in *International Shoe*.[141] Second, it claimed that the Supreme Court of the United States and several circuit courts have developed broad, flexible standards for the relatedness requirement, rejecting the use of singular, mechanical tests.[142] Third, the court said that its test avoids the extreme exclusivity and inclusivity of the substantive relevance and but-for tests, respectively.[143] Proponents of the

next test have used similar justifications in promoting a totality-of-the-circumstances approach to the relatedness requirement.

5. *The No-Test Approach*

Several circuits have chosen not to adopt a test for the relatedness requirement, but rather, to examine the circumstances of each case on a case-by-case basis. The United States Courts of Appeals for the Fourth,[144] Seventh,[145] Tenth,[146] and Eleventh[147] Circuits have followed this approach, either explicitly or implicitly. Their justifications vary for doing so.

In *Oldfield v. Pueblo De Bahia Lora, S.A.*, the United States Court of Appeals for the Eleventh Circuit said it refused to adopt a test because the Supreme Court of the United States has warned against the use of mechanical or quantitative tests.[148] Instead, the Eleventh Circuit chose to conduct "a fact-sensitive analysis consonant with the principle that foreseeability constitutes a necessary ingredient of the relatedness inquiry."[149] The court suggests that such a broad, fact-intensive analysis is implied in the Court's decisions.[150]

The Fourth Circuit has used language such as "arose out of" (without the "or related to" counterpart), "genesis," and "basis," which could suggest that it requires a higher degree of causation.[151] However, the Fourth Circuit has not explicitly adopted or rejected any of the four tests described above, choosing instead to conduct case-by-case, fact-intensive analyses that lean toward substantive relevance.[152]

In *Dudnikov v. Chalk & Varmilion Fine Arts, Inc.*, the Tenth Circuit criticized the sliding-scale test and said it did not need to choose between the remaining substantive relevance and but-for tests because either one would find that the defendant's forum contacts caused the plaintiff's claim.[153] Thus, the Tenth Circuit has not chosen a test because of a simple lack of need.

The Seventh Circuit is the most perplexing of the no-test circuits because it has explicitly adopted two standards, requiring the cause of action to "lie in the wake of" and "directly arise out of" the defendant's forum contacts, only to assert later that it had "never weighed in on the conflict."[154] In *Tamburo v. Dworkin*, the court justified its sudden lack of a test by saying that "even the most rigorous approach" to the relatedness requirement would be satisfied by the facts at hand.[155] In other words, the *Tamburo* court's justification mirrored the Tenth Circuit's in *Dudnikov*.[156]

III. ARGUMENT

None of the tests described above is perfectly consistent with or completely satisfies the policy goals of fairness and state sovereignty set out in *International Shoe* and its progeny. However, the substantive relevance test

comes the closest on both accounts. Critics of that test denounce it as a "policy-based legal filter on 'but for' causation,"[157] contradictory to the inherent flexibility of minimum contacts, and stricter than is necessary given the Court's language in this area to date.[158] However, the substantive-relevance test overcomes these objections for two key reasons. First, the test provides a substantial level of foreseeability (which is at the heart of fairness) to defendants, i.e., it allows defendants to predict when they will be subject to the jurisdiction of a foreign court, without permitting the exercise of jurisdiction in an improperly large number of contexts. Second, the test promotes state sovereignty.

A. The Substantive-Relevance Test Comports the Most with the Fairness Policy Set Forth in International Shoe and Its Progeny.

The Court in *International Shoe* said that, in personal jurisdiction cases, satisfying due process depends upon the "quality and nature of the activity in relation to the fair and orderly administration of the laws."[159] This means that fairness is the central policy underlying the minimum contacts analysis, with state sovereignty constituting a secondary goal.[160] Foreseeability lies at the heart of the fairness policy. The Court said in *World-Wide Volkswagen v. Woodson* that the defendant must be able to reasonably anticipate being summoned to court in the forum.[161] Thus, the relatedness test must ensure such reasonable anticipation.

1. *The Substantive-Relevance Test v. the But-For Test*

Of the five tests used by the courts to assess the relatedness requirement, the substantive-relevance and but-for tests offer the greatest predictability. Yet, the former test has a critical advantage: it promotes foreseeability without sacrificing fairness overall.[162] The but-for test allows potential defendants to anticipate litigation because any link on the "causal chain leading up" to the plaintiff's claim will suffice.[163] Thus, such individuals can reasonably anticipate that as soon as they enter a given forum and interact with other people there, they may be subject to litigation based on those interactions. While such foreseeability promotes fairness in a way, the expansive jurisdictional reach given to courts by the but-for test undermines the kind of fairness that the Court had in mind in fashioning the "minimum-contacts" standard in the first place.[164] The but-for test is so overinclusive, it stretches the notion of "minimum contacts" to the breaking point and promotes overreaching by states.[165] On the other hand, the substantive-relevance test provides the same predictability for defendants, but preserves the "minimum-contacts" standard as a robust protection of due process.

As mentioned in the previous section, some proponents of the but-for test argue that it is fairer than the other tests *because of* its expansiveness.[166]

They argue that more restrictive tests are problematic because they prevent courts from obtaining jurisdiction over defendants that have engaged in substantial, but not quite continuous and systematic, forum contacts that are tenuously related to the plaintiff's claim.[167] According to these proponents, courts should be able to look at all of a defendant's forum contacts, not just the substantively related ones, to determine whether the circumstances as a whole suggest that specific jurisdiction is reasonable.[168]

These arguments present two obvious problems. First, they are based on a misunderstanding of the fairness policy set out in *International Shoe* and its progeny. As stated above, the Court has concerned itself with whether the defendant can reasonably anticipate a summons to court in the forum.[169] But-for test proponents often cite the Court's statement in *Burger King Corp.* that the Due Process Clause is not a territorial shield that protects defendants who have derived a benefit from contacts with a forum state.[170] However, the immediately preceding clause says, "Moreover, where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities . . . ."[171] This language suggests that a state's interest in protecting its citizens from foreign defendants does not override the burden of being hailed into a foreign court unless the harm caused by a defendant is the *proximate* result of the defendant's local activities.[172]

Second, the argument that courts should determine whether the circumstances as a whole render jurisdiction reasonable is merely another way of saying that the reasonableness requirement is more significant than the relatedness requirement. As discussed in the previous section, the Ninth Circuit has stated that the reasonableness requirement can sufficiently limit the expansive nature of the but-for test by disallowing specific jurisdiction when the relationship between the claim and the forum contacts is too attenuated.[173] This will not work, however, because the reasonableness requirement is not concerned with relatedness, but with the burden on the defendant of litigating in the forum.[174] Moreover, defaulting to the reasonableness requirement after a threshold showing of minimum contacts via but-for causation severely weakens the importance of the relatedness requirement.[175] In response, one commentator has suggested a double-reasonableness but-for test, in which courts leave the reasonableness requirement as the third element, but add a separate reasonableness factor to the but-for test for the purposes of the relatedness requirement.[176] However, a court cannot consider which but-for causes reasonably relate to a plaintiff's claim without necessarily considering (albeit to a lesser extent than in a substantive-relevance-test analysis) how those causes substantively relate to the claim. [177] Consequently, this approach advocates the hybrid test because it simply looks for somewhat-substantively relevant but-for causes.

In sum, the pure but-for test, without any additional reasonableness factors,[178] allows defendants to foresee summons to various forums, but it does so only by exposing those defendants to lawsuits in virtually every contacted forum. The foreseeability offered by the but-for test does not promote the fairness policy that the minimum contacts requirement was created to ensure. In fact, it defeats it. Also, the but-for test cannot be repaired by adding a reasonableness factor to the relatedness requirement or replacing the relatedness requirement with the reasonableness requirement. Those changes simply turn the but-for test into something like the hybrid test. For these reasons, the but-for test is significantly inferior to the substantive-relevance test.

2. *The First Circuit's Exception to the Substantive-Relevance Test*

As discussed above, the First Circuit has provided a narrow exception to the substantive-relevance test.[179] The purpose of the exception is to satisfy the relatedness requirement in cases in which a foreign corporation successfully solicits out-of-state business from an in-state resident and the resident subsequently suffers tortious harm while engaging in the business sought.[180] The First Circuit, in *Nowak v. Tak How Investments, Ltd.*, suggested that plaintiffs in these cases deserve to be able to sue such foreign corporations in the plaintiffs' home states because the corporations themselves are at least partially responsible for the creation of the business relationships that lead to the torts.[181] In short, the exception is meant to apply to cases in which it is fair to subject the defendant to jurisdiction in the forum state (because the defendant can reasonably anticipate being haled into court there) but the defendant would nonetheless escape jurisdiction if the substantive-relevance test were strictly applied.[182]

The First Circuit correctly identified circumstances in which the substantive-relevance test unfairly shields defendants from specific personal jurisdiction; however, the remedy it fashioned is overbroad and impacts defendants who should not be haled into courts in foreign states. The First Circuit created what it referred to as a "small overlay" of the but-for test on the substantive-relevance test. [183] But the overlay is not small at all. Rather, it ushers in all of the weaknesses of the but-for test to cases in which the exception would apply. Two issues arise from the *Nowak* court's decision. First, the court's language creates quite a substantial overlap between the but-for and substantive-relevance tests when it discusses a hypothetical corporation that "directly targets residents in an ongoing effort to further a business relationship."[184] Despite the First Circuit labeling the overlap as small, the court's language implies that the exception applies to virtually any case involving a marketing or advertising campaign by a corporation. This creates a huge hole in the applicability of the substantive-relevance test and effectively turns a significant number of specific-personal-jurisdiction

cases over to the but-for test. This leads to the second issue raised by the *Nowak* decision, namely that the but-for test is so overbroad that it should not even be used in exceptional circumstances. Rather, as discussed below, courts should use a middle-ground approach resembling the hybrid test as the exception.

Both of the issues raised by the *Nowak* decision can be resolved by more narrowly defining the potential circumstances in which a court could apply an exception to the substantive-relevance test. The *Nowak* court stated, "If the resident is harmed while engaged in activities *integral to the relationship* the corporation sought to establish," then the relatedness requirement is satisfied.[185] The court should have applied the "integral activities" language to the direct targeting engaged in by corporations. In other words, the exception should apply to cases in which both the corporation and the in-state resident have taken an integral step, or steps, toward establishing a business relationship in the forum state. For example, under this more defined approach, the exception would apply to a corporation that sends an order form to a resident in another state. The order form contains the terms of the contract that become operative if the resident returns the order form and the corporation confirms the order. This kind of business relationship develops over a process. The resident places an order—and in so doing makes an offer—and the corporation accepts the offer by sending the resident a confirmation notice. These steps are integral to the process of forming the desired business relationship, and as long as the efforts by the corporation are eventually successful and the relationship is ultimately formed, any one of the steps will satisfy the relatedness requirement if it takes place in the forum state. When the circumstances in which the exception applies are defined more narrowly, such as here, courts can limit the application of the exception and preserve the general applicability of the substantive-relevance test.

This narrow definition of exceptional circumstances also solves the second issue raised by the *Nowak* decision by dispensing with the use of the but-for test when the exception applies. When courts look for integral steps in the establishment of a business relationship, they are looking for something more than simple but-for causation but less than substantive-relevance or proximate causation. In essence, the narrow definition establishes a small overlay between the *hybrid* and substantive-relevance tests. To illustrate how the hybrid test is preferable for use as the exception, consider a situation similar to the one used above but in which the corporation merely sends an advertisement, instead of an order form, to a resident in a different state. If the resident does not contact the corporation in any way, but rather, simply travels to the corporation's state, uses its products or services, and suffers tortious harm, the exception would not allow that transaction to satisfy the relatedness requirement in the resident's home state. It would not do so because neither of the parties engaged in activities integral to establishing a

business relationship in the resident's home state. Under the narrow definition of exceptional circumstances where a hybrid-test-like analysis applies, the corporation's advertisement would *not* be considered sufficiently integral. However, under the First Circuit's broader definition, the advertisement *would* be considered the but-for cause of the ultimate tort. This result would contradict the purpose of the exception, which is to allow courts to exercise jurisdiction over defendants when it is fair to do so. As discussed above, the but-for test allows for the unfair exercise of jurisdiction.[186] Although the substantive-relevance test is, in some circumstances, overly narrow, its exception should not be overly broad. With a proper exception in place, the substantive-relevance test is superior to the but-for and hybrid tests, as well as the three remaining tests.

3. *The Substantive-Relevance Test v. the Three Remaining Tests*

Critics of the substantive-relevance test assert it "contradicts the notion of flexibility inherent in the minimum contacts philosophy of 'fair play and substantial justice.'"[187] Even though the minimum-contacts standard provides more flexibility than the strict territoriality rule of *Pennoyer*, its primary purpose is to ensure fairness to defendants by protecting them from overreaching by state courts.[188] Such fairness is provided through foreseeability, of which the substantive-relevance test provides the most without being overly inclusive. Proponents of the hybrid test, sliding-scale test, and no-test approach agree that the but-for test is impermissibly overly inclusive but argue that the under inclusiveness of the substantive-relevance test is too high a price to pay for the foreseeability it delivers.[189] On the contrary, such exclusivity is acceptable in the context of the relatedness requirement "because the value of certainty and predictability outweighs the advantage of getting the 'right' answer in individual cases."[190] The hybrid test, sliding-scale test, and no-test approach are inferior to the substantive-relevance test because the former do not promote fairness to defendants as well as the latter.

The hybrid test is problematic because it will narrow the spectrum of the conflicting interpretations of the relatedness requirement if it is adopted. It suggests a fact-intensive analysis that encourages courts to focus on the reciprocity principle of the minimum-contacts requirement.[191] Such an analysis provides defendants little more than they now possess. Under such a test, courts will continue to disagree over the exact amount of causation required in minimum contacts, even after having ruled out the substantive-relevance and but-for tests. Therefore, the hybrid test cannot resolve the current circuit split because it will only cut off the extreme ends and create a narrower split.

The sliding-scale test provides defendants no more foreseeability than the hybrid test and merely reframes the current circuit split in terms of rea-

sonableness. As discussed above, the sliding-scale test makes the relatedness requirement another factor in the reasonableness requirement.[192] It establishes an inverse relationship between the extent of the defendant's forum contacts and the relatedness of those contacts to the plaintiff's cause of action.[193] Thus, it purports to bridge the gap between specific and general jurisdiction by allowing jurisdiction in cases in which it is reasonable to do so.[194] However, by subjecting defendants to jurisdiction upon a court's determination of reasonableness, the sliding-scale test fails to provide defendants with any more foreseeability than they already possess. Again, the primary objective of the minimum-contacts requirement is fairness to defendants, which is ensured enough through foreseeability.[195] Potential defendants cannot reasonably foresee a summons to court in a foreign jurisdiction, and thereby tailor their actions to avoid such summons if the relatedness requirement turns upon a determination of reasonableness by an individual court.[196] Rather, there must be a strict, singular standard like the substantive-relevance test.

The sliding-scale test also fails to distinguish specific from general jurisdiction. This failure cannot be reconciled with *Helicopteros*, which assigned distinct analyses to the two types of jurisdiction.[197] This distinction is not only highly significant[198] but also well ingrained into the judicial system.[199] Moreover, the distinction is important because it promotes foreseeability, and hence fairness, to defendants.[200] If potential defendants engage in continuous and systematic activities in the forum, they can reasonably anticipate a summons to court in that forum regarding any cause of action.[201] If the same defendants purposefully direct their activities into the forum, they can reasonably anticipate summons to court in that forum regarding claims that relate to the activities.[202] In both instances, defendants can control their jurisdictional exposure by limiting either their numerous, unrelated activities or their purposeful, potentially claim-related activities conducted in the forum.[203] However, when the line between specific and general jurisdiction is blurred, personal jurisdiction becomes a function of quantity *and* relatedness, and courts are forced to chart an imaginary slope between the two axes.[204] As the quantity of forum contacts increases, the degree of relatedness required decreases and vice versa.[205] Defendants are thus forced to avoid contact with the forum altogether in order to prevent personal jurisdiction because they cannot reasonably calculate the result of such a function. Such an outcome is undesirable.

The no-test approach provides defendants the least foreseeability of any test and results in varying applications of constitutional due process. As stated above, courts that follow the no-test approach do so for varying reasons, yet they all employ virtually the same "test."[206] As the Eleventh Circuit stated, it is "a fact-sensitive analysis consonant with the principle that foreseeability constitutes a necessary ingredient of the relatedness inquiry."[207] However, such a test contradicts itself. An unstructured, case-by-

case analysis cannot provide foreseeability because it will result in endless, distinct analyses, custom-tailored by every court for every case. Such an analysis would also result in individualized applications, thereby varying the limits of due process.[208] Courts must have a common, consistent understanding of the relatedness requirement in order to apply due process equally.[209] The no-test approach contradicts this essential policy goal of the minimum contacts requirement.

The but-for, hybrid, and sliding-scale tests, along with the no-test approach, are not as preferable as the substantive-relevance test. While the but-for test (in its pure form) provides foreseeability to defendants, it does so at the expense of fairness because it is overly inclusive. The hybrid test, sliding-scale test, and no-test approaches do not provide as much foreseeability and, thereby, do not promote the kind of fairness that the minimum-contacts requirement is meant to ensure. The substantive-relevance test provides the most foreseeability without being overly inclusive, which justifies its under inclusiveness. Also, by providing an appropriate exception to the substantive-relevance test, its under-inclusiveness can be tempered effectively.

B. The Substantive-Relevance Test Best Comports with the Policy of State Sovereignty Set Forth in *International Shoe* and Its Progeny

Even though the Court in *International Shoe* shifted the primary focus of personal jurisdiction from state sovereignty to due process fairness, it also held that the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."[210] The Supreme Court of the United States later said that the minimum-contacts standard did not signal the end of all territorial restrictions on state courts.[211] The Court diminished the importance of state sovereignty in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*[212] but never expressly overturned its earlier, pro-sovereignty language. Thus, it is possible to read the Court's language as implying that the Due Process Clause is the primary basis for restrictions on personal jurisdiction, and that state sovereignty is a secondary beneficiary.[213]

The substantive-relevance test comports most with principles of state sovereignty. As quoted above, the *World-Wide Volkswagen* Court said that it is unfair to deprive a state of personal jurisdiction over a defendant whose actions proximately caused an injury that gave rise to a plaintiff's claim.[214] Courts regulate and punish local conduct by adjudicating claims that substantively relate to that conduct.[215] If a defendant's forum contacts do not substantively relate to the elements of a plaintiff's claim, then those contacts are not regulated or made punishable by the forum state's laws.[216] Therefore, the state's courts should have no authority to review such a defendant's contacts. In *Helicopteros*, Justice Brennan argued that the substantive-relevance

test subjects due process standards to the "vagaries of the substantive law or pleading requirements of each State."[217] While Brennan's argument is true, it does not render the substantive-relevance test unacceptable. As stated above, fairness to defendants is the primary policy behind the limitations to personal jurisdiction; consequently, in considering the substantive-relevance test, the primary issue raised by Justice Brennan's argument must be whether it is fair to subject defendants to specific jurisdiction in one state for contacts that would not justify jurisdiction in another state because of the differences in the two states' laws.[218] Arguably, it is fair. Different states enact different laws, and it is axiomatic that ignorance of the law is no excuse.[219] As citizens travel between the states, they subject themselves to the states' laws, both civil and criminal. Whether those travelers are familiar with a given state's laws, that state's courts may impose liabilities and punishments on them for breaking its laws. Allowing a state court to impose civil judgments and criminal convictions that are based on its unique laws is analogous to allowing the same court to exercise specific jurisdiction based on those laws. After all, once the plaintiff has cleared the jurisdictional hurdle, the defendant must still defend his or her case based on the state's substantive laws. Therefore, Justice Brennan's argument is unpersuasive.[220]

For these reasons, the substantive-relevance test comports most with the notion of state sovereignty. The other tests would allow states to fashion laws binding individuals who otherwise would avoid personal jurisdiction in those states because none of the other tests requires substantive relevance between the defendant's contacts and the plaintiff's claim.[221] Only the substantive-relevance test prevents such territorial overreaching.[222]

IV. CONCLUSION

Presently, potential defendants in the United States cannot tailor their activities in the various states to avoid subjection to suit in those states. The circuit courts have fashioned a three-part test for specific-personal jurisdiction from the language of *International Shoe* and its progeny, but the Supreme Court's subsequent lack of guidance regarding the relatedness requirement has resulted in uncertainty and differing interpretations at the circuit court level. Of the five distinct relatedness tests adopted by the circuit courts, the substantive-relevance test comports most with the policies of the minimum-contacts requirement set out in *International Shoe* and its progeny: fairness and state sovereignty. The test promotes fairness by providing defendants with the most foreseeability without being overly inclusive and, thus, defeating the fairness policy. Last, it promotes state sovereignty by limiting specific jurisdiction to those defendants whose contacts substantively relate to the plaintiff's claim and, thereby, to the relevant state law.

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* Please refer to original version with footnotes for accurate page numbers

1. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
2. 326 U.S. 310 (1945).
3. 95 U.S. 714, 733–34 (1877).
4. *Int'l Shoe*, 326 U.S. at 316.
5. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
6. 357 U.S. 235, 253 (1958) (quoting *Int'l Shoe*, 326 U.S. at 319).
7. 466 U.S. 408, 414 (1984) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).
8. *Id.*
9. Although the phrase "arise out of or relate to" can be cited to *Helicopteros*, 466 U.S. at 414, the idea behind the phrase was introduced in *International Shoe*, 326 U.S. at 319 ("The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state . . . .").
10. 471 U.S. 462, 472 (1985).
11. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 102 (4th ed. 2005).
12. *Id.*
13. 95 U.S. 714, 719 (1877).
14. *Id.* at 720.
15. *Id.* at 720, 724.
16. *Id.* at 719.
17. *See id.* at 719–20. .
18. FRIEDENTHAL ET AL., supra note 11, at 103–04.
19. *See id.* at 103.
20. *Pennoyer*, 95 U.S. at 720.
21. *Id.* at 726; *see* 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, 1265 (1993) ("For many years the case of *Pennoyer v. Neff* established that the only proper bases for a court's assertion of personal jurisdiction were consent by the defendant, physical presence in the forum at the time of service of process, and domicile in the forum state.").
22. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 79–80 (4th ed. 2007) (discussing *Pennoyer* in international law principles as applied between the states as independent sovereigns).
23. *Id.* at 80.
24. *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.").
25. BORN & RUTLEDGE, *supra* note 22, at 80.
26. 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
27. *Id.* at 321.
28. *Id.* at 313.
29. *Id.*
30. *Id.* at 319; *see* BORN & RUTLEDGE, *supra* note 22, at 81 ("*International Shoe* did not entirely abandon *Pennoyer*'s emphasis on territorial sovereignty. The Court cited *Pennoyer* with approval for the proposition that the Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'" (quoting *Int'l Shoe*, 326 U.S. at 319)).
31. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957).
32. Hanson v. Denckla, 357 U.S. 235, 251 (1958).
33. *Id.* at 253.
34. *See* 466 U.S. 408, 414 (1984).

35. *Id.* at 415 (borrowing "continuous and systematic" from Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952)).

36. *Id.* at 414.

37. *Id.*; *see also* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 736 (1988) (discussing the differences between specific and general jurisdiction and highlighting the importance of the relatedness requirement).

38. *See* Tamburo v. Dworkin, 601 F.3d 693, 702 (7th Cir. 2010) (citation omitted); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 35 (1st Cir. 1998); Doe v. Am. Nat'l Red Cross, 112 F.3d 1048, 1051 (9th Cir. 1997).

39. *Hanson*, 357 U.S. at 253.

40. *Helicopteros, S.A.*, 466 U.S. at 414.

41. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

42. Brilmayer et al., *supra* note 37, at 736 (stating that the "vast bulk of commentary on jurisdictional due process . . . is strangely silent on" the relatedness requirement).

43. Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 202 (2005) (quoting Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994)).

44. *Helicopteros, S.A.*, 466 U.S. at 415; *see also* Maloney, *supra* note 21, at 1272–74 (discussing the Court's decision).

45. Maloney, *supra* note 21, at 1274.

46. *Id.* at 1271.

47. *See infra* Part B.1–5.

48. 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS 159 (3d ed. 1998).

49. *Id.*

50. *See infra* Part B.1–5.

51. Maloney, *supra* note 21, at 1277.

52. PROSSER AND KEETON ON THE LAW OF TORTS 266 (W. Page Keeton et al. eds., 5th ed. 1984).

53. Maloney, *supra* note 21, at 1277.

54. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 420 (1984) (Brennan, J., dissenting).

55. *Id.* at 420.

56. *Id.* at 427.

57. *Id.* at 427–28. For an argument in support of a disjunctive reading of "arise out of or relate to," see Braham Boyce Ketcham, Note, *Related Contacts for Specific Personal Jurisdiction over Foreign Defendants: Adopting a Two-Part Test*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 477, 494–97 (2009).

58. *Helicopteros*, 466 U.S. at 425 (Brennan, J., dissenting).

59. Maloney, *supra* note 21, at 1280.

60. *See* Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 335–36 (D.C. 2000) (using the "'arise from' language . . . flexibly and synonymously with 'relate to' or having a 'substantial connection with," and employing a "'discernable relationship'" test where the defendant advertised in the District of Columbia and the plaintiff, responding to those advertisements, shopped at the defendant's store and was injured therein).

61. *See* Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A. Aug. 1981) (stating a "statutory nexus requirement" is met if "the contractual contact is a 'but for' causative factor for the tort [on which the claim is based]"). *But see* Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 487 (5th Cir. 2008) (employing a balancing test that examines "the relationship among the defendant, the forum, and the litigation").

62. *See* Lanier v. Am. Bd. of Endodontics, 843 F.2d 901, 909 (6th Cir. 1988) ("Clearly the cause of action herein, if one exists, arose from, was 'made possible' by, and lies in the 'wake' of the application process . . . ."). *But see* Third Nat'l Bank in Nashville v. WEDGE Grp. Inc., 882 F.2d 1087, 1091 (6th Cir. 1989) ("[R]ather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.'" (quoting S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 384 n.27 (6th Cir. 1968))).

63. *See* Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1216 (7th Cir. 1984) (using an arguably expansive "lies in the wake of" standard). *But see* Tamburo v. Dworkin, 601 F.3d 693, 709 (7th Cir. 2010) ("We have not weighed in on this conflict and need not do so here."); GCIU-Emp'r Ret. Fund v. Goldfarb Corp., 565 F.3d 1018, 1024 (7th Cir. 2009) ("Thus, 'the action must *directly arise* out of the specific contacts between the defendant and the forum state.'" (quoting RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1278 (7th Cir. 1997))).

64. *See* Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 864 (9th Cir. 2003) ("We use a 'but for' test to conduct this [relatedness] analysis.").

65. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1210 (9th Cir. 2006).

66. *Id.*

67. 897 F.2d 377, 379 (9th Cir. 1988), *rev'd* , 499 U.S. 585 (1991).

68. *Id.*

69. *Id.*

70. *See id.* at 384 (discussing with approval the Sixth Circuit's opinion in *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 908–09 (6th Cir. 1988)).

71. *Id.* at 386.

72. A similar inverse relationship is employed by the sliding-scale test, discussed and criticized below. *See infra* Part III.A.3.

73. *Shute*, 897 F.2d at 385.

74. *Id.*

75. *Id.* at 385–86.

76. *See* Maloney, *supra* note 21, at 1288 ("The Ninth Circuit has addressed the concerns of critics [of the but-for test].").

77. Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 373 (2005).

78. *Id.* at 349.

79. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1455 (1988).

80. Simard, *supra* note 77, at 350.

81. PROSSER AND KEETON ON TORTS, *supra* note 52, at 264.

82. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998).

83. *See* Simard, *supra* note 77, at 350.

84. *Id.* at 373; *see* Maloney, *supra* note 21, at 1283 ("If a contact is the proximate or legal cause of an injury, then it is substantively relevant to a cause of action arising from that injury.").

85. *See Mass. Sch. of Law*, 142 F.3d at 34; *see also*, CFA Inst. v. Inst. Of Chartered Fin. Analysts of India, 551 F.3d 285, 295 (4th Cir. 2009) (limiting the relatedness analysis to claims that arise out of the defendant's contacts and saying that the forum contacts at hand formed the "genesis" of the complaint). *Compare* Myers v. Casino Queen, Inc., 689 F.3d 904, 912–13 (8th Cir. 2012), *and* Pearrow v. Nat'l Life and Accident Ins. Co., 703 F.2d 1067, 1069 (8th Cir. 1983).

86. 94 F.3d 708, 715 (1st Cir. 1996) (alteration in original) (citation omitted) (quoting United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992)) (internal quotation marks omitted).
87. *Id.* at 715.
88. *Id.*
89. *Id.* at 711.
90. *Id.*
91. *Id.* at 711–12.
92. *Nowak*, 94 F.3d at 712.
93. *Id.*
94. *Id.*
95. *Id.* at 715–16.
96. *Id.*
97. *Id.* at 716.
98. *See supra* notes 78–85.
99. *See supra* notes 92–102.
100. *See Nowak*, 94 F.3d at 715 ("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."); Maloney, *supra* note 21, at 1290 ("One redeeming quality of the substantive relevance test is its clarity. As is usually the case with rigid standards, the substantive relevance test is simple because its application has no 'gray [sic] area.'"); Rhodes, *supra* note 43, at 241 ("This inquiry insures, at its core, that the defendant is not haled into a distant forum solely on the basis of an attenuated contact that the state has no interest in regulating.").
101. Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 583 (Tex. 2007) ("We note, too, that the substantive-relevance/proximate-cause standard is more stringent than the Supreme Court has, at least thus far, required.").
102. 496 F.3d 312, 323 (3d Cir. 2007) ("We thus hold that specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test . . . .The causal connection can be somewhat looser than the tort concept of proximate causation . . . .").
103. *See* Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A. Aug. 1981); *see also* S. Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 384 n.29 (6th Cir. 1968) ("Only when the *operative* facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact].") (emphasis added). *But see* Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 487 (5th Cir. 2008).
104. *O'Connor*, 496 F.3d at 315.
105. *Id.*
106. *Id.* at 316.
107. *Id.*
108. *Id.*
109. *Id.*
110. *O'Connor*, 496 F.3d at 316.
111. 384 F.3d 93, 98 (3d Cir. 2004).
112. *O'Connor*, 496 F.3d at 320–22.
113. *Id.* at 323. I have named this the "hybrid" test, although it should not be confused with what the *O'Connor* court calls "'hybrid' approaches," which consist of the D.C. Court of Appeals's "substantial connection/discernible relationship" version of the but-for test and the Second Circuit's "sliding scale" test. *See id.* at 321.
114. *Id.* at 323.
115. *Id.*
116. *Id.* at 323–24.
117. *Id.* at 324.

118. *See* Ketcham, *supra* note 57, at 493.
119. *Id.*
120. *See* Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998).
121. *See* CASAD & RICHMAN, *supra* note 48, at 162–64; William M. Richman, Book Review, 72 CAL. L. REV. 1328, 1345–46 (1984).
122. CASAD & RICHMAN, *supra* note 48, at 162.
123. *Id.* at 162–63.
124. *Id.* at 163.
125. *Id.*
126. *Id.* at 164.
127. 926 P.2d 1085, 1093–94 (Cal. 1996).
128. *Id.* at 1089.
129. *Id.* at 1088.
130. *Id.* at 1089.
131. *Id.* at 1088.
132. *Id.* at 1089.
133. *Vons*, 926 P.2d at 1089.
134. *Id.* at 1089–90.
135. *Id.* at 1092.
136. *Id.* at 1094.
137. *Id.* at 1096–97.
138. *Id.*
139. *Vons*, 926 P.2d at 1097.
140. *See id.* at 1096.
141. *Id.*
142. *Id.* at 1097–99; *see* CASAD & RICHMAN, *supra* note 48, at 164 ("[Conceptualistic all-or-nothing] jurisprudence emphasizes characterization and conceptual manipulation at the expense of functional consideration of the variables that should be relevant to the forum's exercise of jurisdiction.").
143. *Vons*, 926 P.2d at 1104, 1106.
144. *See* CFA Inst. v. Inst. of Chartered Fin. Analysts of India, 551 F.3d 285, 295 (4th Cir. 2009) (limiting the relatedness analysis to claims that arise out of the defendant's contacts and saying that the forum contacts at hand formed the "genesis" of the complaint). *But see* Mitrano v. Hawes, 377 F.3d 402, 407 (4th Cir. 2004) (similarly limiting the analysis to the "arise out of" language, but also employing a vague "basis" standard); Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 397 (4th Cir. 2003) (setting out the traditional three-part test for specific jurisdiction, but adding that general jurisdiction is required if "the defendant's contacts with the state [do not] also provide the basis for the suit").
145. *See supra* note 63.
146. *See* Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1078–79 (10th Cir. 2008) (dismissing the sliding-scale test and refusing to choose between the substantive relevance and but-for tests).
147. *See* Oldfield v. Pueblo de Bahia Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009).
148. *Id.*
149. *Id.* at 1223.
150. *See, e.g.*, *id.* at 1222 ("While emphasizing that courts should refrain from rigid tests, the Supreme Court has instructed courts to interpret the Due Process Clause in such a way as to provide 'a degree of predictability to the legal system,' thereby allowing foreign residents the opportunity to 'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))).
151. *See supra* note 144.

152. *See* CFA Inst. v. Inst. of Chartered Fin. Analysts of India, 551 F.3d 285, 295 (4th Cir. 2009) ("Thus, the Reinstatement Stipulations show *a seamless series of business transactions* from ICFAI's 1894 Charlottesville visit to the filing of the Complaint." (emphasis added)).

153. Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1078–79 (10th Cir. 2008).

154. *See supra* note 63.

155. 601 F.3d 693, 709 (7th Cir. 2010).

156. *See supra* note 146 and accompanying text.

157. Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1577 (1994).

158. Simard, *supra* note 77, at 350, 355.

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

160. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); *see* 4 CHARLES ALAN WRIGHT & ARTHER R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 (3d ed. 2002).

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

162. *See, e.g.*, Maloney, *supra* note 21, at 1290 ("Furthermore, if courts exercise specific jurisdiction only on a showing of substantively relevant contacts, defendants can be assured that unless they engage in such activity, they will not subject themselves to a foreign state's adjudicatory authority.").

163. Simard, *supra* note 77, at 359.

164. *See id.* at 379.

165. *See id.* at 360.

166. *See supra* Part II.B.1.

167. Maloney, *supra* note 21, at 1287–88.

168. *Id.*

169. *See supra* note 160.

170. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

171. *Id.* at 473–74 (emphasis added) (citation omitted).

172. *Id.*

173. *Supra* Part II.B.1.

174. Maloney, *supra* note 21, at 1297–98.

175. *Supra* Part II.A.2.

176. Maloney, *supra* note 21, at 1298.

177. *See* Brilmayer, *supra* note 79, at 1456.

178. On the contrary, the two but-for-plus-reasonableness approaches discussed above provide no more foreseeability than any given reasonableness standard will allow, which is almost none.

179. *See supra* notes 87–97 and accompanying text.

180. Nowak v. Tak How Invs., Ltd., 94 F.3d 709, 715–16 (1st Cir. 1996).

181. *Id.* at 716.

182. *Id.*

183. *Id.*

184. *Id.* at 715.

185. *Id.* (emphasis added).

186. *See supra* notes 163–70 and accompanying text.

187. Simard, *supra* note 77, at 355.

188. *Id.*

189. *See, e.g.*, Ketcham, *supra* note 57, at 485, 487.

190. Rose, *supra* note 157, at 1586.

191. *See supra* notes 118–19 and accompanying text.

192. *See supra* notes 120–26 and accompanying text.
193. *See supra* notes 137–39 and accompanying text.
194. *See supra* notes 120–26 and accompanying text.
195. *See supra* Part II.A.1.
196. *See, e.g.*, Rose, *supra* note 157, at 1584 ("[I]n practice, a sliding scale test would be so complex as to be meaningless. Each case would turn on its own particular facts and thus predictability, one of the major policy goals applicable to personal jurisdiction, would disappear.").
197. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984).
198. WRIGHT & MILLER, *supra* note 160, § 1067, at 507.
199. Maloney, *supra* note 21, at 1299.
200. *See* Simard, *supra* note 77, at 366.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 366–67.
205. *Id.* The Ninth Circuit employed a similar inverse relationship in the but-for test. *See supra* notes 70–72 and accompanying text. It is also unworkable for the reasons discussed here.
206. *See supra* Part II.B.5.
207. Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009) (citing U.S. Sec. Exch. Comm'n v. Carrillo, 115 F.3d 1540, 1540 (11th Cir. 1997)).
208. *See* Maloney, *supra* note 21, at 1271.
209. *Id.*
210. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
211. Hanson v. Denckla, 357 U.S. 235, 251 (1958); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293–94 (1980) (reaffirming principles of state sovereignty pronounced in *Hanson*).
212. 456 U.S. 694, 702 (1982).
213. Maloney, *supra* note 21, at 1295.
214. *See supra* notes 170–72 and accompanying text.
215. *See* Brilmayer, *supra* note 79, at 1456, 1457.
216. *Id.* at 1457–58.
217. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting).
218. *See id.*
219. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1611 (2010) (quoting Barlow v. United States, 32 U.S. 404, 410–11 (1833)).
220. The substantive-relevance test sacrifices some foreseeability due to the variations in state laws; however, it still provides the most foreseeability without being overly inclusive, as discussed above.
221. Rose, *supra* note 157, at 1565.
222. *See* Rhodes, *supra* note 43, at 204.

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