Articles

WHY GENERAL PERSONAL JURISDICTION OVER "VIRTUAL STORES" IS A BAD IDEA

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Your client, a corporation, has just told you that it is ready to get on the bandwagon and start selling its goods over the internet. To accomplish this, it has made arrangements with a web design company, a web hosting company, and a company that will process credit card payments made on your client's website, all for a reasonable price. Should you advise your client that by setting up shop on the internet, it may well be establishing a "virtual store" accessible not only throughout the United States but in much of the world? (Your client would probably be happy about that.) Should you advise your client that, because of this virtual store, it may be subject to personal jurisdiction in the courts of any state (at least those that have residents who purchased the store's goods via the internet)? Should you advise your client that this jurisdiction might exist even when the claim has nothing to do with that state, but that the plaintiff's attorney brought suit there because, for example, it was the only state in which the statute of limitations had not expired? In light of some recent cases, perhaps you should. (And perhaps your client would not be so happy about that.)

Courts in the United States today address the constitutional permissibility of personal jurisdiction by discussing two sub-types: "specific jurisdiction" and "general jurisdiction." "Specific jurisdiction"

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may exist "in a suit arising out of or related to the defendant's contacts with the forum."[1] "General jurisdiction" may exist "in a suit not arising out of or related to the defendant's contacts with the forum."[2] This terminology was first proposed by Professors Arthur T. von Mehren and Donald T. Trautman in 1966,[3] and it was first embraced by the United States Supreme Court in 1984 in *Helicopteros Nacionales de Columbia v. Hall.*[4] The distinction, however, was clearly recognized in the Court's landmark decision in *International Shoe Co. v. Washington*,[5] as well as earlier jurisdictional decisions.[6]

Specific jurisdiction may be constitutionally permissible based on a single purposeful contact the defendant has with the forum state if that contact has a strong enough relationship to the claim.[7] General jurisdiction, on the other hand, requires that a corporate defendant have "continuous and systematic general business contacts" with the forum state.[8]

Over the past few years, courts have begun to address whether maintenance of a business oriented website that is accessible to and used by residents of a state can be a sufficient anchor for the constitutional assertion of general jurisdiction in that state.[9] At the level of the United States courts of appeals, a split of authority is developing. The D.C.

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1. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

2. *Id.* at 414 n.9.

3. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). As discussed by Professor Friedrich Juenger, "Although the terminology is of recent vintage, the distinction between general and specific jurisdiction is ancient." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 143.

4. *Helicopteros Nacionales*, 466 U.S. at 414 nn.8-9.

5. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317-19 (1945) (distinguishing suits where the claims are unconnected with the defendant's activities in the forum from cases where the obligations sued upon "arise out of or are connected with the activities within a state").

6. *See, e.g.*, Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (distinguishing suits "arising out of a legal transaction entered into where the suit was brought" from "suits arising out of foreign transactions").

7. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

8. *Helicopteros Nacionales*, 466 U.S. at 415-16.

9. In a 1998 article, Professor Howard B. Stravitz stated that "[w]ith one notable exception, courts have universally rejected the argument that putting up a generally accessible web site permits assertion of general jurisdiction over the web site creator." Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 934 (1998). Things have changed in the intervening years.

Circuit in *Gorman v. Ameritrade Holding Corp.*,[10] and the Ninth Circuit in *Gator.com Corp. v. L.L. Bean, Inc.*,[11] have held that maintenance of a website accessible and used by residents of a state can create general jurisdiction in that state,[12] with the Ninth Circuit labeling L.L. Bean's website a "virtual store."[13] The Fourth, Fifth, Sixth, Tenth, and Federal Circuits, all after relatively short discussions, have held that there is no general jurisdiction in these cases, at least on the facts before them.[14]

This Article argues that the *Gorman* and *Gator.com* cases were improvident and wrongly decided, and that general jurisdiction over virtual stores is inconsistent with any principled development of the law of general jurisdiction. Part I will describe the development of general personal jurisdiction in the United States Supreme Court, a development that was, at best, murky before—becoming only slightly less so after—the watershed personal jurisdiction case of the twentieth century, *International Shoe Co. v. Washington.*[15]

Part II will describe the current state of general personal jurisdiction in the lower courts, with primary focus on the United States courts of appeals. This Part will illustrate some inconsistencies and vagueness in the case law, which make the application of general jurisdiction much less predictable than is desired.

With Parts I and II as a backdrop, Part III will describe more fully the opinions in *Gorman* and *Gator.com*. Part IV will discuss why these decisions were improvident and wrongly decided by highlighting several problems in the legal reasoning and use of precedent in the opinions. This Part will then discuss how such general jurisdiction over virtual stores will exacerbate the problem of the use of indeterminate standards to determine general jurisdiction. It will note how easy it is to set up a

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10. Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002).

11. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003) *reh'g granted*, 366 F.3d 789 (9th Cir. 2004), *reh'g dismissed as moot due to settlement*, 398 F.3d 1125 (9th Cir. 2005).

12. The Eighth Circuit, in *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704 (8th Cir. 2003), though disagreeing with some of the reasoning of *Gorman* and *Gator.com*, *id.* at 711, also suggested that general jurisdiction may be premised on a website, *Id.* at 711-14 (remanding for jurisdictional discovery). A Pennsylvania appellate court also found general personal jurisdiction based on a defendant's website. Mar-Eco, Inc. v. T & R Sons Towing & Recovery, Inc., 837 A.2d 512 (Pa. Super. 2003).

13. *Gator.com*, 341 F.3d at 1078.

14. Hockerson-Halberstadt, Inc. v. Propet USA, Inc., 62 Fed. Appx. 322 (Fed. Cir. 2003); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002); Bird v. Parsons, 289 F.3d 865 (6th Cir. 2002); Soma Med. Int'l. v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999).

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

"virtual store" and how jurisdiction over such stores poses the possibility that almost *any* internet seller of goods may be subject to general jurisdiction, at least in states in which they have regular sales. Part IV will then discuss how the reasoning of the opinions raises the likelihood that some internet sellers, such as Ameritrade and L.L. Bean, will be subject to general personal jurisdiction in every state—a result that several courts have reflexively rejected—which would multiply opportunities for plaintiffs to forum-shop, which could result in an increase in costly litigation. Finally, this part will discuss how such jurisdiction is inconsistent with international norms and how, if applied to foreign defendants, it will raise problems with international relations and trade.

This Article will conclude with a call for the courts of appeals to abandon the concept of general jurisdiction over virtual stores or for the Supreme Court to take up the issue and provide some much-needed guidance on the constitutional limitations of general jurisdiction.

I. GENERAL PERSONAL JURISDICTION IN THE UNITED STATES SUPREME COURT

A. Pre-International Shoe

The 1877 case of *Pennoyer v. Neff*[16]established that states could assert personal jurisdiction over individuals who were served with process while present in the state or who voluntarily appeared to defend the action.[17] Process sent to an individual defendant outside of the state was insufficient.[18] In the terminology we use today, such jurisdiction was "general" personal jurisdiction; the opinion gave no indication that the nature of the claim needed some relationship to the forum state.[19] Dicta in *Pennoyer* indicated that corporations could be subject to such jurisdiction in their state of incorporation.[20]

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16. Pennoyer v. Neff, 95 U.S. 714 (1877).

17. *Id.* at 733-34 ("[F]or any other purpose than to subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'") (quoting COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 405 (1st ed. 1868)).

18. *Id.* at 727 ("Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.").

19. The constitutional validity of general personal jurisdiction over individuals served within the forum state was reaffirmed in *Burnham v. Superior Court*, 495 U.S. 604 (1990).

20. *Pennoyer*, 95 U.S. at 735 ("Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their

The 1940 decision in *Milliken v. Meyer* held that individual defendants are also subject to general personal jurisdiction in the state of their domicile.[21] The Court's early decisions on other bases for the assertion of general jurisdiction over corporations, however, are few in number and unclear in reasoning.

Five years after *Pennoyer*, in *St. Clair v. Cox*, the Court addressed the jurisdiction of a Michigan court over an Illinois corporate defendant.[22] Discussing earlier precedent from various state courts, the Court said that the view that a corporation could not be sued outside of the state in which it was chartered "has been accepted as correctly stating the law."[23] The Court characterized this rule as "the cause of much inconvenience and often of manifest injustice."[24] Noting that corporations in 1882 carried on extensive operations beyond their states of incorporation,[25] the Court said that states other than the state of incorporation could assert personal jurisdiction over corporations. It established as a condition, however, that the record must show "that the corporation was engaged in business in the state."[26] In addition, the rule it adopted is phrased such that it permits only what is known today as "specific jurisdiction":

> The state may . . . impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in

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conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members.").

21. Milliken v. Meyer, 311 U.S. 457, 463 (1940) ("Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service. As in case of the authority of the United States over its absent citizens, the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state." (citation omitted)).

22. St. Clair v. Cox, 106 U.S. 350, 351 (1882).

23. *Id.* at 354-55.

24. *Id.* at 355.

25. *Id.*

26. *St. Clair*, 106 U.S. at 359. The Court found insufficient evidence of this in the case and thus held that the Michigan court lacked personal jurisdiction. *Id.* at 359-60. The requirement that the corporation must be engaged in business in the state precluded jurisdiction in *Conley v. Matheson Alkali Works*, 190 U.S. 406 (1903), a case involving facts that today might easily warrant specific jurisdiction. Plaintiff, a citizen of New York, sued defendant in New York for breach of an employment contract, allegedly made in New York in 1893. *Id.* at 406-07. Although a master's report stated that the defendant had owned and operated a plant in New York prior to December 31, 1900, it concluded that at the time of service in 1901, the defendant had sold those operations and was not doing business in New York. *Id.* at 408-09. Citing the *St. Clair* rule that the corporation must be doing business within the forum state, the court dismissed the case for lack of personal jurisdiction. *Id.* at 411.

> any *litigation arising out of its transactions in the state*, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just.[27]

Goldey v. Morning News of New Haven,[28] decided in 1895, held that service on a corporation's president while he was temporarily in the state was not sufficient for jurisdiction over a corporation "neither incorporated nor doing business within the state."[29] Subsequent cases suggested, however, that the *corporation* could be subject to personal jurisdiction if it was "present" in the state.[30] This was clearly an analogy to *Pennoyer's* rule that individual defendants could be subject to jurisdiction if they were served while present in the state.

Two Supreme Court cases in the early 1900s had fact patterns such that today, most likely, the only plausible theory of personal jurisdiction would be general jurisdiction, not specific jurisdiction.[31] In both, the Court concluded that jurisdiction was not permissible.

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27. *St. Clair*, 106 U.S. at 356 (emphasis added).

28. Goldey v. Morning News of New Haven, 156 U.S. 518 (1895).

29. *Id.* at 521-22.

30. *See, e.g.*, Philadelphia & Reading Ry. v. McKibben, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such a manner and to such extent as to warrant the inference that it is present there."); Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530, 532 (1907) (holding that jurisdiction based on service on a corporate agent in Pennsylvania "depends upon whether the corporation was doing business [in Pennsylvania] in such a manner and to such an extent as to warrant the inference that, through its agents, it was present there").

31. In a third case with such a fact pattern, the Court found personal jurisdiction by consent. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93 (1917), was a suit in Missouri on an insurance policy issued in Colorado by an Arizona corporation insuring buildings in Colorado. The defendant had obtained a license to do business in Missouri and in compliance with a Missouri statute, had filed with the superintendent of the Missouri insurance department a power of attorney consenting that service of process upon the superintendent should be deemed personal service on the company. The suit was begun with such service on the superintendent. *Id.* The defendant asserted that the service was insufficient and that if it was construed to govern the present case, it would deny the defendant due process. *Id.* The Supreme Court of Missouri held that the statute applied and was consistent with the United States Constitution. *Id.* at 94. The United States Supreme Court affirmed on the ground that by filing the power of attorney, the defendant had consented to personal jurisdiction in the case. *Pennsylvania Fire*, 243 U.S. at 95.

The validity of *Pennsylvania Fire* as precedent today is in dispute. *Compare* Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) ("To assert, as plaintiffs do, that mere service on a corporate agent automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles. This concept is directly contrary to the historical rationale of *International Shoe* and subsequent Supreme Court decisions."), *and* Freeman v. Second Judicial Dist. Court, 1 P.3d 963 (Nev. 2000)

In the first, *Green v. Chicago, Burlington, & Quincy Railway*,[32] plaintiffs brought suit in federal court in Pennsylvania to recover for injuries sustained in Colorado through the alleged negligence of the corporate defendant.[33] The defendant's contacts with Pennsylvania consisted of an office in the state, a person at the office designated as district freight and passenger agent, other employees in the office, and advertising and solicitation of passengers and freight to be transported on the defendant's railroad line outside of the state.[34] Re-phrasing the inquiry from "presence" to whether the facts show that the defendant was "doing business" in the state, the Court said it was "obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers."[35] Nevertheless, the court found no jurisdiction:

> The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it.[36]

Similarly, in *Philadelphia & Reading Railway Co. v. McKibben*, the plaintiff sued a Pennsylvania corporation for injuries sustained at one of the defendant's New Jersey freight yards in a federal district court in New York.[37] The Court noted that the defendant, like other railroads, sent loaded freight cars into New York using connecting carriers, which returned the cars to the defendant over time.[38] Another railroad also sold "customary coupon tickets" in New York over its own and connecting lines, including defendant's line, for which the defendant would receive an "ultimate accounting."[39] There were also signs in the

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(holding that general jurisdiction under a statutory scheme like that involved in *Pennsylvania Fire* was inconsistent with more recent Supreme Court decisions), *with* Bohreer v. Erie Ins. Exch., 165 P.3d 186 (Ariz. App. 2007) (finding general jurisdiction based on the authority of *Pennsylvania Fire*); *see generally* Cognitronics Imaging Sys. v. Recognition Research Inc., 83 F. Supp. 2d 689, 692-93 (E.D. Va. 2000) (discussing and citing cases on both sides of the issue).

32. Green v. Chicago, Burlington, & Quincy Ry., 205 U.S. 530 (1907).
33. *Id.* at 531.
34. *Id.* at 532-33.
35. *Id.* at 533.
36. *Green*, 205 U.S. at 533-34.
37. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 266 (1917).
38. *Id.*
39. *Id.* at 267.

terminal and a telephone listing with the defendant's name, directing persons to the railroad that sold the coupon tickets.[40] Asking whether the defendant was "doing business within the state in such manner and to such extent as to warrant the inference that it is present there,"[41] and citing *Green* favorably, the Court again answered in the negative:

> The finding that the defendant was doing business within the state of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. Obviously the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every state.[42]

Unfortunately, however, application of the "presence" test became confusing because it found its way into decisions involving what we would call today specific jurisdiction. In using the terminology in both types of cases, the Court seemed to reach inconsistent results. For example, six years after *Green*, in *St. Louis Southwestern Railway v. Alexander*[43] (a case we would characterize today as one of specific jurisdiction) the plaintiff brought a claim in New York to recover damages for negligence in shipping poultry from Texas to New York.[44] The Court found that the defendant's office with a general freight agent and passenger agent, and a traveling freight agent, were sufficient for personal jurisdiction even though the defendant had lesser contacts than did the defendant in *Green*.[45] One year later, in *International Harvester Co. v. Kentucky*[46] (another case involving what today would be specific jurisdiction) the Court characterized *Green* as "an extreme case"[47] and found jurisdiction permissible based on consistent solicitation of orders and delivery of machines in Kentucky.[48]

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40. *Id.*
41. *Philadelphia & Reading Ry. Co.*, 243 U.S. at 265.
42. *Id.* at 268.
43. St. Louis Sw. Ry. Co. of Texas v. Alexander, 227 U.S. 218, 226 (1913).
44. *Id.* at 222;*see also id.* at 223 (circuit court held that the action arose in New York).
45. *Id.* at 228.
46. Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 589 (1914) (concluding that the defendant's activities in Kentucky "manifest its presence within the state"). The case involved the sufficiency of process of a Kentucky court for a criminal proceeding alleging violation of Kentucky antitrust laws. *Id.* at 582.
47. *Id.* at 586.
48. *Id.* at 585.

It was only three years after *International Harvester*, however, that the Court decided *McKibben*, the second general jurisdiction case described above,[49] in which the Court explicitly reaffirmed the holding of *Green* and concluded that the sale by another carrier of the defendant's coupon tickets was insufficient for jurisdiction.[50] And only one year after *McKibbin*, in *People's Tobacco Co. v. American Tobacco Co.*,[51] a case whose characterization under current terminology is unclear,[52] the Court relied on *Green* in finding no jurisdiction when the defendant advertised and solicited business in the state.[53]

During this period, the Supreme Court never articulated any reconciliation of these seemingly disparate results.[54] Instead, the Court in *People's Tobacco* stressed that "[e]ach case depends upon its own facts."[55] It continued with a fully conclusionary test:

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49. *See supra* notes 37-42 and accompanying text. Perhaps counsel for the defendant in *McKibbin* perceived a distinction in the cases between what we now call specific and general jurisdiction, as the Court, towards the end of the opinion, stated:

> As the defendant did no business in New York, we need not consider its other contention, that it could not be sued there on a cause of action arising in New Jersey, and in no way connected with the business alleged to be done in New York. On this proposition we express no opinion.

McKibben, 243 U.S. at 268-69.

50. *Id.* at 281-82.

51. People's Tobacco Co. v. Am. Tobacco Co., 246 U.S. 79, 84 (1918) (framing the issue in construing the Sherman Act as whether defendant was "present" within the district).

52. The suit was in Louisiana for violation of the federal Sherman Act of 1890. *Id.* at 83. It presumably was based, in part, on conduct in Louisiana because defendant had owned a factory in Louisiana, which had been sold before service was made. *Id.* at 84.

53. *Id.* at 87. The Court distinguished *International Harvester* by noting that in the present case the soliciting agents had no authority beyond solicitation, while the agents in *International Harvester* had authority to receive payment on behalf of the company. *People's Tobacco Co.*, 246 U.S. at 87-88.

54. Professor Robert Casad, discussing the early cases, concluded that "the results were inconsistent, with one exception: A corporation was not considered to be doing business if its only activity within the state was 'mere solicitation' for interstate commerce." ROBERT C. CASAD, *Territorial Jurisdiction Over Persons and Property*, *in* 16 MOORE'S FEDERAL PRACTICE–CIVIL § 108.23[1][b][iv] (3d. ed. 2007).

55. *People's Tobacco Co.*, 246 U.S. at 87; *see also* St. Louis Sw. Ry. Co. of Texas v. Alexander, 227 U.S. 218, 247-48 (1913) ("This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction."); Green v. Chicago, Burlington, & Quincy Ry., 205 U.S. 530, 533-34 (1907) (finding no jurisdiction "[w]ithout undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred . . . .").

> The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.[56]

The confusion generated by these cases was reflected in *Hutchinson v. Chase & Gilbert*, a decision by the Court of Appeals for the Second Circuit, which clearly articulated what we understand today to be the difference between specific and general jurisdiction.[57] Writing for the court, Judge Learned Hand lamented, "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[58] His opinion concluded, "one may look from one end of the decisions to the other and find no vade mecum."[59]

B. International Shoe *and Subsequent Supreme Court Decisions on General Personal Jurisdiction over Corporate Defendants*

The 1945 decision in *International Shoe v. Washington*[60] shifted the conceptual basis of personal jurisdiction from physical power to "traditional notions of fair play and substantial justice."[61] It also appeared to signal a fresh start after the confusion engendered by the Court's earlier decisions.

International Shoe originated as a suit by the State of Washington in Washington courts to recover unpaid contributions to the state unemployment compensation fund.[62] The required contributions were a percentage of the wages paid for the services of the defendant's

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56. *Id.*

57. Hutchinson v. Chase & Gilbert, 45 F.2d 139, 140 (2d Cir. 1930).

> Process was served in New York upon the defendant's vice president, who chanced to be there, and the only question is whether the defendant was 'present' in such sense that it could be reached in a cause of action arising upon a contract, made in the course of the same activities on which the defendant's supposed 'presence' depends. For this reason we have not before us the question . . . whether without express consent a foreign corporation may be sued upon transactions arising outside the state of the forum.

Id.

58. *Id.* at 142.

59. *Id.*

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

61. *Id.* at 316 (internal citation omitted).

62. *Id.* at 311.

employees in the state.[63] The defendant's employees in Washington displayed shoe samples and transmitted orders to the defendant's headquarters "for acceptance or rejection."[64]

Rejecting the defendant's argument that there was no jurisdiction because its activities within the State of Washington were not sufficient to manifest its "presence,"[65] the Court said,

> To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.[66]

With language that reflects our modern day distinctions of specific and general jurisdiction, the Court continued:

> 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there . . . . While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there 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.[67]

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63. *Id.* at 312.
64. *Int'l Shoe*, 326 U.S. at 313-14.
65. *Id.* at 315.
66. *Id.* at 316-17 (internal citation omitted).
67. *Id.* at 317-18 (internal citations omitted). The Court cited three cases after the final phrase of the quotation, which reflects the modern category of general personal jurisdiction. The first was *Missouri, Kansas & Texas Railway. Co. v. Reynolds*, 255 U.S. 565 (1921), a one sentence per curiam opinion affirming *Reynolds v. Missouri, Kansas & Texas Railway Co.*, 123 N.E. 235 (Mass. 1919). The decision affirmed involved costs and contained no discussion of personal jurisdiction. Two earlier opinions in the same case, however, did discuss the issue. In *Reynolds v. Missouri, Kansas & Texas Railway. Co.*, 113 N.E. 413

The Court then noted that some earlier cases had found jurisdiction over foreign corporations on the "legal fiction" of implied consent.[68] As it had with "presence," the Court also discounted this terminology as a conclusionary label, explaining that "more realistically" the acts of authorized corporate agents in the state "were of such a nature as to justify the fiction."[69]

The ultimate result in *International Shoe* was that the defendant was subject to jurisdiction; under today's terminology, the defendant was subject to specific jurisdiction, not general jurisdiction. "The obligation which is here sued upon arose out of those very activities [performed on behalf of appellant in the State of Washington.]"[70]

Since *International Shoe*, the Supreme Court has ruled on the permissibility of general jurisdiction over corporate defendants only twice. In 1952, in *Perkins v. Benguet Consolidated Mining Co.*,[71] the defendant was sued in Ohio, where it carried on "a continuous and systematic, but limited, part of its general business."[72] The plaintiff's claim "did not arise in Ohio and does not relate to the corporation's activities there."[73] The Court described the defendant's business in Ohio as follows:

(Mass. 1916), the defendant had an agent in Massachusetts representing the defendant as its "New England passenger agent, with headquarter in Boston," compensated by commissions on tickets sold in six New England states. *Id.* The court said that "the importance of this branch of the defendant's business depends somewhat upon its magnitude. But the inference seems fair . . . that it is considerable," and "outside a simple solicitation of business." *Id.* at 415. And in *Reynolds v. Missouri, Kansas & Texas Railway. Co.*, 117 N.E. 913 (Mass. 1917), the court concluded that it was of no consequence that the promissory notes sued upon were made or negotiated outside the forum state. *Id.* at 914.

The second case cited was *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917). In *Tauza*, the court found that New York could assert the equivalent of general jurisdiction over a Pennsylvania corporation that had a sales agent with eight salesmen and other employees under him and a suite of offices in New York, which the court characterized as these employees' "headquarters." *Id.* at 916, 918 ("We hold . . . that the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted.").

The third case cited, preceded by a "*cf.*" signal, was *St. Louis Southwestern Railway Co. v. Alexander*, 227 U.S. 218 (1913), discussed previously as a case with a fact pattern suggesting that it was a specific jurisdiction case. *See supra* notes 43-45 and accompanying text.

68. *Int'l Shoe*, 326 U.S. at 318.
69. *Id.*
70. *Id.* at 320.
71. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
72. *Id.* at 438.
73. *Id.*

> The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.[74]

The Court purported to apply the "tests" of *International Shoe*, saying that "[t]he essence of the issue here, at the constitutional level, is . . . one of general fairness to the corporation."[75] It held that the assertion of jurisdiction would not violate due process,[76] but provided little reasoning beyond the factual recitation quoted above and quotation of *International Shoe's* discussion of suits on causes of action arising from dealings distinct from forum activities.[77]

The Court made no significant reference to the jurisdictional holding in *Perkins* until 1984, in *Keeton v. Hustler Magazine, Inc*.[78] In *Keeton*, the Court found that specific personal jurisdiction existed in a defamation suit arising from a magazine distributed throughout the nation where ten to fifteen thousand copies were sold monthly in the forum.[79] In reaching this conclusion, the Court contrasted *Perkins*,

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74. *Id.* at 447-48.
75. *Perkins*, 342 U.S. at 445.
76. *Id.* at 448.
77. *Id.* at 446 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318-19 (1945)).
78. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).
79. *Id.* at 772-74.

saying that "respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities."[80] In an accompanying footnote, the Court summarized the *Perkin's* defendant's activities in Ohio and stated, "In those circumstances, Ohio was the corporation's principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State."[81]

The Court's second post-*International Shoe* decision passing directly on the permissibility of general jurisdiction was decided the same year as *Keeton*. *Helicopteros Nacionales de Columbia v. Hall*[82] was a wrongful death suit brought in Texas against a Columbian corporation with its principal place of business in Columbia after the defendant's helicopter crashed in Peru.[83] The Court framed the issue as whether the defendant corporation's contacts with Texas "were sufficient to allow a Texas state court to assert jurisdiction over the corporation in a cause of action not arising out of or related to the corporation's activities within the state."[84] Later in the opinion, the Court continued, "We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*."[85]

The defendant's contacts with Texas included a trip to the state for a negotiation session regarding the purchase of helicopters and, during the years 1970-1977, the actual purchase of helicopters and related items from the Bell Helicopter Company in Texas for more than four million dollars (approximately eighty percent of the defendant's fleet).[86] It sent prospective pilots, management, and maintenance personnel to Texas for training and consultation, and to ferry the aircraft to South America.[87] It

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80. *Id.* at 779.
81. *Id.* at 779 n.11.
82. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).
83. *Id.* at 409-10.
84. *Id.* at 409. The Court stated 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 415-16. In his dissent, Justice Brennan criticized the majority for limiting its analysis to general jurisdiction, and concluded that the defendant had contacts with Texas that were "sufficiently important, and sufficiently related to the underlying cause of action" to permit the assertion of personal jurisdiction. *Helicopteros Nacionales*, 466 U.S. at 419-20 (Brennan, J., dissenting).
85. *Id.* at 415-16.
86. *Id.* at 411.
87. *Id.*

also received more than five million dollars in payments that were drawn on a Texas bank.[88]

The Court concluded that these contacts were not sufficient for the permissible exercise of general jurisdiction. It said that the one trip for negotiations "cannot be described as a contact of a 'continuous and systematic' nature, as *Perkins* described it . . . ."[89] It dismissed the significance of accepting checks drawn on a Texas bank, because "[c]ommon sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee."[90]

Turning to the more substantial contacts of purchases, related training, and consultation, the Court quickly rejected their sufficiency by invoking a precedent from 1923, *Rosenberg Bros. & Co. v. Curtis Brown Co.*[91] According to the Court, *Rosenberg* "makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction."[92] Noting that *International Shoe* "acknowledged and did not repudiate its holding in *Rosenberg*," the Court concluded that the precedent precluded the permissibility of jurisdiction.[93]

II. GENERAL PERSONAL JURISDICTION IN THE LOWER COURTS SINCE *HELICOPTEROS*

Perkins supports the proposition that general jurisdiction can constitutionally be asserted over corporations in the state of their principal, albeit temporary, place of business. *Helicopteros* supports the proposition that general jurisdiction may not be based on significant purchases in a state over a seven-year period. Needless to say, there is a wide range of possible fact patterns between these two placeholders.

Some lower court decisions on general jurisdiction reason by analogy, asking whether the facts of the case are similar to those in

88. *Helicopteros Nacionales*, 466 U.S. at 411.
89. *Id.* at 416.
90. *Id.* at 416-417 (footnote omitted).
91. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).
92. *Helicopteros Nacionales*, 466 U.S. at 417.
93. *Id.* at 418. The Court read *Rosenberg* as arguably foreclosing both general and specific jurisdiction based on purchases, but stated that because *Helicopteros* involved general jurisdiction, the Court "need not decide the continuing validity of *Rosenberg* with respect to an assertion of specific jurisdiction." *Id.* at 418 n.12.

Perkins or *Helicopteros.*[94] It is fair to say, however, that recent lower court case law on general jurisdiction is in a state of some disarray. This part of the Article will outline those cases, noting some problems along the way.

At the most restrictive end of the spectrum, one decision, review of which was denied by the Supreme Court, suggests that general jurisdiction over foreign corporations should be limited to the state of incorporation and the state of the corporation's principal place of business. *Follette v. Clairol, Inc.* was a case brought in Texas against Clairol and Wal-Mart arising from an accident in Louisiana.[95] The claim had no relationship to Texas, and the reason it was filed there was to obtain the benefit of the Texas statute of limitations.[96]

Notwithstanding contacts the defendants had with Texas, which easily could be described as substantial, systematic, and continuous,[97]

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94. *See, e.g.*, Wilson v. Belin, 20 F.3d 644, 650 (5th Cir. 1994) (finding no general jurisdiction where defendants' "unrelated contacts with Texas were not as 'continuous and systematic' and, in any event, were not as 'substantial' as the nonresident defendant's contacts in *Perkins*"); L.H. Carbide Corp. v. Piece Maker Co., 852 F. Supp. 1425, 1436 (N.D. Ind. 1994) (finding no general jurisdiction where "[t]he facts of *Helicopteros* . . . are somewhat analogous to the facts in the instant case").

95. Follette v. Clairol, Inc., 829 F. Supp. 840, 842 (W.D. La. 1993), *aff'd without opinion*, 998 F.2d 1014 (5th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994).

96. *Id.*

97. *Id.* at 845-46. In resolving the issue of general jurisdiction, the court noted the defendants' contacts with Texas as follows:

> Both Clairol and Wal-Mart have substantial and continuous contacts with Texas. They are both authorized to do business in Texas. As required by law, they have appointed agents for service of process in Texas. Wal-Mart's additional contacts with Texas include:
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> 1. Operation of approximately 264 large scale retail outlets in Texas;
> 2. Deriving substantial income from the sale of goods in Texas;
> 3. Ownership of real and personal property located in Texas;
> 4. Ownership of a Texas corporation;
> 5. Employment of a substantial number of Texas residents . . . .
>
> Clairol's contacts with Texas include:
>
> 1. Location of a business office in Texas;
> 2. The location of division regional offices in Texas;
> 3. Ownership of personal property located in Texas;
> 4. Payment of Texas property taxes;
> 5. Deriving substantial revenue from the sale and marketing of its products in Texas;
> 6. Payment of Texas franchise taxes.

Id.

the court rejected the argument that such contacts should be sufficient for general jurisdiction:

> There are persuasive arguments that the states with power to exercise general personal jurisdiction over a corporation should be limited to the state of incorporation and the state where the corporation's principal place of business is located. This court agrees that this is the "fair" and "reasonable" place to draw the line on permissible exercise of general personal jurisdiction under the circumstances presented in *this case*.[98]

The United States Court of Appeals for the Fifth Circuit affirmed the decision without a written opinion,[99] and a petition for certiorari to the Supreme Court was denied.[100]

Uncertainty ensues once one goes beyond the relatively clear limitations on general jurisdiction suggested by *Follette*. A number of courts suggest that general jurisdiction is permissible if the corporation is "present" within the forum state, invoking the terminology used in the pre-*International Shoe* era. This "test" is used notwithstanding the statement in *International Shoe* that "[t]o say that the corporation is so far 'present' there as to satisfy due process requirements . . . is to beg the question to be decided."[101] The term is also used notwithstanding the Supreme Court's, at least implicit, abandonment of it as a test after *International Shoe*, as the term does not appear at all in *Perkins* and it is used only once, in a quotation of a 1923 case, in *Helicopteros*.[102]

For example, the United States Court of Appeals for the Fifth Circuit has asked whether the defendant's contacts with the forum constitute a "general presence"[103] or a "business presence."[104] The Sixth Circuit also focuses on "presence."[105] Some other circuits have asked

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98. *Follette*, 829 F. Supp. at 846 (referencing Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988)) (internal citation omitted).

99. Follette v. Clairol, Inc., 998 F.2d 1014 (5th Cir. 1993).

100. Follette v. Clairol, Inc., 510 U.S. 1163 (1994).

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

102. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417 (1984) (quoting Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923)).

103. Bearry v. Beech Aircraft Corp., 818 F.2d 370, 376 (5th Cir. 1987).

104. Access Telecom, Inc. v. MCI Telecommc'ns Corp., 197 F.3d 694, 717 (5th Cir. 1999).

105. *See* Michigan Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 464-65 (6th Cir. 1989) ("A foreign corporation must actually be present within the forum state on a regular basis, either personally or through an independent agent, in order to be subjected to general personal jurisdiction.") (quoting Kircos v. Lola Cars Ltd., 296 N.W.2d 32, 35 (Mich. App. 1980)).

the same question with only minor modification. The Ninth Circuit has said that the defendant's contacts must be "activity that approximates physical presence within the state's borders."[106] The Fourth Circuit has asked "whether a defendant's contacts with the forum state are so substantial that they amount to a surrogate for presence."[107]

A crucial question remains: what types of contacts should suffice to meet these (or similar) tests used for general jurisdiction? Some decisions generalize that "the level of contact with the forum state necessary to establish general jurisdiction is quite high."[108] Others say that "the constitutional requirement for general jurisdiction is 'considerably more stringent' than that required for specific jurisdiction."[109] But such generalizations do nothing to clarify the issue of what types of facts will suffice. The remainder of this part of the Article will discuss four general fact patterns for which arguments have been made, and sometimes adopted by courts, as anchors for a finding of general jurisdiction. It will also touch upon one other issue, called "the reasonableness prong," on which there is a division of opinion.

A. A Continuous Physical Business Presence

One sentence in *Helicopteros* reads, "It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State,"[110] arguably implying that this is required. Some lower court decisions do suggest that such a presence is

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106. Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

107. ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997); *see also* Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 787 (7th Cir. 2003) ("[The defendant's] contacts must be so extensive to be tantamount to . . . being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in [the forum state] in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world.").

108. *See, e.g.*, Shute v. Carnival Cruise Lines, 897 F.2d 377, 380 (9th Cir. 1990) (citing Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

109. Purdue Research Found. v. Sanofi-Synthelabo, S.A., 388 F.3d 773, 787 (7th Cir. 2003) (quoting United States v. Swiss American Bank, 274 F.3d 610, 618 (1st Cir. 2001)); *see also* ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997) ("[T]he threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." (citation and internal quotation marks omitted)).

110. *Helicopteros Nacionales*, 466 U.S. at 416.

required.[111] But can that presence be less than the defendant's principal place of business, which sufficed for a finding of jurisdiction in *Perkins*?

The Second Circuit has described *Perkins* as involving "a central office location for supervisory activities," implying that at least that sort of presence would suffice.[112] Other cases have found that less important forms of a physical business presence are sufficient. In a case involving a brick and mortar analogy to the "virtual store" in *Gator.com*, the Eighth Circuit held that operating retail stores in the forum and having a registered agent there for service of process was sufficient for jurisdiction.[113] And in *Rittenhouse v. Mabry*,[114] the Fifth Circuit found general jurisdiction based on the operation of an office in the state only one day per week. *Rittenhouse* involved a suit brought in Mississippi against a foreign professional corporation, whose only member was a physician who was also a defendant in the suit in his individual capacity.[115] Service was made at a Mississippi clinic where the physician regularly practiced one day a week.[116] The court found this scenario to be analogous to the contacts in *Perkins*:

> Gastroenterology conducted its affairs in Mississippi every fifth business day. This conduct was calculated rather than fortuitous and regular and continuous rather than sporadic or isolated. Moreover, the business conducted in Mississippi was not only essentially local in character but was performed there through the nerve center, heart, and soul of the corporation, namely, Dr. Wardlaw (who was then licensed to practice in Mississippi), and necessarily amounted, at those times, to almost all the business then being done by the corporation. *See Perkins*.[117]

Notwithstanding cases like *Rittenhouse*, sometimes an office in the state will not suffice. In *MacInnes v. Fontainebleau Hotel Corp.*, for

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111. *See, e.g.*, Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995) ("[Defendant's] lack of a regular place of business in Washington is significant, and is not overcome by a few visits."); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1331 (9th Cir. 1984) ("Significantly, the defendants did not establish a regular place of business in Arizona."); Kircos v. Lola Cars Ltd., 296 N.W.2d 32, 35 (Mich. App. 1980) ("A foreign corporation must actually be present within the forum state on a regular basis, either personally or through an independent agent, in order to be subjected to general personal jurisdiction.").

112. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 571 (2d Cir. 1996).

113. Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1075 (8th Cir. 2004).

114. Rittenhouse v. Mabry, 832 F.2d 1380 (5th Cir. 1987).

115. *Id.* at 1389.

116. *Id.* at 1388 n.6.

117. *Id.* at 1390.

example, the Second Circuit held that the defendant Florida hotel was not subject to general jurisdiction in New York even though it had an office in the state staffed with three employees.[118]

The difficulty in finding a coherent rule from these cases is easy to see. Some case law suggests that some sort of significant physical business presence will suffice for general jurisdiction, but the significance of the required presence may be subject to debate. Additionally, there is case law suggesting that such a presence is not always a pre-requisite.[119]

B. Significant Purchases

One might reasonably believe that the Supreme Court's decision in *Helicopteros* established as a general proposition that making significant purchases in a state is not sufficient for that state to assert general personal jurisdiction over the purchaser. In *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*,[120] however, the Ninth Circuit found general personal jurisdiction where the facts appeared very analogous to those in *Helicopteros*.

Davies was a suit in federal court in Hawaii against the Marshall Islands and two of its agencies seeking damages for breach of a contract relating to the overhaul of a generator in the Marshall Islands.[121] The court ruled that the federal statute authorizing personal jurisdiction[122]

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118. MacInnes v. Fontainebleau Hotel Corp., 257 F.2d 832, 834-35 (2d Cir. 1958); *see also In re* Rationis Enters. Inc. of Panama, 261 F.3d 264, 270 (2d Cir. 2001) ("While a local office may constitute a 'continuous and systematic' contact sufficient to allow a court to hold that a defendant subjected itself to the general jurisdiction of the forum state, the presence of such an office is not dispositive.").

119. A leading treatise states that "[t]he continuous-and-systematic threshold usually requires, at least, that defendant have an office in the forum," but goes on to note that "some courts have asserted general jurisdiction based on lesser connections." ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2-5[3][a] (3d ed. 1998).

120. Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands, 174 F.3d 969 (9th Cir. 1999).

121. *Id.* at 971-72.

122. The statute being applied was 28 U.S.C. § 1330(b). *Id.* at 974.
28 U.S.C. §§1330(a) and (b) (2000) read as follows:

> §1330. Actions against foreign states
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

was constrained by the due process clause and that, in analyzing whether jurisdiction was permissible, it should consider the extent of the defendants' contacts with the United States.[123]

The court concluded that defendants' "contacts in the United States constitute a consistent and substantial pattern of business relations which warrant the exercise of general personal jurisdiction over them."[124] But the paragraph setting forth the facts preceding that conclusion begins, "For many years, [Defendants] have bought both goods and services from providers doing business or located in the United States."[125] The court then listed purchases from the Hawaii plaintiff of three generators from 1983-1990 at a cost of slightly less than two million dollars, noted that one defendant had solicited bids for the third generator in Hawaii, and noted that the overhaul agreement—which was the subject of this suit—had been negotiated in Guam with meetings also in Hawaii.[126]

The similarity of these facts to those in *Helicopteros* is stunning. The listed purchases were over the same period of years and for smaller amounts than those before the Supreme Court in *Helicopteros* and, as in *Helicopteros*, there were also some negotiations in the forum.[127] Yet, the Ninth Circuit appears to have been blind to these similarities, as the opinion makes no effort to explain how the cases are distinguishable.

C. Substantial Sales

"[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action."[128] So said the Ninth Circuit in 1984. Although this appears to reflect the majority view, it is not as absolute as the statement suggests.

> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. §§ 1330(a)-(b) (2000).

123. *Theo. H. Davies & Co.*,174 F.3d at 974.

124. *Id.* at 975.

125. *Id.* at 974-75.

126. *Id.* at 975. The fact that the overhaul agreement was negotiated in the United States would have supported a plausible argument for specific jurisdiction, as one could argue that those contacts were sufficiently related to the claim. Yet, the court expressly concluded that it was unnecessary to analyze specific jurisdiction in light of its general jurisdiction holding. *Theo. H. Davies & Co.*,174 F.3d at 975.

127. *See supra* notes 87-89 and accompanying text.

128. Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242 (9th Cir. 1984).

In *Nichols v. G.D. Searle & Co.*,[129] the Fourth Circuit found no general jurisdiction over Searle in Maryland, notwithstanding contacts including seventeen to twenty-one employees in Maryland who promoted Searle's products in the state and annual sales in Maryland of nine million to thirteen million dollars.[130] In coming to this conclusion, the court stated the following:

> As two leading jurisdictional commentators have noted, because specific jurisdiction has expanded tremendously, plaintiffs now may generally bring their claims in the forum in which they arose . . . . As a result, "obsolescing notions of general jurisdiction," which functioned primarily to ensure that a forum was available for plaintiffs to bring their claims, have been rendered largely unnecessary. Thus, broad constructions of general jurisdiction should be generally disfavored.[131]

Other circuits have also rejected general jurisdiction based on substantial sales,[132] sometimes distinguishing doing business *with* the forum state from doing business *in* it.[133]

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129. Nichols v. G.D. Searle & Co., 991 F.2d 1195 (4th Cir. 1993).

130. *Id.* at 1198. Additional contacts included holding regional and national meetings in Maryland for its district managers, contracting with a Maryland firm for some of its drug research, and purchases in the state. *Id.*

131. *Id.* at 1200 (citing and quoting Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1148-53, 1187-89 (1966)) (internal citations omitted).

132. *See, e.g.*, Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 787-88 (7th Cir. 2003) (rejecting general jurisdiction based on the defendant's knowing and intending its products to reach the forum because "the stream of commerce theory . . . is only relevant to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant"); Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1292-93 (11th Cir. 2000) (no general jurisdiction where defendant issued bonds and debentures, appointed an agent for service of process in connection with that offering, and marketed its products through a subsidiary in the forum); Burlington Indus., Inc. v. Maple Indus., Inc., 97 F.3d 1100,1103 (8th Cir. 1996) (purchasing equipment from and selling goods through non-parties in the forum is insufficient for general jurisdiction); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 372 (5th Cir. 1987) (no general jurisdiction where over a five-year period, nearly 250 million dollars of defendant's products flowed to independent dealers in the forum); Glater v. Eli Lilly & Co., 744 F.2d 213, 214-15, 217 (1st Cir. 1984) (no general jurisdiction where defendant advertised in trade journals circulated in the forum, employed eight sales representatives in the forum, and made sales to individual distributors in the forum).

133. *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1124-25 (9th Cir. 2002) (making the distinction that "engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state's borders").

Some precedent suggests, however, that general jurisdiction may be based primarily on substantial sales. The Sixth Circuit, for example, has issued two opinions on the sufficiency of sales that are difficult to reconcile. In *Michigan National Bank v. Quality Dinette, Inc.*,[134] the Sixth Circuit found general jurisdiction based primarily on one independent sales representative in the state, solicitation of business in the state, and sales in the state in the amounts of $347,968 and $279,557 over a two-year period.[135] Yet, in *Conti v. Pneumatic Products Corp.*,[136] decided three years later, the same court held that a plaintiff suing a defendant who sold its products in the forum through two distributors, with the annual sales of one distributor amounting to over $900,000, did not establish a "prima facie case" for general jurisdiction.[137]

Additionally, the Third Circuit has found general jurisdiction on a basis quite analogous to sales. In *Provident National Bank v. California Savings & Loan Ass'n*, the court found general jurisdiction in Pennsylvania over the defendant California bank based in part on the facts that between 700 and 1000 of its depositors resided in the forum and it purchased mortgages in the secondary market that could be secured by property in the forum.[138] The court stressed that "California Federal's activities relating to Pennsylvania, the borrowing and lending of money, are the bread and butter of its daily business."[139] Why that should make a difference was not explained. Surely sales are the bread and butter of the daily business of most sellers of goods. Yet, sales have not sufficed for the majority of courts.

Finally, although they appear to be in the minority, there are also a number of state appellate court decisions holding that general jurisdiction can be based on nothing more than substantial sales in the forum.[140]

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134. Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462 (6th Cir. 1989).

135. *Id.* at 465.

136. Conti v. Pneumatic Prod. Corp., 977 F.2d 978 (6th Cir. 1992).

137. *Id.* at 981. The Court's only reference to *Michigan National Bank* was its citation, preceded by a "But cf." signal. *Id.*

138. Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987). An additional basis was that it continuously maintained a "controlled disbursement account" with a Pennsylvania bank that was used every day. *Id.* at 436, 438.

139. *Id.* at 438.

140. *See, e.g.*, *Ex Parte* Newco Mfg. Co., 481 So.2d 867, 869 (Ala. 1985) (annual sales to residents of the forum ranging from sixty-five thousand to eighty-five thousand dollars were sufficient for general jurisdiction); Hayes v. Evergo Tel. Ltd., 397 S.E.2d 325 (N.C. App. 1990) (sales in the United States of thirty-five million dollars by Hong Kong limited company warranted general jurisdiction in North Carolina where defendant made no attempt

D. Lots and Lots of Contacts

Among the most frustrating cases finding general jurisdiction are those finding that it exists because the defendant has, in the court's view, a large number of contacts with the forum, without explaining how those contacts have significance. Two cases, one federal and one state, illustrate this point.

Metropolitan Life Insurance Co. v. Robertson-Ceco Corp. was an action filed in federal court in Vermont based on a claim unrelated to Vermont, apparently to take advantage of Vermont's statute of limitations.[141] The district court dismissed the case on the ground that the defendant did not maintain an office or agents in the state, owned no property in the state, and exercised no control over its independent dealers who sold its products.[142] The Second Circuit reversed.

The court of appeals began its analysis by saying "[t]here is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant's contacts *as a whole*."[143] Calling it "a close case,"[144] the court of appeals later summarized its reasoning justifying its finding of sufficient contacts:

> While it is true that Robertson "owned no property in Vermont, and exercised no control over its independent dealers," the contacts it did have with the state

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to limit the geographic distribution of its product); Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank, 592 N.W.2d 5, 9 (Wis. App. 1998) (sales to retail stores in Wisconsin for at least twenty years warrants general jurisdiction). *But see* Am. Type Culture Collection, Inc. v. Coleman, 83 S.W.3d 801, 807-10 (Tex. 2002) (annual sales to Texas residents of $350,000 for at least eighteen years did not warrant general jurisdiction).

141. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 565 (2d Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996).

142. *Id.* at 566.

143. *Id.* at 570. The Tenth Circuit, somewhat similarly, considers a number of factors in determining whether general jurisdiction is permissible. *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1533 (10th Cir. 1996):

> In order for general jurisdiction to lie, a foreign corporation must have a substantial amount of contacts with the forum state. In assessing contacts with a forum, courts have considered such factors as: (1) whether the corporation solicits business in the state through a local office or agents; (2) whether the corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which the corporation holds itself out as doing business in the forum state, through advertisements, listings or bank accounts; and (4) the volume of business conducted in the state by the corporation.

Id. (internal citation omitted).

144. *Metro. Life Ins. Co.*, 84 F.3d at 572.

> were more than sporadic and occasional. While Robertson's $4 million dollars [sic] in sales in Vermont between 1987 and 1993, standing alone, may not have been sufficient, its relationship with dealers selling its products and its so-called "authorized" builders, the visits to those dealers and builders by Robertson personnel, the advertising and support available to Vermont residents regarding Robertson's products, and the deliberate targeting of Vermont architectural firms as sales prospects, tips the balance in Met Life's favor and leads us to conclude that it satisfied the "minimum contacts" requirement of the due process test.[145]

Marshall v. The Inn on Madeline Island was a suit brought in state court in Minnesota arising out of an accident on vacation property in Wisconsin.[146] One defendant, a Wisconsin corporation that managed and rented the property to the public, moved to dismiss for lack of personal jurisdiction.[147] It was not licensed to do business in Minnesota, owned no property in Minnesota, and did not have any business office or an agent to accept service of process in Minnesota.[148] The Minnesota Court of Appeals concluded that this defendant's contacts with Minnesota would not support the exercise of specific jurisdiction.[149] It concluded, however, that general jurisdiction was constitutionally permissible, summarizing "the kind of systematic general business contacts that indicate the defendant has generally subjected itself to jurisdiction in this state" as follows:

> Here, The Inn's contacts with Minnesota include solicitation of business through advertisements in Minnesota publications and telephone calls and mail to residents of Minnesota who rent from The Inn. The Inn also contracts with residents of Minnesota who own property on Madeline Island, purchases goods and services in Minnesota, and sends employees to attend meetings and training in Minnesota. Therefore, we conclude that the district court may properly exercise personal jurisdiction over The Inn.[150]

It is difficult to describe cases like *Metropolitan Life* and *Marshall* as standing for anything other than the notion that there comes a point when the contacts are so numerous that they suffice. As with some cases early in the American conflict of laws revolution, this sort of approach is

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145. *Id.* at 572-73.
146. Marshall v. The Inn on Madeline Island, 610 N.W.2d 670, 673 (Minn. App. 2000).
147. *Id.*
148. *Id.* at 674.
149. *Id.* at 676.
150. *Marhsall*, 610 N.W.2d at 677.

extremely easy to manipulate.[151] If the plaintiff's counsel can manufacture and articulate a large number of contacts, it appears that he or she may be able to establish general jurisdiction.

Metropolitan Life was essentially another "sales in the forum" case, in which the court said that the quantum of sales, "standing alone, may not have been sufficient."[152] What was added by the additional "contacts" was that they were fairly regular sales and the defendant kept in contact with past and prospective purchasers. Unless one has a case where the facts are very similar, and can argue by analogy, it is very difficult to see other jurisdictional principles for which it stands; except, perhaps, that if a company sells goods to residents of the forum, it should not do any consumer friendly follow-up.[153]

Marshall is not even a "sales in the forum" case. It is best described as a "does business *with* Minnesotans" case. And yes, the *Marshall* court included in its listing of relevant contacts the fact that the defendant purchased goods and services in Minnesota, notwithstanding (albeit citing[154]) *Helicopteros*.

These and the three preceding categories of cases reflect significant vagueness and inconsistency in the application of general jurisdiction. The resulting uncertainty is heightened by some disagreement on another concept: the "reasonableness" prong of jurisdictional analysis.

E. The "Reasonableness" Prong

In *Asahi Metal Industry Co. v. Superior Court*,[155] a case involving the permissibility of specific personal jurisdiction, the Supreme Court analyzed jurisdiction under a structure of two questions. The first was

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151. Professor Brainard Currie criticized some mid-twentieth-century New York conflict of laws decisions relying on a "grouping of contacts" as follows:

> The "grouping of contacts" theory provides no standard for determining what "contacts" are significant, or for appraising the relative significance of the respective groups of "contacts" . . . . One "contact" seems to be about as good as another for almost any purpose. The "contacts" are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is more significant. The reasons for the conclusion are too elusive for objective evaluation.

BRAINARD CURRIE, *Conflict, Crisis, and Confusion in New York*, *in* SELECTED ESSAYS ON THE CONFLICTS OF LAWS 727-28 (1963).

152. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996).

153. *Cf.* Chung v. NANA Dev. Corp., 783 F.2d 1124, 1129 (4th Cir. 1986) ("If a party's slightest gesture of accommodation were to impose personal jurisdiction, commercial dealings would soon turn unobliging and brusque.").

154. *Marshall*, 610 N.W.2d at 674.

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

whether the defendant had sufficient purposeful contacts with the forum state.[156] The second was whether, assuming there are sufficient purposeful contacts, the assertion of jurisdiction was reasonable.[157] A difference of opinion exists on whether this second question should be asked in resolving issues of general jurisdiction.

In *Metropolitan Life*, even though the court found sufficient contacts to warrant general jurisdiction, the majority dismissed the action on the ground that jurisdiction would be unreasonable, taking into account the burden on the defendant, the lack of any Vermont interest in the dispute, and other relevant factors.[158] Circuit Judge Walker, dissenting, argued that it was not appropriate to include a separate analysis of reasonableness in analyzing general jurisdiction.[159]

The evaluation of reasonableness requires focus on the particular facts of a case.[160] Consideration of the particular facts seems inconsistent with the nature of general jurisdiction. As was stated by the Seventh Circuit on the contacts required for general jurisdiction,

> These contacts must be so extensive to be tantamount to [the defendant] being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in an Indiana court in *any* litigation

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156. *Id.* at 108-09 ("'[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established 'minimum contacts' in the forum State.'") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

157. *Id.* at 113.

> We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "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."

Id. (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980)). These two separate questions were first articulated by the Court in *Burger King*. *See* 471 U.S. at 474, 476.

158. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573-75 (2d Cir. 1996). The majority stated:

> As our dissenting colleague points out, the Supreme Court has not had occasion to conduct the reasonableness inquiry in a general jurisdiction case—*Asahi* and *Burger King* were both specific jurisdiction cases. However, every circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific.

Id. at 573 (emphasis in original).

159. *Id.* at 576-78.

160. *See Asahi*, 480 U.S. at 114-16.

> arising out of *any* transaction or occurrence taking place *anywhere* in the world.[161]

By this definition, the particular facts of the case should make no difference. In addition, although they pre-dated *Burger King* and *Asahi*, the Supreme Court made no separate reasonableness inquiry in *Perkins* and *Helicopteros*.

Perhaps the majority in *Metropolitan Life* recognized that its holding on the sufficiency of contacts for general jurisdiction was tenuous and relied on the reasonableness factors as an escape device, enabling it to dismiss a case that it thought was brought in a clearly inappropriate place. That speculation aside, several other courts have also included a separate reasonableness inquiry in determining whether general jurisdiction is permissible.[162]

IV. GENERAL JURISDICTION OVER VIRTUAL STORES AND BUSINESSES

Against this backdrop of vague standards and a degree of inconsistency in the lower courts, two United States courts of appeals have recently concluded that general personal jurisdiction is permissible based on the defendants' business contacts or sales to residents of the forum through the defendants' internet pages.[163] The first, *Gorman v. Ameritrade Holding Corp.*,[164] was a breach of contract suit brought in the United States District Court for the District of Columbia.[165] The district court dismissed for lack of personal jurisdiction and improper

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161. Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 787 (7th Cir. 2003); *see also* Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331, 339 (5th Cir. 1999) ("Unlike the specific jurisdiction analysis, which focuses on the cause of action, the defendant and the forum, a general jurisdiction inquiry is dispute blind, the sole focus being on whether there are continuous and systematic contacts between the defendant and the forum.").

162. *See, e.g.*, Harlow v. Children's Hosp., 432 F.3d 50, 66 (1st Cir. 2005) ("Even if the Hospital's contacts with Maine were minimally sufficient for either specific or general jurisdiction, we would still conclude that the exercise of jurisdiction here would be unreasonable."); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987) ("Even if Beech's connections with the State of Texas could be said to be continuous and systematic, we are persuaded that the exercise of general jurisdiction in this case would not be fair and reasonable.").

163. Another case from the Eighth Circuit, relying in part on the two cases discussed in the text, suggested that the defendant's internet contacts might warrant general jurisdiction but remanded for jurisdictional discovery on the issue. Larkin v. Prudential Sec., Inc., 348 F.3d 704, 710-13 (8th Cir. 2003).

164. Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002).

165. *Id.* at 508.

service of process.[166] The court of appeals affirmed on the ground of improper service.[167] Although technically issuing dicta, the court of appeals strongly suggested that Ameritrade would be subject to general personal jurisdiction in the District of Columbia based largely on its website.

The plaintiff's principal place of business was in Virginia, and Ameritrade, which provided online securities brokerage services through its internet website, had its principal place of business in Nebraska.[168] Because the claim did not arise out of business transacted between the parties in the district, the court of appeals quickly concluded that specific jurisdiction was unavailable.[169]

The court of appeals then raised the question whether the assertion of general jurisdiction would be constitutionally permissible,[170] noting Gorman's allegations that "Ameritrade 'sells securities and provides other online brokerage services to residents of the District of Columbia on a continuous basis' and is therefore 'continuously doing business in the District of Columbia.'"[171] Ameritrade conceded that it engaged in "electronic transactions" with and derived revenue from residents within the district.[172] It made the unfortunate argument, however, that the transactions did not occur in the district, but rather that its business was conducted "in the borderless environment of cyberspace."[173]

The court rebuked this argument with some apparent glee:

> "Cyberspace," however, is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the internet.[174]

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166. *Id.* at 508-09.

167. *Id.* at 516.

168. *Gorman*, 293 F.3d at 508. The opinion does not indicate Ameritrade's state of incorporation.

169. *Id.* at 509.

170. The court noted that the District of Columbia Court of Appeals had construed its long-arm statute, permitting general jurisdiction on the basis of "doing business" in the District of Columbia to be "coextensive with the reach of constitutional due process." *Id.* at 510 (citing Hughes v. A.H. Robins Co., Inc., 490 A.2d 1140, 1148 (D.C. 1985)).

171. *Id.* at 510.

172. *Gorman*, 293 F.3d at 510.

173. *Id.* (quoting Appellees' Brief at 5).

174. *Id.* at 510-11 (footnote omitted). The court used similar language in its concluding paragraph, stating that "Ameritrade is quite wrong in treating 'cyberspace' as if it were a

The court then said the test it would apply for general personal jurisdiction was whether "Ameritrade's contacts with the District [were] 'continuous and systematic.'"[175]

It then focused on the extent to which district residents could use Ameritrade's website to engage in business transactions with Ameritrade:

> The firm's customers can open Ameritrade brokerage accounts online; transmit funds to their accounts electronically; and use those accounts to buy and sell securities, to borrow from Ameritrade on margin, and to pay Ameritrade brokerage commissions and interest. Using e-mail and web-posting, Ameritrade transmits electronic confirmations, monthly account statements, and both financial and product information back to its customers. As a result of their electronic interactions, Ameritrade and its District of Columbia customers enter into binding contracts, the customers become the owners of valuable securities, and Ameritrade obtains valuable revenue.[176]

In light of this capability, the court continued its analysis with language suggesting that the existence of general jurisdiction approached that of a slam dunk:

> Indeed, if anything, Ameritrade appears susceptible to application of the "doing business" test in a much more literal way than a traditional brokerage firm. Ameritrade's website allows it to engage in real-time transactions with District of Columbia residents while they sit at their home or office computers "in the District of Columbia." And by permitting such transactions to take place 24 hours a day, the site makes it possible for Ameritrade to have contacts with the District of Columbia that are "continuous and systematic" to a degree that traditional foreign corporations can never even approach.[177]

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kingdom floating in the mysterious ether, immune from the jurisdiction of earthly courts." *Id.* at 516.

175. *Gorman*, 293 F.3d at 512.

176. *Id.* at 512-13.

177. *Id.* at 513 (quoting from Ameritrade's website) (footnote omitted). The court then backed off only slightly, suggesting that it was "quite possible" that Ameritrade was subject to general jurisdiction, but the court said that, absent the invalidity of service, it would have remanded the case for jurisdictional discovery. *Id.*

In 2008, another panel of the D.C. Circuit rejected an argument that general jurisdiction existed because of a defendant's website where the record showed only one customer of the defendant in the District of Columbia. FC Investment Group v. IFX Markets, Ltd., 529 F.3d 1087, 1092-93 (D.C. Cir. 2008). That panel distinguished *Gorman*, stating that beyond accessibility of the defendant's website, two additional criteria must be met. "First, the web site must be 'interactive,'" and, second, "District residents must use the website in a 'continuous and systematic way.'" *Id.* at 1092.

The second decision, *Gator.com Corp. v. L.L. Bean, Inc.*[178] was a declaratory judgment action filed in the United States District Court for the Northern District of California, requesting a declaratory judgment that a Gator program did not violate L.L. Bean's trademark rights.[179] The district court dismissed the case for lack of personal jurisdiction over L.L. Bean.[180] The United States Court of Appeals for the Ninth Circuit reversed and remanded, concluding that L.L. Bean's connections with the state were "sufficient to support the assertion of general personal jurisdiction."[181]

The court of appeals began its analysis by noting that a very large percentage of L.L. Bean's sales were through mail-order or its website. It noted that in the year 2000, L.L. Bean sold "millions of dollars worth of products in California (about six percent of its total sales) through its catalog, its toll-free telephone number, and its Internet website."[182]

Citing *Perkins*, the Court noted that in analyzing general jurisdiction, courts have focused in part on a "deliberate 'presence' in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation."[183] The court conceded that "L.L. Bean has few of the factors traditionally associated with physical presence, such as an official agent or incorporation."[184] It concluded, however, that "there is general jurisdiction in light of L.L. Bean's extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by Gator, its website is clearly and deliberately structured to operate as a sophisticated virtual store in California."[185] Indeed, shortly after this statement, the court indicated that general jurisdiction would be permissible "even if the only contacts L.L. Bean had with California were through its virtual store."[186]

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178. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), *reh'g granted*, 366 F.3d 789 (9th Cir. 2004), *reh'g dismissed as moot due to settlement*, 398 F.3d 1125 (9th Cir. 2005).

179. *Id.* at 1075.

180. *Id.* at 1074.

181. *Id.*

182. *Gator.com*, 341 F.3d at 1074 (referencing Appellee's Brief at 41) (internal quotation marks omitted). The court also noted that L.L. Bean conducts national print and broadcasting marketing efforts that included California, and that it also maintained relationships with numerous California vendors. *Id.*

183. *Id.* at 1077.

184. *Id.* at 1078.

185. *Gator.com*, 341 F.3d at 1078.

186. *Id.* at 1079.

In 2004, the Ninth Circuit granted a petition for re-hearing en banc.[187] In 2005, however, the parties settled the case, and the en banc court concluded that the settlement rendered the rehearing moot and dismissed it.[188]

V. THE PROBLEMS WITH GENERAL PERSONAL JURISDICTION OVER "VIRTUAL STORES"

A. Inconsistency with Precedent and the Problematic Reasoning of the Decisions

Viewed in a straightforward manner, both *Gorman* and *Gator.com* are cases basing general personal jurisdiction on sales and the servicing of those sales. As noted earlier, the majority view of current lower court decisions appears to be that those sorts of contacts, standing alone, will not suffice.[189]

In addition, basing general jurisdiction on sales appears to be inconsistent, at least from a comparative standpoint, with both *International Shoe* and *Keeton*. In *International Shoe*, a case basing jurisdiction on sales of shoes in the forum, the Court discussed clearly what we know today as general jurisdiction, yet phrased its holding as permitting specific jurisdiction.[190] And in *Keeton*, involving thousands of sales in the forum over a continuing period of time, the Court said that those sales "may not be" sufficient for general jurisdiction.[191]

Gorman and *Gator.com* do not indicate clearly why the making of sales over the internet—as opposed to mail or telephone order or shipment to retailers in the forum—is significant. To say that a defendant has a "virtual store" is just as fanciful as the unfortunate argument made by the defendant in *Gorman* that it conducted its business in the "borderless environment of cyberspace."[192]

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187. Gator.com Corp. v. L.L. Bean, Inc., 366 F.3d 789 (9th Cir. 2004).

188. Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005). Although the opinion therefore lacks any binding precedential value, a Keycite or Shepard's search will reveal citations to it in numerous recent cases, suggesting that it has had significant persuasive value.

189. *See supra* notes 128-40 and accompanying text.

190. *See supra* note 70 and accompanying text.

191. *See supra* notes 78-81 and accompanying text.

192. *See supra* notes 172-73 and accompanying text. And basing general jurisdiction on an actual physical store, let alone a virtual one, in the forum seems problematic in light of the Supreme Court's apparent abandonment of "presence" as an appropriate test for general personal jurisdiction. *See supra* notes 101-02 and accompanying text.

In addition to this general inconsistency with precedent, both decisions have some significant flaws in their reasoning and use of precedent.

For example, in *Gorman* the court reasoned in part as follows:

> In the last century, for example, courts held that, depending upon the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites.[193]

The first sentence is, of course, true, but it is most clearly true in cases invoking specific, not general, jurisdiction. Indeed, all of the cases cited to support the sentence post-date *International Shoe*, which explicitly discounted the "presence" basis for personal jurisdiction. The cases cited give little support to carry the analogy over to general jurisdiction.[194]

The *Gorman* court first cited *Metropolitan Life Insurance Co. v. Robertson-CECO Corp.*, discussed earlier,[195] as finding that "a defendant's mail-order sales to forum residents *may* satisfy the 'continuous and systematic' standard."[196] In the actual *Metropolitan Life* case, the court said that the defendant's four million dollars of sales to forum residents "may not have been sufficient," but found general jurisdiction by reciting other sales-related contacts,[197] calling it "a close case."[198] Indeed, *Metropolitan Life* quoted the statement in *Congoleum Corp. v. DLW Aktiengesellschaft*[199] that "no court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action."[200] Moreover, the portions of *Metropolitan Life* cited by

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193. Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 511 (D.C. Cir. 2002) (footnote omitted).

194. *See id.* at 511 n.4.

195. *See supra* notes 141-45, 158-59 and accompanying text.

196. *Gorman*, 293 F.3d at 511 n.4 (citing Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996) (emphasis added).

197. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996) (noting the defendant's "relationship with dealers selling its products and its so-called 'authorized' builders, the visits to those dealers and builders by Robertson personnel, the advertising and support available to Vermont residents regarding Robertson's products, and the deliberate targeting of Vermont architectural firms as sales prospects").

198. *Id.* at 572.

199. Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242 (9th Cir. 1984).

200. *Metro. Life Ins. Co.*, 84 F.3d at 572.

Gorman may be viewed as dicta because the *Metropolitan Life* court ultimately concluded that general jurisdiction would be so unreasonable as to violate due process and dismissed the suit.[201]

In *Michigan National Bank v. Quality Dinette, Inc.*,[202] the second case cited by *Gorman* to support the "transactions by mail or telephone" analogy, the Sixth Circuit upheld general personal jurisdiction based primarily on sales to forum businesses.[203] But, as noted earlier,[204] this appears to be a minority view among the federal circuits, and *Gorman* made no reference to *Conti*, decided in 1992, in which the Sixth Circuit reached a result that appears at odds with its holding in *Michigan National Bank*.[205] Of the remaining cases *Gorman* cited as supporting the analogy (preceded by a "*cf.*" signal) several are described specifically as involving specific jurisdiction.[206]

When *Gorman* turned to cases discussing personal jurisdiction based on websites, its use of precedent was problematic as well. Before stating that, but for its dismissal on another ground, it would be inclined to remand the case for further discovery on the issue of personal jurisdiction, the court said,

> In short, on the record before this court, it is quite possible that, through its website, Ameritrade is doing business in the District of Columbia by continuously and systematically "enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."[207]

The quoted language was followed by a citation to *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[208] which articulated a "sliding scale test,"[209] for the proposition that a defendant who "clearly

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201. *Id.* at 576.
202. Michigan Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462 (6th Cir. 1989).
203. *Id.* at 465.
204. *See supra* notes 129-41 and accompanying text.
205. *See supra* notes 135-38 and accompanying text. In addition, the only United States Supreme Court decision cited by *Michigan National Bank*, 888 F.2d at 465, for the notion that the defendant need not physically enter the forum was *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which involved specific jurisdiction. *Id.* (finding personal jurisdiction for claims relating to the defendant's extensive contractual relationship with a forum based company).
206. *See* Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 512 n.4 (D.C. Cir. 2002).
207. *Id.* at 513 (alteration in original).
208. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).
209. The court articulated the "sliding scale test" as follows:

does business over the Internet" may be subject to *specific* jurisdiction.[210] This was followed by a citation to the Fifth Circuit's opinion in *Mink v. AAAA Development LLC*,[211] which the court described as "adopting the *Zippo* test for assertions of general jurisdiction."[212] *Mink* did purport to adopt the *Zippo* test in determining general personal jurisdiction,[213] but it is not a particularly good precedent for finding that there *is* general jurisdiction, as *Mink* concluded very quickly that under the test, the defendant there was *not* subject to jurisdiction.[214] Additionally, in *Revell v. Lidov*, a decision only a few months after *Gorman*, the Fifth Circuit recanted any notion that the *Zippo* test was appropriate for general jurisdiction:

> While we deployed this sliding scale in *Mink v. AAAA Development LLC*, it is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction—in other words, while it may be doing business *with* Texas, it is not doing business *in* Texas.[215]

> [O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 1124 (citations and footnote omitted). Professor Richard K. Greenstein characterizes this test as "the overwhelmingly dominant framework now used by American courts." Richard K. Greenstein, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of* Zippo Dot Com, 80 TEMP. L. REV. 21, 23 (2007).

210. *Gorman*, 293 F.3d at 513.
211. Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999).
212. *Gorman*, 293 F.3d at 513.
213. *Mink*, 190 F.3d at 336.
214. *Id.* at 336-37.
215. Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002).

Gator.com also had problems with its use of precedent. Like *Gorman*, it relied on *Metropolitan Life* and *Michigan National Bank*,[216] discussed above.[217] But its application of precedent discussing personal jurisdiction based on web activity was even more problematic.

The court said that "even if the only contacts L.L. Bean had with California were through its virtual store, a finding of *general* jurisdiction in the instant case would be consistent with the 'sliding scale' test that . . . [courts] have applied to internet-based companies," requiring that the party clearly do business over the internet and that its internet business contacts with the forum be substantial or continuous and systematic.[218] But to support this language, the court cited two cases that applied this "sliding scale" test only in the context of *specific* jurisdiction, *Cybersell, Inc. v. Cybersell, Inc.*,[219] and *Zippo Dot Com*.[220] To make matters even more bizarre, unlike the *Gorman* court, this court had the benefit of, and actually cited, the Fifth Circuit's decision in *Revell*, which said that the sliding scale test was *not* well adapted to the general jurisdiction inquiry.[221]

The *Gator.com* court further mis-described precedent following its subsequent citation of *Gorman*: "*see also Cybersell*, 130 F.3d at 417 (discussing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), as a case finding general jurisdiction in Ohio where defendant knowingly used Ohio online computer service provider 'as a distribution center to market his software.')"[222] Not only is there nothing on the cited page in *Cybersell* suggesting that the *Patterson* court found general jurisdiction, but *Patterson* indicates clearly that it found specific, not general, jurisdiction.[223]

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216. Gator.com Corp. v. L.L. Bean, Inc. 341 F.3d 1072, 1079 (9th Cir. 2003).

217. *See supra* notes 193-204 and accompanying text.

218. *Gator.com*, 341 F.3d at 1079 (emphasis added).

219. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997) ("Cybersell AZ concedes that general jurisdiction over Cybersell FL doesn't exist in Arizona, so the only issue in this case is whether specific jurisdiction is available.").

220. Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119, 1127 (W.D. Pa. 1997) ("We also conclude that the cause of action arises out of Dot Com's forum-related conduct in this case.").

221. *Gator.com*, 341 F.3d at 1079; *see supra* notes 213-14 and accompanying text.

222. *Gator.com*, 341 F.3d at 1080 (citing *Cybersell, Inc.*, 130 F.3d at 417).

223. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1267 (6th Cir. 1996) (stating that "we must also find that CompuServe's claims against [Defendant] arise out of his activities in Ohio if we are to find the exercise of jurisdiction proper" and that "Patterson's contacts with Ohio are certainly related to the operative facts of that controversy").

Finally, the *Gator.com* court's discussion of jurisdiction based on websites strangely includes a citation[224] to the Fourth Circuit's decision in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,[225] which contains extensive language that seems directly at odds with the conclusion that general jurisdiction should be permissible based on internet activity.[226]

B. General Jurisdiction over all Internet Sellers? Exacerbating the Problematic use of Indeterminate Standards in Ascertaining General Jurisdiction

One clear problem with basing general personal jurisdiction on having a "virtual store" is that the notion exacerbates the problem in much of the case law of having indeterminate standards for evaluating general jurisdiction. Like the cases basing jurisdiction on "lots and lots" of contacts,[227] will we be litigating the question of how many sales will suffice to elevate a defendant to "virtual store" status? Or, because *Gator.com* characterized L.L. Bean's website as a "sophisticated" virtual store, will courts now try to make distinctions between the sophisticated and unsophisticated websites? Certainly these cases raise that possibility.

Perhaps, contrary to the unstated assumptions of the *Gorman* and *Gator.com* courts, setting up an online store on the internet is not particularly difficult or burdensome. Doing a Google.com search[228] using the terms "commercial web hosting" will return numerous links to companies willing to set up and host commercial websites. Websites such as Authorize.net[229] and Paypal.com[230]—sites that offer to process credit cards and electronic checks for merchants with websites—provide access to numerous partners who are willing to develop and host commercial websites. Network Solutions sells packages starting at $49.95 with "everything you need to build an online store."[231]

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224. *Gator.com*, 341 F. 3d at 1080.
225. ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 209 F.3d 707 (4th Cir. 2002).
226. *See infra* notes 258-60 and accompanying text.
227. *See supra* notes 141-54 and accompanying text.
228. Google Home Page, http://www.google.com (last visited Mar. 31, 2009).
229. Authorize.Net Home Page, http://authorize.net/ (last visited Mar. 31, 2009).
230. PayPal Home Page, https://www.paypal.com/ (last visited Mar. 31, 2009).
231. NetworkSolutions Home Page, http://ecommerce.networksolutions.com/ (last visited Mar. 31, 2009); *see also* Free Management Library, Basic Guide to E-Commerce (Doing Business Over the Internet/Web), http://www.managementhelp.org/infomgnt/e_cmmrce/e_cmmrce.htm (last visited Mar. 31, 2009).

Indeed, if you want a "sophisticated" online store, you can set one up with the technology used by perhaps the most sophisticated online store today, Amazon.com. For about sixty dollars a month plus seven percent of your sales, you can set up a branded, custom, online store powered by Amazon.com's technology, support, and transaction processing.[232] This includes all credit card processing and transaction fees, payment fraud protection, and purchase protection for your customers, among other things.[233]

Online stores are not limited to companies like Ameritrade and L.L. Bean. The *New York Times*[234] and *National Geographic* also have online stores.[235] As does the Carmel Corn Cottage, a shop that's been providing popcorn to visitors to tiny Nashville, Indiana. Its website reads: "Not going to be in Nashville for awhile? No Problem—shop our online store right now!"[236] The Jen Bekman Gallery, which is run by Jen Bekman out of her narrow studio apartment through the website 20x200.com,[237] also has an online store, from which she sells art prints for twenty dollars on up.[238] Most print reviews of products today contain a website address from which the products can be bought or which can refer the reader to authorized dealers. This expansive web commerce is certainly not going to whither any time soon.[239] These examples thus raise the possibility of thousands of cases in which the applicable standards for general jurisdiction over "virtual stores" will be subject to litigation.

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232. WebStore by Amazon, http://webstore.amazon.com/WebStore-Pricing/ (last visited Mar. 31, 2009).

233. *Id.*

234. The New York Times Store, http://www.nytstore.com/ (last visited Mar. 31, 2009).

235. National Geographic Online Store, http://shop.nationalgeographic.com/ (last visited Mar. 31, 2009).

236. About Caramel Corn Cottage, http://www.carmelcorncottage.com/about_ccc.cfm (last visited Mar. 31, 2009).

237. 20x200: A Jen Bekman Project, http://www.20x200.com/ (last visited Mar. 31, 2009).

238. Julie Scelfo, *Easing the Pain of Collecting*, N.Y. TIMES, Feb. 28, 2008, at F1. *See generally* Keith Schneider, *Small-Town Shops Bulk Up on The Web*, N.Y. TIMES, Nov. 16, 2005, at G6.

239. According to the United States Census Bureau, from the fourth quarter of 2006 to the fourth quarter of 2007, adjusted quarterly e-commerce retail sales in the United States increased from 30,712 millions of dollars to 36,247 millions of dollars, and from 3.1% of all retail sales to 3.5%. *See* US Census Bureau, Estimated Quarterly U.S. Retail Sales: Total and E-commerce, http://www.census.gov/mrts/www/data/html/07Q4table1.html (last visited Mar. 31, 2009).

The critical question, then, is what should those standards be? *Gorman* and *Gator.com* seem to suggest that the standard may be quantitative, perhaps setting some sort of online sales dollar threshold. *Gorman* did not indicate the extent of Ameritrade's business with residents of the forum, but it said that determining whether general jurisdiction exists "requires an examination of the frequency and volume of the firm's transactions with District residents."[240] In *Gator.com*, the court noted that for the year 2000, L.L. Bean's website sales accounted for sixteen percent of its total sales, and that in 2000, it "sold millions of dollars worth of products in California (about six percent of its total sales) through 'its catalog, its toll-free telephone number, and its Internet website.'"[241] So, in suggesting that general jurisdiction might be based on L.L. Bean's web sales alone,[242] the court implied that sixteen percent of sales amounting to "millions of dollars worth of product" should suffice. But the court gave no hint of what the actual threshold should be.

Determining a monetary threshold would certainly be a challenge. As noted earlier, the Sixth Circuit found general jurisdiction based on sales of approximately $350,000 and $280,000 over a two-year period, but later said that sales of $900,000 did not establish a prima facie case.[243] And the Fourth Circuit found no general jurisdiction in a case involving annual sales between nine and thirteen million dollars.[244]

In *World-Wide Volkswagen v. Woodson*,[245] the Supreme Court said that "[t]he Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[246] Although the conduct warranting general personal jurisdiction may be somewhat predictable within a given circuit or state, the disparate results throughout the country make general

240. Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002). *Gorman* stated that facts on volume and frequency were unavailable because the plaintiff had not been permitted by the trial court to undertake discovery, and that jurisdictional discovery should have been afforded. *Id.*

241. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1074 (9th Cir. 2003).

242. *Id.* at 1079.

243. *See supra* notes 134-37 and accompanying text.

244. *See supra* notes 129-31 and accompanying text.

245. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1987).

246. *Id.* at 297 (quoting Int'l Shoe v. Washington, 326 U.S. 310 (1945)) (internal citation omitted).

jurisdiction quite unpredictable. Surely this lack of predictability results in the issue being litigated more frequently than would be the case if we had clearer standards.

Assuming, for the sake of argument, that general jurisdiction based on web sales should be permissible, could this problem be avoided by setting a clear monetary threshold? Perhaps it could, but it seems that any such threshold would be arbitrary. It also seems that setting such a threshold would be directly contrary to the following language in *International Shoe*:

> The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[247]

Furthermore, a few years later in *Perkins*, the Court did not even hint that the dollar amount accruing to the defendant as a result of its activities in Ohio was of particular importance in finding jurisdiction. And, nowhere in *Helicopteros* did the Court suggest that the outcome would have been different if the defendant had made purchases in Texas of $40,000,000 rather than the $4,000,000 that it did spend.[248] For there to be any real predictability of when one will be subject to general jurisdiction, the standards need to be structural rather than being some indeterminate dollar amount of sales or a court's subjective judgment about the "sophistication" of a company's website.[249]

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

248. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 411 (1984).

249. In recent years, scholars have suggested various standards to apply in resolving the issue of general personal jurisdiction over corporations. *See, e.g.*, Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (suggesting general jurisdiction "in a forum in which a defendant has a 'branch' facility"); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 742 (1988) ("The basic inquiry must be whether the defendant's level of activity rises to the level of an insider, so that relegating the defendant to the political processes is fair."); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129 (1990) (calling for at least a corporate office in the forum and considering "fair play" factors); Mehren & Trautman, *supra* note 3, at 1141-42 (suggesting that general jurisdiction should be permitted over corporations by their state of incorporation and the state of their "managerial and administrative center"); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 811 (2004) (arguing that courts should require "continuous activities in the forum similar in nature and volume to the in-state activities of an enterprise domiciled or based in the forum"); Allen R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F.

C. The Problem of General Jurisdiction in Multiple Fora

If jurisdictional rules should strive to facilitate the fair and orderly administration of the laws, general personal jurisdiction over virtual stores will have the opposite effect. Such jurisdiction raises the possibility that some defendants, perhaps many, may be subject to general jurisdiction in every state of the United States. That would certainly seem to be the case with the defendants in *Gorman* and *Gator.com.*

The *Gorman* court described the defendant there as follows: "Ameritrade provides online brokerage services through its Internet site to individuals across the country, including District residents."[250] There is nothing in the opinion suggesting that Ameritrade's activities with residents of the District of Columbia are in any way distinguishable from its activities with residents of other states. So, if other courts follow the *Gorman* court's reasoning, Ameritrade will be subject to general jurisdiction in every state in addition to the District of Columbia.

Similarly, the *Gator.com* court stated that "L.L. Bean sells over one billion dollars of merchandise annually to consumers in 150 different countries."[251] It noted that about six percent of L.L. Bean's total sales were in California.[252] That percentage, it seems likely, would make Californians one of L.L. Bean's largest groups of customers. But, if L.L. Bean has a "virtual store" in California, subjecting it to general jurisdiction there, it is difficult to see how it would also not have a similar "store" in all of the remaining states, potentially subjecting it to general jurisdiction in each of them.

Numerous cases reflect a clear, almost reflexive, aversion to the notion that such widespread general jurisdiction might be permissible. In the 1917 *McKibbin* case, discussed earlier,[253] Justice Brandeis, writing the opinion of the United States Supreme Court, declined to find

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373, 382-383 (suggesting that the required contacts should be similar to those of a resident citizen of the forum); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172 (expressing a "change of heart" from her position in *The Myth of General Jurisdiction*, but being "no closer to locating a satisfactory test for doing-business jurisdiction than in the past"); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614 (1988) (calling for courts to limit jurisdiction to the defendant's "home base").

250. Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 508 (D.C. Cir. 2002).

251. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1074 (9th Cir 2003).

252. *Id.*

253. *See supra* notes 37-42 and accompanying text.

jurisdiction over a railroad whose tickets were sold by others in New York and wrote, "Obviously the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every state."[254]

More recently, in *Gehling v. St. George's School of Medicine*,[255] which involved a wrongful death claim, the Third Circuit refused to find general jurisdiction over a school of medicine in Grenada based in part on the fact that six percent of its students, including the decedent, came from the forum state of Pennsylvania.[256] The court reasoned,

> Advanced educational institutions typically draw their student body from numerous states, and appellants' theory would subject them to suit on non-forum related claims in every state where a member of the student body resides. Thus, the fact that residents of the state apply and are accepted for admission to St. George's is of no moment.[257]

Closer to our "virtual store" context, the Fourth Circuit, in *ALS Scan, Inc. v. Digital Service Consultants, Inc.* held that a federal court in Maryland could exercise neither specific jurisdiction nor general jurisdiction over a defendant based on the defendant's website.[258] In the course of its discussion, the court noted that an argument could be made that the internet's electronic signals could be viewed as surrogates for the internet users who conceptually enter a state to the extent they send their electronic signals there.[259] The court then articulated broadly why this would be problematic:

> Under this argument, the electronic transmissions "symbolize those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process." But if that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.
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> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has

254. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 268 (1917).
255. Gehling v. St. George's Sch. of Med., Ltd., 773 F.2d 539 (3d Cir. 1985).
256. *Id.* at 541.
257. *Id.* at 542.
258. ALS Scan, Inc. v. Digital Serv. Consultants, Inc. 293 F.3d 707, 715-16 (4th Cir. 2002).
259. *Id.* at 712-13.

> unlimited judicial power over every citizen in each other State who uses the Internet. That thought certainly would have been considered outrageous in the past when interconnections were made only by telephones.[260]

Indeed, permitting multiple courts to assert general jurisdiction over defendants will exacerbate the ability to forum shop, raising choice of law issues, which can be expensive to litigate and difficult to resolve.[261] As stated by the Fourth Circuit in another decision, "Among the freedoms protected by the due process clause is the freedom not to be haled indiscriminately into court. The reach of judicial process can constitute a form of coercion no less onerous than other overextensions of the arm of the state."[262]

There is absolutely no need or warrant for such expansive jurisdiction. Without it, there will almost always be at least one U.S. state with specific jurisdiction, and the additional option of general

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260. *Id.* at 713 (quoting Int'l Shoe v. Washington, 326 U.S. 310 (1945)) (internal citation omitted). An opinion of the D.C. Circuit pre-dating *Gorman* used similar reasoning to reject an argument that personal jurisdiction could be premised on a defendant's website:

> Indeed, under [Plaintiff's] view, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction. The Due Process clause exists, in part, to give a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. In the context of the Internet, GTE's expansive theory of personal jurisdiction would shred these constitutional assurances out of practical existence.

GTE New Media Servs. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000) (internal citation and quotation marks omitted). This case was distinguished in *Gorman* on the ground that the website in GTE was "essentially passive." Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 512 (D.C. Cir. 2002); *see also* Molnlycke Health Care v. Dumex Med. Surgical Prods., 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999) ("To hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step.").

261. *See, e.g.*, Ferens v. John Deere Co., 494 U.S. 516 (1990). In *Ferens* the plaintiff, injured in Pennsylvania, filed timely contract and warranty claims in federal court in Pennsylvania and, because the Pennsylvania statute of limitations had run, filed tort claims against the defendant in federal court in Mississippi, which would apply the longer Mississippi statute of limitations. *Id.* at 519-20. Because the injuries were incurred in Pennsylvania, it appears that jurisdiction over John Deere in Mississippi must have been general personal jurisdiction. The plaintiff then moved to transfer the Mississippi case to the federal court in Pennsylvania, and the motion was granted. *Id.* at 520. The Supreme Court held that the Mississippi statute of limitations would continue to apply to the tort claims after the transfer to the federal court in Pennsylvania. *Id.* at 519.

262. Fed. Ins. Co. v. Lake Shore, Inc., 886 F.2d 654, 661 (4th Cir. 1989).

jurisdiction, at least in the corporate defendant's state of incorporation and principal place of business. To expand general jurisdiction to such a vast degree is only to invite mischief and increasingly expensive litigation.

D. The Problem with International Relations and Trade

General jurisdiction based on doing business in the forum state is peculiar to the United States.[263] In the European Union, for example, general jurisdiction over a corporation is limited to where the corporation has its "statutory seat," "central administration," or its "principal place of business."[264] If it has a "branch," or an "agency," or "other establishment," it may be sued there only "as regards a dispute arising out of the operations of [the] branch, agency or other establishment."[265]

Indeed, as Professor Kevin Clermont and John Palmer have ably discussed, much of the world views our policy of basing general jurisdiction in part on the defendant conducting business in the forum as "exorbitant."[266] As a result, United States judgments based on such jurisdiction may not be recognized and enforced in other nations.[267] The insistence of the United States on exercising "doing business" jurisdiction, at least for judgments enforceable against a foreign defendant's assets in the United States, appears to have been a "deal-breaker" in the United States' recent failure[268] to negotiate a successful multinational convention on Jurisdiction and Foreign Judgments in Civil

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263. Kevin M. Clermont & John R. B. Palmer I., *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 481-82 (2006).

264. Council Regulation 44/2001, arts. 2, 60, 2001 O.J. (L 12) 1, 13 (EC).

265. *Id.* art. 5(5), 2001 O.J. (L 12) 4 (EC).

266. Clermont & Palmer, *supra* note 263, at 477. The authors define exorbitant as "to exceed ordinary or proper bounds, to be immoderate, perhaps even offensive—literally to have departed from one's track." *Id.* at 476.

267. Drawing upon twenty-one reports on recognition of foreign country judgments from scholars and practitioners from various countries, Professor Friedrich Juenger said, "The largest single group of reporting countries measures the foreign court's jurisdiction by reference to the bases found in their own laws." Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 15 (1988).

268. *Proposed Hague Treaty Said to be Burdened by New Language Needed to Attract Support*, 72 U.S. L. WK. 2719, 2719 (2004) (noting that the Convention was abandoned in 2002, due, in part, "to inflexibility by certain countries' delegations").

and Commercial Matters at the Hague Conference on Private International Law.[269]

One can only try to imagine the reaction of other nations if United States courts extend general jurisdiction over alien defendants who have "virtual stores" on the internet but no physical presence at all in the United States. Professor Clermont and Mr. Palmer note that a few other countries assert exorbitant bases of jurisdiction, "but only over a national of a country that would assert such a basis of jurisdiction over the forum's nationals. These countries' desires are not to exercise exorbitant jurisdiction, but to discourage others from doing so. In other words, these countries employ exorbitant jurisdiction as a retaliatory measure . . . ."[270]

If United States courts assert general jurisdiction over alien "virtual stores," perhaps the countries where they are based would do the same to United States companies, even though the United States companies have no physical ties to those countries. It is difficult to believe that we would just shrug our shoulders if those countries adjudicate claims to which they have no relationship. On the other hand, even if such defendants have few assets in those countries against which the judgment could be enforced,[271] it would seem hypocritical for United States courts to decline to recognize such foreign country judgments rendered under a jurisdictional basis that we also employ.

In *Asahi*, the Supreme Court warned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[272] And, in *Helicopteros*, the United States, in its brief as amicus curiae, urged the Court to find no jurisdiction, with an argument that seems pertinent to this context today. Its summary of argument read as follows:

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269. Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 641-42 (2000).

270. Clermont & Palmer, *supra* note 263, at 504 (giving as examples Belgium, Italy, and Portugal).

271. Under the Hague Convention, member states must recognize judgments of other member states, so a defendant's assets throughout the European Union would be at risk from a judgment of one of its members. *Id.* at 491. Professor Clermont and Mr. Palmer note extensive financial interests owned by United States companies in the European Union that would be exposed to such judgments. *Id.* at 501-02.

272. Asahi Metal Indus. Co., Ltd., v. Superior Court, 480 U.S. 102, 115 (1987) (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

> In *Rosenberg Bros. & Co. v. Curtis Brown Co.*, . . .the Court held that mere purchases of goods in the forum state by a non-resident corporation were insufficient to support *in personam* jurisdiction for a cause of action not related to the purchases. Although the Court has subsequently considered the requirements of the Due Process Clause in this area in a variety of differing factual contexts, nothing in its subsequent case [sic] has cast doubt on the validity of *Rosenberg*.
>
> In this case, we ask the Court to recognize that the realities of today's sophisticated marketing practices, particularly for "high technology" products, frequently make employee training and related services an essential part of a purchase agreement. Thus, it is not uncommon for foreign firms desiring to buy high technology products to send their operational and maintenance employees to the United States to receive such training. In our view, the presence of a foreign firm's employees in the forum state for such purposes should not alter the result reached in *Rosenberg*, rather, purchases plus training or services related to the purchases should not be treated any differently than purchases alone. Such a result reflects a sensible, modern-day application of *Rosenberg*.
>
> The issue is substantial because of the critical importance of foreign trade to our national economy. A foreign firm that finds itself subject to suit in a state court on an unrelated cause of action merely because it has sent employees to that state to learn how to operate and maintain equipment purchases may well find it more expedient to do its foreign trading with firms in other countries. The Executive Branch and Congress have, in recent years, taken important steps to remove obstacles and potential obstacles to the competitive standing of American firms in world markets. Those efforts would be severely undercut if they were met with the imposition of new barriers such as that imposed by the decision below.[273]

This argument did not find its way into the Court's opinion, and it is somewhat difficult to see the relevance of international trade to the concept of due process of law. Yet, the argument may have had some impact, as the Court did what the United States requested in re-affirming *Rosenberg*. And, as was the case in 1984, in today's era of "high technology," a finding of general jurisdiction based on a foreign defendant's sales to persons in the United States through its "virtual store" could very well have a negative impact on international trade by deterring foreign defendants from selling to persons in the United States. Our courts should reason very cautiously before taking such a step.

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273. Brief for the United States as Amicus Curiae, Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984) (No. 82-1127), 1982 U.S. Briefs 1127, 1983 U.S. S. Ct. Briefs LEXIS 201, at *9-*10.

V. CONCLUSION

Case law in the United States regarding general personal jurisdiction is in an unsatisfactory state, at least as it relates to corporate defendants. Although general personal jurisdiction raises a constitutional due process issue, Supreme Court guidance on its scope has been minimal. Lower courts apply vague standards and inconsistent results abound.

If some courts continue to establish a new category of defendants—virtual stores—subject to general jurisdiction, further problems will ensue. There will be battles over what qualifies as a virtual store, with the potential for almost any internet seller to fit the mold. General jurisdiction will be expanded profoundly. It will become even less possible for defendants to predict reasonably where they might be sued on a particular claim. It will enhance the possibility of forum shopping with attendant expensive choice of law litigation, hardly consistent with the fair and orderly administration of the laws. It will be viewed very negatively by other countries with which we want to trade.

Courts that have reasoned that general jurisdiction should be permissible over "virtual stores" should step back and re-think those conclusions in light of the problems noted by this Article (and any other arguments that may be raised by litigants or other authors). It is the author's hope that when the courts do so it will result in the eventual disappearance of such jurisdiction from the legal landscape. And if that does not occur, and divisions of opinion continue on the issue, it is the author's hope that the Supreme Court will resolve the disagreement by supplying some much-needed guidance on the appropriate scope of general personal jurisdiction.