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## *Keeton, Calder, Helicopteros and Burger King - International Shoe's Most Recent Progeny*

William J. Knudsen Jr.

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## ***Keeton, Calder, Helicopteros and Burger King — International Shoe's Most Recent Progeny***

WILLIAM J. KNUDSEN, JR.\*

*This article examines the Supreme Court's most recent pronouncements on the subject of in personam jurisdiction. The author analyzes each of the four cases decided during the Court's last two terms and predicts the impact these decisions will have on future jurisdictional inquiries. Specifically, the author discusses (1) the reappearance of the state interest concept; (2) first amendment considerations within the jurisdictional context; (3) a shift toward a balancing of plaintiffs' and defendants' interests; (4) the propriety of focusing on modern business practices within the jurisdictional analysis; and (5) a possible modification in the traditional burden of proof rule.*

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### **I. INTRODUCTION\*\***

During the 1983 and 1984 terms, the Supreme Court of the

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Professor Knudsen wishes to express his appreciation to Professor Edward J. Brunet for his editorial comments, and to Ms. Lucy Brehm and Mr. Eric Lee, third-year students, for their research assistance and comments in the preparation of this article.

\*\* Some of the matters referred to in this article have been subjected to detailed and

United States handed down four decisions in the area of personal or territorial jurisdiction: *Keeton v. Hustler Magazine, Inc.*;<sup>1</sup> *Calder v. Jones*;<sup>2</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*;<sup>3</sup> and *Burger King Corp. v. Rudzewicz*.<sup>4</sup> This article will take a critical look at these opinions and their probable impact on jurisdictional doctrine.

In brief, *Keeton* followed the traditional "minimum contacts" rule of *International Shoe*,<sup>5</sup> revitalized the concept of state interest as a relevant factor to be considered within the jurisdictional equation, and rejected defendants' arguments that plaintiff must have minimum contacts of her own with the forum state. *Calder* came to grips with the intersection of two constitutional doctrines; namely, the first amendment and the due process clause of the fourteenth amendment. The case also terminated the special treatment more than one circuit had previously accorded the media.<sup>6</sup> In addition, the Court, for the first time, addressed the jurisdictional reach of the due process clause over corporate employees and found no reason to treat them any differently from other defendants. *Helicopteros*, in considering the concept of general jurisdiction after a thirty-two-year hiatus, substituted dated, if not moribund, case law for more recent authorities and, in so doing, ignored the economic realities of the marketplace post-*International Shoe*. Finally, *Burger King*, decided only one year after *Helicopteros*, made an almost 180-degree turn from the narrow focus of *Helicopteros* in relying heavily on modern-day business practices. The decision may also have shifted to the defendant the burden of showing jurisdiction to be "unreasonable" once a court has found the defendant to have had purposeful minimum contacts within the forum state. If that is true, *Burger King* constitutes a major change in procedure.

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scholarly analysis elsewhere. As a consequence, no attempt will be made to duplicate those discussions here.

1. 104 S. Ct. 1473 (1984).

2. 104 S. Ct. 1482 (1984).

3. 104 S. Ct. 1868 (1984).

4. 105 S. Ct. 2174 (1985).

5. 326 U.S. 310 (1945).

6. *Cox Enters., Inc. v. Holt*, 678 F.2d 936 (11th Cir.), *reh'g granted on other grounds*, 691 F.2d 989 (11th Cir. 1982); *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967) (dictum); *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964). *Contra Church of Scientology of Cal. v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir. 1977), *cert. denied*, 432 U.S. 911 (1977); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

## II. *Keeton v. Hustler Magazine*

In the first of the above cases, Kathy Keeton, a New York State resident, sued Hustler Magazine in New Hampshire for libel. The United States District Court for the District of New Hampshire dismissed her complaint for lack of jurisdiction over the defendant; the First Circuit Court of Appeals affirmed this judgment.<sup>7</sup> The Supreme Court reversed.<sup>8</sup> Addressing the court of appeals's "three concerns," namely, "'the single publication rule,' New Hampshire's unusually long statute of limitations, and plaintiff's lack of contacts with the forum State,"<sup>9</sup> the Court found all three wanting.

It has long been the law that where the defendant's contacts in the forum state are related to the claim, lesser contacts are necessary than in the situation where no such relationship exists.<sup>10</sup> The problem for the court of appeals arose from the fact that the substantive law of libel follows the so-called "single publication rule," which permits only one action for damages even though the plaintiff may have suffered damages in several jurisdictions.<sup>11</sup> Because only a small part of Keeton's damages resulted from the distribution of copies of Hustler in New Hampshire, the lower appellate court deemed that the forum contacts had only a "minimal"<sup>12</sup> relationship to the entire claim. The Supreme Court agreed that the contacts of defendant and the forum state had to "be judged in the light of [the total] claim, rather than a claim only for damages sustained in New Hampshire,"<sup>13</sup> and also agreed that the contacts needed to be of such a nature so as to make it "fair"<sup>14</sup> to subject defendant to New Hampshire's jurisdiction. The two courts differed, however, in interpreting the extent of New Hampshire's interest in providing a forum for this type of action. To the Supreme Court, the State of New Hampshire had "a significant interest in

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7. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982).

8. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

9. *Id.* at 1478.

10. See also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136, 1142-44 (1966) (discussing the Court's evolution of the concepts of specific and general jurisdiction). Compare *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (activities considered sufficient where cause of action arose out of those activities) with *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) ("substantial" activities considered sufficient where cause of action arose from activities entirely distinct from the nonresident's activities in the forum state).

11. RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977).

12. 682 F.2d at 34.

13. 104 S. Ct. at 1478.

14. *Id.* at 1479.

redressing injuries that actually occurred within the State,"<sup>15</sup> including not only plaintiff's injuries but also the injuries of "the readers of the statement."<sup>16</sup> In addition, the Court added a somewhat new variation: "New Hampshire also has a substantial interest in cooperating with other States, through the 'single publication rule,' to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding."<sup>17</sup>

All of this emphasis on New Hampshire's interest as an element of the jurisdictional inquiry seems to have resulted in a bit of an about-face for the Court. Justice Brennan brought this fact to the attention of his colleagues.<sup>18</sup> He reminded them that the Court had seemingly laid to rest, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,<sup>19</sup> the state interest factor (which has had a long and varied history, both pre-dating and post-dating *International Shoe*).<sup>20</sup> In *Bauxites*, the Court indicated that its earlier pronouncements on the subject, at least with respect to the "interstate federalism" of *World-Wide Volkswagen Corp. v. Woodson*,<sup>21</sup> were no longer valid:

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15. *Id.*

16. *Id.*

17. *Id.* at 1480. Earlier, the Court considered the "shared interest of the several states in furthering fundamental social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (citing *Kulko v. Superior Court*, 436 U.S. 84, 98-99 (1978)). For a criticism of this "shared interest" theory, see Lewis, *The "Forum State Interest Factor" in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 801 (1982).

18. Justice Brennan agreed that the defendant's claim-related contacts alone were sufficient to support jurisdiction, but concluded that the state interest factor, relied on in part by the majority, could no longer be deemed valid after *Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). *Keeton*, 104 S. Ct. at 1482 (Brennan, J., concurring). In *Bauxites*, the Court held that the defendant was subject to jurisdiction in the absence of any evidence of forum contacts. 456 U.S. 694 (1982). See also Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 7-9 & n.29 (1984) (discussing the Court's explicit recognition in *Bauxites* that the due process question raised by personal jurisdiction is one of individual—not governmental—rights).

19. The forum state interest factor dates back to *Pennoyer v. Neff*, 95 U.S. 714, 737 (1878) (Hunt, J., dissenting). See Lewis, *supra* note 17, at 772-73. It was not until 1916, however, in *Kane v. New Jersey*, that the Court found a strong state interest in promoting safety on its highways, together with the implied consent of the nonresident defendant, to be dispositive of the jurisdictional issue. 242 U.S. 160 (1916). Professor Lewis traces this interest as a jurisdictional factor post-*International Shoe*, concluding that the minimum contact theory made it "wholly unnecessary to resort to a state interest factor as a make-weight to support jurisdiction for nonresidents." Lewis, *supra* note 17, at 781.

20. 456 U.S. 694 (1982). See also Lewis, *supra* note 18, at 3, 7-9; Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 722-26 (1983).

21. 444 U.S. 286, 293 (1980).

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.<sup>22</sup>

It is difficult, if not impossible, to quarrel with Professor Lewis's conclusion that this statement, together with Justice Powell's concurring opinion in *Bauxites*,<sup>23</sup> sounded the death knell of not only *World-Wide Volkswagen's* interstate federalism doctrine, but also that of the older, related concept of state interest, as well.<sup>24</sup>

And, yet, the majority in *Keeton*, glibly stated:

But insofar as the State's 'interest' in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, see *Insurance Corp. v. Compagnie des Bauxites*, . . . we think the interest is sufficient.<sup>25</sup>

But why is a "surrogate" needed? Could not "the factors already mentioned," namely, "the relationship among the defendant, the forum, and the litigation"<sup>26</sup> have justified upholding jurisdiction on their own? Hustler's contacts with the forum were far greater than minimal, consisting of "the sale of 10 to 15,000 copies"<sup>27</sup> per month, and the connection between those contacts and the claim could hardly be closer. By reintroducing the state's concern for "redressing injuries that actually occur within the State,"<sup>28</sup> is the decision as to whether a court may exercise jurisdiction over

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22. 456 U.S. 694, 702 n.10.

23. 456 U.S. 694 (Powell, J., concurring):

Before today, of course, our cases had linked minimum contacts and fair play as jointly defining the 'sovereign' limits on state assertions of personal jurisdiction over unconsenting defendants . . . . The Court appears to abandon the rationale of these cases in a footnote . . . . But it does not address the implications of its action. By eschewing reliance on the concept of minimum contacts as a 'sovereign' limitation on the power of States — for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court — the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play.

*Id.* at 714 (citations omitted).

24. See Lewis, *supra* note 18, at 9; Lewis, *supra* note 17.

25. 104 S. Ct. at 1479 (citation omitted).

26. *Id.* at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

27. *Id.* at 1477.

28. *Id.* at 1479.

the defendant made easier? The answer to all of these questions, it is submitted, is no. If as *Bauxites* unequivocally stated, in confirming longstanding constitutional precedents,<sup>29</sup> "the only source of the personal jurisdiction requirement" is the due process clause,<sup>30</sup> the addition of "state interest" to the existing equation provides no help. That factor has "neither [denied] jurisdiction when jurisdiction should have been upheld, nor [upheld] jurisdiction when it should have been denied."<sup>31</sup>

One of the primary interests of each state must be in making its courts available, on an impartial and neutral basis, to both plaintiffs and defendants alike so that the courts may do justice. But the purpose of the fourteenth amendment's due process clause is certainly no less — to ensure that the court accords each side of the litigation "fair play and substantial justice."<sup>32</sup> If the preceding sentence is true, then what can the forum state do to add to the protection of the due process clause? Can a state alter the protections of the clause by enacting new substantive laws or extending such rights under the common law? It should be noted that we are not concerned here with the reach of a state's long-arm statute, but rather with a state's substantive laws, manifested in its police

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29. See Lewis, *supra* note 17, at 771-74 (arguing that a court can even deem *Pennoyer* v. Neff, 95 U.S. 714 (1878) authority for this proposition, despite the consensus that *Pennoyer*'s emphasis on state sovereignty puts it more in the "state interest" camp). *International Shoe* itself, which in formulating the minimum contacts doctrine made no reference to state interest, supports Professor Lewis's position. 326 U.S. 310 (1945). See also *Kulko* v. Superior Court, 436 U.S. 84, 98, 100 (1978) (refusing to subject the defendant father to jurisdiction in the face of unfairness to him although California's interest in child-support cases was termed "substantial" (despite that State's lack of a "specific jurisdictional [long-arm] statute")); Lewis, *supra* note 17, at 785-87, 800.

30. 456 U.S. at 702 n.10.

31. Lewis, *supra* note 17, at 807. One case that necessarily comes to mind is *Mullane* v. Central Hanover Bank & Trust Co., where the Court appears to have relied solely on state interest as the basis for jurisdiction over nonresidents who had an interest in a common trust fund. 339 U.S. 306 (1950). Admittedly, this case is considered most often with respect to the "notice," rather than the "power," prong of personal jurisdiction; but this, of course, does not answer the question as to why the Court did not address the power concept (as it obviously did in *International Shoe*) more particularly. At any rate, commentators have agreed that the Court could have upheld jurisdiction in *Mullane* under any of several other theories: (1) "jurisdiction by 'necessity,'" (Lewis, *supra* note 17, at 788); (2) "a variant on the standard 'relatedness' basis of jurisdiction" (*Shaffer v. Heitner*, 433 U.S. 186, 207-08 (1977); Lewis, *supra* note 17, at 788-89); or (3) the minimum contacts doctrine itself by an analysis that the "trust . . . established minimum contacts between the absent beneficiaries and the State of New York" (Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77, 108 (P. Kurland ed.)).

32. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

power.<sup>33</sup> We are dealing here with procedural, not substantive, due process. Clearly, each state can supplement the federal due process clause by permitting suits against nonresidents to the full extent that the federal constitution allows<sup>34</sup> or, alternatively, states are free to restrict such actions to a point or points short of that line.<sup>35</sup> This kind of state control has apparently never been questioned so long as the long-arm statute is not unconstitutional on its face or as applied. But to compare this kind of state control with the notion that a court should permit a state to extend its jurisdictional reach by way of substantive enactments is akin to comparing apples with oranges. The two simply have no connection.

How can a court permit State X to give its citizens a greater constitutional right than State Y merely because State X has created a certain substantive right which State Y citizens do not enjoy? If the defendant had absolutely no contacts in State X, then clearly, regardless of forum state interest, no jurisdiction could attach.<sup>36</sup> Again, if the contacts were minimal, but the claim was unrelated to the contacts, there would also be a failure of jurisdiction.<sup>37</sup> But if a related claim coexists with minimum contacts, it would appear that *both* States X and Y should have identical jurisdiction — even if the plaintiff's claim in State Y were based on the statutory right created by State X.<sup>38</sup>

By referring to the forum state's interest, the Court implied that in a close hypothetical case, where the contacts may be mini-

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33. Professor Redish felt that the only proper state interest in litigation between private parties was "in protecting state citizens from the burdens of litigating in a distant forum." Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1139 (1981). Nevertheless, Professor Redish suggests two state interests which he feels should affect the traditional minimum contacts standard; each interest involves choice of law considerations. *Id.* at 1141-42. But the Court has made clear on at least three occasions over the last 17 years, the most recent of which is *Keeton* itself (*see infra* note 42 and accompanying text), that jurisdiction and choice of law are two disparate and distinct issues. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958).

34. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.")

35. *See Perkins v. Benguet Mining Co.*, 342 U.S. 437, 440 (1952) ("The suggestion that federal due process compels the State to open its doors . . . has no substance.")

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

37. *Id.* at 318; *see also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952) (discussing the requisite level of contacts necessary to satisfy due process requirements where the cause of action is distinct from those contacts).

38. "[T]he issue is personal jurisdiction, not choice of law." *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977).



mal at best and the relationship between these contacts and the claim merely conjectural, the substantive law interest of the forum state could tilt the decision in favor of a jurisdictional finding.<sup>39</sup> But such a tilt would be improper when not dealing with the rights of states such as here, but rather the rights of private parties are involved.<sup>40</sup> It is not at all clear why, in the above circumstances, a plaintiff should have greater due process rights over a defendant in State X than he would in State Y. To put it another way, why should a defendant in State X have fewer due process rights than he would in State Y? Furthermore, the only issue is whether the litigation will ultimately take place in State X or elsewhere, most likely the defendant's state of domicile. Assuming that the courts of both states will be neutral and impartial, State X's substantive law should be irrelevant to this decision. In this respect, *Keeton* represents an undesirable return to the pre-*Bauxites* period.

The second issue considered in *Keeton* was New Hampshire's six-year statute of limitations, which made New Hampshire the only forum left in the United States where plaintiff could bring her action.<sup>41</sup> Because of this, the court of appeals deemed plaintiff's action in New Hampshire to be unfair.<sup>42</sup> As the Supreme Court indicated, however, this is not a question of jurisdiction, but is instead a question of choice of law.<sup>43</sup> Furthermore, "such concerns should [not be permitted to] complicate or distort the jurisdictional inquiry."<sup>44</sup> Not only do statute of limitations issues not arise until after the court has established jurisdiction, they have absolutely nothing to do with forum state contacts either.<sup>45</sup>

The final point of departure between the two opinions concerned the plaintiff's contacts in New Hampshire. The court of appeals apparently determined that plaintiff's lack of contacts precluded jurisdiction, but the Supreme Court expressly rejected this notion, providing bench and bar with some much needed clarity on the subject. Referring to its 1952 decision in *Perkins v. Benguet Consolidated Mining Co.*,<sup>46</sup> where the plaintiff had no relationship to the forum state, the Court concluded that although plaintiff's

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39. See Lewis, *supra* note 17, at 807 (Professor Lewis says this has never happened.).

40. A fortiori, when the state is the plaintiff, it should not have greater rights against an individual or corporate nonresident defendant. See Lewis, *supra* note 17, at 824 & n.311.

41. 104 S. Ct. at 1480.

42. 682 F.2d 33, 35-36 (1982).

43. *Id.*

44. *Id.*

45. *Id.*

46. 342 U.S. 437 (1952).

residence "is not, of course, completely irrelevant to the jurisdictional inquiry," it nevertheless "is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts."<sup>47</sup> Reiterating the well-known formula of the tripartite relationship "among the defendant, the forum and the litigation,"<sup>48</sup> *Keeton* provides that "plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum."<sup>49</sup> This is due to the fact that "plaintiff's residence . . . may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum."<sup>50</sup> These statements appear to indicate that while plaintiff's nonresidence will not defeat otherwise sufficient jurisdiction over a nonresident defendant, plaintiff's residence may cause insufficient contacts to be "enhanced" so that they meet constitutional standards. In other words, in a close case, plaintiff's residence could tip the scales in favor of jurisdiction.

Cited as examples of such enhancement are *Calder v. Jones*<sup>51</sup> and *McGee v. International Life Insurance Co.*<sup>52</sup> The only problem with the Court's use of these two cases as examples is that they are worlds apart. In *Calder*, no enhancement was necessary due to the magnitude and nature of defendant's contacts. In fact, references to plaintiff's contacts in that case appear to be mere obiter dictum.<sup>53</sup> *McGee*, on the other hand, is a perfect example of such enhancement because the contacts of defendant insurance company in that case were as minimal as may be found in any case where the Supreme Court has upheld jurisdiction.<sup>54</sup> The use of *McGee* in recognizing the significance of plaintiff's residence as a fac-

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47. 104 S. Ct. at 1481.

48. *Id.* at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

49. *Id.* at 1481.

50. *Id.* (emphasis added).

51. 104 S. Ct. 1482 (1984).

52. 355 U.S. 220 (1957).

53. *See infra* note 69.

54. An Arizona life insurance company insured one Franklin, a California resident, in 1944. In 1948, the company replaced this policy pursuant to a reinsurance agreement with defendant, International Life Insurance Company. Franklin continued to pay premiums to International until his death in 1950. McGee, also a California resident, was the beneficiary of this policy and, when International refused to pay her claim, she sued the company in a California state court where she received a default judgment. When she subsequently sued on this judgment in Texas, the Texas courts refused to enforce it. Ultimately, the Supreme Court of the United States upheld jurisdiction relying on defendant's contacts in California, that State's "manifest interest in providing . . . redress for its citizens," and the fact that its "residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable." 355 U.S. at 223.

tor in the jurisdictional analysis makes good sense.

The Court has, of course, discussed this factor before in *Kulko*,<sup>55</sup> *World-Wide Volkswagen*,<sup>56</sup> and *Rush*,<sup>57</sup> but never to the extent it has in *Keeton*. Whether *Keeton*'s clearer articulation of the role of plaintiff's residence represents a step forward in jurisdictional analysis, however, is not entirely certain. It may be that the Court is only now explaining in greater detail one of the bases for its decision in *McGee*. Even so, it is certainly a worthwhile clarification of *McGee* in this respect. For even though the Court referred to plaintiff's interest in the above cases, it appears, and correctly so, that the interest was not sufficiently "enhancing" to alter the results.

If this reference to plaintiff's contacts in *Keeton* does go further than mere clarification of *McGee* and, instead, heralds a slight refinement of the jurisdictional calculus, then it must be greeted with applause. For plaintiff's interest in forum selection, whether based on residence, other contacts with the forum state, or no contacts at all, deserves recognition. At the same time, we should not confuse plaintiff's interest with the forum state's interest, which, as indicated above,<sup>58</sup> would not seem to merit consideration. *McGee* expressly recognized the interest of the forum state in determining jurisdiction over a nonresident defendant, but was not as explicit with respect to the interest of the plaintiff. In fact, the two concepts, discussed almost as one in that case, seemed to be merged into the former.<sup>59</sup> *Keeton*, although reaffirming the interest of the state, has clearly given further impetus to plaintiff's interests than heretofore, even if only by way of dictum. This could well signify a much desired and more equitable balancing of plaintiffs' and defendants' burdens in the future, a balancing which has met with a good deal of support from commentators,<sup>60</sup> and, somewhat more

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55. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

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

57. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

58. See *supra* note 17 and accompanying text.

59. *World-Wide Volkswagen Corp. v. Woodson* seems to confirm this by citing *McGee* as an example of state interest, while citing *Kulko* for plaintiff's interest. 444 U.S. 286, 292 (1980).

60. Professor McDougal has stated that the Court has "focus[ed]—at least since *Hanson*—solely on the due process protection of defendants. The Court thus has ignored the possibility that a plaintiff may also be deprived of due process of law" when he cannot "as a practical matter . . . pursue the defendant either to the defendant's home state or to the state where the contacts engendering the controversy occurred." McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 9 (1982). Professor Redish suggests "consider[ing] the relative burdens a denial of jurisdiction would impose

indirectly, from some courts.<sup>61</sup>

### III. *Calder v. Jones*

In *Calder v. Jones*,<sup>62</sup> Shirley Jones, a well-known entertainer residing in California, brought a libel action against four defendants: the National Enquirer; a local distributor; Calder, the president and editor of the magazine; and South, a reporter employed by the Enquirer. The two individual defendants moved to dismiss for lack of personal jurisdiction and, although the trial court indicated that the actions of such defendants would ordinarily be insufficient to subject them to jurisdiction, it appeared to rely primarily on the first amendment in granting the motion.<sup>63</sup> The California Court of Appeals reversed,<sup>64</sup> holding that "petitioners intended to, and did, cause tortious injury to respondent in California,"<sup>65</sup> and that first amendment considerations were not relevant to the issue of jurisdiction.<sup>66</sup>

In affirming the decision of the California Court of Appeals,<sup>67</sup> the Supreme Court began by endorsing that court's "'effects test.'" <sup>68</sup> Put simply, the test permits the exercise of jurisdiction over a nonresident who "cause[s] an effect in a state by an act

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upon the plaintiff." Redish, *supra* note 33, at 1138. Professor Jay put it this way: "The fourteenth amendment would protect not merely the defendant from an unfair forum, but also would stand as a source for plaintiffs' rights, recognizing their entitlement to a reasonable site for the lawsuit." Jay, "Minimum Contacts" As A Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 454 (1981). See also Lewis, *supra* note 17, at 816 n.269 (arguing that plaintiff's interest is not adequately accounted for within the jurisdictional analysis if it is deemed to hinge on plaintiff's forum residence or citizenship); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960) (discussing the desirability of balancing the plaintiff's and the state's interests against the inconvenience to the defendant).

61. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *Nelson v. Miller*, 11 Ill. 2d 378, 385, 143 N.E.2d 673, 677 (1957).

62. 104 S. Ct. 1482 (1984).

63. The Supreme Court opinion stated that "the superior court surmised that the actions of petitioners in Florida, causing injury to respondent in California, would ordinarily be sufficient to support an assertion of jurisdiction over them in California." *Id.* at 1485. The California Court of Appeal, however, quoted the superior court in its "memorandum of decision" as having stated that: "The totality of such contacts, [South's and Calder's] in this Court's view, are [sic] insubstantial." *Jones v. Calder*, 138 Cal. App. 3d 128, 131, 187 Cal. Rptr. 825, 827 (1982).

64. *Jones v. Calder*, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982).

65. 104 S. Ct. at 1485.

66. *Jones v. Calder*, 138 Cal. App. 3d 128, 132, 187 Cal. Rptr. 825, 828 (1982).

67. The Supreme Court of California denied review. *Jones v. Calder*, 2 Civ. No. 65403 (Cal. 1983), reproduced in Joint Appendix to Briefs to the United States Supreme Court at 122 (No. 82-1401), 104 S. Ct. 1482 (1984).

68. 104 S. Ct. at 1486 n.6.

done elsewhere.”<sup>69</sup> This rule is neither surprising nor shocking; in fact, it makes good sense and has long been espoused by commentators<sup>70</sup> and numerous courts.<sup>71</sup> Use of the “effects” approach is somewhat different in this case, however, due to the nature of the defendants. Instead of the usual defendant who commits an act in a foreign state, here the perpetrators of the act (the writing of the allegedly libelous article) were two nonresident employees. They wrote the article for their corporate employer, which not only had authorized the article, but which had extensive contacts with California. On the other hand, one of the employees, Calder, apparently had insufficient physical contacts with California to support an independent finding of jurisdiction.<sup>72</sup> Therefore, if the Court were to uphold jurisdiction over Calder, it had to reverse either the state appellate court’s conclusion on the contacts issue or affirm on the causation issue. Defendants contended that California courts could not obtain jurisdiction over them because they had not acted as individuals, but had rather acted “in their respective capacities as officer and employee of the corporate defendant.”<sup>73</sup> A reporter in California first made this argument; the California court rejected it then,<sup>74</sup> and again here below.<sup>75</sup> The Supreme Court treated the argument similarly. In affirming, the Court ruled for the first time that nonresident employees (at least within the publishing business), both at executive and lower levels, could be subject to jurisdiction in their individual capacities. With respect to Calder, this result is not startling, because he was president and editor of the *Enquirer*. Defendant South, however, was not an executive; he was merely a reporter. Both petitioners made the analogy of the “welder employed in Florida who works on a boiler

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69. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). Generally, it would seem that the quantity of contacts, at least in a libel case, would have some bearing on jurisdiction under the effects test. For example, a single magazine or newspaper article in the forum state would undoubtedly not meet the minimum contacts standard. In this case, defendant corporation’s weekly circulation of its magazine in California totaled about “600,000 . . . copies, almost twice the level of the next highest State.” 104 S. Ct. at 1484-85.

70. Reese & Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).

71. See, e.g., *Doggett v. Electronics Corp. of Am.*, 93 Idaho 26, 454 P.2d 63 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 4332, 176 N.E.2d 761 (1961); *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 448 P.2d 571 (1968).

72. 138 Cal. App. 3d at 133-34, 187 Cal. Rptr. at 829. This was not true of defendant South, however. 138 Cal. App. 3d at 135, 187 Cal. Rptr. at 830.

73. 138 Cal. App. 3d at 135, 187 Cal. Rptr. at 830.

74. *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978).

75. 138 Cal. App. 3d at 136, 187 Cal. Rptr. at 831.

which subsequently explodes in California,"<sup>76</sup> but the Court, through Justice Rehnquist, stated that this analogy "does not wash"<sup>77</sup> because the welder would have been guilty, at most, of "mere untargeted negligence."<sup>78</sup> On the other hand, petitioners' actions here were "intentional, . . . allegedly tortious, . . . and expressly aimed at California."<sup>79</sup>

Two observations seem pertinent here, but they will be limited to a discussion of South alone, because if it is appropriate to subject him to jurisdiction in California, then a fortiori, jurisdiction over Calder would be proper as well. First, South's contentions about the welder, who works on a boiler in State A, which later explodes in State B, deserved a better answer. The Court attempted to distinguish this hypothetical by stating that because the welder's actions would be tantamount to "untargeted negligence," jurisdiction would not attach. But this response fails to meet the essence of petitioner's argument. Many factories design their products for specific markets. In such a situation, our welder would probably be aware of the fact that all of the boilers on which he was working were destined for sale in State B.<sup>80</sup> In such a case, under *Calder*, it seems clear that he, too, would be subject to jurisdiction in State B. But this is not necessarily bad. Obviously, our welder would be subject to a negligence suit in State A, so why not in State B? No good reason comes to mind, unless it could be argued that the welder could not "reasonably anticipate being haled into court"<sup>81</sup> in State B. Because our happy welder probably never considered being haled into court even in State A, this argument is without substance.

Second, the impact of subjecting a low-level employee to jurisdiction in a distant state will undoubtedly be de minimis in the usual manufacturing and commercial case. Bringing in the welder would not only complicate the run-of-the-mill negligence case,<sup>82</sup>

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76. 104 S. Ct. at 1487.

77. *Id.*

78. *Id.*

79. *Id.*

80. It should perhaps be noted that the effects test is employed "frequently . . . in the field of products liability." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 comment a (1971).

81. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citing *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). See *infra* note 200.

82. In addition to proving the defendant company liable for its negligence, the plaintiff would have to prove this particular employee's responsibility for that particular widget—not always an easy task.

but would seldom, if ever, increase either the amount or the likelihood of collection on the judgment. The effect of *Calder* on reporters, commentators, editorial writers, and the like, however, may well be more pronounced. Although it is unlikely that the amount of judgment or possibility of recovery will be vastly improved,<sup>83</sup> in the case of reporters and others similarly situated, as compared to factory workers, the individualistic and professional nature of the reporter's job gives him greater control over, and thus increased responsibility for, his work product. This necessarily requires a greater reliance by the publisher-employer on the competency and integrity of such employees than exists in the manufacturer-factory worker relationship. Moreover, it is certainly realistic for a publisher to expect the reporter to bring to its attention anything contained in the article that might result in litigation. Failing that, it is entirely reasonable for the publisher to demand contribution from the reporter toward any judgment awarded against the publisher.<sup>84</sup> In this respect, then, it is probable that *Calder* will have a greater impact on employees within the media industry than it will within the industrial and commercial fields.

The Court finally resolved the second and by far the more significant issue decided in *Calder*, namely, whether different jurisdictional standards are justified for the media as contrasted with all other defendants. In rejecting a double standard, the Court agreed with the majority of circuit courts<sup>85</sup> and the few commentators who have addressed the question.<sup>86</sup> The problem, as exemplified by cases like *New York Times Co. v. Sullivan*<sup>87</sup> and *New York*

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83. It is possible, of course, that under certain circumstances, the plaintiff might recover punitive damages from the author of the article, as opposed to the employer, but this presumably would be the rare case.

84. This will be especially so where the reporter has not been completely honest with his publisher about the factual basis for, or the sources of, the article, and when this lack of candor has led the employer to publish something it otherwise would not have.

85. See *supra* note 5.

86. Comment, *Long-Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 COLUM. L. REV. 342, 351 (1967) [hereinafter cited as Comment, *Long-Arm Jurisdiction*]; Comment, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967) [hereinafter cited as Comment, *Constitutional Limitations*]; Case Notes, 35 FORDHAM L. REV. 723, 726 (1967); Comments on Recent Cases, 52 IOWA L. REV. 997, 1034 (1967). Contra Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975 (1982).

87. 376 U.S. 254, 264 n.4 (1964). The parties argued the jurisdictional issue here, but the Court refused to decide it on the ground that the defendant had entered a general appearance. *Id.*

*Times Co. v. Connor*,<sup>88</sup> arises from defendants' fears "that they will receive an unfair trial in the plaintiff's home forum."<sup>89</sup> If such fears were realized in the form of large jury verdicts and punitive damage awards, then the media, especially newspapers and magazines, might well decide to restrict distribution to less hostile states or tend to be more cautious in the content of their articles to the detriment of first amendment freedoms. Most commentators<sup>90</sup> have nevertheless concluded that the substantive law,<sup>91</sup> the right of removal,<sup>92</sup> and restrictions in long-arm statutes themselves<sup>93</sup> adequately protect the media from unfair trials. Other alternatives also exist.<sup>94</sup> The Supreme Court clearly agreed with the commentators, stating that "[t]he infusion of [first amendment] considerations [into the jurisdictional analysis] would needlessly complicate an already imprecise inquiry."<sup>95</sup> Concluding that "the potential chill on protected First Amendment activity stemming from libel and defamation actions" had already been "taken into account"<sup>96</sup> in substantive law decisions,<sup>97</sup> and that "in other contexts" the Court had refused "to grant special procedural protections to defendants in libel and defamation actions,"<sup>98</sup> the Court took less than half a page to reject the notion that first amendment rights demanded stricter jurisdictional standards. Perhaps the Court could be faulted for not at least considering such an important constitutional question in greater depth;<sup>99</sup> the decision, neverthe-

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88. 365 F.2d 567 (5th Cir. 1966).

89. See Comment, *Constitutional Limitations*, *supra* note 86, at 437 n.4.

90. See *supra* note 86.

91. See Comment, *Long-Arm Jurisdiction*, *supra* note 86, at 451-52; Comment, *Constitutional Limitations*, *supra* note 86, at 358-61.

92. See Comment, *Long-Arm Jurisdiction*, *supra* note 86, at 359-60. Once a case has been removed, of course, there is always the possibility of a transfer pursuant to 28 U.S.C. § 1404 (1976). *Id.* at 360 n.98. General Westmoreland originally filed his suit against CBS in the United States District Court of South Carolina, but the case was later transferred to the Southern District of New York. See N.Y. Times, Nov. 19, 1982, at 34, col. 1 (D.S.C. Nov. 18, 1982).

93. See Comment, *Constitutional Limitations*, *supra* note 86, at 448.

94. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984) (holding that appellate courts should review the record independently with respect to the facts constituting "actual malice" in libel cases); see also *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 165, 173 (1984) (suggesting that courts "award attorneys' fees to libel defendants who prevail against frivolous claims") [hereinafter cited as *Leading Cases*].

95. 104 S. Ct. at 1487.

96. *Id.* at 1488.

97. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964)).

98. *Id.*

99. See *Leading Cases*, *supra* note 94, at 173 (criticizing the Court, not for its holding,



less, is eminently correct. Undoubtedly, *New York Times*<sup>100</sup> and *Gertz*<sup>101</sup> have made it a good deal more difficult to sue public figures for libel. *Bose*<sup>102</sup> has further reinforced this substantive law because it requires stricter appellate review of the record in such cases. The negative effect of these decisions on in terrorem suits cannot be denied. In view of these cases, more restrictive jurisdictional standards for libel cases would only present an additional hurdle that could well preclude a legitimate claimant from ever bringing his action.<sup>103</sup> Furthermore, *Connor*'s chilling-effect argument<sup>104</sup> may well rest "on questionable assumptions"<sup>105</sup> with respect to the ultimate actions by publishers.

One explanation for the Court's relatively brief treatment of this issue is that there has already been a good deal of commentary on the subject, most of which supports the Court's position.<sup>106</sup> More importantly, however, the holding simply makes good sense.

#### IV. *Helicopteros v. Hall*

In the third and clearly most troublesome of the four cases, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>107</sup> the survivors and representatives of four United States citizens brought a wrongful death suit against Consorcio/Williams-Sedco-Horn (WSH), Bell Helicopter Co. and Helicopteros (Helicol) in the District Court of Harris County, Texas.<sup>108</sup> The four decedents were

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but for its "failure to address the first amendment seriously").

100. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

101. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

102. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

103. See Comment, *Long-Arm Jurisdiction*, *supra* note 86, at 362-63.

104. *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966).

105. See *Leading Cases*, *supra* note 94, in which the commentators state:

These arguments, however, are by no means unproblematic. The self-censorship argument rests on questionable assumptions about the way publishers think; it may well overstate the extent to which purely economic factors influence publishers' editorial decisionmaking at the expense of journalistic objectives. The restriction-of-circulation argument, by contrast, relies upon questionable economic assumptions. Restriction of circulation will be rational only when the marginal costs of distributing a publication in a forum exceed the revenues derived from that forum; thus, only publishers with relatively small circulations in a state are likely to withdraw their publications from it. Certainly the expansion of long-arm jurisdiction has not deterred other businesses from vigorously extending their sales territories.

*Id.* at 172 (footnotes omitted).

106. See *supra* note 86.

107. 104 S. Ct. 1868 (1984).

108. *Id.* at 1871.

employees of WSH. While on a helicopter flight toward the construction site of a pipeline in Peru,<sup>109</sup> the employees were killed in the regular course of business. Because helicopters were needed "to move personnel, materials, and equipment into and out of the construction area,"<sup>110</sup> WSH employed Helicol, "a Colombian corporation . . . engaged in the business of providing helicopter transportation for oil and construction companies in South America."<sup>111</sup> WSH representatives had negotiated a contract with the chief executive officer of Helicol in Houston and a formal contract was later executed in Peru, some time after Helicol actually began operations for the consortium.<sup>112</sup>

Defendant Helicol specially appeared to object to personal jurisdiction, the court denied the motion, and the case proceeded to trial against the three defendants. The court ultimately entered judgment against Helicol alone in an amount exceeding one million dollars.<sup>113</sup>

On appeal to an intermediate appellate court, the judgment was reversed on the ground that the trial court lacked in personam jurisdiction over Helicol.<sup>114</sup> The Supreme Court of Texas, with three justices dissenting, reversed on rehearing,<sup>115</sup> after initially affirming.<sup>116</sup> Because the Supreme Court of Texas had interpreted its long-arm statute to reach "as far as the Due Process Clause of the Fourteenth Amendment permits,"<sup>117</sup> the sole issue remaining

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109. Under Peruvian law, a non-Peruvian company could not construct a pipeline. As a result, a consortium was formed of Williams International Sudamericana, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and Horn International, Inc., a Texas corporation. According to the Supreme Court: "Consortio is the alter-ego [sic] of a joint venture named Williams-Sedco-Horn (WSH)." 104 S. Ct. at 1870. In this article, the consortium will be referred to as "WSH" or "the consortium."

110. 104 S. Ct. at 1870.

111. *Id.*

112. *Id.*

113. *Id.* at 1871. The court directed verdicts in favor of the other two defendants, WSH and Bell Helicopter Co. *Id.* at 1871 n.6.

114. 616 S.W.2d 247 (Tex. Civ. App. 1981).

115. 638 S.W.2d 870 (Tex. 1982).

116. 25 Tex. Sup. Ct. J. 190 (1982).

117. 104 S. Ct. at 1871 (citing 638 S.W.2d at 872). The majority opinion by the Supreme Court of Texas seems to have misconceived the role of the state long-arm statute in the jurisdictional scheme. The Texas statute, article 2031b, requires that the claim against the nonresident defendant arise out of the defendant's business in Texas. 638 S.W.2d at 877-78 (Pope, J., dissenting) (construing TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1972)). As a consequence, the statute is congruent with the federal due process limitations only with respect to "arising out of" claims. Because the foregoing words act as a *state* limitation on any claims under the statute, it does not matter that the Supreme Court of Texas construed the statute to go as far as the United States Constitution allows. See LOUI-

before that court was one of constitutional law. In an eight to one decision, the Supreme Court of the United States reversed.<sup>118</sup>

The court characterized the issue of jurisdiction as one of "general," as opposed to "specific," jurisdiction<sup>119</sup> and refused to deal with the latter concept.<sup>120</sup> Thus constrained, Justice Blackmun, writing for the majority, examined Helicol's contacts in Texas and concluded that they failed to meet the standard required for a finding of general jurisdiction.<sup>121</sup> Stating that Helicol had no place of business in Texas and had never been licensed to do business there,<sup>122</sup> the Court gave short shrift to "[t]he one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH."<sup>123</sup> Neither was the court influenced by the fact that the consortium paid Helicol with checks drawn on a Texas bank. In subjecting Helicol to jurisdiction, the Supreme Court of Texas had relied primarily "on the purchases and the related training trips."<sup>124</sup> The Supreme Court disagreed "with that assessment,"<sup>125</sup> reaching back for support to a 1923 decision, *Rosenberg Brothers & Co. v. Curtis Brown Co.*<sup>126</sup> The Court emphasized that "mere purchases, even if occurring at regular intervals,"<sup>127</sup> could not be sufficient for the assertion of general jurisdiction. Nor could the Court deem the training of Helicol's personnel in connection with such purchases "a significant contact."<sup>128</sup>

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SELL, HAZARD & TAIT, PLEADING AND PROCEDURE 315-16 (5th ed. 1983). Put another way, the statute permits all "arising out of" claims to go to the federal constitutional limits, but does not allow any claims against nonresidents that do not arise out of defendant's contacts in Texas. There may well be some basis of jurisdiction with regard to such claims, but article 2031b is not one of them.

118. 104 S. Ct. 1868 (1984).

119. *Id.* at 1872-73. "General jurisdiction" refers to the exercise of jurisdiction over a nonresident defendant where the cause of action sued upon does not arise out of or is unrelated to the defendant's contacts with the forum state. "Specific jurisdiction," on the other hand, refers to the exercise of jurisdiction over a nonresident where the cause of action *does* arise out of or is related to that defendant's contacts with the forum state. *See id.* at 1871 nn.8-9 (citing von Mehren & Trautman, *supra* note 10).

120. The majority opinion concluded that "[a]ll parties to the present case concede that respondents' claims against Helicol did not 'arise out of,' and are not related to, Helicol's activities within Texas." *Id.* at 1872-73 (footnote omitted).

121. *Id.* at 1874.

122. *Id.* at 1873.

123. *Id.*

124. *Id.* at 1874.

125. *Id.*

126. 260 U.S. 516 (1923).

127. 104 S. Ct. at 1874.

128. *Id.*

As in *Keeton*, Justice Brennan authored a separate opinion in *Helicopteros*,<sup>129</sup> although this time in dissent. Specifically, he took issue with the majority's conclusions that: (1) defendant had insufficient contacts to be subject to general jurisdiction; (2) the *Rosenberg* case could be valid authority in 1984; and (3) the issue before the Court was limited to a question of general jurisdiction only, rather than involving both specific and general jurisdiction.<sup>130</sup>

By viewing the jurisdictional issue only from the standpoint of general jurisdiction, the Court forced itself to deal with this question for the first time<sup>131</sup> since its 1952 decision in *Perkins*.<sup>132</sup> The facts in that case were as follows:

During the Japanese occupation of the Philippine Islands, the president and general manager of a Philippine mining corporation maintained an office in Ohio from which he conducted activities on behalf of the company. He kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines. In short, the foreign corporation, through its president, 'ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business,' and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was 'reasonable and just.'<sup>133</sup>

After reciting the above facts in *Perkins* and reviewing Helicol's contacts in Texas, the Court, in an amazing tour de force, looked to *Rosenberg*<sup>134</sup> as precedent. No mind that the *Rosenberg* decision is over sixty years old, that it was decided under pre-*International Shoe* doctrine, that the "nature and quality" as well as the quantity of contacts were in stark contrast to those in *Helicopteros*; no, the Court managed to resurrect a dead case and a dead doctrine, while dealing a body blow to jurisdictional law

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129. 104 S. Ct. 1868, 1875 (Brennan, J., dissenting).

130. *Id.*

131. The Court had discussed *Perkins* on previous occasions, namely, in *Keeton* and *Calder*, but these cases were examples of specific jurisdiction, and, thus, the Court had no reason at the time of those decisions to determine what the limits of its holding in *Perkins* were.

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

133. 104 S. Ct. at 1872 (quoting *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952)).

134. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923).

from which it may take years or decades to recover.<sup>135</sup> Let us first look at the *Rosenberg* facts: defendant, Curtis Brown, was "a small retail dealer in men's clothing and furnishings in Tulsa, Oklahoma," whose only contacts in New York were limited to buying "a large part of the merchandise"<sup>136</sup> in New York for resale in his Tulsa store. In contrast, Helicol committed all of the following acts in Texas:

- a. Purchased substantially all of its helicopter fleet in . . . 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 . . . ;
- c. Negotiated in Houston, . . . [a] contract to provide the helicopter service involving the crash leading to this cause of action . . . ;
- d. Sent pilots to . . . Texas to pick up [Bell] helicopters . . . and fly them . . . to Columbia [sic];
- 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 [a bank] . . . in . . . Texas; . . . <sup>137</sup>

Curtis Brown purchased goods in New York, period. Neither the Supreme Court nor lower court<sup>138</sup> opinions disclosed the amount of his expenditures. Helicol, on the other hand, bought more than four million dollars worth of goods in Texas, spending an average of fifty thousand dollars per month for some six consecutive years. In addition, it regularly sent pilots to Fort Worth to pick up helicopters, it sent maintenance personnel and pilots to

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135. Despite its eight to one vote, it might not be unreasonable to conclude that the Court never mentioned the real reason for its decision. In an amicus curiae brief, the Department of Justice argued "that the ability of American firms to compete in world trade markets could be adversely affected because foreign corporations might be dissuaded from purchasing American products if the mere purchases of products in the United States—together with training in the United States as part of the purchase agreement—is sufficient to subject foreign businesses to the jurisdiction of American courts for causes of action totally unrelated to their purchases. Such a result would be detrimental to the government's efforts to promote the export of American products." Brief for the United States as Amicus Curiae at 1-2, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868 (1984).

136. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923).

137. 638 S.W.2d at 871-72.

138. 260 U.S. 516 (1923); 285 F. 879 (W.D.N.Y. 1921).

Texas for training, and had employees in that state "on a year-round rotation basis."<sup>139</sup> Moreover, it negotiated a large service contract in Houston, resulting in over five million dollars in sales. In other words, the activities carried on by Helicol in Texas were neither irregular nor casual, but were rather "continuous" and "substantial."<sup>140</sup> Unlike Curtis Brown, Helicol was not merely a purchaser of goods, but was also a seller of services on a grand scale.<sup>141</sup> Summing up, Helicol's business dealings with Texas involved buying, selling, negotiating, and training of personnel over a six-year period on a regular monthly basis, totaling some nine million dollars.

Looking at the law in *Rosenberg*, however, provides an even dimmer perspective. *International Shoe*, decided in 1945, marked a new departure in personal jurisdiction. As Professor Kurland has stated: "The *International Shoe* case . . . served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow."<sup>142</sup> Part of the doctrine that Chief Justice Stone destroyed in his opinion was the "presence" theory of jurisdiction, a theory that the Court in *Rosenberg* followed rigidly. The Court now attempts to justify its step backward in time in *Helicopteros* by reference to the fact that the holding in *Rosenberg* was "acknowledged" and "not repudiate[d]" in *International Shoe*.<sup>143</sup> But this statement is not exactly accurate. It is true that the Court acknowledged *Rosenberg*, and that it was not repudiated. That portion of Chief Justice Stone's opinion that refers to *Rosenberg*, however, simply catalogued past cases in which presence and consent were the bases for deciding jurisdiction over out-of-state defendants. The opinion did not attempt to reevaluate such cases under the new standards. Rather, it appears that the Court was attempting to show that the former theories failed to do

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139. 638 S.W.2d at 871.

140. 326 U.S. at 318.

141. See Knudsen, *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U. L. REV. 101, 117-18 (1983). Although this article is primarily aimed at the travel industry, its conclusions are equally valid with respect to any seller of services who successfully solicits sales in another state or country.

142. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 586 (1958). See also *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 923 (1960) ("Mr. Chief Justice Stone discarded the presence and consent theories as mere legal conclusions that the assumption of jurisdiction was reasonable. In place of these he offered a new standard: whether the corporation had certain 'minimum contacts' with the state such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice.").

143. 104 S. Ct. at 1874.

an adequate job. In fact, the Court's citation of *Rosenberg* for the proposition that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it,"<sup>144</sup> clearly indicates that the defendant's actions in *Rosenberg* at most constituted only "occasional acts."<sup>145</sup> Had the Court decided *Helicopteros* at the time of *Rosenberg* in 1923, it can hardly be doubted that the Court would have considered Helicol to be *present* in Texas in view of its vast number of business activities and its large amount of dollar volume in that state.

The majority opinion has another elemental defect. In using *Perkins* as the criterion for judging whether general jurisdiction exists, the Court seems to have confused the factual situation in *Perkins* with doctrine. Obviously, in order to obtain general jurisdiction over a corporate defendant it is not now necessary to sue the corporation in its state of domicile, nor was it necessary in the immediate pre-*International Shoe* period. Despite the Supreme Court's zigging and zagging on this issue during the first quarter of this century, this rule seems to have ultimately won the day.<sup>146</sup> For, immediately preceding the aforementioned reference to the *Rosenberg* case in *International Shoe*, Chief Justice Stone concluded:

[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.<sup>147</sup>

Moreover, in upholding jurisdiction over the defendant corporation in *Perkins*, the majority opinion relied on this very quotation.<sup>148</sup> In concluding that there was no basis for subjecting Helicol to jurisdiction in the general sense, the Court in effect failed to give the *International Shoe* standards an appropriate reading. First, these standards permit jurisdiction only where the suit will not "offend 'traditional notions of fair play and substantial justice.'"<sup>149</sup> The

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144. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

145. *Id.*

146. Compare *Simon v. Southern Ry.*, 236 U.S. 115 (1915) with *Missouri, Kan. & Tex. Ry. Co. v. Reynolds*, 255 U.S. 565 (1921) and *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

147. 326 U.S. at 318.

148. *Perkins*, 342 U.S. at 446.

149. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463

task for the Court was to decide — using *International Shoe* guidelines and not the outdated “presence” doctrine — whether Helicol’s contacts in Texas were “so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>150</sup> Second, the reference to “mere purchases” by Helicol in Texas was patently wrong. As indicated above,<sup>151</sup> and as the Supreme Court of Texas clearly set forth, Helicol *sold* approximately five million dollars worth of services to WSH. To characterize Helicol as a mere purchaser, when its actual sales were in the neighborhood of five million dollars, utterly miscomprehends the facts of the case. This fundamental misunderstanding obviously had some part in the Court’s reliance on *Rosenberg*, where the defendant made no sales in the forum state. Of course, if the Court considered Helicol’s sales to WSH irrelevant and therefore of no significance to the issue of jurisdiction, the Court was not only wrong on the merits,<sup>152</sup> but, by neglecting to even refer to these significant contacts, it also failed to comply with those high standards of methodology the Supreme Court of the United States is expected to establish and meet. Third, the Court not only omitted any discussion of the benefits Helicol had derived from its transaction of business in Texas, but also did not address Justice Brennan’s incisive arguments, to-wit:

As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions. And chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation’s commercial activities.<sup>153</sup>

Finally, the doctrine of *International Shoe* is not set in marble; it has continued to evolve, as is implicitly recognized in the phrase “*International Shoe* and its progeny.”<sup>154</sup> The minimum

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(1940)).

150. 326 U.S. at 318.

151. See *supra* note 137 and accompanying text.

152. See Comment, *Personal Jurisdiction In The Post-World-Wide Volkswagen Era—Using a Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155 (1984) (suggesting the use of dollar revenues as a factor in the jurisdictional analysis).

153. 104 S. Ct. at 1877 (Brennan, J., dissenting).

154. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).



contacts theory originated in 1945, but there have probably been hundreds of appellate decisions since that time, refining, modifying, and clarifying the theory. Over twenty-five years ago, Justice Black recognized this process when he stated:

[M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.<sup>155</sup>

In *World-Wide Volkswagen*, Justice White acknowledged these changes in this way: "The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided."<sup>156</sup>

Here, in 1984, the Court had a chance to continue to develop the law of general jurisdiction, as last expressed in *Perkins*, in light of these fundamental changes and the realities of the market place. It missed this great opportunity, though, and in relying so heavily on *Rosenberg*, took the state of the law back sixty years.

With respect to specific jurisdiction,<sup>157</sup> the Court took the easy way out by refusing to give it any consideration.<sup>158</sup> This aspect of the case merits some discussion. First, as Justice Brennan stated, the majority had "remove[d] its decision from the reality of the actual facts presented for our consideration."<sup>159</sup> Whether the question of specific jurisdiction was actually before the Court is not crystal clear.<sup>160</sup> Second, both opinions of the Supreme Court of Texas discussed the issue of whether the causes of action arose out of Helicol's activities in Texas, but came to opposite conclusions.<sup>161</sup> Third, in the second and final opinion of that court, the majority (formerly the dissent) decided that it was "unnecessary" to consider whether the claims arose out of Helicol's contacts in Texas because the contacts were so "numerous" as to amount to the es-

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155. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

156. 444 U.S. at 293.

157. See *supra* note 119.

158. 104 S. Ct. at 1872-73 & n.10.

159. *Id.* at 1878 (Brennan, J., dissenting).

160. Justice Brennan stated in dissent that "while the respondents' position before this Court is admittedly less than clear, I believe it is preferable to address the specific jurisdiction of the Texas courts because Helicol's contacts with Texas are in fact related to the underlying cause of action." *Id.* at 1877-78 n.3 (Brennan, J., dissenting).

161. 25 Tex. S. Ct. J. 190, 193-95 (1982) (Wallace, J., dissenting).

tablishment of defendant's "presence" there.<sup>162</sup> The dissent, however, contended that the only basis for upholding jurisdiction (due to the narrow long-arm statute) was to find that the causes of action arose out of defendant's Texas activities and that such was not the case.<sup>163</sup> Fourth, when a plaintiff wins a million dollar verdict against a nonresident defendant, only the most unequivocal concession by plaintiff that he did *not* rely on specific, as well as general, jurisdiction should preclude the Court from considering the issue. Alternatively, because it was a constitutional issue, the Court should, on its own motion, have ordered reargument on that point alone.<sup>164</sup>

Examination on the merits into the question of whether Helicol would have been subject to specific jurisdiction in Texas leaves little doubt. Because the Supreme Court of Texas interpreted its long-arm statute to reach as far as the United States Constitution permits,<sup>165</sup> the issue of whether the causes of action in this case arose out of defendant's activities in Texas necessarily would have become a matter of federal constitutional law. It is worth noting that the Supreme Court has never decided this precise issue. This is true even in *Perkins*, where there was no discussion of the conclusion that "[t]he cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there."<sup>166</sup> Of course, lower courts have faced this question on occasion.<sup>167</sup>

Justice Brennan contended that the Court should have considered whether there was "any distinction between controversies that 'relate to' a defendant's contacts with the forum and causes of action that 'arise out of' such contacts."<sup>168</sup> In finding Helicol's contacts with Texas to be "sufficiently related to the underlying cause

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162. 638 S.W.2d at 872.

163. *Id.* at 877.

164. Obviously, in the usual case, the Court should accept concessions by counsel, but such concessions should be clear-cut. More importantly, in constitutional cases, the Court's duty is not only to the litigants, but to the concept of the rule of law.

165. *See supra* note 117.

166. 342 U.S. at 438.

167. *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 (6th Cir. 1968); *Gullett v. Qantas Airways, Ltd.*, 417 F. Supp. 490, 497 (M.D. Tenn. 1975):

In the case at bar, the cause of action cannot fairly be said to be entirely unrelated to defendant's activities within this state. An injury occurring on a flight which was contracted and paid for within this state cannot be said to be wholly unrelated to the sale of the ticket. There is an obvious logical nexus between defendant's exploitation of the Tennessee market and an injury occurring on a flight which was contracted for as a result of the exploitation.

168. 104 S. Ct. at 1877-78 (Brennan, J., dissenting).

of action, to make it fair and reasonable for the State to assert jurisdiction over Helicol,"<sup>169</sup> Justice Brennan seems to have opted for a standard he apparently believed to be somewhat broader than the "arising out of" limitation referred to in *International Shoe*.<sup>170</sup>

This concern on his part appears to be misplaced because the Court, in one form or another, used the terms "related to," "arising from," "arise out of," and "connected with," in conjunction with a nonresident defendant's activities in the forum state.<sup>171</sup> More significantly, the Court used them all interchangeably. *Perkins*, although concluding that no connection existed between the cause of action and defendant's activities in the state, supports the language of *International Shoe*.<sup>172</sup> So, too, does *McGee*, where Justice Black stated: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."<sup>173</sup>

If there is no legal distinction between the terms "arising out of" and "related to," then the next question is whether the causes of action in *Helicopteros* were in any way related to its extensive, multimillion dollar, long-term contacts in Texas. A review of the facts reveals that the four men killed in the helicopter crash were employees of WSH, a consortium headquartered in Texas; the accident occurred during the course of business; Helicol rendered the helicopter services, valued at five million dollars, on a regular basis pursuant to a contract negotiated with WSH in Texas; Helicol purchased almost all of its helicopters in Texas, sent its maintenance personnel and pilots there for training, kept employees in that state year-round and paid them from a Texas bank.<sup>174</sup> The question would seem to answer itself.

There is no question that Bell could have sued Helicol in Texas over any dispute arising out of their extensive business dealings. The same is true of WSH with respect to any claims it may have had that were connected to its multimillion dollar service contract negotiated in Texas.<sup>175</sup> If WSH could have sued Helicol in

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169. *Id.* at 1878 (Brennan, J., dissenting).

170. 326 U.S. at 319.

171. *Id.* at 317-21.

172. See *supra* note 166 and accompanying text.

173. 355 U.S. at 223.

174. See *supra* note 137 and accompanying text.

175. A few courts have held that the negotiation of a contract in the forum state constitutes the transaction of business and is sufficient to confer jurisdiction upon its courts, even when formal execution has taken place elsewhere. *American Eutectic Welding Alloys Sales*

Texas over the service contract, how are the services rendered pursuant to this contract any less related to the claims of the deceased employees of WSH?

In fact, it appears that decedents' causes of action were as sufficiently connected to Helicol's helicopter purchases and personnel training in Texas as they were to its sale of services there. Both of Helicol's contacts meet the arising out of, or relatedness test of *International Shoe* and its progeny. Moreover, with respect to the sale of services, the negotiation of the large contract in Texas should not be deemed the primary contact. Far more important is the economic reality of Helicol's sale of approximately five million dollars worth of services to a Texas consortium. The Supreme Court of California specifically articulated this "economic activity" standard at an early date<sup>176</sup> and later reaffirmed it in *Buckeye Boiler Co. v. Superior Court*,<sup>177</sup> where it stated that it would deem nonresident manufacturers to be engaged in:

economic activity within a state as a matter of 'commercial actuality' whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result.<sup>178</sup>

Following this logic, a nonresident contractor's sale of services should reach the same jurisdictional result,<sup>179</sup> at least where, as here, the nonresidents have "solicited business in Texas by sending a representative to Houston to negotiate with Williams-Sedco-Horn"<sup>180</sup> and a relationship exists between that sale and the forum state. Moreover, it would seem that the contacts between Helicol and Texas were so extensive and far-reaching that Helicol could "reasonably anticipate being haled into court there."<sup>181</sup>

#### V. *Burger King v. Rudzewicz*

The last, but in no way the least of these decisions, *Burger*

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Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971); *Liquid Carriers Corp. v. American Marine Corp.*, 375 F.2d 951 (2d Cir. 1967).

176. *Empire Steel Corp. of Texas v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502, 17 Cal. Rptr. 150 (1961).

177. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

178. *Id.* at 902, 458 P.2d at 64, 80 Cal. Rptr. at 120.

179. See Knudsen, *supra* note 141.

180. 638 S.W.2d at 874 (Campbell, J., concurring).

181. 444 U.S. at 297 (citing *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). See *infra* note 200.

*King Corp. v. Rudzewicz*,<sup>182</sup> began as an ordinary breach of contract and trademark infringement action in the United States District Court for the Southern District of Florida by a Florida franchisor against two of its Michigan franchisees.<sup>183</sup> Both defendants, Rudzewicz and MacShara, argued that the court lacked personal jurisdiction over them "because they were Michigan residents and because Burger King's claim did not 'arise' within the Southern District of Florida."<sup>184</sup> The court rejected these contentions, defendants answered,<sup>185</sup> and the court ultimately entered judgment after trial in favor of plaintiff on each of its claims. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed for lack of personal jurisdiction, with one judge dissenting.<sup>186</sup> After granting certiorari,<sup>187</sup> the Supreme Court reversed, six to two.<sup>188</sup>

The relevant facts are as follows:

Rudzewicz and MacShara jointly applied for a franchise to Burger King's Birmingham, Michigan district office in the autumn of 1978. Their application was forwarded to Burger King's Miami headquarters, which entered into a preliminary agreement with them in February 1979. During the ensuing four months it was agreed that Rudzewicz and MacShara would assume operation of an existing facility in Drayton Plains, Michigan. MacShara attended the prescribed management courses in Miami during this period . . . and the franchisees purchased \$165,000 worth of restaurant equipment from Burger King's Davmor Industries division in Miami.<sup>189</sup>

Disagreements between the parties began "[e]ven before the final agreements were signed" and were "negotiated both with the

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182. 105 S. Ct. 2174 (1985).

183. Jurisdiction was based on diversity for the contract claim and on 28 U.S.C. § 1338(a) for the trademark claim. 105 S. Ct. at 2180.

184. *Id.*

185. Defendants also counterclaimed against Burger King, but they did not prevail on the merits of this claim at trial. *Id.*

186. *Burger King Corp. v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), *rev'd sub. nom. Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). Rudzewicz alone prosecuted the appeal, while MacShara dropped out of the case. Moreover, by virtue of a compromise between Rudzewicz and Burger King, the appeal was limited to the breach of contract claim. 105 S. Ct. at 2180 n.11.

187. Burger King appealed the judgment of the Eleventh Circuit, but the Supreme Court dismissed the appeal and granted certiorari. 105 S. Ct. at 2181.

188. 105 S. Ct. 2174. Justice Powell did not participate in the case; Justices Stevens and White dissented.

189. *Id.* at 2179 (citation omitted).

Birmingham district office and with the Miami headquarters.”<sup>190</sup> After the Miami office made certain concessions to the franchisees, the parties executed the franchise contracts. The terms of the contract required the franchisees to make payments directly to Miami. When payments were late, the Miami office mailed out notices of default and once again discussions took place among the franchisees, the district office, and headquarters. After prolonged negotiations by mail and telephone between the franchisees and Miami, Burger King’s Miami headquarters terminated the franchise.

In upholding jurisdiction, the trial court relied on Florida’s long-arm statute, which permits jurisdiction over an out-of-state resident on a “cause of action arising” from the breach of “a contract in this state by failing to perform acts required by the contract to be performed in this state.”<sup>191</sup> The district court further concluded that the statute as applied did not violate the due process clause of the fourteenth amendment. The Eleventh Circuit Court of Appeals limited its inquiry solely to the due process issue because the parties had stipulated, for purposes of the appeal, that the reach of the long-arm statute was sufficient to include Rudzewicz.<sup>192</sup> In reversing, the appellate court emphasized that Rudzewicz not only “lacked notice of the possibility of suit in Florida [but] he was financially unprepared to meet its added costs.”<sup>193</sup> As a consequence, “jurisdiction . . . would offend the fundamental fairness which is the touchstone of due process.”<sup>194</sup>

Justice Brennan’s majority opinion wasted no time rejecting the “‘fair warning’ requirement”<sup>195</sup> of the court below in favor of *Hanson v. Denckla*’s “purposeful availment”<sup>196</sup> and *Keeton*’s closely-related “‘purposefully directed’ activities” concepts.<sup>197</sup> Recognizing that a defendant must be said to have reasonably anticipated “being haled into court”<sup>198</sup> in a state where he “‘deliber-

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190. *Id.*

191. FLA. STAT. § 48.193(1)(g) (Supp. 1984).

192. 105 S. Ct. at 2181 n.12.

193. 724 F.2d at 1512.

194. *Id.* at 1513.

195. 105 S. Ct. at 2182. This term apparently originated in *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring). It is closely allied, if not synonymous, with Justice Marshall’s phrase in the majority opinion: “expect to be haled before a Delaware court.” *Id.* at 216. The majority subsequently quoted this phrase verbatim in *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) and, with a minor change in wording, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

196. 105 S. Ct. at 2183.

197. *Id.* at 2182.

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

ately' has engaged in significant activities . . . or has created 'continuing obligations' between himself and residents of the forum,"<sup>199</sup> the majority opinion is patently correct in its construction of *World-Wide Volkswagen's* well-known dictum.<sup>200</sup> Moreover, the fact that "the defendant did not *physically* enter the forum State"<sup>201</sup> cannot defeat jurisdiction in circumstances such as these. Presence may "enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there," but in "modern commercial life . . . a substantial amount of business is transacted solely by mail and wire communications across state lines."<sup>202</sup> The test, therefore, is not physical presence, but whether the "commercial actor's efforts are 'purposefully directed' toward residents of another State."<sup>203</sup>

Returning to fundamental principles, the Court stressed that once it is found that the defendant has "purposefully established minimum contacts within the forum State," a second level of inquiry may be appropriate, namely, "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"<sup>204</sup> At this stage, relevant considerations include:

'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'<sup>205</sup>

Furthermore, the balancing of these factors may permit a court to uphold jurisdiction "upon a lesser showing of minimum contacts than would otherwise be required."<sup>206</sup> Additionally, the Court stated that once a court has made the initial determination that

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199. 105 S. Ct. at 2184.

200. The entire sentence reads: "Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297. For the history of this jurisdictional factor, see *supra* note 195. The specific references to "defendant's conduct" and "defendant's connection with the forum State," as well as defendant's requirement that his anticipation be "reasonable," make it clear that a court must always employ an objective basis for defendant's "anticipation." See Lewis, *supra* note 18, at 20.

201. 105 S. Ct. at 2184.

202. *Id.*

203. *Id.*

204. *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

205. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

206. 105 S. Ct. at 2184.

the defendant has "purposefully . . . directed his activities at forum residents . . . he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."<sup>207</sup> The Court suggests as an example of such a compelling case, "litigation 'so gravely difficult and inconvenient' that a party would be at a 'severe disadvantage' in comparison to his opponent."<sup>208</sup>

The exact import of the foregoing language is not crystal clear. The Court seems to be saying that if it appears that the defendant has engaged in purposeful minimum contacts within the forum state, two alternatives are possible. First, the quantity, quality, and nature of such contacts may be sufficient for a finding of jurisdiction without more.<sup>209</sup> In that situation, there is no necessity to examine the "other factors." But where the contacts are inadequate by themselves to obtain jurisdiction, the second alternative comes into play: examination into those elements to determine whether subjecting the defendant to jurisdiction would be fair and just. This level of inquiry seems to require the tribunal to balance the five interests listed. It is, however, at this point that the defendant "must present a compelling" case against jurisdiction, suggesting that where the balance is even, the tribunal will uphold jurisdiction. This may be merely another way of saying that once the court has established a defendant's purposefully directed minimum contacts, the burden shifts to the defendant to prevail at the second stage.<sup>210</sup> In light of the past general rule that placed the entire burden of proving jurisdiction on the plaintiff,<sup>211</sup> it remains to be seen,

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207. *Id.* at 2185.

208. *Id.*

209. The Court stated that "these contacts *may* be considered in light of other factors." *Id.* at 2184 (emphasis added). It did not say they *must* be considered for there will be no need to take them into account when it becomes obvious that jurisdiction over the defendant, on the basis of such contacts alone, will "comport with 'fair play and substantial justice.'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

210. Although this would represent a major procedural change in jurisdictional law, it is similar in theory to recent Supreme Court cases dealing with the law of employment discrimination. Admittedly, these cases rely on congressional intent, but that is irrelevant here. Once plaintiff has established a *prima facie* case, the burden shifts to defendant. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). By analogizing plaintiff's proof that defendant has "purposefully established minimum contacts within the forum State" as a *prima facie* case, to be rebutted only by defendant's "present[ation of] a compelling case . . . that jurisdiction [would be] unreasonable," the Court comes close to, if it does not in fact adopt, such a position. 105 S. Ct. at 2184-85.

211. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188 (1936); *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967); *Northcross v. Joslyn Fruit*



without more precise articulation, whether the Court meant to affect such a tremendous change in the law. Nevertheless, it can be argued with conviction that once defendant has intentionally created minimum contacts within the forum state, there is no need to continue the bias in his favor. As Judge Friendly noted in *Buckley v. New York Post*:

There has been a 'movement away from the bias favoring the defendant,' in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him' when there is a sufficient basis for doing so.

. . . .  
 . . . [I]t would not be difficult to extrapolate from the *McGee* decision and opinion a general principle that the due process clause imposes no bar to a state's asserting personal jurisdiction . . . in favor of a person within its borders who suffers damage from the breach of a contract the defendant was to perform there or a tort the defendant committed there. Once we free our minds from traditional thinking that the plaintiff must inevitably seek out the defendant, such a doctrine would not seem to violate basic notions of fair play. . . .<sup>212</sup>

The Court went on to clarify the due process significance of a contract between the parties, a matter that was a source of "division among lower courts."<sup>213</sup> Adopting the better view, the Court concluded that where a contract is the sole contact with the forum state, it cannot support jurisdiction over the nonresident contracting party.<sup>214</sup> Rejecting "'mechanical' tests"<sup>215</sup> and "conceptualistic . . . theories,"<sup>216</sup> as it has in the past, the Court instead took the:

'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. It is these factors — prior negotiations and contemplated future consequences, along

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Co., 439 F. Supp. 371, 376 (D. Ariz. 1977).

212. 373 F.2d 175, 181 (2d Cir. 1967) (citing von Mehren & Trautman, *supra* note 10, at 1128).

213. 105 S. Ct. at 2185.

214. *Id.* at n.21. (citing Brewer, *Jurisdiction in Single Contract Cases*, 6 ARK. LITTLE ROCK L.J. 1, 7-11, 13 (1983); Note, *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contract?*, 61 B.U.L. REV. 375, 384-88 (1981).

215. 105 S. Ct. at 2185 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

216. *Id.* (quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943)).

with the terms of the contract and the parties' actual course of dealing — that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.<sup>217</sup>

Rudzewicz had voluntarily sought "a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."<sup>218</sup> Upon execution of the agreement, he had subjected himself to "the long-term and exacting regulation of his business from Burger King's Miami headquarters."<sup>219</sup> Moreover, his failure to make the franchise payments directly to the Miami headquarters, as required by the agreement, and his misuse of plaintiff's "trade-marks and confidential information . . . caused foreseeable injuries to the corporation in Florida."<sup>220</sup>

Key to the decision is the Court's emphasis on the fact that all real power at Burger King resided solely in the Miami office. All disputes of any consequence<sup>221</sup> between franchisee and franchisor were subject to the "decisionmaking authority . . . vested in the Miami headquarters," while the district office in Michigan "served largely as an intermediate link between the headquarters and the franchisees."<sup>222</sup>

The Court also provided a new perspective on choice-of-law agreements between parties. The Eleventh Circuit Court of Appeals had concluded that such provisions were irrelevant, citing *Hanson v. Denckla* as authority,<sup>223</sup> but this analysis "ignored" defendant's having "'purposefully invoked the benefits and protections of a State's laws.'"<sup>224</sup> Explaining, Justice Brennan added: "Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of pos-

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217. *Id.* at 2185-86 (citation omitted).

218. *Id.* at 2186.

219. *Id.*

220. *Id.*

221. "When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami." *Id.* at 2187.

222. *Id.* at 2186-87.

223. 724 F.2d at 1512 n.10.

224. 105 S. Ct. at 2187.

sible litigation there."<sup>225</sup>

The Court noted two other points raised by the court of appeals. First, the Court paid little attention to the disparity of wealth between Rudzewicz and Burger King. In fact, in negating this as a factor, the Court relegated this discussion to a mere footnote.<sup>226</sup> Second, the Court likewise put to rest the lower court's fear that a finding of jurisdiction in this case might lead to a proliferation of suits "to collect payments due on modest personal purchases"<sup>227</sup> from out-of-state consumers. Reminiscent of an earlier "not . . . while this Court sits"<sup>228</sup> dictum, the majority opinion made clear that this decision in no way created any "talismanic jurisdictional formulas."<sup>229</sup> Stressing that "the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice,' "<sup>230</sup> the Court concluded that "these dangers are not present in the instant case."<sup>231</sup>

Justice Stevens, in dissent, quoted extensively from the majority opinion of the appellate court below,<sup>232</sup> and found "a significant element of unfairness" in subjecting Rudzewicz to suit in Florida.<sup>233</sup> The major flaw in Justice Stevens's analysis, like the Court's analysis in *Helicopteros*, is that it completely ignores the realities of the modern commercial world in two respects. First, it fails to appreciate the roles of the telephone and the mail in negotiating today's business deals. Physical presence is no longer necessary for the parties to iron out even the most minute details of a contract. Second, a high percentage of large corporations still make not only policy, but specific decisions, at headquarters, despite the fact that their networks include regional and district offices. The majority opinion recognized this fact of life, both in its decision in favor of jurisdiction as well as in a footnote indicating that for "different decisionmaking structures" the result might be the opposite.<sup>234</sup>

Essentially, the relationship of Rudzewicz and Burger King

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225. *Id.*

226. *Id.* at 2188 n.12.

227. *Id.* at 2189.

228. "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

229. 105 S. Ct. at 2189.

230. *Id.*

231. *Id.* at 2190.

232. *Id.* at 2190-91 (quoting *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1511-13 (11th Cir. 1984)).

233. 105 S. Ct. at 2190.

234. *Id.* at 2189 n.28.

consisted of a business arrangement between the franchisees in Michigan and the corporate headquarters in Florida. Contract negotiations leading to the consummation of the relationship took place primarily between Rudzewicz and the Miami office, the Miami office made precontract concessions to Rudzewicz, Rudzewicz made payments to the Miami office, the Miami office handled disputes between Rudzewicz and the company, and that office carried out the final act of termination. To conclude that the franchisee had not "engaged in significant activities . . . or . . . created 'continuing obligations'"<sup>235</sup> with Burger King in Florida simply flies in the face of the facts.

## VI. CONCLUSION

How will these four cases shape the ever-developing minimum contacts doctrine? Obviously no definitive answer is possible, but some consequences seem more probable than others. *Keeton* should, in close cases, prove helpful in giving lower courts greater leeway to balance plaintiffs' interests against defendants' interests. Admittedly, the Court spoke in terms of "plaintiff's residence" acting as a possible "enhance[ment]" of "defendant's contacts with the forum,"<sup>236</sup> but as *Keeton* was not a resident of New Hampshire, it would seem a small step for lower courts to give greater credence to the spirit of that statement than to a begrudging literal reading. Moreover, *Keeton* provides a new approach toward understanding *McGee* as a decision which actually relied more on plaintiff's interest in upholding jurisdiction than on the interest of the state.

The return of the state interest concept, after its apparent demise in *Bauxites*, will continue to afford lower courts a rationale for subjecting nonresident defendants to their jurisdiction when they need a makeweight. As a practical matter, however, this should be of little moment for, as Professor Lewis has concluded, the forum state interest factor has never led to a finding or denial of jurisdiction when such decisions could not be supported on other grounds.<sup>237</sup> If Professor Lewis's observation continues to be true, then this aspect of *Keeton* will do nothing more than muddy the conceptual waters and, presumably, we can all live with that.

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235. *Id.* at 2184 (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950)) (citation omitted).

236. 104 S. Ct. at 1481.

237. See Lewis, *supra* note 17, at 807.

On the other hand, *Keeton* used strong language in dismissing the statute of limitations issue, to-wit: that "choice of law concerns" should not be allowed to "complicate or distort the jurisdictional inquiry."<sup>238</sup> This could well have a negative effect on the substantive law concerns of the forum state and ultimately lead to that concept's demise,<sup>239</sup> leaving only the forum state's "interest in redressing injuries that actually occur within the State."<sup>240</sup> In time, that too might pass away.

*Calder's* main impact will naturally be on the media, which now will be subject to the same rules as all other defendants, be they commercial, industrial, or individual. Both courts and litigants will have to deal with the usual contacts questions without any complicating first amendment baggage. In fact, we may find that together *Calder* and *Keeton* may allow a relatively small number of plaintiffs to sue in their home states when heretofore this would have been impossible. Does this portend an opening of the floodgates in libel suits? Hardly, for as the Court emphasized, defendants will be able to find protection in the substantive law as it now stands, and, together with the kind of protection afforded by *Bose*,<sup>241</sup> it might work to inhibit frivolous suits.<sup>242</sup>

Because the most disturbing of the cases, *Helicopteros*, did not concern itself with the law of specific jurisdiction, it should not have any *direct* effect on that aspect of the minimum contacts theory. Nevertheless, its retreat into the past to resurrect doctrines long considered dead will undoubtedly result in all manner of pre-*International Shoe* cases finding their way into defendants' briefs in the next few years. It is to be hoped that these "authorities" do not also make their way into court opinions. Its influence on the future of general jurisdictional concepts, though, may well be devastating. The Court's refusal to even consider the real world of business and commerce, including the role of a multimillion dollar purveyor of services to a forum buyer, clearly bodes ill.

Finally, we come to the last, and very possibly the most important, case of the quartet, *Burger King*. By looking at the economic effects of defendant's actions in the forum state, rather than on physical presence and "conceptualistic theories," and by focusing on the realities of the modern-day business world, the Court may

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238. 104 S. Ct. at 1480.

239. See Redish, *supra* note 33.

240. 104 S. Ct. at 1479.

241. See *supra* note 94.

242. See *Leading Cases*, *supra* note 94, at 173 n.70.

have, quietly and indirectly, undone some of the damage created by *Helicopteros*. Moreover, if the Court has actually shifted the burden from plaintiff to defendant once the trial court is satisfied that "defendant [has] purposefully established minimum contacts within the forum State,"<sup>243</sup> then the Court will have wrought a most significant, as well as salutary, procedural change.

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243. 105 S. Ct. at 2184.