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"Arise out of" or "Related to": Textualism and Understanding Precedent Through Interpretatio Objectificata, "Objectified Interpretation"—A Four Step Process to Resolve Jurisdiction Questions Utilizing The Third Circuit Test in O'Connor as a Uniform Standard

Victor N. Metallo

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Interpretation"—A Four Step Process to
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Standard*

Victor N. Metallo*

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Introduction

In the aftermath of *Helicopteros Nacionales de Columbia, S.A. v. Hall*¹ and its progeny, the circuits are still divided as to the meaning and

1. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding that the petitioner's contacts with Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment and hence to allow the Texas court to assert in personam jurisdiction over petitioner). "The one trip to Houston by petitioner's chief executive officer for the purpose of negotiating the transportation services contract cannot be regarded as a contact of a 'continuous and systematic' nature, and thus cannot support an assertion of general jurisdiction." *Id.*

application of the terms "arise out of" or "related to" in specific jurisdiction analysis. While the Supreme Court indicated its reluctance to expound on these terms,² several circuits have focused significantly on this language in adopting and developing their own peculiar jurisdictional methodology in answer to the perceived discrepancy.³

For the first time in over a quarter of a century, the Supreme Court has granted *certiorari* to two cases involving the "stream of commerce" theory used by state courts to justify lawsuits against foreign companies whose products end up injuring state residents.⁴ Whether or not the Court will use the opportunity to resolve the disagreement among the circuits over the "arise out of" or "related to" language is unclear. For now, the various approaches taken by the several circuits in light of these phrases are still in play, and companies will have to remain wary of when and where they will be subject to jurisdiction.

The purpose of this article is to argue for a single jurisdictional standard, using textualism as a way to understand the meaning of the "arise out of" or "relates to" language. At present, there is no single standard. Instead, the circuits have responded to the problem by borrowing different tests from tort law to measure a defendant's activity within a state.⁵ Circuits, such as the First and the Eighth, apply the "proximate cause" test,⁶ while others, such as the Sixth, Seventh, and the Ninth, apply the looser but

2. See *id.* at 415 n.10 (refusing to define or expound on the differences between "arise out of" and "related to").

3. See *id.* (noting that the Court's decision not to expound results from the fact that they received no briefing on the issue of specific jurisdiction and plaintiffs stipulated that this was not a case of specific jurisdiction).

4. See *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 53 (2010), *cert granted*, 131 S.Ct. 62 (2010) (acknowledging that the "stream of commerce" theory is applicable); *Brown v. Meter*, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009), *cert granted sub nom* *Goodyear Lux. Tires S.A. v. Brown*, 131 S.Ct. 63 (2010) (noting that defendants "purposefully injected their product into the stream of commerce").

5. See *infra* notes 8–9 (citing cases in which circuit courts determine activity in the state through the application of various tests).

6. See *Pizaro v. Hoteles Concorde, Int'l, C.A.*, 907 F.2d 1256, 1259 (1st Cir. 1990) (noting that the court applies a "proximate cause" test to show the liability of the defendant); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714–15 (1st Cir. 1996) ("[W]e think the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry."); *Sybaritic Inc. v. Interport Int'l Inc.*, 957 F.2d 522, 524–25 (8th Cir. 1992) (noting that the corporation's contacts with the state were not extensive enough to establish minimum contacts).

for test⁷ to determine a causal relationship between the defendant's contacts and the plaintiff's claim. The Second Circuit does not subscribe to either test.⁸ Instead, it employs a test that primarily considers the totality of circumstances, utilizing a "sliding scale" with general and specific jurisdiction at diametric endpoints.⁹

The Third Circuit, however, rejects using a "hybrid" approach, holding that sliding scale tests are in tension with the Supreme Court's distinction between specific and general jurisdiction.¹⁰ It considers the test too variable, because it focuses too much on the quantity and quality of the defendant's activity.¹¹ Because a sliding scale test creates such uncertainty, it makes it difficult for a defendant to know whether or not it will be subject to jurisdiction.¹² Instead, the Third Circuit created a heightened but for standard, which compensates for the disparity between the proximate cause and the but for tests, while maintaining the causation requirement. The Third Circuit test

7. See *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988), ("Whether the decision to discriminate occurred before, during, or after . . . is not controlling and indeed may well be a contested matter of proof; it arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain board certification-efforts."); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984) (noting that without the defendant's contacts with the forum state, the claim would not have arose); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) ("Our circuit . . . implicitly adopted the "but for" test in analyzing whether a cause of action arises from a defendant's continuing efforts to solicit business in the forum state.") "Today, we make its adoption explicit." *Id.*

8. See *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 2007) (stating that the court will not use the but for and proximate cause tests but instead will consider all contacts with the United States); see also *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335–36 (D.C. 2000) (explaining that the court will use a loose standard for determining jurisdiction rather than a strict test); *Vons Cos. v. Seabest Foods, Inc.*, 14 Cal. 4th 428, 434 (Cal. 1996) (noting that the D.C. Circuit also applies a "hybrid" approach).

9. See *O'Connor v. Sandy Lane Hotel, Co.*, 496 F.3d 312, 320–21 (3d Cir. 2007) (criticizing the Second Circuit use of a sliding scale); *Del Ponte v. Universal City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 U.S. Dist. LEXIS 3528, at *37 n.8 (S.D.N.Y. Jan 16, 2008) (suggesting that the court apply a sliding scale approach).

10. See *O'Connor*, 496 F.3d at 320–21 ("[T]he 'sliding scale,' 'substantial connection,' and 'discernible relationship' tests are not the law in this circuit. . . ."). "General and specific jurisdiction merge, and the result is a freewheeling totality-of-the-circumstances test." *Id.*

11. See *id.* at 321 ("[H]ybrid' approaches allow courts to vary the scope of the relatedness requirement according to the 'quantity and quality' of the defendant's contacts.").

12. See *id.* ("The Due Process Clause is supposed to bring a 'degree of predictability to the legal system.'" (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285, 297 (1980))).

maintains the distinction between general and specific jurisdiction, and thus, is in harmony with Supreme Court precedent.

The remaining portion of this article is divided into five parts. Part I of this comment briefly sets forth the historical background to personal jurisdiction analysis through *Helicopteros*. Part II analyzes the split among the circuits in their interpretation and application of the above terms. In Part III, the Third Circuit's approach to jurisdiction analysis is discussed and analyzed. Part IV supports the Third Circuit's test using textualism and suggests a four-step process as a framework to resolving jurisdictional questions. Finally, Part V concludes that the Third Circuit test should be adopted as a single, uniform standard.

PART I: Pennoyer to Helicopteros and the Boundaries of Specific and General Jurisdiction

The state is a perfect society in the sense of being self-sufficing, independent, autonomous, and sovereign. It has all it needs to fulfill its end and depends on no higher society. But its sovereignty is not absolute, for it is limited by the natural law and the rights of other states.¹³

In the United States, the move away from state autonomy toward interstate dependence was necessary for the sake of the common good. As the above provides, national unity requires a *quid pro quo*—respect for the rights of other states and the boundaries of their jurisdiction. Jurisdiction belongs to a state as the extremities belong to the human person; but, like human extremities, jurisdiction has its limits. *Pennoyer v. Neff*¹⁴ echoed the fundamental notion of limited jurisdictional reach by one state over residents of another.¹⁵ Although the holding was substantially overruled in *International Shoe Co. v. Washington*,¹⁶ two jurisdictional bases outlined in

13. AUSTIN FAGOTHY, S.J., RIGHT AND REASON 328 (1963).

14. *See Pennoyer v. Neff*, 95 U.S. 714, 728 (1877) (holding that "[n]o person is required to answer in a suit on whom process has not been served, or whose property has not been attached").

15. *See id.* at 715 ("The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him."). "Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery." *Id.*

16. *See Int'l Shoe Co. v. Wash.* 326 U.S. 310, 316 (1945) (holding that in order to be subject to personal jurisdiction a party must either be physically present in the forum state or have established minimum contacts with the state); *see also Pennoyer*, 95 U.S. at 733

Pennoyer survived—presence and citizenship—which continued to act as the fundamental building blocks of jurisdictional analysis in subsequent cases.¹⁷

With the rise of the corporation, courts faced new challenges in analyzing whether they could exercise jurisdiction over a corporate defendant. The two jurisdictional bases of presence and citizenship were difficult to apply in such a case.¹⁸ A corporation is a fictional person and has no existence outside the documents that created it.¹⁹ It acts through its personnel instead of on its own, and technology facilitates its ability to cross state boundaries without physical detection.²⁰ As a result, the courts developed two theories prior to *International Shoe* to deal with this phenomenon: one based on consent and the other based on presence.²¹

Under the consent theory, the corporation needed the state's consent to conduct business, which theoretically would be conditioned on appointing an agent to receive process.²² If a corporation did not appoint an agent, consent could only be deemed implied.²³ Over time, the courts abandoned the consent theory in favor of the presence theory,²⁴ most likely because

("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person.") "Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." *Id.*

17. See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE—CASES AND MATERIALS 75 (9th ed. 2005) (noting that "presence and citizenship" are jurisdictional bases developed in *Pennoyer*); see also, JACK H. FRIEDENTHAL, MARY K. KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 3.1 (4th ed. 2005) (noting that under modern-day jurisprudence, the extent of a court's jurisdictional power is determined through a "review of the relationship that exists among the place where the underlying transaction took place, the parties, and the territory of the state where the suit is brought").

18. See FRIEDENTHAL, ET AL., at 75 ("The jurisdictional bases developed in *Pennoyer*—presence and citizenship—were not easily applied to corporations.").

19. See *id.* ("A corporation is . . . a fiction."). "It exists on paper." *Id.*

20. See *id.* (noting that "[a] corporation . . . acts through its employees, directors, and shareholders" and "technology facilitated interstate transport").

21. See *id.* (stating that the courts were able to adapt the jurisdictional basis from *Pennoyer* by developing the theory of "consent" and the theory of "presence").

22. See *id.* ("The courts first developed the 'consent' theory Under this theory, a foreign corporation could be required to consent to service of process in the state by appointing an agent to receive process within the state, as a condition of obtaining permission to do business there.").

23. See FRIEDENTHAL, ET AL., *supra* note 17 at 75 (stating that when the corporation failed to appoint an agent it could only have implied consent).

24. See *id.* ("As the courts became increasingly disenchanted with the unrealistic nature of the 'consent' theory, they developed the 'presence' theory.").

obtaining a corporation's consent was more convenient in theory than in practice.

The presence theory similarly became untenable to apply. Under this theory, a foreign corporation could be served with a summons if it conducts business in the forum state in a way in which it can properly be deemed "present" in the state.²⁵ Engaging in this type of inquiry could be an onerous task. Since the corporation is essentially a legal entity, which lacks a physical body, determining its "presence" within a state can be problematic. Moreover, once a corporation ceased to conduct business within the state, the precursors to jurisdiction evaporated.²⁶ *International Shoe* presented a new answer.

There, the Court held that a corporation's presence could be determined by the measure of its "contacts" with the forum state.²⁷ They can be "minimal" (even reduced to one in some cases) provided that the "quality and nature" of the activity justifies maintenance of a lawsuit so as not to offend "traditional notions of fair play and substantial justice."²⁸ In

25. See *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state . . . as to warrant the inference that it is present there."). "And . . . the process will be valid only if served upon some authorized agent." *Id.*

26. See FRIEDENTHAL ET AL., *supra* note 17 at 76 ("Under the presence theory . . . a court lost its adjudicatory authority over a corporation once it ceased doing business in the state.").

27. See *Int'l Shoe*, 326 U.S. at 316 (noting that in order to satisfy due process, a corporation's presence within a state can "be manifested only by activities carried on in its behalf" by the corporation's agents).

To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.

Id. at 316-17.

28. See *id.* at 319 (satisfying due process "must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws" rather than the quantity of contacts).

[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

later cases, the Court clarifies how contacts are ascertained within the dichotomous spheres of specific and general jurisdiction; but, without doubt, *International Shoe* stretched the reach of the long arm of the law beyond requiring physical presence as held earlier.

In the early 1980s, the Court culminated its jurisdictional teachings in *Helicopteros*. The case is a landmark decision not only for its stance on general jurisdiction, but for its "arise out of or related to" test for specific jurisdiction.²⁹ There, a group of United States citizens working for an oil pipeline contractor were killed in a helicopter crash in Peru.³⁰ The defendant, Helicopteros Nacionales de Colombia, S. A. ("Helicol"), a Columbian corporation, provided helicopter transportation services for workers of oil and construction companies throughout South America.³¹ At the time of the crash, the plaintiffs were employed by Consorcio, a Peruvian consortium.³² Consorcio, based in Texas, was formed in compliance with Peruvian law for the purpose of constructing a pipeline in Peru.³³

Helicol's involvement began with a trip by its president to Houston to negotiate over prices and the availability of his company's helicopter services to the consortium.³⁴ Eventually, a contract was executed in Peru

and substantial justice. . . ." It is evident that the criteria by which we mark the boundary line between those activities which justify the subjecting of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Id.

29. *See Helicopteros*, 466 U.S. at 414–15 (discussing jurisdiction based on controversies relating to or arising out of a defendant's contacts with the forum).

30. *See id.* at 409–10 ("On January 26, 1976, a helicopter owned by Helicol crashed in Peru. Four United States citizens were among those who lost their lives in the accident.").

31. *See id.* at 409–10 ("Helicopteros Nacionales de Colombia, S.A. (Helicol), is a Colombian corporation . . . engaged in the business of providing helicopter transportation for oil and construction companies in South America.").

32. *See id.* at 410 (noting that Consorcio was in fact an alter ego of Williams-Sedco-Horn, a combination of Williams International Sudamericana, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and, Horn International, Inc., a Texas corporation).

33. *See id.* (noting that Peruvian law provides only Peruvian companies could work on the pipeline).

34. *See Helicopteros*, 466 U.S. at 410 ("Consorcio . . . needed helicopters to move personnel, materials, and equipment into and out of the construction area."). "In 1974, upon

detailing the terms of the negotiation in Spanish on Peruvian government stationary.³⁵ Of particular importance, the contract indicated that all the parties were Peruvian residents, and according to the contract's consent to jurisdiction clause, the Peruvian courts were the venue for all controversies arising out of any breach.³⁶

The Court began its analysis with the rule summarized as follows: *in personam* jurisdiction over a non-resident defendant corporation does not offend traditional notions of fair play and substantial justice when a controversy is related to or arises out of a defendant's contacts with the forum.³⁷ In ascertaining those contacts, tribunals should be mindful that the "'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction."³⁸ Conversely, "when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to *in personam* jurisdiction when there are *sufficient* contacts between the State and the foreign corporation."³⁹

Helicol's contacts with Texas included: the negotiation session between the defendant's president and the consortium; purchases of approximately 80% of its helicopter fleet and spare parts from Bell Helicopter in Fort Worth, Texas, between 1970 and 1977; sending pilots to Texas for training; sending management to Bell Helicopter to familiarize themselves with the plant; and reception of \$5 million in payments from Consorcio drawn upon a local Houston bank.⁴⁰ There were no other

request of Consorcio/WSH, the chief executive officer of Helicol, Francisco Restrepo, flew to the United States and conferred in Houston with representatives of the three joint venturers." *Id.*

35. *See id.* ("Helicol began performing before the agreement was formally signed in Peru on November 11, 1974."). "The contract was written in Spanish." *Id.*

36. *See id.* at 411 ("[T]he residence of all the parties would be Lima, Peru . . . controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts.").

37. *See id.* at 414 ("Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

38. *Id.*

39. *Helicopteros*, 466 U.S. at 414.

40. *See id.* at 411 (noting Helicol's other business contacts with Texas).

Aside from the negotiation session in Houston between Restrepo and the representatives of Consorcio/WSH, Helicol had other contacts with Texas. . . . [I]t purchased helicopters . . . spare parts, and accessories for more than \$4 million from Bell Helicopter Company in Fort Worth . . . Helicol sent prospective pilots to Fort Worth for training and

business contacts between the defendant and the State of Texas; Helicol was never authorized to do business there and it never had an agent present for the service of process within the state.⁴¹

The Court further found that Helicol never performed any services in Texas, nor solicited any business or sold any product there.⁴² Notably, the defendant never signed any contract in Texas; the contract, instead, was signed in Peru.⁴³ Moreover, it never had any employee based in Texas nor ever recruited any employees there.⁴⁴ Helicol did not own any property in Texas, maintained no office or records in Texas, nor did it have any shareholders there.⁴⁵ Finally, none of the plaintiffs or their deceased family members lived in Texas.⁴⁶

Since the parties conceded that the injuries did not arise out of the defendant's contacts, nor were related to any of the defendant's activities in Texas, the analysis proceeded under the general jurisdiction rubric.⁴⁷ In the end, the Court held for the defendants, finding that the nature of contacts did not amount to the continuous and systematic general business contacts as compared to its prior, sister case, *Perkins v. Benguet Consolidated Mining Co.*⁴⁸ By contrast, in *Perkins*, a mining company was sued in Ohio

to ferry the aircraft to South America. It also sent management and maintenance personnel to visit Bell Helicopter in Fort Worth Helicol received into its New York City and Panama City, Fla., bank accounts over \$5 million in payments from Consorcio/WSH drawn upon First City National Bank of Houston.

Id.

41. *See id.* at 411–12 (affirming that Helicol had only one business contact with Texas and "Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State").

42. *See id.* ("[Helicol] never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas.").

43. *See id.* (stating that Helicol never signed a contract in Texas).

44. *See Helicopteros*, 466 U.S. at 411–12 (noting that Helicol "never had any employee based there, and never recruited an employee in Texas").

45. *See id.* ("Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there."). "Helicol has maintained no records in Texas and has no shareholders in that State." *Id.*

46. *See id.* at 412 ("None of the respondents or their decedents were domiciled in Texas.").

47. *See id.* at 415 (noting that because Helicol's actions did not give rise to the cause of action, a general jurisdictional analysis was necessary).

48. *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 437 (1952) (holding that "it would not violate due process of law under the Fourteenth Amendment for Ohio courts either to take or refuse to take jurisdiction of a foreign corporation in action not arising out of the corporation's activities within the state"); *see also Helicopteros*, 466 U.S. at 415–16 ("We thus must explore the nature of Helicol's contacts with the State of Texas to

state court by a non-Ohio resident over claims that had no connection to the defendant's contacts in Ohio.⁴⁹ Benguet, the defendant in the case, was a foreign company that owned and operated certain gold and silver mines in the Philippines.⁵⁰ Looking for safe haven during the Japanese occupation of the Philippines, Benguet moved its operations to Ohio.⁵¹

A suit was filed against Benguet in Ohio for damages arising from the defendant's failure to issue stock certificates in the Philippines.⁵² The trial court treated Benguet as a foreign corporation conducting business in Ohio.⁵³ Yet, in contrast to the contacts in *Helicopteros*, Benguet's contacts with Ohio were significant enough to warrant general jurisdiction.⁵⁴ The contacts were sufficiently continuous and systematic enough to implicate that Benguet's corporation was present in the forum state.⁵⁵ Therefore, the

determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*. We hold that they do not."); *see also id.* at 423–24 (Brennan, J., dissenting) (criticizing the findings of the Court and opining that specific jurisdiction was found without referring to any causal connection to the injury, because the purchases of helicopters were the same as involved in the crash, availing the protections of Texas laws).

49. *See Perkins*, 342 U.S. at 438–39 (noting that Idonah Perkins was not domiciled in Ohio but filed a claim in Ohio against Benguet Consolidated Mining Co., who claimed that the suit did not arise out of actions in Ohio).

50. *See id.* at 439 ("Among those sued is the Benguet Consolidated Mining Company."). "It is styled a 'sociedad anonima' under the laws of the Philippine Islands, where it owns and has operated profitable gold and silver mines. *Id.*

51. *See id.* at 447–48 (detailing the company's move during the Japanese occupation from the Phillipine Islands to Clermont County, Ohio, where the president of the company maintained an office and did many things on behalf of the company there).

52. *See id.* at 439 ("In one action petitioner seeks approximately \$68,400 in dividends claimed to be due her as a stockholder."). "In the other she claims \$2,500,000 damages largely because of the company's failure to issue to her certificates for 120,000 shares of its stock." *Id.*

53. *See id.* (acknowledging "the holding of the Supreme Court of Ohio, not contested here, that, under Ohio law, the mining company is to be treated as a foreign corporation").

54. *See Perkins*, 342 U.S. at 447–48 (noting that in Ohio, the president kept an office of the company, as well as files, bank accounts including one with the stock of the company, wrote salary checks, held business meetings, and generally conducted the business of the company from Ohio during WWII). "Without reaching that issue of state policy, we conclude that, under the circumstances . . . it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding." *Id.* at 448.

55. *See id.* at 445 (conducting "continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings in personam in that state").

Court found that it was constitutionally fair and reasonable for the Ohio courts to exercise jurisdiction if they so choose.⁵⁶

PART II: The Circuits Are Split: "Proximate Cause," "But For," Or Something Else?

In *Helicopteros*, the court declined to attach any significance to the phrases "arise out of" or "relates to," but arguably significance exists.⁵⁷ While it seems that the Court in *Helicopteros* intended to teach what is *not* contemplated by the Constitution in terms of general jurisdiction,⁵⁸ the case simultaneously had a remarkable effect on the formula for specific jurisdiction. In total, looking at the case in context with surrounding decisions, such as *International Shoe*, *Hanson v. Denckla*,⁵⁹ and *Burger King Corp. v. Rudzewicz*,⁶⁰ it appears that an argument can be made that the Court has indeed provided sufficient, if imperfect, guidance as to the limits of each jurisdictional theory, which is why, perhaps, it never reviewed another case. Not everyone agrees, however. Courts across the land have found there to be little guidance from the Supreme Court, at least from the standpoint of the specific jurisdiction teaching in *Helicopteros*.⁶¹ As a result, each circuit adopted its own test to ascertain when an injury "arose from" or "related to" a defendant's contact.

56. *Id.* at 445.

57. *See Helicopteros*, 466 U.S. at 415 n.10 (describing the Court's decision not to define the terms "arising out of" and "related to" and declining to define their connection to one another). The Court continued: [W]e 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." *Id.*

58. *See id.* at 416 (deciding that *Helicopteros*' contacts are not the "kind of continuous and systematic general business contacts the Court found to exist in *Perkins*").

59. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (holding that the Florida court lacked personal jurisdiction over the defendant because minimum contacts with the forum had not been established and thus did not "purposefully avail" itself to forum law).

60. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (holding that personal jurisdiction is appropriate when the defendant's contacts with the forum result from actions by the defendant that create a substantial connection with the forum state).

61. *See Del Ponte v. Universal City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 U.S. Dist LEXIS 3528, at *33 (S.D.N.Y. Jan. 16, 2008) (noting that "[w]ithout explicit guidance from the Supreme Court, the various Circuits have reached different conclusions on what standard should be applied in determining whether a claim 'arises from or relates to' a defendant's contacts with a forum").

The Proximate Cause Approach

The First Circuit is considered to be the leading circuit applying the proximate cause test in specific jurisdiction analysis.⁶² *Pizarro v. Hoteles Concorde Int'l, C.A.*⁶³ exemplifies its application. There, the plaintiff, a citizen of Puerto Rico, was injured at the defendant's hotel in Aruba, when an employee accidentally knocked into the plaintiff sending her to the floor.⁶⁴ The plaintiff brought suit against the defendant in the United States District Court for the District of Puerto Rico, alleging that the defendant's hotel advertisements appearing in a Puerto Rican magazine enticed her to take the trip.⁶⁵ The court ruled that the plaintiff's reliance upon the advertisements in support of its claim was not the proximate cause⁶⁶ of the plaintiff's injuries. Therefore, since the claims did not "arise from" the defendant's contacts, the court declined to take jurisdiction over the case.⁶⁷

The result of the First Circuit's approach appears cut-and-dry, but its application is not always predictable, however. By comparison to *Pizarro*, in *Nowak v. Tak How Investments, Ltd.*,⁶⁸ the First Circuit remarkably

62. See *Nowak v. Tak How Inv. Ltd.*, 94 F.3d 708, 715 (1996) ("This circuit, whether accurately or not, has been recognized as the main proponent of the proximate cause standard.").

63. See *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1256 (1990) (holding that "the defendant's solicitation of business in Puerto Rico by placing nine advertisements in a Puerto Rican newspaper did not vest the Puerto Rican court with personal jurisdiction over the defendant").

64. See *id.* at 1258 (noting that "Ivette was injured at the hotel when, according to the complaint, 'an employee of the Aruba Concorde Hotel came running in the direction of the plaintiffs, and due to his negligence . . . skidded and hit plaintiff Ivette Ramos, causing her to fall to the floor'").

65. See *id.* (noting that due to the advertisements in Puerto Rico she "learned of the hotel, and decided to visit").

66. See *id.* at 1259 ("Whether certain events 'arise out of' a nonresident defendant's actions within Puerto Rico is comparable or analogous to whether certain actions can be said to be the legal, or proximate cause of injuries suffered by a plaintiff.").

67. See *id.* at 1260 (noting that the court focused on the "arise out of" language in adopting the proximate cause test); see also Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH & LEE L. REV. 1265, 1283-84 (1993) (contending that the First Circuit as applied the proximate cause standard from a reading of the entire phrase).

68. See *Nowak v. Tak How Inv. Ltd.*, 94 F.3d 708, 715 (1996) (holding that defendant personally availed himself of the forum state through his solicitation and that the defendant's contacts with the forum were sufficiently related to the forum to assert personal jurisdiction).

This circuit, whether accurately or not, has been recognized as the main proponent of the proximate cause standard. We think the attraction of proximate cause is two-fold. First, proximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm.

tempered its strict use of the proximate cause test. The facts were similar to *Pizzaro*, but the results were strikingly different. In *Nowak*, a woman drowned in a pool at a Hong Kong hotel owned by the defendant.⁶⁹ Her husband brought suit in Massachusetts federal court on behalf of himself and his wife alleging that the hotel's faxed-solicitation to his employer for discounted room-rates set in motion the fatal trip.⁷⁰ The plaintiff's company, Kiddie Products, arranged with the defendant, Tak How, to fly the plaintiff and his wife to the defendant's hotel through those solicitations.⁷¹

The First Circuit held that the Massachusetts court had jurisdiction over the Hong Kong entity, notwithstanding a lack of proximate cause between the contacts and the claims.⁷² This time the court did not ignore that solicitations and promotional materials evidenced an "on-going relationship" between the two companies.⁷³ The court found that strictly adhering to one test, as in this case a proximate-cause test, was too restrictive, opining that: "[W]e intend to emphasize the importance of

Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong. . . . 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. . . . A "but for" requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.

Nowak, 94 F.3d at 715 (citations omitted).

69. *See id.* at 711 ("A Massachusetts resident who accompanied her husband on a business trip to Hong Kong drowned in their hotel's swimming pool."). "Plaintiffs later brought this wrongful death diversity action against the Hong Kong corporation that owns the hotel." *Id.*

70. *See id.* (noting that the defendants decided to stay at the hotel based on a promotion received by defendant's employer and that this is in addition to about 15,000 solicitations sent to previous guests throughout Massachusetts).

71. *See id.* (remarking that all arrangements were made through Kiddie Products).

72. *See id.* at 716 ("While the nexus between Tak How's solicitation of Kiddie Product's business and Mrs. Nowak's death does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered.").

73. *See Nowak*, 94 F.3d at 717 (noting that "it may be said that the materials were sent as part of an on-going relationship between the two companies").

proximate causation, but to allow a slight loosening of that standard when circumstances dictate."⁷⁴

Regardless of the anomalous result of *Nowak*, proximate cause analysis is still generally the standard in the First Circuit, but in this case the court needed to loosen the standard under the circumstances.⁷⁵ Here, the First Circuit found for jurisdiction by appearing to be remarkably leaning toward applying a but for test, holding that:

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. This concept represents a small overlay of "but for" on "proximate cause."⁷⁶

74. *Id.* at 716.

75. *See id.* at 717 ("[S]trict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive."). The court continued:

The concept of proximate cause is critically important in the tort context because it defines the scope of a defendant's liability. In contrast, the first prong of the jurisdictional tripartite test is not as rigid: it is, "relatively speaking . . . a 'flexible, relaxed standard.'" We see no reason why, in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should always render the exercise of specific jurisdiction unconstitutional. 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. This concept represents a small overlay of "but for" on "proximate cause." In a sense it is a narrower and more specific identification of the Seventh Circuit's formulation for jurisdiction-worthiness of claims lying 'in the wake' of commercial activities in the forum. It may be that other kinds of fact patterns will be found to meet the basic factor of foreseeability, but we have no occasion here to pronounce more broadly.

Id. *See also O'Connor*, 496 F.3d at 319 (noting that the First Circuit employs a proximate cause in most cases, but allows for a slight loosening of the standard at appropriate times).

76. *Nowak*, 94 F.3d at 715–16 (finding the exercise of jurisdiction reasonable when a corporation achieves its purpose of targeting residents for business and that business results in a tortious injury).

The Eighth Circuit, like its sister circuit,⁷⁷ also uses the proximate cause test, as exemplified in *Sybaritic, Inc. v. Interport Int'l, Inc.*⁷⁸ There, Sybaritic, a fitness equipment manufacturer from South Dakota, with its principal place of business in Minnesota, filed suit in Minnesota federal court against Interport, a Californian exporter of American products to Asia, seeking damages arising from their business relationship.⁷⁹ In 1989, Interport's president contacted Sybaritic about an advertisement he saw in a magazine regarding one of their face-lift products.⁸⁰ Sybaritic sent him information about its other products and invited him to inspect the plant.⁸¹ In December of that year, Interport's president accepted that offer.⁸²

Eventually after a series of phone calls and other communications, a deal was struck in Japan for Interport to act as Sybaritic's agent there and to sell its products to Interport's Japanese contacts.⁸³ For reasons not disclosed in the case, Sybaritic brought an action in state court to declare the agency contract void.⁸⁴ Interport removed the case to federal district court on diversity grounds and simultaneously moved to dismiss for lack of personal jurisdiction.⁸⁵ The district court granted the motion.⁸⁶ The Eighth Circuit upheld the district court's order dismissing the complaint, finding that one trip by the defendant to Minnesota with a purpose to inspect the plant and subsequent telephone and mail communications was "too few in number and too attenuated" from the claim to "support jurisdiction."⁸⁷ Furthermore, the contract was negotiated, drafted and executed in Japan, and thus had no connection to Minnesota.⁸⁸

The proximate cause test as applied by the First and Eighth Circuits could support a theory that adoption of such a test can arguably be divined

77. See *id.* at 715 (describing the Eighth Circuit as using a proximate cause standard); see also *Chew*, 143 F.3d at 29 (describing the Eighth Circuit as using a proximate cause standard).

78. See *Sybaritic, Inc. v. Interport Int'l, Inc.*, 957 F.2d 522, 524–25 (8th Cir. 1984) (holding the defendant's contacts to be too attenuated and unrelated to the cause of action and thus declining to exercise jurisdiction).

79. *Id.* at 523.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Sybaritic*, 977 F.2d at 523.

84. *Id.* at 524

85. *Id.*

86. *Id.*

87. See *id.* at 525 (affirming the district court upon agreement with its analysis).

88. *Sybaritic*, 977 F.2d at 525.

through a natural reading of the "arise out of" language.⁸⁹ The term "arise out of" does connote a level of rigidity and a stricter jurisdictional causal connection for tort claims. Such stringency, however, does not resonate well with the other courts. As an alternative, the but for test is used by several circuits, including the Sixth, the Seventh, and the Ninth, because of its broad application.⁹⁰ Although the Sixth and the Seventh Circuits have tests with different names—"the made possible test" and the "lies in the wake test," respectively—both tests are seen, at least by the Third Circuit, as essentially but for tests.⁹¹

Circuits That Apply the "But For" Test

The Sixth Circuit demonstrates the use of the but for test in jurisdiction analysis in *Lanier v. American Bd. of Endodontics*.⁹² The facts surround a Michigan dentist who sued the national dental board for denying her certification to practice a specialty.⁹³ She alleged sex discrimination.⁹⁴ The contacts basically amounted to phone calls, the sending and returning of application packets, and correspondence advising her that she failed the licensing exam.⁹⁵ Michigan's long-arm statute conferred limited personal jurisdiction if the defendant "transact[ed] any business" within the state.⁹⁶

89. See *infra* notes 192–205 and accompanying text (observing that the Third Circuit applies an arising out of test that mirrors the language of the proximate cause test).

90. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 379–80 (9th Cir. 1990), *rev'd on other grounds* 499 U.S. 585 (1991) (aligning the Ninth Circuit with the Fifth and the Sixth Circuits in noting that the proximate-cause test adopted by the First Circuit and Eighth is to rigid a test.) The Court found the proximate-cause test too limiting and observed instead, the but for test "preserves the essential distinction between general and specific jurisdiction." *Id.* See also *O'Connor v. Sandy Lane*, 496 F.3d 312, 322 (3rd Cir. 2007) (observing that the but for test has "no limiting principle" (citing *Shute* and *Nowak*)).

91. See *O'Connor*, 496 F.3d at 319 n.8 (labeling the Sixth Circuit and Seventh Circuit tests "but for"); *Del Ponte v. University City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 U.S. Dist. LEXIS 3528, at *36 n.7 (S.D.N.Y. Jan. 16, 2008) ("Despite their titles, the 'made possible' and 'lies in the wake' tests essentially describe 'but for' tests.").

92. See *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 903 (6th Cir. 1988) (finding jurisdiction "constitutionally fair" where party defendants purposefully availed themselves of the laws of the forum); see also *Third Nat'l Bank in Nashville v. Wedge Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (signaling a movement way from the "made possible by" test to focus on the cause of action having a "substantial connection" to the defendant's in-state activities—a test also criticized by the Third Circuit).

93. *Lanier*, 843 F.2d at 903.

94. *Id.*

95. *Id.* at 907.

96. *Id.* at 908.

The court essentially found that a but for relationship existed between the claim and the contacts:

Whether the final decision to discriminate was made in Illinois, or Arizona, or elsewhere, it must necessarily have arisen from the Board's assessment of facts it obtained as a result of its contacts with Dr. Lanier in Michigan, and but for which Michigan contacts it would not have acted upon her application at all and thus would not have made the discriminatory decision . . . Clearly the cause of action herein, if one exists, arose from, was "made possible" by . . . the application process, much of which occurred in Michigan.⁹⁷

The court was satisfied that the Board transacted a sufficient amount of its business with the plaintiff and held there to be jurisdiction in Michigan.⁹⁸ As previously stated, the Seventh Circuit uses a similar approach, but phrases it differently: "[I]f the cause of action 'lies in the wake' of the business transaction, it arises from it."⁹⁹ The following case exemplifies how this standard can be applied to a contract cause of action.

In *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*,¹⁰⁰ the defendant, a Netherlands corporation operating out of California, was sued in Illinois by a purchaser of ice cream making equipment made by an Illinois-based manufacturer for damages arising from a breach of contract.¹⁰¹ The defendant's business was negotiating deals between manufacturers and purchasers throughout the western United States and Europe.¹⁰² The plaintiff, a resident of Oregon, claimed breach of implied and express warranties for defects in the equipment.¹⁰³ The Seventh Circuit found jurisdiction over the defendant based on meetings between the defendant

97. *Id.* at 909; *see also Nowak*, 94 F.3d at 714 (noting that the Sixth Circuit test involves a but for relationship); *Chew*, 143 F.3d at 29 (stating the belief that the difference between the relatedness test and the but for test is not "as stark as it may first appear").

98. *See Lanier*, 843 F.2d at 908 ("[J]urisdiction lies where any transaction of business gives rise to a cause of action."). The court continued:

"Contract negotiation and formation are business transactions. It is of no moment, for purposes of determining the existence of jurisdiction, what type of cause of action arises from a business transaction under Mich[igan] laws . . ."

Id.

99. *See Nowak*, 94 F.3d at 714 (noting that the Seventh Circuit suggests a "but for" relationship); *Chew*, 143 F.3d at 29 (finding similarity between the different tests used by the different Circuits).

100. *See Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984) (finding minimum contacts satisfied from the business relationship in the forum state).

101. *Id.* at 1210–12.

102. *Id.*

103. *Id.*

and the manufacturer in Illinois, which constituted sufficient contacts giving rise to the contract between the plaintiff and the manufacturer.¹⁰⁴ The contract, therefore, lay in the wake of Bates' commercial activities in Illinois, and the defendant was subject to jurisdiction.¹⁰⁵

Likewise, the Ninth Circuit adopted the but for test in the renowned case of *Shute v. Carnival Cruise Lines*.¹⁰⁶ The plaintiff in *Shute* filed suit in Washington for damages relating to "slip and fall" injuries sustained while on one of the defendant's cruise ships.¹⁰⁷ The contacts constituting purposeful availment consisted of advertisements, mailings, solicitations, and seminars held by Carnival with travel agents throughout the State of Washington.¹⁰⁸

While citing persuasive authority from the First and Eighth Circuits, the defendant contended that the plaintiff's slip and fall claim did not "arise out of" the defendant's solicitations, and thus defeated a finding of jurisdiction.¹⁰⁹ The court agreed that if it were to apply the "arise out of" analysis using proximate cause as applied in other circuits, it would have to find that the Shutes' injuries did not "arise out of" the solicitations in Washington, but from the defendant's activity on the ship.¹¹⁰ Considering that the proximate cause test applied in other circuits would "unnecessarily [limit] the ordinary meaning of the 'arising out of' language," the court used the but for test instead, since it is more "consistent with the basic function of the 'arising out of' requirement, thus preserving the essential distinction between general and specific jurisdiction."¹¹¹ Causality is still a

104. See *id.* at 1216 (finding the exercise of jurisdiction consistent with the requirements of due process).

105. See *Deluxe Ice Cream*, 726 F.2d at 1216 (finding the defendant amenable to suit under the Illinois long arm statute); *Chew*, 143 F.3d at 29 (noting that the Eighth Circuit's test involves a but for relationship).

106. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385–86 (9th Cir. 1990), *rev'd on other grounds* 499 U.S. 585 (1991) (holding the exercise of jurisdiction proper under the "but for" test because plaintiffs cause of action arose out of defendant's contacts and would not exist but for defendant's contacts).

107. *Id.* at 379, 382–83.

108. *Id.*

109. *Id.* at 383.

110. See *Shute*, 897 F.2d at 383 ("Were this court to apply the 'arising from' analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington." (citing *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) and *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983)). Both courts denied jurisdiction since defendant's contacts were not the proximate cause of the plaintiff's injuries.

111. See *Shute*, 897 F.2d at 385 (interpreting the "arising out of" language to connote a but for relationship, while the First Circuit in *Pizzaro* held there to be a proximate-cause

required factor for establishing personal jurisdiction, as the court explains, "[u]nder this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction."¹¹² The court concluded that but for Carnival's solicitations, the Shutes would not have taken the trip and suffered injury.¹¹³

The "Sliding Scale" Test

The Second Circuit does not subscribe to either the proximate cause or but for test; instead, it employs a "sliding scale."¹¹⁴ The Third Circuit describes the "sliding scale" test as an approach that conflates minimum contacts with reasonableness and, as a result, it "allow[s] courts to vary the scope of the relatedness requirement according to the 'quality and quantity' of the defendant's contacts."¹¹⁵ Under the sliding scale, causation has no significant impact on the analysis.¹¹⁶ *Chew v. Dietrich*¹¹⁷ demonstrates the results of using this application.

relationship, further indicating the discrepancy among the Circuits regarding how to interpret this language).

112. *Id.* ("The 'but for' test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum."); *see also O'Connor*, 496 F.3d at 322 (observing the but for test separates the related from the unrelated); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580 (Tex. 2007) ("Rather than considering only isolated contacts that relate to a specific element of proof or the proximate cause of the injury, the but for analysis considers jurisdictional contacts that occur over the 'entire course of events' of the relationship between the defendant, the forum, and the litigation.").

113. *See Shute*, 897 F.2d at 386 ("It was Carnival's forum-related activities that put the parties within 'tortuous striking distance' from one another.").

114. *See O'Connor*, 496 F.3d at 320–21 (citing *Chew* as applying a sliding scale test); *Del Ponte*, 2008 U.S. Dist. LEXIS 3528, at *37 n.8 (concluding that *Chew* applied a sliding scale test); William M. Richman, *Review Essay: Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1340–1346 (1984) ("The concepts of general and specific jurisdiction are simply the two opposite ends of this sliding scale.").

115. *O'Connor*, 496 F.3d at 321 (citations omitted); *Del Ponte v. University City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 U.S. Dist. LEXIS 3528, at *37 n.8 (S.D.N.Y. Jan. 16, 2008).

116. *See O'Connor*, 496 F.3d at 319 (observing that under the sliding scale test "causation is of no special importance").

117. *See Chew v. Dietrich*, 143 F.3d 24, 30 (2d Cir. 1998) (finding sufficient contacts to sustain jurisdiction consistent with due process).

Bent Dietrich, a German citizen, entered his yacht in a race from Newport, Rhode Island to Bermuda.¹¹⁸ Chew was one of nine men Dietrich recruited in Rhode Island through an agent to assist in the voyage.¹¹⁹ After the crew was assembled, the yacht set sail for the tropical island.¹²⁰ On the return trip, the crew encountered choppy seas throwing Chew overboard into international waters.¹²¹ Tragically, his body was never recovered.¹²² Chew's parents sued Dietrich in the Southern District of New York.¹²³ Dietrich moved to dismiss under Fed. R. 12(b)(2) for lack of personal jurisdiction but consented to fight the suit in New York if personal jurisdiction could be established either in New York or Rhode Island.¹²⁴ The plaintiffs conceded that New York did not have jurisdiction over the case; so, the District Court proceeded to look to Rhode Island and First Circuit authority for guidance, because it was convinced that the issue involved Rhode Island law.¹²⁵ Rhode Island's long arm statute provided for personal jurisdiction to the full extent of its Constitution; but, because Rhode Island case law was silent on the issue, the court looked to the First Circuit's treatment of personal jurisdiction, acknowledging its adoption of the proximate-cause test.¹²⁶ Because the act of recruiting Chew was not a proximate cause of his death, the court granted the motion to dismiss.¹²⁷

On appeal, the Second Circuit considered the fact that under Rhode Island law, the defendant may not be subject to jurisdiction, but nonetheless opined that under Rule 4(k) there was still jurisdiction over him as long as subjecting him to suit does not offend "traditional notions of fair play and substantial justice."¹²⁸ The court noted the split among the circuits over using either the proximate cause test or

118. *Id.* at 26.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Chew*, 143 F.3d at 26.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.* (opining that the First Circuit would apply the proximate-cause test in a case such as the one before the court and observing that the court below also acknowledged that other circuits apply a but for test, and that the First Circuit at times applied the same test).

127. *Chew*, 143 F.3d at 26.

128. *See id.* at 28 (reviewing one of the court's recent decisions articulating the standard for exercising jurisdiction under 4(k) (citations omitted)).

but for test.¹²⁹ It took a different stance, concluding that the two tests are not "dichotomous."¹³⁰ Instead, the court used a sliding scale test based primarily on the number of contacts:

It must be remembered that the relatedness test is but a part of a general inquiry Where the defendant has had only *limited* contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. Where the defendant's contacts with the jurisdiction that relate to the cause of action are *more substantial*, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.¹³¹

To the Second Circuit, the constitutional test is met as long as the analysis involved an examination of the relationship "among the defendant, the forum and the litigation" and exercising personal jurisdiction does not offend "traditional notions of fair play and substantial justice."¹³² So in concluding that there were multiple contacts by Dietrich in Rhode Island, the court found jurisdiction because Dietrich: entered Rhode Island with the intent of assembling a crew to go to Bermuda; recruited Chew through his agent; and intended to return to Rhode Island "with many of the same crew."¹³³ Therefore, because Dietrich knew he would be returning with "most of the crew," he could "reasonably anticipate being 'haled into court'" there.¹³⁴

Following Second Circuit precedent, the district court in *Del Ponte v. Universal City Dev. Partners, Ltd.*,¹³⁵ found jurisdiction over a foreign kiosk operator as a result of a purchase of a lead-contaminated necklace made by a New York resident vacationing in Florida.¹³⁶ Linda Del Ponte sued the defendants on behalf of her child, Dominic, who was poisoned by at least one of two lead-

129. *Id.* at 29.

130. *See id.* ("We do not believe that this dichotomy is as stark as it may first appear.").

131. *Id.* (citations omitted) (emphasis added).

132. *See Chew*, 143 F.3d at 28 (restating the relatedness test (citations omitted)).

133. *See id.* at 30 (finding Dietrich's contacts alone enough to allow the exercise of jurisdiction).

134. *Id.*

135. *See Del Ponte v. University City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 U.S. Dist. LEXIS 3528, at *46 (S.D.N.Y. Jan. 16, 2008) (holding the balance of "reasonableness factors" allows for proper exercise of jurisdiction over defendant).

136. *Id.* at *45.

contaminated necklaces she purchased from defendant Ray Art at Universal Studios, Florida.¹³⁷ The injury occurred when they returned home to New York. Dominic took hold of the necklaces and began to chew on them. Routine pediatric tests revealed elevated levels of lead in his blood.¹³⁸

The Plaintiffs sued in the Southern District of New York alleging that Ray Art purchased like-kind necklaces from vendors in New York.¹³⁹ Jurisdictional discovery, however, revealed that the only product in Ray Art's inventory resembling the offending necklace came from a Pennsylvania distributor.¹⁴⁰ Consequently, Ray Art submitted that its purchases in New York were completely unrelated to Dominic's injuries.¹⁴¹ The Del Pontes countered that even if it were true that the offending necklace came from Pennsylvania, Ray Art "obtain[ed] a significant percentage of similar inventory from New York vendors."¹⁴² They argued the district court in New York had jurisdiction because "the sale that caused injury in New York still 'relate[d]' to Ray Art's business in New York."¹⁴³

Ray Art moved to dismiss before the magistrate judge for lack of personal jurisdiction.¹⁴⁴ The magistrate judge issued a report and recommendation denying the defendant's motion.¹⁴⁵ Subsequently, Ray Art appealed to the district judge arguing the magistrate judge erred in finding that purchases of necklaces and related trips in New York were enough to conclude that Ray Art conducts business in New York; erred in finding that Ray Art's contacts with New York distributors have connection with the injury that took place; ignored *Helicopteros*' precepts where "mere purchases and related trips, even if occurring at related intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a non-resident corporation in

137. *Id.* at *2.

138. *Id.*

139. *Id.*

140. *Del Ponte*, 2008 U.S. Dist. LEXIS 3528 at *4, *21, *39.

141. *Id.* at *39.

142. *Id.*

143. *See id.* ("Plaintiffs note that Ray-Art obtains a significant percentage of similar inventory from New York vendors, and thus argues that the sale [in Florida] that caused injury in New York still "relates" to Ray-Art's business in New York."); *but see O'Connor*, 496 F.3d at 318 ("A Philadelphia vendor may sell a lot of cheese steaks to German tourists, but that does not mean he has purposefully availed himself of the privilege of conducting activities within Germany.").

144. *Del Ponte*, 2008 U.S. Dist. LEXIS 3528 at *2.

145. *Id.* at *2.

a cause of action not related to the purchases;" and, finally, erred in concluding that a finding of personal jurisdiction over Ray Art "comport[ed] with traditional notions of fair play and substantial justice."¹⁴⁶

The district court accepted the magistrate's recommendation and denied the motion to dismiss.¹⁴⁷ Distinguishing the various circuits above and, at one point, recognizing the Third Circuit as "critical" of its circuit's use of the sliding scale, the district court proceeded to examine the case under the Second Circuit approach.¹⁴⁸ Again, under the test if the defendant has "scant contacts with the forum the court may demand a proximate cause relation between the . . . contact and the injury."¹⁴⁹ Conversely, if "the defendant has substantial contacts with the forum (even if not sufficient to establish general jurisdiction) the court may accept a more attenuated relation" between the contact and the injury.¹⁵⁰ The Court said that, under normal circumstances:

[T]he demonstrated relationship between Plaintiffs' cause of action and Ray Art's contacts with New York would not be sufficient to warrant a finding of specific jurisdiction. However, Ray Art's substantial contacts with the New York forum change the calculus. Under *Chew*, Ray Art's consistent activity in New York effectively lowers the relatedness bar thus permitting a broader interpretation of 'arise from or relate to.'¹⁵¹

The court went on to note that Ray Art's purchases in New York "enabled Ray Art to stock the variety of inventory desired by consumers like the plaintiffs."¹⁵² Acknowledging that the contacts

146. *Id.* at *8.

147. *Id.* at *45.

148. *See id.* at *37–38 n.8 (opining that the Second Circuit did not "conflate[] minimum contacts with reasonableness" but rather adopted the sliding scale to make the analysis easier for the district courts).

149. *Del Ponte*, 2008 U.S. Dist. LEXIS, at *36.

150. *Id.* at *36.

151. *Id.* at *39–40 (emphasis added).

152. *Id.* at *40–41 ("While not free from doubt, the Court finds that Plaintiffs' cause of action relates to Ray-Art's contacts with the forum.") The court explained further:

Under most circumstances, the demonstrated relationship between Plaintiffs' cause of action and Ray-Art's contacts with New York would not be sufficient to warrant a finding of specific personal jurisdiction. However, Ray-Art's substantial contacts with the New York forum change the calculus. Under *Chew*, Ray-Art's consistent activity in New York effectively lowers the relatedness bar, thus permitting a broader interpretation of "arise from or relate to." Because Ray-Art has purchased a very significant portion of its inventory from New York

were only "broadly related" to the plaintiff's claims, the court, however, found they were "broad enough" to "satisfy the constitutional requirement of 'fair play and substantial justice.'"¹⁵³ The Third Circuit, however, does not apply such a broad test, and takes a different view on what constitutes fair play and substantial justice.

PART III: The Third Circuit Presents a More Compelling View Against the Use of "Sliding Scale" Tests for Jurisdiction

In *O'Connor v. Sandy Lane*,¹⁵⁴ the Third Circuit disagreed with the Second Circuit's use of a "sliding scale" test in personal jurisdiction analysis, distinguishing the law in its circuit.¹⁵⁵ Patrick O'Connor, a Pennsylvania resident, suffered personal injuries from a slip and fall in the defendant hotel.¹⁵⁶ Sandy Lane, a luxury resort hotel, advertised itself as "the premiere address in the Caribbean" overlooking the "gorgeous crescent of beach on the Barbados' western coast."¹⁵⁷ On the recommendation of their friends, who were travel agents, the O'Connors booked a trip to Sandy Lane through American Express travel services.¹⁵⁸ They left for their first trip to Barbados in late February 2002 and returned to their Pennsylvania home in early March of that year.¹⁵⁹

vendors and its principals have visited New York on a yearly basis, Ray-Art's New York contacts have enabled Ray-Art to stock the variety of inventory desired by consumers such as Plaintiffs And, as a result of this activity in New York, Ray-Art could have anticipated becoming a party in New York courts, either as a defendant or as a plaintiff. Thus, while Ray-Art's contacts with the forum may be only broadly related to the instant cause of action, this broad relation is sufficient to satisfy the constitutional requirement of "fair play and substantial justice."

Id. See also *Chew*, 143 F.3d at 30 (noting that the Second Circuit is "at liberty to decide for [itself, regardless of the authority in other Circuits] what the Due Process Clause requires to sustain personal jurisdiction.").

153. *Del Ponte*, 2008 U.S. Dist. LEXIS, at *40–41.

154. See *O'Connor v. Sandy Lane*, 496 F.3d 312, 325 (3d Cir. 2007) (holding the exercise of jurisdiction proper where minimum contacts exist and the forum is reasonable and thus compliant with due process).

155. See *id.* at 321 (distinguishing "hybrid" approaches from the Third Circuit cases, which analyze general and specific jurisdiction cases separately).

156. *Id.* at 315.

157. *Id.*

158. *Id.*

159. *O'Connor*, 496 F.3d at 315.

Afterward, Sandy Lane began mailing the O'Connors seasonal newsletters.¹⁶⁰ Inspired by what they read, the O'Connors decided to book another trip the following year but, before they departed, Sandy Lane mailed them yet another brochure, this time describing their state-of-the-art spa treatments as able to "rejuvenate the mind, body and spirit" and encouraged scheduling them in advance.¹⁶¹ Subsequent phone calls were placed both to and from Sandy Lane to schedule and confirm the various appointments.¹⁶²

Sometime after the O'Connors arrived at Sandy Lane, Mr. O'Connor attended a spa treatment.¹⁶³ After he received the treatment, he was told by a Sandy Lane employee to step into the shower to wash up.¹⁶⁴ Due to residual treatment oil on his body and a lack of any protective mat on the shower floor, Mr. O'Connor slipped as he exited the shower and tore his rotator cuff.¹⁶⁵ Consequently, the O'Connors sued Sandy Lane in the Court of Common Pleas for Philadelphia County for negligence.¹⁶⁶

Sandy Lane removed the case to the United States District Court for the Eastern District of Pennsylvania, which eventually dismissed it for lack of personal jurisdiction.¹⁶⁷ On appeal, the Third Circuit exercised plenary review over the dismissal and ultimately reversed the decision.¹⁶⁸

Finding Purposeful Minimum Contacts

The Third Circuit began its examination of the activities between the parties, recognizing that *deliberate* targeting of the forum state is the constitutional standard.¹⁶⁹ In so doing, the court considered and affirmed that "contacts with a state's citizens that take place outside the state are not

160. *See id.* (explaining the marketing methods of Sandy Lane Hotel Co.).

161. *Id.* at 316 (criticizing the Second Circuit use of a sliding scale).

162. *See id.* (describing the nature of communications between the O'Connors and Sandy Lane Hotel Co.).

163. *See id.* (describing O'Connors' experience at Sandy Lane Hotel).

164. *See O'Connor*, 496 F.3d at 316 (detailing the circumstances surrounding O'Connors' injury).

165. *See id.* (explaining the causes of O'Connors' injury).

166. *See id.* at 316 (detailing the procedural history of the instant case).

167. *See id.* (explaining the procedural history of the case and its dismissal for lack of personal jurisdiction).

168. *See id.* at 315–16 (explaining the Third Circuit's exercise of plenary review and ultimate reversal of the case).

169. *See O'Connor*, 496 F.3d at 317 (explaining the court's focus on interactions between the parties and Sandy Lane Hotel's targeting of the forum state (emphasis added)).

purposeful contacts with the state itself."¹⁷⁰ Applying that standard to the facts of the case, the Third Circuit found that activities such as receiving recommendations from friends who happen to be travel agents do not constitute purposeful "contacts" by the defendant-corporation with the forum state, because Sandy Lane was not a party to those conversations.¹⁷¹ The contacts Sandy Lane made to Pennsylvania, after the O'Connor's 2002 trip also lacked jurisdictional significance.¹⁷² The contacts before the O'Connor's third visit, however, were sufficient to support specific jurisdiction.¹⁷³

In particular, the mailing of the seasonal newsletters, the brochure regarding the spa-treatments, and the phone calls were all in furtherance of "cultivat[ing] the relationship" with the O'Connors.¹⁷⁴ The court found that Sandy Lane used these contacts to form a contract to render spa services, explaining, "[t]hrough these acts, Sandy Lane deliberately reached into Pennsylvania to target two of its citizens."¹⁷⁵ Thus, "if the O'Connor's allegations are true, then they establish purposeful contacts with Pennsylvania."¹⁷⁶

The Third Circuit's Answer to the "Arise Out Of or Relates To" Conundrum

After identifying the first-prong of the inquiry, the Third Circuit proceeded to examine whether the claims arose out of or related to at least one of these contacts. The Third Circuit acknowledged that there is no consensus among the circuits as to the meaning of the phrase "arise out of or related to" in specific jurisdiction analysis, because as explained before, the Supreme Court has not "explained the scope of this requirement."¹⁷⁷ As

170. *Id.*

171. *See id.* at 317–18 (explaining that non-purposeful contacts by Sandy Lane Hotel were insufficient to support specific jurisdiction).

172. *See id.* (explaining the effect of the contacts between the O'Connors and Sandy Lane).

173. *See id.* (explaining the jurisdictional significance of the O'Connors' third visit).

174. *O'Connor*, 496 F.3d at 317–18.

175. *Id.*

176. *Id.* at 318.

177. *Id.* at 316 (criticizing the Second Circuit's use of a sliding scale); *see also Helicopteros*, 466 U.S. at 415–16 n.10 ("We do not address . . . whether the terms 'arising out of' and 'related to' describe different connections . . ."). "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." *Id.*

a result of the lack of specificity from the Supreme Court, the Third Circuit noted the three standards used by the various circuits to resolve the problem.¹⁷⁸ It concentrated on the third standard which focuses on hybrid approaches such as: "[T]he substantial connection test," the "discernible relationship test," and the "the sliding scale test" used by the Second Circuit.¹⁷⁹ This is the area where the Third Circuit departs from its sister circuit.

The court observed that hybrid tests, such as the sliding scale, omit the causation element.¹⁸⁰ It found that since this approach considers the "totality of the circumstances," there is *no distinction* between general and specific jurisdiction.¹⁸¹ Contacts are measured quantitatively along a sliding scale with general and specific jurisdiction at the endpoints.¹⁸² As a result, sliding scale tests used to gauge personal jurisdiction have not been adopted by the Third Circuit.¹⁸³

*The Third Circuit Considers and Rejects "Hybrid" Approaches as
Inconsistent with Supreme Court Precedent*

As stated above, the Third Circuit deemed hybrid approaches too easily manipulated, offending the separate, dichotomous spheres of specific and general jurisdiction.¹⁸⁴ Consequently, it rejects their use for jurisdiction analysis.¹⁸⁵ The criticism stems from the uncontrolled flexibility of hybrid tests, which allow courts to "vary the scope of the relatedness requirement" according to the "'quantity and quality' of the defendant's contacts."¹⁸⁶ In criticizing the Second Circuit's use of a sliding scale in *Chew*, the Third

178. See *O'Connor*, 496 F.3d at 318–20 (detailing the three most popular judicial approaches: the "proximate cause" or "substantive relevance test, the but for causation test, and the "substantial connection" or "discernable relationship" test).

179. *Id.* at 319–21.

180. See *id.* at 319 ("Unlike the but for test, causation is of no special importance [to the 'substantial connection' or 'discernable relationship' test.]").

181. *Id.* at 320.

182. See *id.* at 321 (explaining that the Third Circuit, unlike others, does not view general and specific jurisdiction as being "two points on a sliding scale").

183. See *O'Connor*, 496 F.3d at 321 (explaining the Third Circuit's will not adopt the sliding scale approach employed by other circuits).

184. See *id.* at 321 (finding that the variability inherent in the "hybrid approaches" was undesirable).

185. See *id.* (explaining that "the 'sliding scale,' 'substantial connection,' and 'discernible relationship' test are not the law in [the Third C]ircuit").

186. *Id.*

Circuit opined in *O'Connor* that, as a result of using a hybrid approach, "[g]eneral and specific jurisdiction merge, and the result is a freewheeling totality-of-the-circumstances test. Our cases, however, have always treated general and specific jurisdiction as analytically distinct categories, not two points on a sliding scale."¹⁸⁷

To the Third Circuit, the Supreme Court clearly made two distinctions. If the defendant makes systematic and continuous "affiliations" with the forum, then general jurisdiction is found.¹⁸⁸ On the other hand, if the defendant's contacts are anything less than the general standard, then "at least one contact *must give rise or relate to* the plaintiff's claim."¹⁸⁹ When using hybrid approaches, the court determined that "all factors come together in 'a sort of jurisdictional stew.'"¹⁹⁰ The Third Circuit's reasoning is persuasive because adopting a test that does not confine contacts to two discernable spheres fails to place defendants on notice of where they stand. As a result, they would not be able to, as the Third Circuit says, "control their jurisdictional exposure."¹⁹¹

The Third Circuit Applies a Qualified or Heightened "But For" Test

In the end, the Third Circuit opined that the but for test was the better test to "preserve the distinction between general and specific jurisdiction," since "[b]ut-for cause does not shift with the strength of the defendant's contacts, nor does it slide along a continuum. Rather it draws a bright line separating the related from the unrelated."¹⁹² The court reasoned, however, that the but for test has its weaknesses and therefore it requires a more "direct causal connection."¹⁹³ Primarily, the court found the test can be over-inclusive, explaining, "[The but for test] has . . . no limiting principle;

187. *Id.*

188. *See O'Connor*, 496 F.3d at 321 n.10 ("Whatever the merits of [a sliding scale test] it is clear that a fairly sharp dichotomy between [specific and general jurisdiction] still expresses the view of the Supreme Court." (quoting EUGENE F. SCOLES, ET AL, CONFLICT OF LAWS 306 (West Publishing Co., 4th ed., 2004)).

189. *Id.* at 321 (emphasis added).

190. *Id.* (citing Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 666 (1991)).

191. *Id.* ("As long as out-of-state residents refrain from continuous and substantial forum contacts, they can conduct their affairs 'confident that transactions in one context will not come back to haunt them unexpectedly in another.'). The court further held: "A standard so formless has no place in our relatedness inquiry." *Id.* at 322.

192. *Id.* at 322.

193. *O'Connor*, 496 F.3d at 323.

it literally embraces every event that hindsight can logically identify in the causative claim."¹⁹⁴ The court admonished that but for causes must have a "meaningful relationship" to the "scope of the 'benefits and protection' received from the forum;" and, therefore, since some but for causes "do not relate to their effects in a jurisdictionally significant way," the relatedness inquiry cannot end with ascertaining a but for cause alone.¹⁹⁵ "If but for causation sufficed, then defendants' jurisdictional obligations would bear no meaningful relationship to the scope of the 'benefits and protection' received from the forum. As a result, the relatedness inquiry cannot stop at but for causation."¹⁹⁶ Therefore, the court answered the dilemma by buttressing the but for test with the reciprocity principle (or the "quid pro quo" principle) found in *Burger King*:

The causal connection can be somewhat looser than the tort concept of proximate causation, but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.¹⁹⁷

The court began its analysis starting with Mr. O'Connor's affidavit. Mr. O'Connor claimed that he relied on the brochures when he made the spa treatment appointment.¹⁹⁸ On this basis, the court concluded, "but for the mailing of the brochure, Mr. O'Connor never would have purchased a massage, and he would not have suffered a massage-related injury."¹⁹⁹ In addition, consistent with its ruling that but for analysis needed something more substantial, the court further found that the reciprocity principle was

194. *Id.* at 322.

195. *Id.* at 322–23.

196. *Id.* at 322 (criticizing the Second Circuit's use of a sliding scale).

197. *Id.* at 323 ("We thus hold that specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test."). The Court continued:

"But in the course of this necessarily fact-sensitive inquiry, the analysis should hew closely to the reciprocity principle upon which specific jurisdiction rests." The relatedness requirement's function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact closely tailored to that contact's accompanying substantive obligations."

Id.

198. *See O'Connor*, 496 F.3d at 323 (explaining that Sandy Lane's solicitation is a "but for" cause of O'Connor's injury because O'Connor claims he received massage treatment "as a result" of Sandy Lane's solicitation").

199. *Id.* at 323.

satisfied.²⁰⁰ It found that Sandy Lane availed itself of Pennsylvania's commercial laws and through the mailings and phone calls formed a contract for spa services.²⁰¹ Because the mailings and phone calls were in furtherance of a contract from which the defendant benefited, with "those rights came accompanying obligations."²⁰² Those obligations included an implied contractual promise by Sandy Lane to exercise due care when performing the spa services.²⁰³

Although the O'Connors' claims involved a tort not a contract, the court found that Sandy Lane breached a social duty not to act with negligence:

Our relatedness analysis, however, requires neither proximate causation nor substantive relevance. It is enough that a meaningful link exists between a legal obligation that arose in the forum and the substance of the plaintiffs' claims. The O'Connors claim Sandy Lane breached a duty that is identical to a contractual duty assumed by the hotel in Pennsylvania. 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.²⁰⁴

Based on this analysis, the court held that the O'Connors' claims "'arise out of or relate to' Sandy Lane's Pennsylvania contacts."²⁰⁵

PART IV: Interpreting The Phrases "Arise Out Of" Or "Related To" Through "Objectified Interpretation" And Offering a Four-Step Approach to Resolving Personal Jurisdiction Questions

Textualism has traditionally extended to interpretation of statutes,²⁰⁶ constitutions and other legal texts; however, its tenets may shed some light

200. *See id.* at 323–24 (explaining that Sandy Lane's solicitation of the O'Connors in Pennsylvania created rights enjoyed by Sandy Lane and created obligations to the O'Connors).

201. *See id.* at 324 (explaining that Sandy Lane created a contract for spa services under Pennsylvania law "through its mailings and phone calls to Pennsylvania").

202. *Id.* at 323.

203. *See id.* (finding that the nature of the contract formed between the parties required that Sandy Lane "exercise due care in performing the services required").

204. *O'Connor*, 496 F.3d at 324.

205. *Id.*

206. *See* Justice Antonin Scalia, Associate Justice of the United States Supreme Court, Remarks at The Catholic University of America, "A Theory of Constitutional Interpretation" (Oct. 18, 1996) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (opining on statutory and constitutional textualism).

If you are a textualist, you don't care about the intent, and I don't care if the

here.²⁰⁷ The courts have read the language to mean to apply one test over the other. Regardless of whether the Court declined to decide whether there was a distinction, the circuits have certainly focused on the meaning and application of those terms.²⁰⁸

Obviously, the Supreme Court is constitutionally charged with the responsibility to interpret the law. A metaphysical view as to what constitutes "interpreting a law" was well put by Jesuit philosopher Fr. Austin Fagothy and most closely resembles the conservative jurisprudential view: "Interpretation of the law is its genuine explanation according to the mind of the lawgiver."²⁰⁹ In turn, textualism provides that law's interpreter should adhere as close to the text as objectionably and as reasonably as possible.²¹⁰ The question, however, remains as to how far this should extend to the reading of case law.

Judge Frank Easterbrook offers that when the textualist looks at statutory structure he "hear[s] the words as they would sound in the mind of a skilled, *objectively reasonable* user of words."²¹¹ Rationally, it should be the same when taking direction from any authority, including a court. Therefore, in cases where there is much focus on the Court's teaching,²¹²

framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. I do the same with statutes, by the way, which is why I don't use legislative history. The words are the law.

Id.

207. See Caleb Nelson, *What is Textualism?* 91 VA. L. REV. 347 (2005) (explaining the difference between textualism and intentionalism). "The most common way of distinguishing textualism from its principal judicial rival, 'intentionalism,' purports to identify a basic disagreement about the proper goal of statutory interpretation: intentionalists try to identify and enforce the 'subjective' intent of the enacting legislature, while textualists care only about the 'objective' meaning of the statutory text." *Id.*

208. See *Helicopteros*, 466 U.S. at 415–16 n.10 (detailing that the Supreme Court declined to decide the distinction between the phrases "arise out of" and "related to").

209. FAGOTHY, *supra* note 13, at 296.

210. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–25 (Princeton Univ. Press, 1997) (explaining that textualism does not require "strict constructionism" but rather requires interpretation within a word's "limited range of meaning").

211. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (emphasis added).

212. See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1254–55 (explaining the importance placed on written judicial opinions).

In the United States, however, the common law is embarking on a path towards becoming increasingly textual, just as statutes have been for hundreds of years. It is no exaggeration to say that in this country, the

and where there is very little explanation surrounding a clear mandate to a lower court, such as in the case of specific jurisdiction where the Court is emphatic that the claim must arise out of or relate to the defendant's contact, reading the Court's instruction as one would a statute,²¹³ objectively and rationally, might yield a clearer and truer result.

common law consists of what judges write in their opinions. What they think or what they say during the proceedings before them is almost entirely irrelevant. As a result, it is less and less necessary to search for the holding or *ratio decidendi* of a case; the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does. As a consequence, legal reasoning is gradually being supplanted by close reading . . . The end result of these two centuries of development in the United States is that what an appellate judge says—for example, during or after oral argument—is completely irrelevant. What matters, for legal purposes, is what judges write in their opinions. Because the text comes straight from the horse's mouth, so to speak, lawyers focus intently on the judges' exact words. The practice of having a single majority opinion, when possible, imbues the text of the opinion with further power, since it is normally no longer necessary to extract a *ratio decidendi* from two or more opinions that reach the same result but differ in their reasoning.

Id.

213. *See id.* at 1254–55 (explaining the new approach taken by the Supreme Court in developing multi-part or multi-prong tests to assist lower courts and the view among lower courts of Supreme Court opinions as being akin to statutes). The author explains:

The observation that the Supreme Court has become inclined to set clear guidelines for lower courts to follow, often via multi-part tests, is not novel. Robert Nagel has observed the tendency of the Court during the past few decades to use a "formulaic style" of opinion writing in constitutional cases, a style that makes much use of "elaborately layered sets of 'tests' or 'prongs' or 'requirements' or 'standards' or 'hurdles.'" He suggests that the elaborateness and detail of the formulae in constitutional cases is "an obvious effort to achieve control and consistency." Unlike an earlier era, where judges were subject to "simple and undefined maxims," modern courts are bound by "rules that are specific and multiple." Frederick Schauer has also addressed the notion that modern judicial opinions, especially in constitutional cases, "read more like statutes than like opinions of a court." Schauer's view is that it is especially courts lower in the hierarchy that are likely to interpret a judicial opinion like a statute: "It is not what the Supreme Court held that matters, but what it said . . . One good quote is worth a hundred clever analyses of the holding." The language of an opinion therefore "takes on a special significance" in the lower courts and "operates like a statute." As a consequence, the opinion's language "will be carefully analyzed, and discussions of why one word rather than another was used will be common."

Id.

The Third Circuit's Test is Supported by a Natural Reading of the Text

There are several classifications of textualism, but the purpose of this article is not to argue which one is better or more pure than the other.²¹⁴ Professor John Manning, in keeping with the judicial philosophy of Justice Scalia and Judge Easterbrook, argues that textualism focuses on "objectified intent"—the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words."²¹⁵

Here, when dealing with case law we can apply *interpretatio objectificata*, or the "objectified interpretation" standard, which is akin to the "objective intent" standard.²¹⁶ Lower courts arguably "interpret" case law from the Supreme Court and, in order to be rational and fair to the Court's teaching, that interpretation should be objective and *rationaliter lectum*, "rationally read." Because the terms "arise out of" and "related to" present a paradox in context, one must proceed by applying other interpretive tools.²¹⁷ Therefore, starting with a dictionary definition, the terms "arise out of" mean that the claim must arise, or "come into being" (to originate from a particular source or natural consequence) from the contact.²¹⁸ In turn, the terms "related to" mean, in the context of the entire

214. See Elliot M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 984 (2007) (describing the difference between Justice Alito's "newer textualism" and Justice Scalia; where Justice Alito will use legislative history to establish context); J.T. Hutchins, *A New New Textualism: Why Textualists Should Not Be Originalists*, 16 KAN. J.L. & PUB. POL'Y 108, 110–27 (2007) (arguing for an "evolutionary" textualism); R. Shep Melnik, *Statutory Reconstruction, The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 96 (1995) (reviewing and quoting Eskridge's "dynamic textualism" as "look[ing] forward to the contemporary world's 'values and social needs' and to 'unforeseen circumstances'" (WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994))).

215. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005).

216. See *id.* at 433 (explaining "objectified intent" as a "concept predicated on the notion that a judge should read a statutory text as a reasonable person conversant with applicable social conventions when read").

217. See *Barnhart v. Sigmon Coal, Co.*, 534 U.S. 438, 450, 461 (2002) (explaining that analysis begins with the language of the text to determine whether it has "plain and unambiguous meaning" at which point the inquiry ceases). If that fails, then the analysis proceeds through the application of "other canons or interpretive tool[s]." See also *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994) (explaining the Court's utilization of the dictionary definitions to assist in resolving an ambiguity in 47 U.S.C.S. 203(b)(2)).

218. See THE NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 50 (Int'l Ed. 1989) ("Whether certain events 'arise out of' a nonresident defendant's actions within Puerto

sentence, claims that relate or are associated (the way in which one thing is associated with another; to show nor establish a logical or causal connection between) to a defendant's activities within the forum state.²¹⁹ This suggests a more relaxed standard than the former. Therefore, the result is that sometimes specific jurisdiction can be found through a more direct, intimate relationship between a contact and a claim, and at other times, a looser relationship between a contact and a claim is warranted.

One reading of the text calls for using two separate tests. The proximate cause and but for tests could be used, as it is now, in separate, exclusive applications.²²⁰ The inconsistent results in doing so, however, are apparent in the present circuit split. Applying a proximate cause test to the contacts and claims in either *Nowak* or *O'Connor*, for instance, would not yield jurisdiction, because the advertisements were not intimate (no proximity) to the tort claim. As discussed above, this is the problem with applying proximate cause alone. The test is too restrictive, because the advertisements still had a causal link to the claims in those cases. On the other hand, applying the but for test to the circumstances in *Nowak* and *O'Connor* would yield a finding for jurisdiction; but, notwithstanding the Third Circuit's qualified version, the problem with the but for test, as the Third Circuit says, is that it is over-inclusive,²²¹ where unfettered application could result in hauling an unwary defendant into court from contacts too attenuated to the claim.

A second way to keep specific and general jurisdiction distinct would be to apply both the proximate cause test and the but for test consecutively within an analysis. The problem here is that if at first the proximate-cause test yielded a negative result for jurisdiction and a subsequent application of the but for test yielded a positive result for jurisdiction on the same facts

Rico is comparable or analogous to whether certain actions can be said to be the legal, or proximate cause of injuries suffered by a plaintiff."); see also *Pizzaro*, 907 F.2d at 1259 (explaining the nature of defendant's negligence must have "arose out of" defendant's contacts with Puerto Rico to establish *in personam* jurisdiction over the defendants).

219. See THE NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE, 840 (Int'l Ed. 1989); see also THE MERRIAM-WEBSTER DICTIONARY, 588 (Pocket Ed. 1974); *Merriam-Webster's Online Dictionary*, MERRIAM-WEBSTER (11th Ed. 2009) <http://www.merriam-webster.com/dictionary/relate>; see also *Leocal v. Ashcroft*, 125 S.Ct. 377, 382 ("When interpreting, we must give words their 'ordinary or natural' meaning.").

220. See Braham Boyce Ketcham, Note, *Related Contacts for Specific Personal Jurisdiction Over Foreign Defendants: Adopting a Two-Part Test*, 18 TRANSNAT'L L. & CONTEMP. PROB. 477, 492-96 (2009) (arguing that a disjunctive reading yields a two part test).

221. See *O'Connor*, 496 F.3d at 322 (criticizing the but for test as lacking a limiting principle).

and circumstances, the application of the but for test will render the proximate cause test superfluous. As a result, applying the two tests consecutively would simply make the relevant test the looser one.

There is another, more natural reading of the language which suggests something in between a strict connection and a looser one. It suggests a test that is broad enough to separate the related from the unrelated, while limiting any over-inclusive effects. The Third Circuit test compensates for but for's inherent limitless application and thus, is consistent with a natural reading of the "arise out of or related to" language.²²² When it articulated its version of the test, the court opined that while the but for test "draws a bright-line . . . between the related and un-related," it cautioned against the test's "overinclusiveness."²²³ Therefore, in order to separate the related from the unrelated while applying the but for test, a court should examine whether the "causal connection [is] . . . intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable."²²⁴

There has been some criticism that the Third Circuit test concentrates too much on causality.²²⁵ The Third Circuit is in good company because causality is what most courts use to establish specific jurisdiction²²⁶ and the concept appears to be the only means to keep the spheres of specific and general separate.²²⁷ Further, there is a claim that the Third Circuit rejected the but for test.²²⁸ This assertion is incorrect. The Third Circuit did not

222. See *id.* at 323 (explaining that the causal connection must be close enough "to keep the quid pro quo proportional and personal jurisdiction reasonable foreseeable"); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 331–32 (2007) (Scalia, J., concurring) ("The Court and the dissent criticize me for suggesting that there is only one reading of the text.") "They are both mistaken. I assert only that mine is the natural reading of the statute (i.e., the normal reading), not that it is the only conceivable one." *Id.* *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (reasoning that, "[w]hen interpreting . . . we must give words their 'ordinary or natural' meaning").

223. *O'Connor*, 496 F.3d at 322.

224. *Id.* at 323.

225. See Jonathan P. Diffley, Note, *Spa-cific Jurisdiction: A Massage in Barbados Perpetuates Improper Analysis of Personal Jurisdiction in U.S. Courts*, 58 CATH. U. L. REV. 305, 329 (2008) ("At its outset, the *O'Connor* approach overemphasized the issue of causation, making it the threshold factor in the relatedness requirement inquiry.")

226. See Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But-For" Test*, 82 CALIF. L. REV. 1545, 1577 (1994) ("The notion of a causal relationship between the contacts and plaintiff's injury is present in many judicial opinions, even if no specific type of causation is discussed.")

227. See Diffley, *supra* note 225, at 323 (observing that the Third Circuit acknowledged that the but for test keeps the doctrines of specific and general jurisdiction separate).

228. See *id.* (noting that there is no limiting structure in the casualty chain).

reject the but for test, but however criticized its "overinclusiveness."²²⁹ It regarded the test as a starting point from which a court should arguably do what it is designed to do—make a decision as to whether the defendant had a legal obligation to the plaintiff as a result of its contacts with the forum.²³⁰ There has also been criticism that the Third Circuit did not hew closely to the teachings of *Burger King*.²³¹ The argument is that the Third Circuit overreached when it dismissed the substantial connection test as a hybrid that confused the lines between specific and general jurisdiction.²³²

To the contrary, the Third Circuit observed all the teachings of the Court and is unerring in its disregard of the "substantial connection" test as one that fails to keep the *quid pro quo* proportional.²³³ The focus should be on the defendant and its actions toward the forum's citizens.²³⁴ The Court in *World-Wide Volkswagen*, was clear: the question is whether "the

229. See *id.* at 322 (discussing various overinclusive situations when applying the but for test).

230. See *O'Connor*, 496 F.3d at 321–22 (noting that "courts must decide each case individually" and refraining from adopting a mechanical test).

231. See Diffley, *supra* note 225, at 327–28 (arguing that the *Burger King* court "determine[d] whether the [defendant's] contact had substantial connections with the forum state" and "refused to be bogged down by analysis of whether the relationship between the defendants' contacts with the forum state and the plaintiff's claims were casually connected"). The Court made no such assertion that there should be no casual connection between a defendant's contacts with the forum, as *Burger King* was a case in contract thus obviating the need to find causality. *Id.* at 327–28. See also 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, 579 (1998) ("[T]he Court has given little indication of the jurisdictional characteristics that might justify the exercise of specific jurisdiction in the absence of a causal nexus."). Arguably, there could have been *not* specific but general jurisdiction over Audi, since the citizens of Oklahoma were not involved. *Id.* at 579–80.

232. See Rose, *supra* note 226, at 328 (concluding that the Third Circuit overreached).

233. See *id.* at 326 ("The O'Connor opinion correctly analyzed and rejected the proximate cause and but-for tests."); but see Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 641 (2009) (criticizing the substantial connection test's lack of the causal element, turning it into a sliding scale); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1461 (1988) (contending in context of products liability cases that finding for specific jurisdiction because similar products are present in the forum can blur the line between specific and general jurisdiction). In an analysis of "hybrid approaches," Professor Twitchell uses the metaphor of a recipe that by combining "a little purposefulness, a little relatedness, a little convenience and some state interest [you have] fair jurisdiction, even if the case falls outside the contours of specific and general jurisdiction as they have been defined by courts and commentators." Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 666 (1991).

234. See *World-Wide Volkswagen*, 444 U.S. at 297 (finding that the focus should be on the defendant and its actions toward the forum's citizens).

defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there" as "critical to due process analysis."²³⁵ Similarly in *Burnham v. Superior Court*,²³⁶ Justice Scalia described "uncertainty and unnecessary litigation over the preliminary issue of the forum's competence" as "evils."²³⁷ Predictability should be the goal of jurisdictional rules.

A Formulaic Depiction of Jurisdictional Analysis

Taking into account the teachings of all the case law discussed herein, a four-step process is postulated as a uniform method to determine jurisdiction. At Step 1, the inquiry should center on whether the defendant "purposely availed" itself of the legal protections and benefits of the forum state.²³⁸ At Step 2, a court should analyze whether the contacts are causally related to the claims, using the Third Circuit's qualified but for test.²³⁹ If the test is positive for jurisdiction, then under Step 3, a court should determine reasonableness.²⁴⁰ Finally, under Step 4, if the test instead

235. *Id.* The Court denied jurisdiction in the in the forum state of Oklahoma because the defendants decided against serving, either directly or indirectly, the Oklahoma market for their product. *Id.* at 295. The defendants were a New York car dealership and New York distributor that served solely the New York market. *Id.* at 288–89. The automobile involved in the accident was sold to the customer in New York, but found its way to Oklahoma via the *customer's* "unilateral activity," not by any effort on the part of the defendants to reach the Oklahoma market with their products. *Id.* at 298. *See also* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (O'Connor, J., concurring) (noting that *World-Wide Volkswagen* "rejected the assertion that a consumer's unilateral act of bringing the defendant's product into the forum State was a sufficient constitutional basis for personal jurisdiction over the defendant").

236. *See* *Burnham v. Superior Court*, 495 U.S. 604, 626 (1990) (finding that the Due Process Clause does not prohibit courts from exercising jurisdiction over petitioner based on in-state service); *see also* *Cote v. Wadel*, 796 F. 2d 981, 983 (1986) ("Jurisdictional rules should be as simple as possible, so that the time of the litigants and judges is not wasted deciding where a case should be brought and so that fully litigated cases are not set at naught . . . because a subtle jurisdictional bar was overlooked until the appeal. . .").

237. *Burnham*, 495 U.S. at 626.

238. *See* *Burger King Corp.*, 471 U.S. at 472 (noting that the defendant must have "purposely directed [its] activities at the forum").

239. *See* *O'Connor*, 496 F.3d at 323 (describing its test).

240. *See* *Ressler*, *supra* note 233, at 635 (explaining that courts typically use a three-pronged test to determine whether sufficient contacts exist to confer specific jurisdiction and that one of those prongs is a reasonableness requirement).

produces a negative result, the contacts would be examined under general jurisdiction analysis.²⁴¹

Before proceeding with the four-step jurisdiction analysis, the following legal formulae are offered to visualize the various concepts involved in that analysis. While these are not the only formulae that could be derived, they represent the major elements necessary to determine jurisdiction. The case law discussed heretofore combined with the Third Circuit test can be reduced to this equation²⁴² for specific jurisdiction:

$$J = Pmc + T + R$$

Jurisdiction (J) equals purposeful minimum contacts (Pmc) + Third Circuit test (qualified but for) variable (T) + reasonableness (R).

For general jurisdiction, the following postulations are suggested, where J = jurisdiction, Csc = continuous and systematic contacts, H = *Helicopteros*, and P = *Perkins*:

If $Csc \geq P$, then J.

If $Csc \leq H$, then not J.²⁴³

If continuous and systematic contacts are *greater than or equal to Perkins*,²⁴⁴ then jurisdiction should be found. If continuous and systematic contacts are *less than or equal to Helicopteros*,²⁴⁵ then no jurisdiction should be found. To recapitulate, in *Perkins* the defendant conducted his entire business in Ohio, including maintaining an office there, keeping office files, bank accounts, holding directors meetings, and supervising operations from there.²⁴⁶ Contrastingly, in *Helicopteros*, the contacts with Texas were fewer in number.²⁴⁷ They consisted of, but were not limited to, purchases of 80% of its fleet of helicopters, purchases of supplies, sending pilots to training, sending management to Texas for training, and receiving approximately \$5 million in payments drawn upon a Houston bank.²⁴⁸

241. See *infra* note 272 and accompanying text (explaining the substantial contacts analysis for general jurisdiction by the Court in *Del Ponte*).

242. The use of algebraic formulas to reduce certain legal concepts to mathematical elements may assist at times in applying the law to facts in a given situation. Here, the Third Circuit test supplants the "arise out of" or "related to" requirement in *Helicopteros*.

243. Since analyzing jurisdiction is fact-sensitive, there may be cases where the amount of contacts may be one more or one less in either case. The result can be no jurisdiction if applying strictly or perhaps a reasonably close standard could be applied to find jurisdiction.

244. See *Perkins*, 342 U.S. at 447–48 (describing contacts).

245. See *Helicopteros*, 466 U.S. at 411–12 (describing contacts).

246. See *supra* text accompanying note 29 (describing jurisdiction analysis in *Perkins*).

247. See *supra* text accompanying note 29 (describing jurisdictional analysis in *Helicopteros*).

248. See *id.* (explaining the contacts defendant had in *Helicopteros*).

A Four Step Approach to Determine Jurisdiction

Based on the above formulae, the four-step approach is applied in the analysis below using the fact pattern in *Del Ponte*.

Determine Purposeful Contacts

The first step requires the determination of a defendant's contacts purposefully directed to the forum state.²⁴⁹ Under the above formula, the representative variables at this step are Pmc (purposeful minimum contacts). To find the elements, there must be a deliberate targeting of the forum—a reaching in by the defendant, keeping in mind that "unilateral activity of those who claim some relationship with a non-resident defendant" is insufficient as well as contacts with a state's citizens taking place outside the state.²⁵⁰

Ray Art's contacts were relatively small in number, reduced to purchasing some of its inventory from New York vendors and annual visits by its principals to the state.²⁵¹ The court calculated the purchases to be a third of its inventory over five years.²⁵² Assuming the court's five-year historical value and accepting, for now, its conclusion that these contacts evidenced purposeful availment,²⁵³ the analysis moves to Step 2.

Apply the Third Circuit Test for Specific Jurisdiction

The Third Circuit opined that the problems with hybrid approaches, particularly sliding scale tests, "vary the scope of the relatedness

249. See *Hanson*, 357 U.S. at 253 ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State."); see also *O'Connor*, 496 F.3d at 317 (noting that specific jurisdiction has three parts starting with determining purposeful availment); *Moki Mac River Expeditions*, 221 S.W.3d at 577 ("[T]he facts alleged must indicate that the seller intended to serve the Texas market.").

250. See *Hanson*, 357 U.S. at 253 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

251. See *Del Ponte*, 2008 WL 169358, at *5–7 (describing contacts).

252. See *id.* at *5 ("[J]urisdictional discovery has demonstrated that Ray-Art has purchased nearly a third of its inventory over a five-year period from New York vendors.").

253. See *id.* at *11 ("In light of all of these considerations, including the stage at which this case rests, Plaintiff has established sufficient minimum contacts.").

requirement" and thus, merge personal and general jurisdiction.²⁵⁴ Thus, identifying a but for cause is necessary to draw "a bright line separating the related from the unrelated."²⁵⁵ Arguably, any test which fails to recognize the causation element blurs the line between specific and general jurisdiction.²⁵⁶

The Third Circuit approach compensates for that.²⁵⁷ To reiterate, it held that "specific jurisdiction requires a closer and more direct causal connection than that provided by the but for test alone."²⁵⁸ The court opined that the but for test needed to account for the defendant's intentions: Whether there was an intimate causal connection to "keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable."²⁵⁹ In *O'Connor*, the court first found evidence of reaching in by the defendant to target Pennsylvania's citizens and availing itself to the protections of Pennsylvania law to make contracts in Pennsylvania.²⁶⁰ A contract was formed through the mailings and phone calls to the O'Connors such that there existed a "meaningful link . . . between a legal obligation that arose in the forum and the substance of the plaintiffs' claims."²⁶¹ The court further held that even though the O'Connors' claims "sounded in tort" the

254. *O'Connor*, 496 F.3d at 321; *see also* Simard, *supra* note 231, at 581 (contending that the sliding-scale has "an inherent tendency to dilute jurisdictional requirements"). "[I]t seems that theoretically and pragmatically the categories of general and specific jurisdiction should be considered separate and distinct from each other rather than merely as the two extreme on a continuum of contacts." *Id.* at 581. *See also* Diffley, *supra* note 231, at 328 (arguing that "the sliding-scale test that the Third Circuit condemned clearly defies the personal jurisdiction doctrine").

255. *O'Connor*, 496 F.3d at 321; *see also* *Moki Mac*, 221 S.W.3d at 579 (acknowledging that most courts have interpreted relatedness to require a causal connection); *but see* Ketcham, *supra* note 220, at 492–96 (arguing against adopting the Third Circuit test as a national standard since it focuses on causality and for a test which simply requires a direct relationship where a causal relationship is not necessary, disagreeing with most courts).

256. *See Moki Mac*, 221 S.W.3d at 583 (noting that even the sliding scale jurisdictional analysis presents a number of problems such as blurring the distinction between general and specific jurisdiction); *see also* Maloney, *supra* note 67, at 1299–1300 (discussing the impact of the but for test).

257. *See O'Connor*, 496 F.3d at 321 (finding that identifying a but for cause is necessary to draw a bright line separating the related from the unrelated).

258. *Id.* at 323; *see also* *Moki Mac*, 221 S.W.3d at 581 (noting that "[a]lthough the *Shute* court posited that the required reasonableness inquiry would act as a check on the but for test's expansiveness, commentators have questioned the efficacy of the reasonableness safeguard, calling it 'highly deferential'" (citations omitted)).

259. *Id.*

260. *See id.* (discussing defendant's contacts with Pennsylvania).

261. *Id.* at 323–24.

defendant had a binding social duty to act without negligence, which was identical to the contractual duty they assumed in the forum state.²⁶²

If the "but for" test were applied in a case like *Del Ponte*, "but for defendant's purchases of jewelry in New York, the sale in Florida would not have occurred," while applying the Third Circuit's limiting principle that the causal connection be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable, personal jurisdiction would not be established. Mere purchases of jewelry²⁶³ by the defendant in New York have no "meaningful link . . . of a legal obligation that arose in the forum [New York] and the substance of plaintiff's claim [injury to the child]."²⁶⁴ The defendant was not targeting the Del Pontes' through those purchases, and therefore, formed no contract with them in New York. The necklace was sold in Florida and the injury occurred in New York. As the Third Circuit reasoned: "Contact with vacationing Pennsylvanians is no substitute for contact with Pennsylvania A Philadelphia vendor may sell a lot of cheese-steaks to German tourists, but that does not mean he has purposefully availed himself of the privilege of conducting activities within Germany."²⁶⁵ Furthermore, there is a reasonable probability that the offending necklace came from Pennsylvania.²⁶⁶ As a result, specific jurisdiction under Step 2 arguably should not be found.

Determine Whether It Would Be Reasonable to Subject the Defendant to Jurisdiction.

If Step 2 yields a positive result, then the analysis would move to whether exercising jurisdiction would offend "traditional notions of fair

262. *See id.* at 324 (describing duty).

263. *See D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 104 (3d Cir. 2009) (describing contacts). "Pilatus's direct contacts within Pennsylvania . . . are limited to: (1) sending two employees to Pennsylvania to view displays at a potential supplier, and (2) purchasing \$ 1,030,139 in goods or services from suppliers in Pennsylvania during the five-year period preceding this litigation." *Id.* (emphasis added).

264. *O'Connor*, 496 F.3d at 324; *see also Marten v. Godwin*, 499 F.3d 290, 298 (3rd Cir. 2007) (holding that in order to have jurisdiction either under personal jurisdiction analysis or the effects test the plaintiff must show that the defendant intentionally aimed his conduct toward the forum and knew that the plaintiff would suffer injury because of that tortious conduct).

265. *O'Connor*, 496 F.3d at 318.

266. *See Del Ponte*, 2008 WL 169358 at 11 (noting the uncertainty over the origin of the necklace).

play and substantial justice."²⁶⁷ Once minimum contacts are established, a court should presume jurisdiction, but the defendant can then rebut the presumption.²⁶⁸ The defendant has the burden to show a compelling reason why jurisdiction would be unreasonable, which is a high burden to meet.²⁶⁹ Courts consider several factors when deciding whether it is reasonable to subject a defendant to jurisdiction: "[T]he burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the [non-resident] judicial system's interest in obtaining the most efficient resolution of controversies,"²⁷⁰ and "[t]he procedural and substantive interests of other nations."²⁷¹ Here, Step 2 failed to establish any existence of minimum contacts, rendering the reasonableness inquiry unnecessary. By inputting all the variables, the formula, $J = Pmc + T + R$, would produce a sum-zero for specific jurisdiction. Therefore, the analysis moves to general jurisdiction.

General Jurisdiction is a Constitutionally Separate Consideration

Before analyzing this step, it is important to note that the court in *Del Ponte* specifically did not reach the question of general jurisdiction.²⁷² It reasoned that since the Supreme Court did not specifically say that large amounts of purchases by Helicopteros within Texas failed to satisfy specific jurisdiction analysis, there is no reason why those contacts could not satisfy specific jurisdiction analysis under their sliding scale test.²⁷³ Further, in arriving at its conclusion that there was specific jurisdiction over the defendant as a result of using the sliding scale, the court seemed to ignore

267. *Int'l Shoe*, 326 U.S. at 316 (internal citations omitted).

268. *See O'Connor*, 496 F.3d at 324 ("The existence of minimum contacts makes jurisdiction presumptively constitutional, and the defendant 'must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" (citations omitted)).

269. *See Burger King*, 471 U.S. at 477 (opining that if the reasonableness factors weigh more in favor of jurisdiction that may lessen the level of contacts that would normally be required).

270. *Id.* (quotation marks omitted).

271. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 115 (1987).

272. *See Del Ponte*, 2008 WL 169358, at *10 (noting that the court can find substantial contacts with the forum without general jurisdiction).

273. *See id.* at *6 n.2 ("The court in *Helicopteros* did not decide whether a large volume of purchases would be sufficient to satisfy specific personal jurisdiction—it merely determined that purchases from the forum were insufficient to satisfy the higher threshold required of general personal jurisdiction.")

the fact that both parties in *Helicopteros* conceded specific jurisdiction did not lie.²⁷⁴ The *Del Ponte* court's answer, however, was to find for jurisdiction only because Ray Art made some purchases of jewelry in New York.²⁷⁵ This would not be the result under general jurisdiction analysis.

In *Del Ponte*, the defendant purchased nearly a third of its jewelry from vendors in New York, but only over a five year period.²⁷⁶ Similarly, the defendants in *Helicopteros* bought 80% of its aircraft fleet and supplies in Texas over a seven-year period.²⁷⁷ Thus, under the formula, "If Ccs ≤ H, then not J," general jurisdiction would not be found in *Del Ponte* because the only contacts involved are the jewelry purchases from New York, which is far less than 80% of the helicopter purchases in *Helicopteros* between 1970 and 1977, let alone the other contacts, such as the visit by Helicol's president, the reception of payments, and the training of the crew.²⁷⁸ While both helicopter and jewelry purchases are "business-related," the Supreme Court held in *Helicopteros* that "business relation" alone was too attenuated to the injury.²⁷⁹

Ray Art does not own any real estate in New York and has no dealers or retail outlets within the state.²⁸⁰ It does not engage in any direct advertising or sales of its products to consumers in New York.²⁸¹ Ray Art does not pay business or other taxes in New York. It has not advertised in New York, has no agents or representatives there, and has not participated

274. See *Helicopteros*, 466 U.S. at 415–16 ("All parties to the present case concede that respondents' claims against [the defendant] did not 'arise out of,' and are not related to, [the defendant's] activities within Texas."). The Court concluded that "[w]e thus must . . . determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Id.* The Court held that they do not. *Id.*

275. See *Del Ponte*, 2008 WL 169358, at *4 (finding jurisdiction).

276. See *id.* at *13 (describing purchases).

277. See *Helicopteros*, 466 U.S. at 411 (describing purchases).

278. See *id.* at 410–11 (noting other contacts of defendant).

279. See *id.* at 411 (noting that the defendant never performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas . . . and never recruited an employee in Texas); see also *Del Ponte*, 2008 WL 169358, at *3 (presenting Defendant's argument that the magistrate judge overlooked *Helicopteros*' precepts that mere purchases and related trips are not enough to assert jurisdiction over a corporate defendant).

280. See generally *Del Ponte*, 2008 WL 169358, at *1–13 (failing to address Ray Art's ownership of real estate and retail outlets in New York).

281. See *id.* at *4 ("While percentage of business is typically measured by sales in the forum, purchases from companies located in New York can also demonstrate regular business dealings with the forum.").

in any shows, exhibits, or competitions in the forum state.²⁸² Because Ray Art's contacts were not continuous and systematic enough to indicate that it purposely availed itself to protections and benefits of New York, general jurisdiction should not be found.

PART V: Conclusion

Specific and general jurisdiction are constitutionally distinctive and involve separate analyses.²⁸³ Circuits that exclusively use the "proximate cause" test when determining specific jurisdiction may find it difficult to apply in all circumstances. Conversely, circuits that exclusively adopt the but for test may find it easier to apply in all circumstances. The problem there is that indiscriminate application of the but for test may at times result in jurisdiction over a defendant with contacts too attenuated to the claims. On the other hand, sliding scale tests blur the divide between the two, as the Third Circuit opines, and make it even more difficult to place a potential defendant on notice as to when they could be hauled into court.

The Third Circuit's qualified but for test for jurisdiction, however, as a result of "objectified interpretation," is supported by a natural reading of the "arise out of" or "related to" language from *Helicopteros*.²⁸⁴ It allows for jurisdiction in cases where the contacts fail to establish a proximate cause to the claim but nonetheless were a foreseeable consequence of the defendant's activity.²⁸⁵ As a result, the test is in harmony with Supreme Court precedent that there remain two dichotomous spheres of jurisdiction; and, it is a more effective barometer to use to place defendants on notice of where they stand.

Substantial justice tempered by fair play is at the heart of due process.²⁸⁶ Until the High Court decides whether to take up the issue again, the several circuits remain divided. What is certain is that having a variety of approaches creates a daunting task for defendants to ascertain the

282. See generally *Del Ponte*, 2008 WL 169358 at *1–13 (failing to address Ray Art's advertising in New York).

283. See *supra* note 272 and accompanying text (explaining that the Court can find substantial contacts with forum without general jurisdiction).

284. See *supra* notes 192–205 and accompanying text (explaining the Third Circuit's application of a qualified or heightened "but for" test).

285. See *supra* note 154 and accompanying text (describing when the exercise of jurisdiction is proper).

286. See *Int'l Shoe*, 326 U.S. at 316 ("[D]ue process requires only that . . . he have certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (internal quotes omitted)).

boundaries of their activity, thus necessitating the adoption of a uniform standard. Therefore, courts throughout the land should take another look at the Third Circuit test and consider adopting it within their purview.