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SPECIFIC PERSONAL JURISDICTION AND THE “ARISE FROM OR RELATE TO” REQUIREMENT . . . WHAT DOES IT MEAN?

I. INTRODUCTION

At one time, the issue of personal jurisdiction was without intricacies.¹ For many years the case of *Pennoyer v. Neff*² established that the only proper bases for a court's assertion of personal jurisdiction were consent by the defendant, physical presence in the forum at the time of service of process, and domicile in the forum state.³ Today, however, the issue of personal jurisdiction is far less rigid, and, consequently, far less simple.⁴ A particularly troublesome problem that courts face today is the confusion and inconsistency of the requirement that a cause of action “arise from or relate to”⁵ the defendant's contacts with the forum state in order for a

1. See ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* 1-8 (1991) (recognizing that at one time courts adhered to strict bases for personal jurisdiction without exception). As a consequence of rigid adherence to the standards of personal jurisdiction, courts could easily settle the issue of personal jurisdiction.

2. 95 U.S. 714 (1878)

3. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) (holding that personal jurisdiction does not exist “where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof”); CASAD, *supra* note 1, at 1-8 (noting that after *Pennoyer v. Neff*, only appropriate bases for jurisdiction were consent, presence, and domicile).

Pennoyer involved an action for the recovery of a tract of land in Oregon by Neff, a resident of California, from Pennoyer. *Pennoyer*, 95 U.S. at 719. Pennoyer acquired the property through a sheriff's sale of Neff's land in satisfaction of a judgment against Neff issued by an Oregon court. *Id.* The property was not the subject of the judgment against Neff and was sold only in satisfaction of that judgment. *Id.* at 720. Neff challenged the legitimacy of the sheriff's sale arguing that the Oregon court lacked personal jurisdiction over him. *Id.* at 719. The Circuit Court of the United States for the District of Oregon invalidated the judgment against Neff on other grounds, holding that there were fatal defects in the statutorily required order of publication. *Id.* at 720. The United States Supreme Court, however, found no such defects but affirmed the judgment of the district court on the ground that the Oregon court lacked personal jurisdiction over Neff. *Id.* at 722. The majority opinion, written by Justice Field, set forth an all-or-nothing standard by which a state has unquestionable jurisdictional authority over persons within its territory and no jurisdictional authority over persons not within its territory. *Id.* The Court noted that at the time of the judgment against Neff in Oregon, Neff was not a resident of Oregon, was not served with process in Oregon, and did not voluntarily appear in Oregon for the adjudication. *Id.* at 719-20. The Court's opinion firmly established the rule of territoriality in determining personal jurisdiction.

4. See CASAD, *supra* note 1, at 1-8 (recognizing that traditional bases for jurisdiction have expanded and thinking on jurisdiction has become more sophisticated). Because rigidity fosters simplicity, as the standards for personal jurisdiction have become far less restrictive, they have become more complex. *Id.*

5. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (stating “arise from or relate to” requirement); *infra* text accompanying notes 81-83 (discussing origins of “arise

court to assert specific personal jurisdiction.⁶ With the United States Supreme Court's refusal to consider this issue in *Shute v. Carnival Cruise Lines*,⁷ it appears that the confusion will persist.⁸

A. A Brief History of Contemporary Personal Jurisdiction

The landmark case of *International Shoe Co. v. Washington*⁹ abandoned the outdated jurisdictional standards of *Pennoyer* and established an entirely new perspective on the issue of personal jurisdiction.¹⁰ In *International Shoe*,

from or relate to" requirement). The test for specific personal jurisdiction "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472.

6. See *United Elec., Radio & Machine Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (describing lack of consistency in application of "arise from or relate to" requirement in specific personal jurisdiction); *infra* text accompanying notes 35-44 (discussing problem with "arise from or relate to" requirement).

7. 111 S. Ct. 1522 (1991).

8. See Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 338-39, 369 (1992) (noting that Supreme Court's refusal to address "arise from or relate to" issue surprised many followers of *Carnival Cruise Lines*, and left open important jurisdiction questions).

9. 326 U.S. 310 (1945).

10. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (noting Court's departure from *Pennoyer v. Neff*); Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 442 (1991) (stating that *International Shoe* signaled modern era for concepts of personal jurisdiction); Bert Hart et al., Note, *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 GEO. L.J. 342, 342-43 (1958) (discussing turning point in personal jurisdiction represented by *International Shoe*).

International Shoe involved an action brought by and in the state of Washington for the recovery of unpaid contributions to an unemployment fund established by state statute. *International Shoe*, 326 U.S. at 311. The defendant, International Shoe Company, was a Delaware corporation with its principal place of business in Missouri and engaged in the manufacture and sale of footwear. *Id.* at 313. Although International Shoe maintained no office in Washington and made no contracts there for the sale or purchase of merchandise, the company did employ, during the years in question, 11 to 13 salesmen who resided in Washington and performed their principal activities for the company in Washington. *Id.* International Shoe claimed that its activities within the state were insufficient to establish a "presence" in the state; therefore, personal jurisdiction under the territorial rule of *Pennoyer* was lacking. *Id.* at 315-16.

The Supreme Court set forth a new jurisdictional standard whereby "presence" was no longer necessary when a defendant's contacts with the forum state are such that it would not offend "traditional notions of fair play substantial justice" to maintain the suit in the forum state. *Id.* at 316. The Court noted that under this standard, casual and infrequent activities that are unconnected to the cause of action would not sustain personal jurisdiction, while continuous and systematic activity giving rise to the cause of action should always be sufficient. *Id.* at 317. Apart from these two extremes, the Court stated that some instances of isolated yet claim-related activity may be sufficient as well as some instances of systematic and continuous activity that is unrelated to the cause of action. *Id.* at 318-19. With regard to International Shoe Company, the Court concluded that the company's actions were both continuous and systematic, and related to the cause of action; therefore, personal jurisdiction was held proper. *Id.* at 320.

the Court made clear that plaintiffs no longer were bound by *Pennoyer's* mechanical requirements of consent, physical presence, or domicile, by stating that a court may assert jurisdiction over any defendant having "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹¹

Over the last twelve years, the Court has crafted the language of *International Shoe* into a two-pronged constitutional analysis for personal jurisdiction.¹² The first prong concerns whether the defendant has sufficient minimum contacts with the forum state.¹³ After satisfying this requirement, a court will determine whether the exercise of personal jurisdiction is consistent with fair play and substantial justice.¹⁴ This second prong is known commonly as the "reasonableness" standard.¹⁵ Although the Court has established firmly the reasonableness requirement as the second step of the constitutional analysis,¹⁶ its practical effect is the subject of some controversy.¹⁷ The Supreme Court has stated that the satisfaction of the minimum contacts inquiry creates a strong presumption of reasonableness.¹⁸

11. *Id.* at 316; see Abramson, *supra* note 10, at 442 (noting that *International Shoe* marked retreat from strict standard of *Pennoyer v. Neff*); Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669, 670 (same). *But see* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 508 (1987) (noting that although Supreme Court has abandoned physical presence rule, "the doctrinal core" of *Pennoyer*, that personal jurisdiction requirement is substantive due process right, remains).

12. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-16 (1987) (applying two-part test); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (stating that constitutional inquiry involves two-part analysis of minimum contacts and reasonableness); Abramson, *supra* note 10, at 441 (recognizing that two-part test evolved from series of Supreme Court cases).

For a discussion of the more recent Supreme Court cases on personal jurisdiction, see Maltz, *supra* note 11, at 669 (analyzing significant Supreme Court cases leading up to *Asahi*).

13. See *Asahi*, 480 U.S. at 108-13 (applying minimum contacts portion of two-part test); *Burger King*, 471 U.S. at 478-82 (same); see also Abramson, *supra* note 10, at 441 (noting that finding of minimum contacts is first part of two-part personal jurisdiction test).

14. See *Asahi*, 480 U.S. at 113-16 (applying reasonableness analysis); *Burger King*, 471 U.S. at 476 (holding that "reasonableness" analysis should follow minimum contacts inquiry); Abramson, *supra* note 10, at 441 (same).

15. See Abramson, *supra* note 10, at 441 (identifying second prong of constitutional analysis as "reasonableness" or "fair play" standard).

16. See Maltz, *supra* note 11, at 680-81 (noting that *Burger King* implied, and *Asahi* affirmed, that "reasonableness" is second part of constitutional analysis). The *Burger King* opinion was the first to make clear that "unreasonableness" possibly could create a basis for denial of personal jurisdiction in otherwise permissible cases, and *Asahi* was the first case to actually deny jurisdiction on this ground. *But see infra* text accompanying note 20 (noting that Court in *Asahi* did not reach majority conclusion that "unreasonableness" was basis for denial of personal jurisdiction because four members of Court held that defendant did not have minimum contacts).

17. See Maltz, *supra* note 11, at 680 (noting that prior to *Asahi*, Supreme Court had never denied personal jurisdiction despite showing of minimum contacts).

18. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (stating that where

Moreover, the Court has denied personal jurisdiction on the basis of unreasonableness only once,¹⁹ and even then the Court divided on whether the defendant had minimum contacts.²⁰ Although the Court continues to examine reasonableness as a distinct prong, it would appear that the finding of minimum contacts will be controlling in the vast majority of situations.²¹

Just as *International Shoe* and its progeny established the two-pronged constitutional analysis, the cases also have established that the minimum contacts prong is satisfied in two distinct contexts.²² In 1966 Professors Arthur T. von Mehren and Donald T. Trautman formally identified these two contexts as general personal jurisdiction and specific personal jurisdiction.²³ The doctrine of general jurisdiction suggests that a defendant can have contacts with the forum state "so substantial and of such a nature" that the state may assert jurisdiction over the defendant even for causes of action unrelated to the defendant's contacts with the state.²⁴ In *Helicopteros Nacionales de Colombia v. Hall*,²⁵ the Supreme Court stated that the degree of contacts with the forum must be "continuous and systematic" to justify the assertion of general personal jurisdiction over unrelated causes of

defendant has minimum contacts with forum, personal jurisdiction is prima facie reasonable; in order to rebut presumption of reasonableness "he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable").

19. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (finding personal jurisdiction unreasonable in light of heavy burden on defendant in having to defend case in forum state).

20. See *id.* at 116-22 (revealing that majority of Court did not conclude that "unreasonableness" created sole basis for denial of personal jurisdiction); Maltz, *supra* note 11, at 681 (noting that Court was deeply divided on whether defendant had established minimum contacts). Four members of the Court felt that the defendant's mere knowledge that its products would be purchased in the forum state (the "stream of commerce" theory) was insufficient to create a showing of "purposeful availment;" thus, minimum contacts were not present. *Asahi*, 480 U.S. at 105, 108-13. This portion of the Court held that due process required a "stream of commerce" plus some affirmative effort on the part of the defendant. *Id.* By contrast, a separate four members of the Court concluded that "stream of commerce" standing alone satisfied minimum contacts, but nonetheless determined that the assertion of personal jurisdiction over the defendant was unreasonable. *Id.* at 116-21 (Brennan, J., concurring). Consequently, *Asahi* does not represent a case where a majority of the Court has denied jurisdiction exclusively on the basis on "unreasonableness."

21. See *Asahi*, 480 U.S. at 116 (Brennan, J., concurring) (stating that cases where finding of minimum contacts, standing alone, is insufficient for assertion of personal jurisdiction are "rare").

22. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414-15 (1984) (holding that jurisdiction is proper in two circumstantial categories); *infra* text accompanying notes 24-30 (discussing two categories of personal jurisdiction).

23. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-45 (1966) (identifying and naming two basic categories of personal jurisdiction as general jurisdiction and specific jurisdiction).

The Supreme Court formally recognized the general and specific classifications in *Helicopteros*. 466 U.S. at 414 nn.8-9.

24. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945); see von Mehren & Trautman, *supra* note 23, at 1121, 1144 (discussing general jurisdiction).

25. 466 U.S. 408 (1984).

action.²⁶ Significantly, the Supreme Court has found a defendant's contacts to be "continuous and systematic" on only one occasion.²⁷ It is not surprising, therefore, that specific rather than general jurisdiction accounts for the majority of personal jurisdiction litigation.²⁸

Specific personal jurisdiction exists when the defendant's contacts are limited, yet connected with the plaintiff's claim such that the cause of action "arises from or relates to" the defendant's contacts with the forum.²⁹

26. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 416 (1984) (stating that case fails requirements of general jurisdiction unless defendant's contacts with forum state are "continuous and systematic").

Helicopteros involved a wrongful death action brought in the state of Texas against Helicol, a Colombian corporation. *Id.* at 409, 412. The action was based on an accident that took place in Peru when a Helicol helicopter carrying the decedents crashed. *Id.* at 410. The decedents were American employees of a Peruvian consortium which was the alter ego of a Texas based joint venture. *Id.* The facts revealed the following contacts with the state of Texas: (1) Helicol's chief executive officer flew to Houston to discuss Helicol's services and negotiate a contract with representatives of the Texas joint venture; (2) Over a period of eight years Helicol purchased approximately 80% of its helicopters and substantial quantities of spare parts out of Texas; (3) Helicol sent pilots to Texas for training and additional personnel to Texas for technical consultation; (4) Helicol received payments from a Texas bank. *Id.* at 410-11.

In district court, Helicol moved to dismiss for lack of personal jurisdiction and was denied. *Id.* at 412. On appeal, the Texas Court of Civil Appeals reversed, finding that personal jurisdiction over Helicol in Texas was lacking. *Id.* The Texas Supreme Court initially affirmed but later reversed the opinion of the Civil Appeals Court, concluding that Texas courts had jurisdiction over Helicol. *Id.*

The United States Supreme Court, applying a general jurisdiction analysis, held that the contacts by Helicol with the state of Texas were not continuous and systematic and, therefore, could not sustain an assertion of general jurisdiction. *Id.* at 418. Specifically, the Court stated that purchases of equipment, even if made at regular intervals, are not sufficient contacts for general jurisdiction. *Id.* Additionally, the Court found that Helicol's sending of personnel to Texas for training did not enhance the quality or significance of Helicol's contacts. *Id.*

Justice Brennan filed a dissenting opinion in which he assigned greater significance to Helicol's Texas contacts and concluded that general jurisdiction would be proper. *Id.* at 423-24.

27. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (holding that, based on facts of *Perkins*, application of general jurisdiction would be proper). In *Perkins* the president of the defendant corporation lived and maintained an office in the forum state and conducted various business affairs there including the upkeep of office files, sending and receiving business correspondence, drawing and distribution of salary checks, supervision of the corporation's well-being, disbursement of funds to cover corporation expenditures, and the use of forum state banks for the transfer and maintenance of corporate funds. *Id.* at 447-48. The Court thus concluded that the defendant corporation had carried on "continuous and systematic" activities within the forum state. *Id.*; see also von Mehren & Trautman, *supra* note 23, at 1144 (noting that "the *Perkins* facts should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction").

28. See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630 (1988) (noting that exercise of general jurisdiction is rare).

29. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (describing specific personal jurisdiction); *Helicopteros*, 466 U.S. at 414 (same). When the cause of action arises from or relates to the defendant's contacts with the forum, a court can exercise specific jurisdiction. *Id.*

The connection between the forum state, the defendant's activities, and the cause of action establish a court's jurisdiction to adjudicate; therefore, a court's jurisdiction is limited, thus "specific," to the related cause of action.³⁰

Because the exercise of specific personal jurisdiction is far more common than the exercise of general jurisdiction, courts must be confident in their understanding and application of the specific jurisdiction analysis. The Supreme Court has been helpful in this regard by clarifying the scope of specific personal jurisdiction in two important aspects. First, for a contact to qualify under this analysis, it must be a "purposeful availment" by the defendant of the benefits of conducting activities within the forum state³¹ or with forum state residents.³² Second, the number of these purposefully availed contacts can be minimal.³³ Indeed, the Court has held that a single contact with the forum can be sufficient if the cause of action arises from that contact.³⁴

B. The Problem with "Arise from or Relate to"

Although the Court has been helpful in determining what constitutes a "contact" and how many contacts are necessary, a substantial degree of uncertainty still exists as to the constitutional limits of specific jurisdiction.³⁵ Most notable is the confusion concerning the interpretation of "arise from

30. See von Mehren & Trautman, *supra* note 23, at 1136 (noting that specific jurisdiction is limited to related causes of action, thus, is "specific" to related causes of action).

31. See *Burger King*, 471 U.S. at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The *Hanson* Court stated and the *Burger King* Court reaffirmed that:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Id.

32. See *Burger King*, 471 U.S. at 476 (holding that dealings with residents of forum state, without physical presence in state, can be sufficient). As long as the defendant has "purposefully availed" herself of the benefits of doing business with forum residents, the fact that defendant has not actually entered the forum will not prevent the assertion of personal jurisdiction. *Id.*

33. See Maltz, *supra* note 11, at 671 (noting Supreme Court's approval of personal jurisdiction based on single forum contact by defendant in *McGee v. International Life Ins. Co.*).

34. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (affirming assertion of personal jurisdiction based on one forum contact). According to the *McGee* Court, the defendant's contact with the forum state satisfied due process because the plaintiff's action "was based on a contract which had a substantial connection with [the forum state.]" *Id.* at 223. The *McGee* Court noted that "[t]he [insurance] contract was delivered in [the forum state], the premiums were mailed from [the forum state] and the insured was a resident of [the forum state] when he died." *Id.*

35. See Twitchell, *supra* note 28, at 633 (stating that constitutional limits of specific personal jurisdiction are unknown).

or relate to."³⁶ Much constitutional weight rides on the application of this one phrase.³⁷ Consider the following jurisdictional truths: (1) A finding of minimum contacts, through either a specific or general jurisdictional analysis, is usually conclusive; therefore, the "reasonableness" prong of the two-part constitutional test is little more than a rubber stamp;³⁸ (2) courts usually base personal jurisdiction on a specific, rather than general, jurisdictional analysis;³⁹ and (3) a single contact with the forum state may provide the basis for specific personal jurisdiction, provided that the cause of action arises from or relates to that contact.⁴⁰ Because of these three jurisdictional truths, the propriety of asserting jurisdiction can, under the proper circumstances, rest solely on the interpretation of the "arise from or relate to" requirement.⁴¹

The "arise from or relate to" requirement is the essence of specific personal jurisdiction because it defines the necessary relationship between the defendant and the forum state.⁴² It follows, therefore, that a misapplication of "arise from or relate to" is tantamount to a misapplication of due process.⁴³ For this reason, if courts are to recognize, and they should, that the limits of constitutional due process should not vary from one court to another, courts must have a firm and consistent understanding of "arise from or relate to."⁴⁴

36. See *United Elec., Radio & Machine Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (describing uncertainty among circuits on issue of "arise from or relate to").

37. See *Lea Brilmayer et al., A General Look At General Jurisdiction*, 66 *TEX. L. REV.* 721, 736 (1988) (arguing that determining whether cause of action and defendant's contacts are related is crucial to jurisdictional analysis because it determines whether specific or general jurisdiction will be used).

38. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) (stating that cases are "rare" where minimum contacts, standing alone, are insufficient for personal jurisdiction); *supra* text accompanying notes 18-21 (discussing fact that minimum contacts are usually dispositive of personal jurisdiction issue).

39. See *supra* note 28 and accompanying text (noting that exercise of general jurisdiction is rare).

40. See *Maltz, supra* note 11, at 671 (noting Supreme Court's approval of personal jurisdiction based on one forum contact in *McGee v. International Life Ins. Co.*); *supra* text accompanying notes 33-34 (discussing low threshold contact requirement for specific jurisdiction).

41. See *Jodi E. Saposnick, Federal Practice and Procedure: Personal Jurisdiction*, 1985 *ANN. SURV. AM. L.* 349, 358-59 (noting that whether or not defendant's contacts are related to plaintiff's cause of action can control jurisdictional inquiry).

42. See *von Mehren & Trautman, supra* note 23, at 1136 (noting that, with specific jurisdiction, basis for court's jurisdiction to adjudicate is element of relatedness between cause of action and forum contacts).

43. See *Stan Mayo, Note, Specific Jurisdiction: Time for a "Related to" Analysis*, 4 *REV. LITIG.* 341, 342-43 (1985) (suggesting that courts cannot properly apply due process standards without properly applying "arise from or relate to" requirement).

44. See *Twitchell, supra* note 28, at 680-81 (concluding that court's jurisdictional standards, both specific and general, must become uniform for development of sound jurisdictional practice).

Despite the obvious importance of the "arise from or relate to" requirement, the commentary on jurisdictional due process surprisingly dismisses this issue.⁴⁵ In addition, although the Supreme Court has had the opportunity to comment on this issue twice in the past eight years, a majority of the Court has declined to do so.⁴⁶

II. THE SUPREME COURT CASES

The first case in which the Supreme Court identified the problems associated with the "arise from or relate to" requirement was *Helicopteros Nacionales de Colombia v. Hall*.⁴⁷ In *Helicopteros* the defendant (Helicol), a Colombian Corporation with its principal place of business in Bogota, provided helicopter transportation for South American oil and construction companies.⁴⁸ In 1974 Helicol entered into negotiations with a Texas-based joint venture and eventually agreed to provide its services for the venture's pipeline construction project in South America.⁴⁹ On January 26, 1976, in the process of providing its services for the Texas organization, one of Helicol's helicopters crashed in Peru.⁵⁰ Four American employees of the Texas organization died in the crash, and the plaintiffs, survivors of the decedents, brought wrongful death actions against Helicol in a Texas district court.⁵¹

Despite Helicol's motion to dismiss, the state district court and the Texas Supreme Court on appeal found Texas jurisdiction over Helicol proper.⁵² The facts of the case indicated that Helicol maintained no office in Texas, had no agent for service of process in Texas, was not licensed to do business and engaged in no helicopter operations in Texas, and recruited no employees in Texas.⁵³ The facts, however, also indicated that Helicol did have many contacts with the state of Texas including contract negotiations with the Texas organization, large purchases of helicopters and equipment in Texas, and the training of pilots and other personnel in Texas.⁵⁴

45. See Brilmayer et al., *supra* note 37, at 736 (noting that commentary on jurisdictional due process is "strangely silent" on "arise from or relate to" issue); *supra* text accompanying notes 37-44 (discussing importance of "arise from or relate to" requirement in analysis for personal jurisdiction).

46. See *infra* text accompanying notes 47-80 (describing Supreme Court's handling of "arise from or relate to" issue in *Helicopteros* and *Carnival Cruise Lines*).

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

48. *Id.* at 409.

49. *Id.* at 410.

50. *Id.*

51. *Id.* at 412.

52. *Id.* The Texas Court of Appeals reversed the judgment of the district court and the Texas Supreme Court originally upheld the judgment of the appeals court. *Id.* On rehearing, however, the Texas Supreme Court reversed the decision of the appeals court and reinstated the ruling of the district court. *Id.*

53. *Hall v. Helicopteros Nacionales de Colom.*, 638 S.W.2d 870, 871 (Tex. 1982) (opinion of Texas Supreme Court upon rehearing).

54. See *id.* at 871-72. In *Helicopteros*, the Texas Supreme Court found:

For purposes of the “arise from or relate to” requirement, *Helicopteros* could have been the perfect test case.⁵⁵ It presented the atypical situation in which the cause of action arguably, but not obviously, arose from or related to the contact with the forum state.⁵⁶ For instance, although the direct cause of the crash in *Helicopteros* was the alleged negligence of the pilot, the plaintiffs *could* have argued that without the contract with the Texas organization, the decedents would not have been aboard Helicol’s helicopter or died in the crash.⁵⁷ Additionally, plaintiffs *could* have argued that without Helicol’s contacts with Texas, Helicol would be unable to operate, and no crash would have occurred.⁵⁸ Unfortunately, the plaintiffs did not make these arguments.

Because the plaintiffs did not make the “arise from or relate to” arguments, the Supreme Court inquiry concerned only whether Helicol’s contacts were sufficient for general jurisdiction.⁵⁹ In limiting its analysis to general jurisdiction, the *Helicopteros* Court noted that both parties had conceded that the causes of action did not “arise from or relate to” the

In addition to negotiating this contract [with the Texas organization], Helicol committed all of the following acts in Texas:

- a. Purchased substantially all of its helicopter fleet in Fort Worth, Texas;
- b. Did approximately \$4,000,000 worth of business in Fort Worth, Texas, from 1970 through 1976 as purchaser of equipment, parts and services. This consisted of spending an average of \$50,000 per month with Bell Helicopter Company, a Texas corporation;
- c. Negotiated in Houston, Harris County, Texas, with a Texas resident, which negotiation resulted in the contract to provide the helicopter services involving the crash leading to this cause of action . . . and wherein Helicol agreed to obtain liability insurance payable in American dollars to cover a claim such as this;
- d. Sent pilots to Fort Worth, Texas to pick up helicopters as they were purchased from Bell Helicopter and fly them from Fort Worth to Colombia;
- e. Sent maintenance personnel and pilots to Texas to be trained;
- f. Had employees in Texas on a year-round rotation basis;
- g. Received roughly \$5,000,000 under the terms and provisions of the contract in question here which payments were made from First City National Bank in Houston, Texas; and
- h. Directed the First City National Bank of Houston, Texas to make payments to Rocky Mountain Helicopters pursuant to the contract in question.

Id.

55. See William M. Richman, *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, 1338 (1984) (stating that facts in *Helicopteros* were excellent for defining approach to cases falling between specific jurisdiction and general jurisdiction).

56. See *id.* (recognizing that defendant Helicol had significant contacts with Texas that, while not truly giving rise to cause of action, were not unrelated to plaintiffs’ claims).

57. See Dennis G. Terez, *The Misguided Helicopteros Case: Confusion in the Courts Over Contacts*, 37 BAYLOR L. REV. 913, 934-35 n.110 (1985) (recognizing that plaintiffs in *Helicopteros* clearly could have made arguments based on specific jurisdiction, and noting several possibilities).

58. *Id.*

59. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 415-16 (1984) (stating that all parties conceded that cause of action did not “arise out of” or “relate to” defendant’s Texas activities, thus limiting analysis to general jurisdiction).

defendant's activities.⁶⁰ Consequently, the Court concluded that the determination of the required nexus between a defendant's forum activities and a plaintiff's cause of action was unnecessary.⁶¹ The fact that the opinion in *Helicopteros* went so far as to state several questions it *would not* answer makes the Court's declination all the more frustrating.⁶² By making this statement, however, the Court at least recognized that these types of questions exist.⁶³ It simply declined to answer them.

Although the majority of the Court wished to wait for a case in which the "arise from or relate to" questions faced them squarely,⁶⁴ Justice Brennan was not so inclined.⁶⁵ In his dissenting opinion, Justice Brennan first asserted that the Court based its refusal to consider the "arise from" questions on an erroneous determination that the plaintiffs had conceded that the causes of action did not relate to the defendant's Texas activities.⁶⁶ Justice Brennan went on to argue that the Court should have recognized a difference between the terms "arise from" and "relate to."⁶⁷ By recognizing such a difference the Court could conclude that although the respondent's causes of action may not formally arise from the defendant's forum contacts,

60. See *id.* (noting plaintiff's concession that cause of action did not "arise from or relate to" defendant's activities in Texas). But see *infra* text accompanying note 66 (discussing Justice Brennan's dissent in *Helicopteros*). Justice Brennan argued that the plaintiffs had not conceded that the cause of action was unrelated to defendant's activities in the forum state. *Helicopteros*, 466 U.S. at 425 n.3.

61. See *Helicopteros*, 466 U.S. at 415 n.10 (concluding that "arise from or relate to" issue is not presented in case at hand).

62. See *id.* (setting forth "arise from or relate to" questions but refusing to address them). In declining to address the "arise from or relate to" questions, the *Helicopteros* Court stated as follows:

Respondents have made no argument that their cause of action either arose out of or is related to Helicol's contacts with the state of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

Id.

63. See Richman, *supra* note 55, at 1339 (noting that Court's opinion in *Helicopteros*, if nothing else, at least "enhanced the awareness of the issue").

64. See *id.* (recognizing that Court did not see fit to address specific jurisdiction questions because parties did not argue "arise from or relate to" issue).

65. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 419 (1984) (Brennan, J., dissenting) (disagreeing with refusal of majority of Court to consider "arise from or relate to" issue).

66.

See *id.* at 425 n.3 (disagreeing that parties conceded that causes of action were not related to defendant's Texas activities).

67. See *id.* at 425 (arguing that there is "substantial difference" between "arise from" and "relate to").

they nonetheless are "related to" those contacts.⁶⁸ Although Justice Brennan's opinion sparked a fair amount of commentary,⁶⁹ the Court has not adopted his approach. The legacy of *Helicopteros* is that it provided the important first step of recognizing the "arise from or relate to" problem.⁷⁰

Apart from *Helicopteros*, only one other Supreme Court case has presented the "arise from or relate to" problem. In *Carnival Cruise Lines v. Shute*,⁷¹ one of the questions presented to the Court was whether a negligence action could "arise from or relate to" the defendant's advertising and ticket sales for Carnival Cruise Line vacations.⁷² The Ninth Circuit held that although the defendant, Carnival Cruise Lines, only conducted advertising activities in plaintiff's home state of Washington, plaintiff's negligence action for a slip and fall aboard a Carnival Cruise ship nonetheless arose from defendant's solicitation of plaintiff's purchase of the cruise ticket.⁷³ In so holding, the Ninth Circuit applied an expansive interpretation of "arise from or relate to."⁷⁴ The defendants appealed to the Supreme Court.⁷⁵ Unfortunately, and to the surprise of followers of the case,⁷⁶ the Court was

68. See *id.* (asserting that respondents' wrongful death claims were "significantly related" to petitioners' undisputed contacts with Texas).

69. See Mayo, *supra* note 43, at 343-44 (calling for adoption of separate standard for causes of action related to, but not arising from defendant's activities); Richman, *supra* note 55, at 1340-46 (suggesting sliding scale analysis utilizing concepts in Brennan dissent in *Helicopteros*); Terez, *supra* note 57, at 934 n.109 (criticizing Justice Brennan's analysis in *Helicopteros*); *infra* text accompanying notes 108-17 (discussing Justice Brennan's "relate to" test).

70. See Richman, *supra* note 55, at 1339 (noting value of *Helicopteros* in bringing awareness to jurisdiction problems).

71. 111 S. Ct. 1522 (1991).

72. See *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522, 1525 (1991) (noting that Court granted certiorari to address constitutionality of Ninth Circuit's conclusion regarding personal jurisdiction).

Shute involved an action for a slip and fall accident aboard one of the defendant's cruise ships. *Id.* at 1524; see *infra* text accompanying notes 92-93 (discussing facts of *Shute*). The Supreme Court granted certiorari to determine whether it was proper for the courts of plaintiff's home state of Washington to hear the plaintiff's claim. *Shute*, 111 S. Ct. at 1525. Two issues were present. First, a forum selection clause was contained in the terms and conditions of the plaintiff's cruise ticket naming the state of Florida as the location of any dispute resolution. *Id.* Second, if the forum selection clause was invalid, as the Ninth Circuit found, there remained the question of the propriety of asserting personal jurisdiction over the defendants in light of the tenuous nexus between the defendant's activities in the forum state and the plaintiff's cause of action. Noting that "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case," the Court declined to address the due process personal jurisdiction question after concluding that the forum selection clause was valid and, thus, dispositive of the case. *Id.* (citations omitted).

73. See *Shute*, 111 S. Ct. 1524-25 (discussing Ninth Circuit holding "that 'but for' petitioner's solicitation of business in Washington, respondents would not have taken cruise and Mrs. Shute would not have been injured").

74. See *infra* text accompanying notes 90-94 (discussing Ninth Circuit's application of "but for" interpretation of "arise from or relate to").

75. *Shute*, 111 S. Ct. at 1525.

76. See Mullenix, *supra* note 8, at 338-39 (noting surprise of followers of *Shute* that Supreme Court did not address "arise from or relate to" issue).

able to dispose of the case on other grounds and did not address the issue.⁷⁷

As a result of the lack of guidance from the Supreme Court,⁷⁸ courts have attempted to develop their own definition of "arise from or relate to."⁷⁹ Predictably, courts have chosen different paths.⁸⁰

III. CONFLICTING INTERPRETATIONS OF "ARISE FROM OR RELATE TO"

As with much of the present day personal jurisdiction doctrine, the "arise from or relate to" requirement originated in *International Shoe*.⁸¹ In *International Shoe*, the Court observed that conducting activities in a state "may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, [requiring] the [defendant] to respond to a suit brought to enforce [those obligations] can, in most instances, hardly be said to be undue."⁸² This language has evolved into the present requirement that a cause of action must "arise from or relate to" the defendant's activities in the forum state.⁸³ To date, the courts

77. See *Carnival Cruise Lines v. Shute*, 111 S. Ct. 1522, 1525 (1991) (holding that because forum selection clause [the second of two questions certified for review] is dispositive of case, Court need not address constitutional question). The sales contract for the cruise ticket contained a forum selection clause that was not honored by the lower courts. *Id.* By validating this forum selection clause, the Supreme Court ended the controversy. *Id.*

78. See Brilmayer et al., *supra* note 37, at 736 (noting lack of guidance from academic community as well as Supreme Court regarding proper interpretation of "arise from or relate to" requirement).

79. See *United Elec., Radio & Machine Worker's of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (describing various attempts by circuits to decipher "arise from or relate to" requirement); *infra* text accompanying notes 81-146 (discussing various interpretations of "arise from or relate to" requirement).

80. See *United Elec.*, 960 F.2d at 1089 (noting differing interpretations of "arise from or relate to"); see generally *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990) (applying broad "but for" interpretation of "arise from or relate to"), *rev'd on other grounds*, 111 S. Ct. 1522 (1991); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988) (applying "made possible by" interpretation of "arise from or relate to"); *Pearrow v. National Life and Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983) (applying strict interpretation of "arise from or relate to" requirement).

81. See *Burnham v. Superior Court*, 495 U.S. 604, 618 (1990) (noting that "arise from or relate to" language originated in *International Shoe*).

82. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

83. See *Burnham*, 495 U.S. at 618 (reaffirming standard requiring that cause of action "arise from or relate to" defendant's contacts with forum state); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (same); *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414 (1984) (same); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444-45 (1952) (same). The "arise from or relate to" requirement has evolved from language in *International Shoe* noting that activity conducted by a defendant within a state may give rise to obligations and that personal jurisdiction in the forum state over the defendant in actions brought to enforce these obligations does not violate due process. *International Shoe*, 326 U.S. at 319. Under this language, there is an argument that, because the cause of action need not arise from the defendant's contacts but only from obligations arising from those contacts, the true test for "arise from or relate to" should not demand a direct relationship between the cause of action and the defendant's forum state activities. Conversely, the requirement of an

have applied two general theories of interpretation for the "arise from or relate to" requirement: (1) the "but for" test⁸⁴ and (2) the substantive relevance-proximate cause test.⁸⁵

A. The "But For" Test

The "but for" test is the most expansive of the various interpretations of "arise from or relate to."⁸⁶ Some jurisdictions refer to this test as the "made possible by" test or the "lie in the wake of" test.⁸⁷ Under any name, however, the general theory is that a cause of action "arises from or relates to" the defendant's forum state activities when "but for" those activities the cause of action would not have arisen.⁸⁸ Therefore, if a plaintiff can trace the chain of events leading up to the cause of action and find that the defendant's activities contribute to this chain, the cause of action is said to arise from those activities for the purposes of determining personal jurisdiction.⁸⁹

"obligation" may suggest that the contacts with the forum must have substantive significance to the plaintiff's claim in order for the cause of action to "arise from or relate to" those contacts.

84. See *infra* text accompanying notes 86-117 (discussing "but for" test).

85. See *infra* text accompanying notes 118-46 (discussing substantive and proximate cause tests).

86. But see *infra* text accompanying notes 109-14 (recognizing "relate to" test as most expansive interpretation of "arise from or relate to"). The "relate to" test has not gained significant acceptance among the courts. Of the more widely accepted interpretations of "arise from or relate to," the "but for" test is the most expansive.

87. See *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984) (applying "lie in the wake of" test); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972) (applying "made possible by" test). Both the "made possible by" test and the "lie in the wake of" test are variations of the "but for" test.

In *Deluxe Ice Cream*, the Seventh Circuit found jurisdiction proper when the defendant's contacts in the forum state ultimately led to a contract which formed the basis for the cause of action. *Deluxe Ice Cream*, 726 F.2d at 1215-16; see *infra* text accompanying notes 100-04 (discussing holding in *Deluxe Ice Cream*). The Sixth Circuit has stated that the required nexus between the contacts and the cause of action is satisfied when the plaintiff's cause of action was "made possible only by" the defendant's forum state contacts. *In Flight Devices Corp.*, 466 F.2d at 231.

88. See *Alexander v. Circus Circus Enter., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991) (describing "but for" test as requiring only that relationship between cause of action and defendant's forum contacts be such that "but for" defendant's contacts with forum state, cause of action would not have occurred); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382-86 (9th Cir. 1990) (same), *rev'd on other grounds*, 111 S. Ct. 1522 (1991); *Cabbage v. Merchant*, 744 F.2d 665, 670 (9th Cir. 1984) (same). The *Cabbage* opinion "implies" the use of the "but for" test and in *Shute*, the Ninth Circuit expressly adopts this interpretation. See *Shute*, 897 F.2d at 385. The *Alexander* opinion is the Ninth Circuit's most recent application of "but for."

The "but for" test is not the legal causation test applied in tort law, but a far more deferential test. See *infra* text accompanying notes 123-24 (discussing distinction between "but for" cause and legal or proximate cause).

89. See *infra* text accompanying notes 90-104 (describing applications of "but for" test).

Several circuits have applied the "but for" test.⁹⁰ In the Ninth Circuit the most notable application of the "but for" test is *Shute v. Carnival Cruise Lines*.⁹¹ In *Shute* the Ninth Circuit held that the plaintiff's cause of action for a slip and fall accident aboard the defendant's cruise ship would not have occurred "but for" the defendant's advertising for, and sale of, a Carnival Cruise Line ticket in the forum state.⁹² Despite the defendant's contention that the cause of action merely arose from the negligence of the ship's crew, the court reasoned that without the defendant's forum state activities the plaintiffs never would have boarded the defendant's cruise ship. Therefore, in the absence of the defendant's actions, the negligence of the ship's crew never would have affected the plaintiffs.⁹³ Consequently, having found a clear "but for" relationship, the court concluded that, for purposes of determining jurisdiction, the cause of action did arise from the defendant's activities in the forum state.⁹⁴

The Fifth Circuit also has indicated approval of the "but for" test. In *Prejean v. Sonatrach, Inc.*⁹⁵ the defendants argued that a tort action could not arise from a contract with a forum state corporation.⁹⁶ The Fifth Circuit

90. See *infra* text accompanying notes 91-104 (discussing application of "but for" test by Ninth, Fifth, and Seventh Circuits).

91. 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

92. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382-86 (9th Cir. 1990) (finding that plaintiff's cause of action arose from defendant's forum state activities because "but for" those contacts, plaintiff's accident aboard defendant's cruise ship would not have occurred), *rev'd on other grounds*, 111 S. Ct. 1522 (1991). For a detailed analysis of the Ninth Circuit's holding in *Carnival Cruise Lines*, see Mary Lou Johnson, Comment, *Personal Jurisdiction over the Nonresident: Washington Contributes Shoe and Shute*, 26 Gonz. L. Rev. 243 (1991).

93. See *Shute*, 897 F.2d at 382-86 (holding that negligence of ship's crew could not have affected plaintiffs if not for defendant's activities in forum state).

94. See *id.* (holding that cause of action did "arise from or relate to" defendant's activities in forum state). In holding that the cause of action did "arise from or relate to" defendant's contacts with the forum state, the court rejected the argument, which is accepted by courts that apply a stricter interpretation of "arise from or relate to," that a tort cannot arise from a contractual contact within the forum state. See *infra* text accompanying notes 131-37 (describing strict interpretation of "arise from or relate to," and noting that under such interpretation, tort cannot arise from contract).

95. 652 F.2d 1260 (5th Cir. 1981).

96. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) (recognizing defendant's argument that required nexus between cause of action and forum contacts is not met when forum contacts are contractual and cause of action sounds in tort).

Prejean involved a wrongful death action brought by the widows of two deceased employees of a Dallas engineering firm that allegedly contracted with defendant Sonatrach, Inc., an Algerian oil company, to provide technical services. *Id.* at 1264. While performing contractual duties in Algeria, an Algerian airliner, allegedly chartered by Sonatrach, Inc., crashed, killing the decedents. *Id.* The United States District Court for the Southern District of Texas dismissed the action, finding personal jurisdiction lacking over Sonatrach and two other defendants, Beech Aircraft Corp., the manufacturer of the aircraft, and Air Algerie, the owner of the aircraft. *Id.*

The Fifth Circuit upheld the dismissal as to Beech Aircraft and Air Algerie, but reversed as to Sonatrach and remanded for further findings of fact. *Id.* at 1270-71. In so holding, the court disagreed with the argument advanced by Sonatrach that regardless of the existence of

disagreed, stating that entering into a contract in the forum state can give rise to a cause of action in tort when "but for" the contract, the plaintiff's injuries could not have occurred.⁹⁷ Specifically, the court reasoned that "the contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other."⁹⁸ The court concluded that in such a situation, a cause of action in tort could "arise from or relate to" a contractual contact with the forum state.⁹⁹

The Seventh Circuit case of *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*¹⁰⁰ illustrates a more protracted application of the "but for" test. In *Deluxe Ice Cream*, the plaintiff brought an action for breach of warranty.¹⁰¹

its alleged contacts with the forum state, the alleged contacts were contractual in nature, whereas the plaintiff's cause of action was based in tort. *Id.* at 1270. Sonatrach, therefore, argued for the conclusion that because, as a matter of substantive law, the forming of a contract cannot formally give rise to a tort, the "arise from or relate to" requirement was not satisfied. *Id.* The Fifth Circuit, however, disagreed by reasoning that when the defendant's contacts are a "but for" causative factor of the tortious injury, the "arise from or relate to" requirement is satisfied. *Id.* at 1270 n.21. The court, therefore, remanded for determination of whether Sonatrach had in fact established contractual contacts with the forum state. *Id.* at 1270.

Although the *Prejean* court dealt with the Texas long arm statute "arise from or relate to" requirement, the holding that a "but for" relationship would be sufficient necessarily involves due process considerations because due process must limit the interpretation of the long arm statute. *Id.* at 1264.

97. *See id.* at 1270 (rejecting defendant's argument that action in tort cannot arise from contract, and holding that for purposes of determining personal jurisdiction, when "but for" contractual contacts with forum state plaintiff's cause of action would not have come about, action in tort can "arise" from contract). The court stated that defendant's interpretation of "arise from or relate to," which would prevent a tort claim from arising from a contract, would allow personal jurisdiction only when the forum contact, in and of itself, created the cause of action. *Id.* at 1270 n.21. This interpretation, reasoned the court, ignores the plain meaning of "arise from or relate to." *Id.*

98. *Id.*

99. *See id.* at 1270 (holding that where contract puts parties within "tortious striking distance" of one another, contractual contacts with forum state can give rise to cause of action in tort).

100. 726 F.2d 1209 (7th Cir. 1984)

101. *See Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (9th Cir. 1984) (analyzing plaintiff's cause of action).

Deluxe Ice Cream involved an action for breach of warranty. The defendant Sumner H. Bates was the sole shareholder of a Netherlands corporation engaged in the business of locating purchasers of ice cream making equipment. *Id.* at 1210-11. Bates located plaintiff, Deluxe Ice Cream Company, and pursued discussions relating to the purchase of ice cream equipment from SMW Packaging Corporation. *Id.* at 1211. Some of these discussions took place in the forum state. *Id.* SMW and Deluxe Ice Cream ultimately executed a contract for the purchase of the equipment and, following Deluxe Ice Cream's dissatisfaction, a breach of warranty action was instituted against SMW and Bates. *Id.* at 1211-12. The United States District Court for the Northern District of Illinois dismissed the action against Bates for lack of personal jurisdiction. *Id.* at 1212.

On appeal to the Seventh Circuit, the court reversed the dismissal, finding personal jurisdiction proper over Bates. In so holding, the court reasoned that "the discussions that took place in Illinois between [plaintiff] and Bates played a part in the subsequent negotiations

The Seventh Circuit held that the contract between the plaintiff and a third party that formed the basis for the cause of action would not have occurred "but for" certain negotiations in the forum state between the defendant and plaintiff.¹⁰² In so holding, the court reasoned that the contract creating the warranty "lies in the wake" of the defendant's activities in the forum state.¹⁰³ Thus, the court concluded that the cause of action did "arise from or relate to" the defendant's contacts with the forum state.¹⁰⁴

The theme advanced by the circuits applying the "but for" test is that the immediate cause of the plaintiff's cause of action is only the starting point for the determination of personal jurisdiction.¹⁰⁵ The "but-for" jurisdictions will look to the "cause of the cause" and beyond to determine whether the suit "arises from" the defendant's activities in the forum state.¹⁰⁶ Although the "but for" test has failed to command unanimous acceptance of the courts, an expansive interpretation of "arise from or relate to" has gained approval from at least one justice of the Supreme Court.¹⁰⁷

Justice Brennan's dissent in *Helicopteros Nacionales de Colombia v. Hall* called for the Court to adopt a standard that would recognize the "relate to" language of the "arise from or relate to" requirement.¹⁰⁸ Indeed, Justice Brennan's *Helicopteros* dissent may have called for a standard even more expansive than "but for."¹⁰⁹ His dissent never discussed a threshold of causal relatedness, but only distinguished, and would hold sufficient, contacts that "formally 'give rise'" to the cause of action and contacts that

between Bates and the plaintiff, which led to the contract between SMW and the plaintiff." *Id.* at 1215-16. Thus, the court concluded that the contract forming the basis of the cause of action "lies in the wake of" Bates's contacts with the forum state; therefore, Bates contacts sufficiently "gave rise" to the cause of action. *Id.* at 1216.

102. *See id.* at 1215-16 (finding "arise from or relate to" relationship). The Court held that the contract from which the cause of action arose would not have arisen "but for" the defendant's discussions and negotiations with a "middle man" to the transaction. *Id.*

103. *Id.* at 1216.

104. *See id.* (concluding that because contract forming basis for cause of action "lies in the wake" of defendant's forum activities, cause of action did "arise from or relate to" those activities).

105. *See Alexander v. Circus Circus Enter., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991) (implying that courts should not limit their analysis to immediate "cause" of cause of action; rather, courts should consider "entire course of events" leading up to plaintiff's cause of action).

106. *See id.*

107. *See Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 419 (1984) (Brennan, J., dissenting) (supporting broad interpretation of "arise from or relate to").

108. *See id.* at 424-28 (arguing in favor of interpretation of "arise from or relate to" that recognizes distinction between causes of action "arising from" and causes of action "relating to" defendant's contacts with forum state). Note that the *Helicopteros* majority concluded, and Justice Brennan disagreed, that the parties had conceded that the cause of action was unrelated to the defendant's contacts. *Id.* at 415.

109. *See id.* at 424-28 (avoiding explicit definition of sufficient relationship between plaintiff's action and defendant's contacts under "relate to" analysis).

are "related to" the cause of action.¹¹⁰ Although it appears from Justice Brennan's dissent that he found that "formally arise out of" means more than "but for," it is not clear whether his "related to" test requires at least a "but for" relationship.¹¹¹ One commentator has noted that a "related to" approach potentially could encompass two types of relationships: a "but for" relationship, and a "similarity" relationship.¹¹² The similarity relationship, which is the most expansive possible interpretation, would allow jurisdiction in any state where the defendant has engaged in activity similar to that which caused the plaintiff's injury.¹¹³ Could Justice Brennan have intended such an approach?¹¹⁴

Regardless of the particular semantics of the term "relate to," Justice Brennan clearly would have at least supported a "but for" test, and possibly would have called for an even more expansive test.¹¹⁵ Critics of the "but for" test would quickly point out, however, that Justice Brennan's opinions on personal jurisdiction often have conflicted with the mainstream.¹¹⁶ Nonetheless, the majority of the Court in *Helicopteros* did not

110. See *id.* (distinguishing between causes of action "formally arising from" and causes of action merely "related to" defendant's contacts with forum state). Justice Brennan argued that there is a difference between the two relationships and that both are sufficient for specific jurisdiction. *Id.* at 425.

111. See *id.* (indicating that "arise from" means more than "but for," but avoiding defining "relate to"). It appears that Justice Brennan's interpretation of "arising from" requires a substantively relevant contact because he concedes that the cause of action in *Helicopteros* did not "formally arise from" the defendant's contacts with Texas. *Id.* Alternatively, although the facts of *Helicopteros* do indicate a "but for" relationship between the defendant's Texas contacts and the cause of action, Justice Brennan does not explicitly state that "but for" is the minimum sufficient relationship for his "relate to" analysis. *Id.* at 425-28.

112. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 83 (noting that there are two reasons for characterizing defendant's forum activity as "related" to cause of action). Brilmayer refers to the California Supreme Court case of *Cornelison v. Chaney*, 545 P.2d 264 (Cal. 1976). *Id.* In that case, as in Justice Brennan's dissent in *Helicopteros*, the court relied on a "relate to" analysis without explicitly defining the necessary relationship.

113. See Brilmayer, *supra* note 112, at 84 (stating that if "relate to" analysis permitted mere similarity between defendant's acts and those acts leading to cause of action, jurisdiction would be proper in any state wherein defendant engaged in such similar acts). Brilmayer illustrates the flexibility of a "similarity" standard by suggesting that in a cause of action arising from an automobile accident, the defendant could be sued in any state where she had previously driven. *Id.*

114. See Mayo, *supra* note 43, at 344 (suggesting adoption of "relate to" test). This approach, like Justice Brennan's dissent in *Helicopteros*, does not define the necessary relationship for the "relate to" analysis; however, the author expressly recommends that no specific parameters govern the application of "relate to." *Id.* at 360-61.

115. See Brilmayer, *supra* note 112, at 83 (identifying two possible interpretations of "relate to"). Of the two possible interpretations of "relate to," "but for" is the narrower meaning. Justice Brennan's call for a "relate to" test, therefore, necessarily indicates his approval of at least a "but for" interpretation.

116. See *Rush v. Savchuk*, 444 U.S. 320, 333 (1980) (Brennan, J., dissenting) (finding assertion of personal jurisdiction proper despite majority holding that personal jurisdiction

necessarily disagree with Justice Brennan's "relate to" analysis, but held only that the issue was not before the Court.¹¹⁷ Justice Brennan's dissent, therefore, is significant to proponents of "but for" in that it represents the only explicit pronouncement by a member of the Court regarding the "arise from or relate to" issue.

B. *The Substantive-Proximate Cause Test*

In sharp contrast to the "but for" test, the substantive relevance test applies a very strict interpretation of "arise from or relate to." Under this test, for a cause of action to "arise from or relate to" a defendant's contacts with the forum state, the contacts must have substantive relevance to the cause of action.¹¹⁸ More plainly, the forum contacts must be necessary to the proof of the cause of action.¹¹⁹ Consequently, the substantive relevance test denies jurisdiction in many instances in which the "but for" test would allow personal jurisdiction.¹²⁰

Some courts have applied the substantive relevance interpretation of "arise from or relate to" under the name of the "proximate cause" test.¹²¹ This test analogizes the "arise from or relate to" requirement to the binary

was lacking); *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting) (same); *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Brennan, J., dissenting) (same). Justice Brennan filed a joint dissenting opinion for *Rush* and *World Wide Volkswagen*.

117. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 415 (1984) (holding by majority that parties have stipulated that claims did not "arise from or relate to" defendant's contacts with state of Texas). Because the majority declined to address the "relate to" issue, the opinion is not in disagreement with Justice Brennan's interpretation of that phrase, but only in disagreement that the determination of the meaning of "related to" is necessary to the disposition of the case.

118. See *Brilmayer*, *supra* note 112, at 82 (stating that cause of action does not arise from forum contacts unless that contact "is the geographical qualification of a fact relevant to the merits").

119. See *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (holding that forum contacts must constitute "a material element of proof" for cause of action to "arise from or relate to" those contacts); *Standard Life and Accident Ins. Co. v. Western Fin.*, 436 F. Supp. 843, 846 (W.D. Okla. 1977) (noting that acts offered as proof of personal jurisdiction must be same acts offered as proof of cause of action). The *Standard Life* court interpreted a provision of an Oklahoma long arm statute. *Id.* However, the court noted that the Supreme Court of Oklahoma had construed its long arm statute as extending personal jurisdiction to the limits of federal due process. *Id.* The issue, therefore, required a judgment of the limits of due process. *Id.*

120. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 383 (9th Cir. 1990) (noting that under facts of *Shute*, jurisdiction would not be proper if court applied "arise from" test set forth in *Marino v. Hyatt Corp.*), *rev'd on other grounds*, 111 S. Ct. 1522 (1991). The *Shute* court affirmatively disagreed with the substantive relevance test set forth in *Marino*, and explicitly stated that the "but for" and substantive relevance tests would yield opposite results on the same factual situation. *Id.*

121. See *Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1259 (1st Cir. 1990) (suggesting use of proximate cause test for "arise from or relate to" requirement); see also *Shute*, 897 F.2d at 385 (referring to the restrictive interpretations of "arise from or relate to" set forth in *Marino* as "the proximate cause approach").

proximate cause requirement in tort law.¹²² Proximate cause requires that a contact not only have a "but for" relationship to the cause of action, but also that the contact be the legal or "proximate" cause of the injury.¹²³ For an event to be the proximate cause of an injury, the injury generally must be a foreseeable consequence of that event.¹²⁴ If a contact is the proximate or legal cause of an injury, then it is substantively relevant to a cause of action arising from that injury.¹²⁵ Consequently, the substantive relevance test and the proximate cause test are essentially the same. For simplicity, the substantive relevance and proximate cause tests are referred to hereinafter as the substantive test.

Several circuits have applied the substantive test.¹²⁶ In *Pizarro v. Hoteles Concorde International*,¹²⁷ the First Circuit analyzed a case bearing strong factual similarity to *Shute v. Carnival Cruise Lines*.¹²⁸ In *Pizarro* the court ruled that a negligence action for injuries occurring in defendant's Aruba hotel could not "arise from" the defendant's solicitation of tourist reservations in the forum state.¹²⁹ In so holding, the court implied that, at a

122. See *Pizarro*, 907 F.2d at 1259 (suggesting analogy between "arise from or relate to" requirement and binary test for legal causation in tort law).

123. See *id.* (noting that legal causation in tort requires two-pronged analysis). For an event to be the legal cause of injury, it is insufficient to show only that "but for" the event, the injury would not have occurred. *Id.* A "but for" relationship, which is sufficient for personal jurisdiction in courts applying the "but for" test, is only the first requirement for legal causation. *Id.* The second requirement is met only when the event is also the proximate or foreseeable cause of the injury. *Id.* at 1259-60.

124. See *id.* (recognizing that foreseeability is "touchstone" of legal causation); WILLIAM L. PROSSER ET AL., *THE LAW OF TORTS* 280 (5th ed. 1984) (noting that accepted view of proximate cause requires foreseeability).

125. See PROSSER, *supra* note 124, at 164-65 (recognizing that proximate cause is one of four elements to cause of action in tort). By definition, proximate cause means the legal cause of the injury. If, therefore, a contact with the forum constitutes the proximate cause of the plaintiff's injury, it must be "substantively relevant" to the cause of action.

126. See *United Elec., Radio & Machine Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089-90 (1st Cir. 1992) (applying strict substantive relevance or proximate cause interpretation of "arise from or relate to"); *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1281 (8th Cir. 1991) (same); *Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1259-60 (1st Cir. 1990) (same); *Marino v. Hyatt Corp.*, 793 F.2d 427, 429-30 (1st Cir. 1986) (same); *Pearrow v. National Life Ins. Co.*, 703 F.2d 1067, 1068-69 (8th Cir. 1983) (same); *Gelfand v. Tanner Motor Tours*, 339 F.2d 317, 321-22 (2d Cir. 1964) (same).

127. 907 F.2d 1256 (1st Cir. 1990).

128. Compare *Pizarro*, 907 F.2d 1256 (1st Cir. 1990) (analyzing plaintiff's claim that negligence action for slip and fall in defendant's hotel "arose from" defendant's solicitation of business in forum state) with *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990) (analyzing plaintiff's claim that negligence action for slip and fall aboard defendant's cruise ship "arose from" defendant's solicitation of business in forum state), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

129. See *Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1260 (1st Cir. 1990) (holding that negligence action did not arise from defendant's solicitation of business in forum state).

Pizarro involved a negligence action for personal injury sustained by plaintiff Ivette Ramos, a citizen of Puerto Rico, in an accident occurring at the defendant Aruba Concorde Hotel. *Id.* at 1258. The action was brought in the United States District Court for the District

minimum, a contact should constitute a legal or proximate cause of an injury for a cause of action to "arise from" that contact.¹³⁰ Therefore, the *Pizarro* court clearly applied the substantive test interpretation of "arise from or relate to."

The Second Circuit case of *Gelfand v. Tanner Motor Tours*¹³¹ offers another example of the substantive test. In *Gelfand* the court relied on an argument, rejected by the "but for" jurisdictions,¹³² that a tort cannot arise from a contract.¹³³ The court reasoned that obligations under tort law "are

of Puerto Rico where the court granted Concorde's motion to dismiss for lack of personal jurisdiction over the Aruban defendant. *Id.* In so holding, the court noted that Concorde's only contacts with Puerto Rico were advertisements in Puerto Rican newspapers and concluded that the plaintiff's injuries did not, as required by the Puerto Rican long arm statute, "arise out of or result from" these limited contacts with Puerto Rico defendant's contacts. *Id.* The court, therefore, rejected the plaintiff's argument that it was only because of the defendant's advertisements in Puerto Rico that she visited the hotel and, thus, was injured there. *Id.*

On appeal, the United States Court of Appeals for the First Circuit upheld the opinion of the district court. *Id.* at 1260. In so holding, the court noted an earlier case, *Marino v. Hyatt Corp.*, 793 F.2d 472 (1st Cir. 1986), wherein very similar facts were found insufficient to demonstrate that the plaintiff's cause of action "arose from" the defendant's contacts with the forum state. *Pizarro*, 907 F.2d at 1259. The *Marino* court stated that the granting of personal jurisdiction in such tenuous cases would render the "arise from" requirement a "nullity." *Id.* In determining whether events "arise from" the defendant's forum state contacts, the *Pizarro* court suggested an analogy between the "arise from" requirement and the requirement of legal causation or proximate cause in tort law. *Id.* Finding no such nexus in the present case, the court concluded that personal jurisdiction over Concorde in Puerto Rico was improper. *Id.* at 1260.

Although the First Circuit's opinion was primarily concerned with the "arise from" requirement in the Puerto Rican long arm statute, the case, nonetheless, represents an evaluation of the due process "arise from" requirement because the court stated that personal jurisdiction, regardless of the long arm statute, would violate due process. *Id.*

130. See *Pizarro*, 907 F.2d at 1259-60 (ruling that defendant's contacts with forum state did not constitute proximate or legal cause of injury; therefore, defendant's contacts were insufficient). The court construed a provision of the Puerto Rican long arm statute requiring that causes of action "arise from" the defendant's contacts with the state. *Id.* at 1258. The court, however, determined that the long arm statute required that "the activity linking defendant, forum and cause of action must be substantial enough to meet due process requirements of 'fair play and substantial justice.'" *Id.* The issue, therefore, required a determination of the requirements of federal due process, thus, the determination of the proper interpretation of the "arise from or relate to" requirement.

131. 339 F.2d 317 (2d Cir. 1964).

132. See *supra* text accompanying notes 96-99 (discussing fact that "but for" courts reject argument that action in tort cannot arise from defendant's contractual contacts with forum state).

133. See *Gelfand v. Tanner Motor Tours*, 339 F.2d 317, 321-22 (2d Cir. 1964) (holding that plaintiff's cause of action in tort could not have arisen from contract because law of tort, rather than law of contract, imposes obligations which plaintiff alleged defendant breached).

Gelfand involved an action for personal injury brought by the Gelfands, husband and wife, for injuries sustained in a motor vehicle crash while aboard one of defendant's tour buses. *Id.* at 318. The plaintiff's purchased their bus tickets from the defendant, Tanner Motor Tours, through an independent travel bureau in New York, the forum state. *Id.* at 321. The Second Circuit rejected the argument that this sale could establish the basis for personal

creations of the law implicit in the parties' relationship to each other rather than express undertakings [in a contract]."¹³⁴ The court's holding indicates that because a contract does not create the obligation or duty from which the cause of action accrues, a contract cannot give rise to the cause of action.¹³⁵ The *Gelfand* opinion, therefore, rejects the reasoning of the Fifth Circuit in *Prejean v. Sonatrach, Inc.*¹³⁶ that a contract can give rise to a cause of action in tort when that contract brings the parties within "tortious striking distance" of one another.¹³⁷

Despite the restrictive nature of the substantive test, some proponents of the substantive test have suggested that this is the approach the Supreme Court is most likely to adopt.¹³⁸ These commentators point to the language of the 1980 Supreme Court case of *Rush v. Savchuk*¹³⁹ and argue that it "strongly supports the substantive relevance test."¹⁴⁰ *Rush* involved an action for personal injuries arising from an automobile accident in Indiana.¹⁴¹ The plaintiff sued in Minnesota, claiming that jurisdiction was proper because the defendant's insurance company did business in Minnesota.¹⁴² The Court rejected this argument, concluding that only the insurance company, not the defendant, had a contact with Minnesota and that the insurance policy

jurisdiction over the defendant. *Id.* The court held that, even assuming the sale of the bus tickets constituted a contact by the defendant with New York, the cause of action did not "arise from" this sale. *Id.* In so holding, the court relied in part on the theory that a tort cannot formally arise from contractual contacts such as the sale of bus tickets. *Id.* at 321-22. The court, however, went on to state that even an action for personal injuries based on breach of contract would fail because the "gist" of the claim is still in tort. *Id.* at 322.

134. *Id.*

135. *See id.* (concluding that contract did not give rise to tort action). Note that the *Gelfand* court went so far as to say that an action sounding in contract (for breach of contract of safe carriage) would fail because the "gist" of such a claim is in tort. *Id.* This reasoning is in direct conflict with a holding in the Sixth Circuit that stated:

[When] a tort action has its roots in a commercial relationship between businessmen, and where the cause of action relates to commercial aspects of that transaction, jurisdiction may be predicated upon the defendant's transaction of business within the state, regardless of whether the action technically sounds in contract or tort.

In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 231 (6th Cir. 1972).

136. *See supra* text accompanying notes 96-99 (discussing Fifth Circuit's argument that action in tort can arise from contract when contract puts parties within "tortious striking distance" of one another).

137. *Compare* *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981) (holding that cause of action in tort can arise from contract) *with Gelfand*, 339 F.2d at 322 (holding that contract cannot give rise to action in tort).

138. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1463 (1988) (supporting substantive test by noting that it is consistent with previous holdings of Supreme Court); Brilmayer, *supra* note 112, at 100 (same); Robert L. Theriot, Note, *Specific and General Jurisdiction—The Reshuffling of Minimum Contacts Analysis*, 59 TUL. L. REV. 826, 840 (1985) (same).

139. 444 U.S. 320 (1980).

140. Brilmayer, *supra* note 112, at 100.

141. *Rush v. Savchuk*, 444 U.S. 320, 322 (1980).

142. *Id.* at 328.

“was not related to the operative facts of the litigation.”¹⁴³ Proponents of the substantive test contend that this language indicates the Court’s inclination toward a standard of substantive relevance.¹⁴⁴ Presumably, the assumption is that the “operative facts of the litigation” include only substantively relevant facts.¹⁴⁵ The holding in *Rush*, however, cannot be conclusive evidence of the Court’s intent. In that case, the alleged contact with the forum state, even assuming the Court had attributed it to the defendant, did not demonstrate even a “but for” relationship to the cause of action.¹⁴⁶ The Court appears to require a stronger relationship than that present in *Rush*, but where the Court will draw the line remains a question.

IV. MAKING A CHOICE

A. Arguments for and Against the “But For” Test

The Ninth Circuit, perhaps the strongest proponent of the “but for” test, has advanced several arguments in support of this expansive interpretation.¹⁴⁷ First, the words “arise from or relate to,” (by definition) arguably imply an expansive test for the connection between the cause of action and the forum contacts.¹⁴⁸ Requiring more than a “but for” relationship “unnecessarily limits the ordinary meaning of [‘arise from or relate to’].”¹⁴⁹ Indeed, the Ninth Circuit’s textual argument is supported by the fact that the Supreme Court has neglected to clarify or narrow the “arise from or relate to” language.¹⁵⁰ As a consequence, the argument is reasonable that

143. *Id.* at 329. The *Rush* Court first concluded that the alleged contact with the forum state was not attributable to the defendant because there was no purposeful activity by the defendant directed to the forum state. *Id.* The Court then held that the alleged contact was not related to the “operative facts” of the case. *Id.*

144. See *supra* notes 138-40 (contending that *Rush* offers support for substantive test).

145. See *Rush*, 444 U.S. at 329 (requiring contacts that are “operative facts of the litigation”). It is unclear what the *Rush* Court meant when it referred to the “operative facts of the litigation.” *Id.* If this language is to have any value to proponents of the substantive test, it must be assumed that the *Rush* court meant “substantively relevant facts of the litigation.”

146. See *id.* at 322 (reading of facts indicates absence of “but for” relationship). In *Rush*, if the alleged contact with the forum state, the insurance policy, had never existed, the accident leading to the cause of action would still have occurred. Consequently, the holding in *Rush* would have been the same if the Court had expressly applied the “but for” test. Because the Court did not identify the necessary relationship between the contact and cause of action, the holding only suggests that the Court will require a stronger relationship than that presented in *Rush*.

147. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir. 1990) (advancing arguments in favor of “but for” test for “arise from or relate to” requirement), *rev’d on other grounds*, 111 S. Ct. 1522 (1991); see also Johnson, *supra* note 92 at 249 (outlining various arguments advanced by Ninth Circuit in *Shute* supporting adoption of “but for” test).

148. See *Shute*, 897 F.2d at 385-86 (reasoning that plain meaning of “arise from or relate to” suggests liberal nexus requirement between cause of action and forum contacts).

149. *Id.* at 385.

150. See *supra* note 45 (explaining that there is little guidance from either academic commentary or Supreme Court as to proper interpretation of “arise from or relate to”).

courts should not restrict the ordinary meaning of "arise from or relate to" without further guidance from the Supreme Court.¹⁵¹

The Ninth Circuit also has argued that the basic function of the "arise from or relate to" requirement is to maintain the distinction between specific and general personal jurisdiction.¹⁵² That court insists that the "but for" test fulfills this essential function by refusing the application of specific personal jurisdiction when there is no discernable nexus between the cause of action and the defendant's activities in the forum state.¹⁵³ In such a case, a plaintiff would have to satisfy the general jurisdiction requirements by showing that the defendant has continuous and systematic contacts with the forum state.¹⁵⁴

Another argument in favor of the "but for" test is that only with an expansive interpretation of "arise from or relate to" can a court achieve a fair result in cases in which, for instance, a defendant has numerous, but not "continuous and systematic," contacts with the forum state, but the cause of action bears a tenuous relationship to those contacts.¹⁵⁵ The application of a stricter test, the Ninth Circuit argues, would permit a defendant to engage in substantial activities in the forum state, yet escape forum jurisdiction with respect to tenuously related claims.¹⁵⁶ The "but for"

151. See *Helicopteros de Nacionales de Colom. v. Hall*, 466 U.S. 408, 424-28 (1984) (Brennan, J., dissenting) (arguing that restrictive interpretation of "arise from or relate to" is inconsistent with plain meaning of words).

152. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (stating that basic purpose of "arise from or relate to" requirement is to maintain distinction between specific and general jurisdiction), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

153. See *id.* (offering proof that "but for" test maintains distinction between general and specific jurisdiction). The court in *Shute* insisted that it would not exercise adjudicatory authority over causes of action truly unrelated to defendant's contacts in the forum stating:

Under 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. See, e.g., *Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (an assault on a flight attendant occurring in a plane on the ground in Reno does not arise out of a defendant's musical performances or sales of records or tapes in California); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Production*, 614 F.2d 1247, 1254 (9th Cir. 1980) (visits to California by a defendant's representatives to execute formal documents in prior transactions do not support the exercise of jurisdiction over a cause of action relating to subsequent, unrelated transactions). 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.

Id.

154. See *id.* (stating that court will sustain personal jurisdiction over cause of action with no relationship to defendant's forum contacts only upon showing of contacts necessary for general jurisdiction).

155. See *id.* (noting that cases involving substantial contacts with forum state but only tenuous relationship between cause of action and forum contacts may require "but for" interpretation of "arise from or relate to" in order to achieve fair result).

156. See *id.* at 386 (noting potential unfairness of applying strict interpretation of "arise from or relate to"). The *Shute* court suggested that allowing a defendant with substantial contacts to avoid the forum's jurisdiction on tenuously related claims may represent "an unwarranted departure from the core concepts of 'fair play and substantial justice.'" *Id.*

test, however, would permit jurisdiction over tenuously related claims when the circumstances as a whole suggest it would be reasonable to do so.¹⁵⁷

A major criticism of the "but for" test is that by allowing a court to examine the entire history of events leading up to the cause of action, the "but for" test allows almost unlimited jurisdiction.¹⁵⁸ Professor Lea Brilmayer, a critic of the "but for" test, has voiced serious concerns over the seemingly unlimited jurisdiction offered by the "but for" interpretation.¹⁵⁹ Brilmayer illustrates this concern with a hypothetical. She gives the example of a New York citizen driving from Connecticut to Maine by way of Massachusetts.¹⁶⁰ If the New York citizen injures a pedestrian in an automobile accident in Massachusetts, she argues that under the "but for" test jurisdiction would be proper in both Connecticut and Maine in an action by the pedestrian.¹⁶¹ This conclusion, although potentially correct using an absolute interpretation of a "but for" relationship, ignores the practical restraint placed on the "but for" test by the courts applying it.¹⁶²

The Ninth Circuit has addressed the concerns of critics such as Brilmayer, noting that cases that are "too attenuated" would fail the "reasonableness" standard for personal jurisdiction.¹⁶³ The "but for" interpretation, therefore,

157. See *id.* (stating that "reasonableness" prong of personal jurisdiction analysis will prevent exercise of jurisdiction over claims that are too tenuously related to defendant's contacts with forum).

158. See Terez, *supra* note 57, at 941-42 (stating that "but for" test would allow jurisdiction in cases not meeting requirements of fair play and substantial justice required by due process). A major concern with an expansive interpretation of "arise from or relate to" is that it would increase the number of potential forums for litigation, thus, increase plaintiffs' choice-of-law options. A strict interpretation, therefore, would limit a plaintiff's ability to "forum shop" for the most advantageous state law. See Twitchell, *supra* note 28, at 653 (noting forum shopping problem).

159. See Brilmayer, *supra* note 138, at 1462 (criticizing "but for" as being too expansive); Brilmayer, *supra* note 112, at 84 (same). Brilmayer notes that one's own birth is a "but for" causative factor of everything that individual does in his or her lifetime. Brilmayer, *supra* note 138, at 1462.

160. See Brilmayer, *supra* note 138, at 1445 (setting forth hypothetical illustration for determining scope of "but for" test).

161. *Id.* at 1458 (arguing that, under "but for," jurisdiction would be proper in state traveled through, as well as state of destination).

162. Technically, Brilmayer is correct in her assessment that "but for" passing through the state of Connecticut, and "but for" the defendant's trip toward Maine the accident in Massachusetts would not have occurred. *Id.* As a practical matter, however, a court would still require a showing that the defendant had purposely availed contacts with the forum state. See *supra* text accompanying notes 31-32 (discussing purposeful availment requirement). This consideration may render jurisdiction improper in Maine, a state where, according to Brilmayer's facts, the defendant may have no contacts at all. See Brilmayer, *supra* note 138, at 1445 (setting forth facts of hypothetical). Moreover, Brilmayer's conclusion does not consider the impact of a "reasonableness" analysis of the facts as a whole, which could also render jurisdiction inappropriate. See *infra* text accompanying notes 223-30 (discussing "reasonableness" analysis utilized in Ninth Circuit and potential modifications).

163. See *Alexander v. Circus Circus Enter., Inc.*, 939 F.2d 847, 850 (9th Cir. 1991) (setting forth Ninth Circuit's three-pronged test for personal jurisdiction, third prong being

is not a bright line test as applied. A "but for" relationship, standing alone, is insufficient for personal jurisdiction. There must also exist, according to the Ninth Circuit, accompanying factors of reasonableness for a court to assert personal jurisdiction.¹⁶⁴

Policing the "but for" test with a "reasonableness" analysis, as the Ninth Circuit suggests,¹⁶⁵ will help alleviate the concerns with the "but for" test if courts will step up the now highly deferential "reasonableness" scrutiny.¹⁶⁶ In practice, courts may find it difficult to depart from the accepted method of presuming reasonableness upon a showing of minimum contacts. Even the Ninth Circuit in one of its most recent applications of the "but for" test stated that "[o]nce purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable."¹⁶⁷ In the usual case, a court conducts the "reasonableness" analysis only *after* a showing of minimum contacts.¹⁶⁸ In "but for" cases, however, the "reasonableness" analysis must contribute to the determination of whether minimum contacts exist.¹⁶⁹ Consequently, a deferential "reasonableness" analysis would not effectively safeguard the requirements of due process.

"reasonableness"); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (noting that "reasonableness" requirement would prevent assertion of jurisdiction where defendant's contacts are "too attenuated"), *rev'd on other grounds*, 111 S. Ct. 1522 (1991). *But see infra* text accompanying notes 165-69 (discussing problem of policing "but for" test with "reasonableness" analysis in light of tendency among courts to engage in highly deferential test for reasonableness).

164. *See Shute*, 897 F.2d at 385 (requiring assertion of jurisdiction to be reasonable, noting that this requirement will prevent jurisdiction over claims with relationship to defendant's contacts that is "too attenuated").

165. *See supra* text accompanying notes 163-64 (discussing Ninth Circuit's suggestion that "reasonableness" prong of personal jurisdiction analysis will prevent abuse of "but for" test).

166. *See supra* text accompanying notes 16-21 (discussing deferential application of "reasonableness" standard after finding of minimum contacts).

167. *Alexander*, 939 F.2d at 854.

168. *See supra* text accompanying notes 14-15 (noting that "reasonableness" inquiry is final prong of personal jurisdiction analysis).

169. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (stating that smaller number of contacts with forum would require stronger nexus between cause of action and forum contacts), *rev'd on other grounds*, 111 S. Ct. 1522 (1991). By examining such factors as the number of the defendant's additional, unrelated contacts with the forum, the Ninth Circuit is actually engaging in a "reasonableness" determination for the use of the "but for" test. Some commentators would suggest that such an approach dilutes the distinction between specific and general jurisdiction. *See Richman, supra* note 55, at 1339 (noting that some commentators maintain that personal jurisdiction is inappropriate when based on mixed consideration of related and unrelated contacts) (citing EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 8.31 (1982) and Brilmayer, *supra* note 112, at 80-88). *But see Shute*, 897 F.2d at 385 (insisting that "but for" test maintains distinction between specific and general personal jurisdiction analysis). The Ninth Circuit's approach can be likened to the so called "sliding scale" approach to personal jurisdiction. *See Richman, supra* note 55, at 1336-46 (describing and endorsing "sliding scale" analysis); *infra* notes 239-41 and accompanying text (describing how adoption of "but for" test will allow "sliding scale" analysis without disrupting structure of present general and specific jurisdictional models).

B. Arguments for and Against the Substantive Test

As the most restrictive interpretation of "arise from or relate to," the substantive test has several positive features that are the logical products of a strict standard.¹⁷⁰ One redeeming quality of the substantive relevance test is its clarity.¹⁷¹ As is usually the case with rigid standards, the substantive relevance test is simple because its application has no "grey area."¹⁷² If the contact is not substantively relevant, it cannot count as a consequential contact for specific personal jurisdiction.¹⁷³ Another result of the rigidity of the substantive test is alleviation of the "forum shopping" problems associated with the "but for" test.¹⁷⁴ With a restricted number of available forums, the potential for forum shopping by plaintiffs decreases.¹⁷⁵ Furthermore, if courts exercise specific jurisdiction only on a showing of substantively relevant contacts, defendants can be assured that unless they engage in such activity, they will not subject themselves to a foreign state's adjudicatory authority.¹⁷⁶

Another argument in favor of the substantive test is set forth by Professor Brilmayer.¹⁷⁷ According to Brilmayer, the true basis for a court's assertion of specific jurisdiction is to exercise regulatory authority over activity conducted in the state.¹⁷⁸ Based on this assumption, she argues that contacts forming a substantively relevant part of a cause of action are the only contacts that a court may consider in order to exercise regulatory authority.¹⁷⁹ Indeed, in suits not involving a jurisdiction dispute, nonsubstantively related contacts have no significance.¹⁸⁰ Nonsubstantively relevant contacts, Brilmayer argues,

170. See Twitchell, *supra* note 28, at 653 (noting that substantive test has advantages: clarity, deterrence of forum shopping, and notice to defendants).

171. See *id.* (recognizing that substantive test creates "bright line" for determining propriety of specific personal jurisdiction).

172. See *id.* (stating that substantive test avoids difficulties associated with analyzing "fairness" by establishing "bright line" test that provides definitive answer to question of whether cause of action "arises from or relates to" defendant's forum contacts). The fact that the substantive test is a "bright line" test distinguishes this test from the "but for" test. See *supra* text accompanying notes 163-64 (discussing that "but for" test is not "black and white" test).

173. See *supra* text accompanying notes 126-37 (discussing application of substantive test).

174. See *supra* note 158 (discussing forum shopping problems associated with "but for" test).

175. See *supra* note 158 (stating that substantive test would limit forum shopping).

176. See Twitchell, *supra* note 28, at 653 (noting that substantive test gives defendants "minimum notice of the applicable substantive law").

177. See Brilmayer, *supra* note 112, at 82-86 (arguing for substantive test).

178. See *id.* at 86 (stating that "the most convincing justification [for requiring defendant to litigate cause of action in foreign state] is the state's right to regulate activities occurring within state").

179. See *id.* (arguing that only substantively related contacts receive consideration by courts in determining specific personal jurisdiction). Brilmayer reasons that courts need not concern themselves with nonsubstantively related contacts because the court's regulatory authority is not called upon unless the defendant has engaged in forum state activity that is substantively relevant to a cause of action in the forum state. *Id.*

180. See *infra* note 181 (noting inequity of considering nonsubstantively related contacts only because jurisdiction is at issue).

do not necessitate or attract a court's regulatory authority in cases in which jurisdiction is not an issue; thus, nonsubstantively related contacts should not gain significance simply because jurisdiction is at issue.¹⁸¹ Brilmayer concludes, therefore, that the substantive test is the fairest and most logical interpretation of "arise from or relate to."¹⁸²

Apart from claiming that the substantive test is simply too restrictive,¹⁸³ critics of the test have noted that, despite the apparent ease of application, the substantive test may be quite difficult to administer.¹⁸⁴ This difficulty is most evident in the close cases in which the necessity for a decisive standard for "arise from or relate to" is most apparent.¹⁸⁵ The difficulty exists in determining what constitutes a "substantively relevant" contact. In close cases, this may involve a determination of what constitutes a "proximate cause" of the injury leading to the cause of action.¹⁸⁶ Consequently, in deciding the preliminary question of personal jurisdiction, a court may find it necessary to pass judgment on the ultimate issue of the merits of the case, that is, whether the defendant's actions were the legal or "proximate" cause of the plaintiff's injuries.¹⁸⁷ In light of this potential problem, it appears that

181. See Brilmayer, *supra* note 112, at 82-83, 86 (arguing that giving significance to nonsubstantively related contacts is unfair to defendant). Relying on the assumption that the basis for asserting jurisdiction over nonresident defendants is the state's regulatory authority, Brilmayer suggests that the consideration of nonsubstantively relevant contacts is unfair to the defendant because, in doing so, a court gives weight to conduct having no regulatory significance only because jurisdiction is at issue. *Id.* at 86. Brilmayer goes so far as to state, "[i]t would be arbitrary, and thus a violation of due process if the court merely seized on the [nonsubstantively relevant] contact . . . as a pretext for jurisdiction." *Id.*

182. See *id.* at 82 (stating that using substantive relevance to determine whether cause of action "arises from or relates to" defendant's contacts is "a natural test").

183. See *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 419-20 (1984) (Brennan, J., dissenting) (arguing that limiting application of "arise from or relate to" to causes of action formally arising from defendant's contacts, *i.e.*, substantive test, is too restrictive); *Alexander v. Circus Circus Enter., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991) (same); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir. 1990) (same), *rev'd on other grounds*, 111 S. Ct. 1522 (1991); Twitchell, *supra* note 28, at 653-54 (same).

184. See Twitchell, *supra* note 28, at 656-57 (noting potential difficulty in determining when contacts are substantively relevant to cause of action).

185. See *id.* at 656 (stating that difficulty in determining substantive relevance is particularly troublesome in tenuously related claims).

186. See *id.* (suggesting that it is not always clear which contacts have substantive relevance to cause of action). In tenuously related claims, the question of jurisdiction could turn on whether the defendant's activity in the forum was the legal cause of the plaintiff's injury. *Id.* at 656-57. This requires a determination of "proximate cause," an issue that many law students and professors agree is among the most perplexing issues to determine. See PROSSER, *supra* note 124, at 280 (stating that "[t]here is perhaps no other issue in the law of torts over which so much controversy has raged" than what constitutes proximate cause).

187. See Twitchell, *supra* note 28, at 657 (noting that courts, in tenuously related cases, cannot readily answer questions of jurisdiction because determining of substantive relevance is not clear). It is not hard to imagine a case wherein the very claim of innocence by the defendant is that her actions were not the legal cause of the plaintiff's injuries. This is the defendant's defense on the merits. This same defense to the merits will be the defense to jurisdiction under the substantive test. Thus, a court will have to make a decision on the merits at the jurisdiction stage. In jury trials, this could be particularly troublesome.

the substantive test is "simple" only in the sense that it provides an absolute, bright line test.¹⁸⁸ Nonetheless, serious difficulty may arise in determining on which side of the "bright line" a particular case falls.

C. The Policy Behind the Personal Jurisdiction Doctrine and a Decision Based on Fairness

Even assuming, however, that the substantive test is in fact easier to administer than the "but for" test, this benefit alone would not justify the adoption of the substantive test. The need for administrative efficiency should not govern the limits of due process.¹⁸⁹ If administrative ease were determinative, the Supreme Court likely would have chosen not to depart from the simplistic territoriality rule of *Pennoyer v. Neff*.¹⁹⁰ The critical inquiry in determining the most appropriate standard for "arise from or relate to" involves an examination of each test's basis within the personal jurisdiction doctrine set forth by *International Shoe* and its progeny.¹⁹¹

An examination of the relative benefits and drawbacks associated with the adoption of either interpretation of "arise from or relate to" reveals that neither test provides a perfect standard.¹⁹² The fundamental criticisms are that "but for" is too broad and the substantive test is too narrow. The analysis, therefore, must shift to a determination of which test best fulfills the underlying justification for distinguishing between related and unrelated contacts.¹⁹³

Professor Brilmayer has argued that the justification for the limitations on specific jurisdiction rests on the concept of state sovereignty.¹⁹⁴ Under this

188. See *supra* notes 171-72 and accompanying text (describing substantive test as rigid, bright line test). It is not denied that the substantive test is, indeed, simple to apply once it is clear that a defendant's contacts are or are not substantively relevant. In contrast to the "but for" test, the substantive test is complete when a determination on substantive relevance is made. See *supra* text accompanying notes 163-64 (noting that "but for" is not bright line test).

189. See *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (indicating that test for personal jurisdiction should not be mechanical). The Court's emphasis on a case by case analysis of the particular facts supporting personal jurisdiction clearly suggests that administrative ease was not a consideration in the Court's determination of the proper test for personal jurisdiction.

190. See *supra* text accompanying notes 1-4 (describing rigid, yet administratively simple territorial rule of *Pennoyer*). When the Supreme Court departed from *Pennoyer* in *International Shoe*, it obviously made a choice in favor of flexibility over administrative convenience.

191. See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702-03 (1982) (clarifying that test for personal jurisdiction is based on *International Shoe* and its progeny).

192. See *supra* text accompanying notes 147-88 (discussing various arguments for, and criticisms against, adoption of either "but for" or substantive relevance tests).

193. See Brilmayer, *supra* note 138, at 1459 (emphasizing importance of determining underlying foundation for personal jurisdiction and supporting this foundation with proper interpretation of "arise from or relate to").

194. See Brilmayer, *supra* note 112, at 84 (arguing that distinction between related and unrelated contacts in personal jurisdiction analysis is based on state sovereignty).

assumption, a state must overcome the limitations of state sovereignty by justifying its assertion of jurisdiction over nonresidents.¹⁹⁵ Brilmayer argues that the most convincing justification, and to her the only sufficient justification, is a state's right to regulate conduct within its boundaries.¹⁹⁶ If state sovereignty is in fact the proper basis for the requirements of personal jurisdiction, then substantive relevance may well be the proper test.¹⁹⁷ The substantive test essentially requires wrongful conduct by the defendant in the forum state.¹⁹⁸ According to Brilmayer's analysis, without wrongful conduct in the forum state, the state has no right to assert jurisdiction because it has no regulatory interest in the conduct.¹⁹⁹ Consequently, the "but for" test, which does not require wrongful conduct in the forum state, would overstep the boundary of the state's regulatory authority.²⁰⁰

Brilmayer's analysis, of course, depends on the legitimacy of her assumption that state sovereignty is the basis for the distinction between related and unrelated contacts. The support for the state sovereignty assumption comes from the 1980 Supreme Court case of *World Wide Volkswagen Corp. v. Woodson*.²⁰¹ In *World Wide* the Court appeared to return somewhat to the federalism and state sovereignty concepts emphasized so heavily in the territorial doctrine of *Pennoyer v. Neff*, stating that state sovereignty is relevant for jurisdictional purposes in that it places a limitation on the sovereign power of other states to try cases in their courts.²⁰² The Court then

195. See *id.* at 85-86 (understanding Due Process Clause to require state to justify its assertion of personal jurisdiction over nonresident defendants).

196. See *id.* at 86 (suggesting only proper justification for burdening nonresident defendant is exercise of state's regulatory authority). Brilmayer notes that when a state requires its own citizens to litigate in its courts there can be no state sovereignty objections because exercising authority over its own citizens is an act of state sovereignty. *Id.* at 85. When the burden is placed on outsiders, however, the state must support this burden with adequate justification. *Id.* at 85-86. Brilmayer argues that the best justification is the state's interest in regulating activities within its borders. *Id.* at 86.

197. The conclusion that substantive relevance is the best test under the state sovereignty theory necessarily requires the assumption that the exercise of a state's regulatory authority is the *only* justification for a state to burden an out of state defendant, not just the *best* justification. See *supra* note 196 (stating justification based on regulatory authority). But see *Kulko v. Superior Court*, 436 U.S. 84, 98 (1982) (implying that adjudicatory authority of forum state is important factor to consider).

198. See *supra* text accompanying notes 118-25 (describing substantive test).

199. See *supra* notes 196-97 (discussing reasoning and necessary assumptions for conclusion that state sovereignty requires substantive relevance).

200. See Brilmayer, *supra* note 112, at 86 (suggesting that basing jurisdiction on nonsubstantively related contacts would violate state sovereignty limitations of due process).

201. 444 U.S. 286 (1980).

202. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980) (indicating revival of federalism and state sovereignty concepts in personal jurisdiction). The Court stated:

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. . . . [T]he Framers also intended that the

concluded that "even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment."²⁰³ Professor Brilmayer has interpreted this language to require a focus on a state's justification for burdening an out of state defendant.²⁰⁴ As noted above, this justification is met only when the defendant has engaged in in-state conduct that is substantively relevant to the cause of action.²⁰⁵

The state sovereignty argument fails, however, because the Supreme Court essentially recanted much of the state sovereignty emphasis of *World Wide* two years later in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*.²⁰⁶ In *Insurance Corp.* the Court stated that the requirements of personal jurisdiction represent a restriction on state judicial power "not as a matter of sovereignty, but as a matter of individual liberty."²⁰⁷ So guided, it

States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each state, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id.

World Wide involved a products liability action brought in Oklahoma for recovery of damages arising from an automobile accident in Oklahoma. *Id.* at 288. Plaintiffs purchased their allegedly defective automobile in New York from a New York retailer and brought suit against the retailer and its distributor, World Wide Volkswagen. *Id.* The Supreme Court quickly noted that neither defendant had any contact with the forum state of Oklahoma. *Id.* at 289. In so concluding, the Court reasoned that the unilateral contacts of the plaintiffs with the state of Oklahoma were not attributable to the defendants. *Id.* at 295. Furthermore, the Court refused to assign significance to the fact that it was potentially foreseeable by the defendants that customers would drive their automobiles in Oklahoma. *Id.* at 295-96. The foreseeability that is critical, the court held, is that the defendants reasonably foresee the possibility of litigation in the forum state. *Id.* at 297. Finding no such foreseeability in the present case, the Court refused to permit jurisdiction over the defendants. *Id.* at 299.

203. *Id.* at 294.

204. See Brilmayer, *supra* note 112, at 85-86 (suggesting that states must, according to *World Wide*, justify their imposition of burdens of litigation on out of state defendants). In light of the Supreme Court's announcement that even when litigation in a particular state presents no burden at all on the out of state defendant jurisdiction will sometimes fail from state federalism concerns, Brilmayer argues that the emphasis should not be the individual defendant's right not to be burdened, but the right of the forum state to impose that burden. *Id.*

205. See *supra* text accompanying notes 194-200 (discussing argument that state sovereignty limitations require substantively relevant contacts).

206. 456 U.S. 694 (1982).

207. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982). See Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1218 (1991) (recognizing that *Insurance Corp.* rejected state sovereignty emphasis of *World Wide*).

In *Insurance Corp.*, the Court expressly modified its opinion in *World Wide* stating: The restriction on state sovereign power described in *World Wide Volkswagen Corp.*, . . . must be seen as ultimately a function of the individual liberty interest preserved

is possible to give a reading to *World Wide* that is consistent with *Insurance Corp.* For instance, the *World Wide* Court stated that one function of the minimum contacts analysis is to ensure that states do not breach the limits "imposed on them by their status as coequal sovereigns in a federal system."²⁰⁸ The Court, however, went on to explain that a defendant should have minimum contacts with a state such that "he should reasonably anticipate being haled in to court there."²⁰⁹ This statement arguably suggests that state sovereignty does not define minimum contacts, and hence, does not limit specific jurisdiction.²¹⁰ Rather, state sovereignty is only a tangential beneficiary of the due process protection of individual liberty. Regardless of the ability to accord *World Wide* with *Insurance Corp.*, the final word appears to be that the individual liberty protection of due process provides the sole basis of the limitations on personal jurisdiction.²¹¹

by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns.

Insurance Corp., 456 U.S. at 702-03 n.10. This language appears to suggest that although state sovereignty is a valid concern, this concern ultimately finds protection through the safeguarding of a defendant's individual liberty interests.

Insurance Corp. involved an action for recovery under an insurance policy. *Insurance Corp.*, 456 U.S. at 698. The defendants included a large number of foreign based insurance companies acting as excess insurers. *Id.* at 696. These defendants refused an order of the district court to produce documents pertaining to the defendants' motion to dismiss for lack of personal jurisdiction. *Id.* at 699. The district court, therefore, ruled that personal jurisdiction was proper as a sanction for violation of a discovery order. *Id.* The Supreme Court upheld the imposition of jurisdiction over the defendants, reasoning that the failure to comply with the district court's discovery order operated as a waiver or admission of the personal jurisdiction requirements. *Id.* at 709.

208. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

209. *Id.* at 297.

210. See Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 712 (1983) (noting that, arguably, *World Wide* Court was not suggesting that state sovereignty would prevent jurisdiction in states where defendant has minimum contacts).

A discussion of state sovereignty was not necessary in *World Wide*. *Id.* at 715. The *World Wide* Court was concerned primarily with emphasizing that jurisdiction is improper without purposeful availment by the defendant of the "privilege of conducting activities within the forum state." *World Wide*, 444 U.S. at 297. Without purposeful availment, the Court concluded, a defendant does not have "notice that it is subject to suit there." *Id.* The Court described this notice as critical to due process, and concluded that when it is present, a state does not exceed its powers in asserting jurisdiction. *Id.* at 297-98. *World Wide*, therefore, may have suggested only that state sovereignty is protected to the extent that an individual's due process rights are protected, but that state sovereignty, in and of itself, does not provide or establish the criteria by which an individual's rights are determined. Such a conclusion would be consistent with *Insurance Corp.* Note, however, that reading *World Wide* without the benefit of *Insurance Corp.* readily leads to a conclusion such as professor Brillmayer's. See *supra* notes 204-05 and accompanying text (discussing Brillmayer's reading of *World Wide*).

211. Ultimately, the holding in *Insurance Corp.* appears to be less of an explanation of *World Wide* than a recantation of it. The clear statement of the Court in *Insurance Corp.* was that the protection of individual liberty is the sole source of the restrictions on personal jurisdiction. *Insurance Corp.*, 456 U.S. at 702 n.10.

In providing a limit to personal jurisdiction, due process protects the individual liberty interests of a defendant by requiring that the defendant have "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²¹² Thus, the basis for the distinction between related and unrelated contacts must be that it is inherently more fair to require a defendant to litigate in a foreign state when the defendant's contacts with that state played some part in the injury leading to the cause of action.²¹³ When a court relies on the fact that the defendant's contact with the state played a part in the cause of action, the court is applying specific jurisdiction.²¹⁴ In determining how significant a part the defendant's contacts must play in the cause of action, fairness must be the guideline.²¹⁵ The question, then, is whether the "but for" or substantive test provides the greater likelihood for fairness in every case.

With fairness as the basis for the personal jurisdiction requirements, the "but for" test prevails for two reasons. First, a "but for" relationship establishes a logical threshold for specific jurisdiction. Without a "but for" relationship, that is, if the injury leading to the cause of action would have occurred absent the defendant's forum state contacts, it is reasonable to refuse specific jurisdiction.²¹⁶ Second, the "but for" test foresees and provides for the possibility that, in light of the circumstances as a whole, specific jurisdiction may be proper over defendants with nonsubstantively related contacts.²¹⁷

212. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see also *Insurance Corp.*, 456 U.S. at 702-03 (restating that rule in *International Shoe* protects individual liberty interest of out of state defendant); Lewis, *supra* note 210, at 727 (noting that personal jurisdiction focuses on interests of individual litigants, not interests of state governments).

213. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (stressing that defendant's must have "fair warning" that their activities in state may require them to litigate matters there). The probability that an individual has "fair warning" would appear to drop most dramatically between causes of action for which the defendant's contacts played some part (at least a "but for" relationship), and causes of action for which the defendant's contacts played no part (no "but for" relationship). Therefore, if courts must draw a line separating the specific and general jurisdictional analysis, it is most appropriately drawn with the "but for" relationship.

214. See Twitchell, *supra* note 28, at 644 (suggesting that courts apply specific jurisdiction analysis when "the nature of the claim" is considered in determination of personal jurisdiction). Twitchell's article, while expressly rejecting the substantive test, makes no specific suggestion as to when "the nature of the claim" should receive consideration. See *id.* at 652-63 (rejecting substantive test and recognizing that claims having "some connection" to defendant's forum contacts have stronger basis for jurisdiction than claims with no connection).

215. See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702-03 n.10 (1982) (clarifying that "only source of the personal jurisdiction requirement" is due process and that due process is defined by "fairness" rule of *International Shoe*).

216. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (concluding that "but for" relationship maintains distinction between specific and general jurisdiction), *rev'd on other grounds*, 111 S. Ct. 1522 (1991).

217. See *infra* text accompanying notes 223-30 (discussing application of dual "reasonableness" test to determine whether jurisdiction is proper in cases demonstrating only "but

In comparison to "but for," the substantive test effectively precludes a fair result when the defendant's forum state contacts are not substantively relevant.²¹⁸ If due process, and therefore, fair play and substantial justice, are the standards for the personal jurisdiction requirements, adherence to the substantive test would require the conclusion that substantive relevance defines fairness.²¹⁹ The clear mandate of *International Shoe* denies that mechanical guidelines can or should define fairness.²²⁰ Courts may determine fairness only through a case-by-case review of the circumstances as whole. Because the substantive test fails to provide for such a determination in cases not demonstrating substantive relevance, the "but for" test better serves the standard of fair play and substantial justice.

The conclusion that the "but for" test provides the greatest possibility for fairness in each case is not without qualification. Just as the substantive test is underinclusive, the "but for" test is potentially overinclusive.²²¹ The difference between the two flaws is that the underinclusive effect of the substantive test is without remedy, whereas the overinclusiveness of the "but for" test is controllable.²²²

The Ninth Circuit suggests that the "reasonableness" prong of the personal jurisdiction test will safeguard against the over-application of the

for" relationship between contacts and cause of action); *infra* text accompanying note 236 (describing situation in which "but for" analysis is necessary to achieve fair result).

218. See *supra* notes 172-73 and accompanying text (noting that substantive test is "bright line," "all or nothing" test). The substantive test does not foresee the possibility that personal jurisdiction could be fair despite the fact that the defendant's contact are not substantively relevant to the cause of action.

219. See *supra* text accompanying notes 211-12 (recognizing fairness as basis for personal jurisdiction requirement). The object of the personal jurisdiction test is to insure fairness. Concluding, therefore, that specific personal jurisdiction is improper when there is no substantive relevance to the defendant's contacts is to conclude that it is never fair to assert specific jurisdiction in the absence of substantively related contacts. Thus, the substantive test attempts to define fairness.

220. See *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (stating that test for personal jurisdiction cannot be defined in mechanical terms). Granted, a test based on fairness lacks clarity. Nonetheless, the Court appears to have willingly sacrificed clarity for flexibility. For a discussion of how courts define "fair play and substantial justice," see generally Abramson, *supra* note 10.

221. See *supra* text accompanying notes 158-61 (criticizing "but for" test as being too expansive, allowing almost unlimited jurisdiction). The "but for" test will not eliminate from consideration any potentially fair cases. Without proper safeguards, however, the "but for" test also will include many unfair cases.

222. See *supra* text accompanying notes 172-73 (stating that under substantive test, analysis ends without further consideration if defendant's contacts have no substantive relevance to cause of action). Generally, a substantively relevant contact is always sufficient but not always necessary; thus, the substantive test is underinclusive. See *supra* notes 218-20 and accompanying text (identifying shortcomings of substantive test). By contrast, a "but for" contact is always necessary but not always sufficient. See *supra* text accompanying note 216 (noting "but for" relationship as minimum requirement for application of specific jurisdiction). To prevent over-inclusiveness, courts can govern the application of the "but for" test with a heightened "reasonableness" analysis. See *infra* text accompanying notes 223-30 (suggesting dual consideration of reasonableness).

“but for” test.²²³ This safeguard, however, may be inadequate.²²⁴ The usual “reasonableness” test, in addition to being highly deferential,²²⁵ focuses primarily on the inconvenience imposed on the out of state defendant.²²⁶ Inconvenience is not the focus of the minimum contacts analysis.²²⁷ The Supreme Court has stated that the minimum contacts requirement protects defendants by providing “fair warning” that their conduct may result in litigation in the forum state.²²⁸

A proper safeguard for the requirements of due process should measure “reasonableness” twice: at the minimum contacts stage, and again at the traditional “reasonableness” stage. At the minimum contacts stage the focus should be not on the inconvenience of litigation, but on the existence of factors that suggest reasonable foreseeability by the defendant of the possibility of litigation in the forum state.²²⁹ Upon satisfaction of this test, the analysis can proceed to the traditional “reasonableness” evaluation of the convenience of the litigation.²³⁰ Because the dual reasonableness test considers both the foreseeability and convenience of litigation in the forum state, the test provides an adequate safeguard for the standard of fair play and substantial justice.

Explicitly modifying the “but for” test with a dual reasonableness requirement will insure that those cases demonstrating the minimum “but for” relationship are properly “filtered,” with only those cases satisfying “fair play and substantial justice” remaining. With control of the overinclusive potential of the “but for” test, the critics of “but for” are left only with

223. See *supra* text accompanying notes 163-64 (noting Ninth Circuit’s use of “reasonableness” prong of personal jurisdiction analysis to safeguard against abuses of “but for” test).

224. See *supra* text accompanying notes 165-69 (questioning legitimacy of using “reasonableness” prong of personal jurisdiction analysis to prevent abuse of “but for” test).

225. See *supra* text accompanying note 18 (indicating that finding of minimum contacts creates presumption of reasonableness; thus, courts deferentially apply reasonableness analysis).

226. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14 (1987) (emphasizing burden on defendant in making determination of reasonableness); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (same); Abramson, *supra* note 10, at 447 (recognizing that Supreme Court cases indicate that burden on defendant is primary concern in assessing reasonableness).

227. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286; 294 (1980) (stating that regardless of convenience of litigating in forum state, jurisdiction is improperly asserted when defendant has not established minimum contacts).

228. See *Burger King*, 471 U.S. at 472 (stating that minimum contacts requirement safeguards standard of fair play and substantial justice by providing “fair warning” to defendants that their conduct may lead to litigation in forum state); *World Wide*, 444 U.S. at 297 (same); *Shaffer v. Heitner*, 433 U.S. 186, 218 (1997) (Stevens, J., concurring) (same).

229. See *Burger King*, 471 U.S. at 474-75 (emphasizing importance of foreseeability of litigation in forum state in minimum contacts analysis). Factors considered in determining reasonable foreseeability could include the quantity, quality, duration and purpose of the defendant’s contacts with the forum state.

230. See *supra* text accompanying notes 13-15 (indicating that “reasonableness” analysis follows finding of minimum contacts). After a finding of minimum contacts, utilizing the minimum contacts “reasonableness” test, the traditional determination of reasonableness can follow. At this point, the use of the deferential “reasonableness” analysis is not problematic because minimum contacts are already established.

the argument that courts will abuse their discretion over fairness and reasonableness.²³¹ A basic faith in the judicial process, however, is necessarily assumed in every facet of jurisprudence, and evidence suggests this assumption is well founded.²³² Accepting this assumption, the modified "but for" test provides the surest method to achieve fairness in every case—and fairness in every case should be the ultimate goal.

D. *The Impact of "But For," a Step Toward the Sliding Scale*

Some commentators have suggested the elimination of the strict categorization of personal jurisdiction as "general" or "specific."²³³ Indeed, it appears that a byproduct of this categorical approach is the practice of defining fair play and substantial justice in terms of whether a particular fact pattern fits neatly into the "general" or "specific" paradigm.²³⁴ A suggested alternative to alleviate this problem is to establish a "sliding scale" for personal jurisdiction whereby courts consider both the number of the defendant's forum state contacts and the relatedness of those contacts to the cause of action.²³⁵ Under such an approach, a defendant with many contacts with the forum state, though falling short of "continuous and systematic," is still subject to personal jurisdiction in a cause of action having some slight relationship to the forum state contacts.²³⁶

The problem with a pure sliding scale is that it abandons the general-specific analysis already well integrated into the judicial system.²³⁷ Moreover, the specific and general categories are useful because they provide structure

231. See Bruce N. Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 9 PACE L. REV. 451, 453-58 (1989) (identifying criticisms of "fair play" standard, noting potential for inconsistent application).

232. See Winton D. Woods, *Carnival Cruise Lines v. Shute: An Amicus Inquiry into the Future of "Purposeful Availment"*, 36 WAYNE L. REV. 1393, 1396 n.16 (1990) (noting that courts are not abusing their discretion over determination of reasonableness). Professor Woods states:

If one thing emerges from a review of recent state court decisions it is that state courts, if anything, tend to be unnecessarily protective of the rights of the defendant who is summoned to trial in their forum. *There is no evidence that state courts are abusing their jurisdictional or choice of law powers.*

Id. (emphasis added).

233. See generally Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (suggesting abandonment of specific and general analysis); Richman, *supra* note 55, at 1336-52 (suggesting "sliding scale" approach to personal jurisdiction).

234. See Richman, *supra* note 55, at 1346 (noting that specific and general categories foster "mechanical jurisprudence," that inhibits ability of courts to focus on true fairness rather than categorical adherence).

235. See *id.* at 1336-52 (describing "sliding scale" approach).

236. See *id.* at 1340-45 (illustrating how "sliding scale" accounts for factual situations not falling directly into specific or general category).

237. See *id.* at 1337 (recognizing that specific and general categories have gained substantial acceptance in court system).

for judicial decisions on personal jurisdiction.²³⁸ The conflict, therefore, is between the two important but seemingly incompatible goals of flexibility and structure. The modified "but for" test offers a solution.

The modified "but for" test will allow courts to achieve flexibility without completely sacrificing structure. The modified "but for" test expands specific jurisdiction, allowing courts to engage in a "sliding scale" approach.²³⁹ When a defendant's contacts have a "but for" relationship to the plaintiff's injury, the court can apply a specific jurisdictional analysis.²⁴⁰ The ultimate decision, however, turns on an assessment of "reasonableness," which can include a consideration of the number of contacts with the forum.²⁴¹ By allowing a dual consideration of the quantity and relatedness of the defendant's contacts, the modified "but for" test offers structure *and* flexibility, thus insuring that fair play and substantial justice remain the focus of personal jurisdiction.

V. CONCLUSION

The "arise from or relate to" issue, when once again presented to the Supreme Court, offers an excellent opportunity to reacknowledge fairness as the hallmark of personal jurisdiction. The Supreme Court already has restricted the boundaries of general jurisdiction.²⁴² Similarly restricting specific jurisdiction with the adoption of the substantive test would solidify the

238. See *id.* (conceding that specific and general categories are beneficial in that they provide structure for decisions on personal jurisdiction).

239. See Twitchell, *supra* note 28, at 662 (suggesting that courts apply specific jurisdiction analysis to tenuously related claims). Expanding specific rather than general jurisdiction is consistent with both logic and precedential authority. As a matter of logic and semantics, general jurisdiction implies authority to adjudicate claims "generally," whether related to the defendant's contacts or not. See *id.* at 637 (noting that general jurisdiction authorizes jurisdiction over any claim asserted against defendant). When a court, therefore, exercises general jurisdiction, there should be no consideration of the specific claim asserted by the plaintiff. *Id.* at 650-51. If the court must resort to a consideration of the specific claim in order to determine that jurisdiction is fair, the court's ruling is by definition "specific" to the particular cause of action at hand. See *id.* at 644. Because the "sliding scale" necessarily requires a dual consideration of the number and relatedness of the defendant's contacts, the sliding scale should be applied within the specific jurisdiction category.

As a matter of judicial precedent, applying the scale to the general jurisdiction category would require a modification or the Supreme Court's restriction on the use of general jurisdiction. See generally *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408 (1984) (restricting general jurisdiction to cases showing "continuous and systematic" contacts with forum state and denying that this threshold was met despite substantial showing of contacts by defendant). The easiest way, therefore, to add flexibility to the present structure is to adopt a "but for" interpretation of the "arise from or relate to" requirement for specific jurisdiction.

240. See *supra* text accompanying note 216 (suggesting that "but for" creates logical threshold for application of specific jurisdiction).

241. See *supra* text accompanying notes 223-30 (discussing dual reasonableness test, which includes consideration of factors such as quantity of defendant's forum contacts, as safeguard against over-application of "but for" test).

242. See *supra* text accompanying notes 25-27 (noting that Supreme Court has limited general jurisdiction to defendant's having "continuous and systematic" contacts with forum state).

establishment of two discrete "islands" of jurisdiction with an entire sea of potentially fair and reasonable cases in between.²⁴³ Such a result would be inconsistent with a standard based on fair play and substantial justice.²⁴⁴ Alternatively, adopting the modified "but for" test would signal a rejection of mechanical determinations of fairness, thus reaffirming the core principals of *International Shoe* and its progeny.

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243. See *supra* note 234 and accompanying text (suggesting that fairness now is defined often in terms of whether cases fit within strict categories of specific or general jurisdiction).

244. See *supra* text accompanying note 219 (indicating that adoption of substantive test requires conclusion either that fairness is not standard for personal jurisdiction or that courts should define fairness by substantive relevance).

