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A CLASH OF PRINCIPLES: PERSONAL JURISDICTION AND TWO-LEVEL UTILITARIANISM IN THE INFORMATION AGE

WESLEY M. BERNHARDT*

ABSTRACT

*Utilitarianism provides the best analytic framework for “minimum contacts” analyses in multi-state mass tort litigation. Utilitarianism is a consequentialist ethical philosophy contending that one should act in a way that maximizes utility; that is, act in a way that maximizes pleasure and minimizes pain. This is often referred to as the “felicific calculus.”¹ To maintain a civil lawsuit against a defendant, a court must have “personal jurisdiction” over that defendant, meaning that the defendant must have minimum contacts related to the suit such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.² This is referred to as the “minimum contacts” test.³ The minimum contacts test serves two primary functions: first, ensuring that litigation takes place in a convenient forum; and second, ensuring that states do not intrude on the sovereignty of other states.⁴ The former function can be seen as a form of utilitarianism, whereby the court effectively weighs the costs and benefits of maintaining litigation in the given forum. However, the former function can conflict with the latter, more formalist function of maintaining a federalist system. This conflict featured in the recent Supreme Court case *Bristol-Myers Squibb v. Superior Court*, where the Supreme Court ruled that California did not have personal jurisdiction over mass tort claims from Oklahoma consumers, even though the exact same claims were being brought in California.⁵ In this case, the Supreme Court affirmed that in minimum contacts analyses, the formalist function is more important than the utilitarian one. The purpose of this note is to argue that the utilitarian function of minimum contacts should subsume the formalist one.*

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1. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1, n.1 (1823) (“The word utility does not so clearly point to the ideas of pleasure and pain as the words felicity and happiness do . . .”) (emphasis in original).

2. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3. *See id.*

4. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780–81 (2017).

5. *See id.* at 1776.

INTRODUCTION

The first section of this note, titled “Background,” explores the philosophy of Utilitarianism, especially as laid out by Jeremy Bentham and Richard Hare. Additionally, it explores the doctrines of personal jurisdiction under current Supreme Court precedent, especially as it relates to multi-state litigation.

The “Analysis” section explores the clash between utilitarianism and federalism within personal jurisdiction jurisprudence. Next, the doctrinal and pragmatic issues of valuing federalism over utilitarianism are discussed, with a particular emphasis on how the cyber age warrants a new conception of personal jurisdiction and an overturning of *International Shoe, Co. v. Washington*. Finally, a new standard for personal jurisdiction, modeled on Richard Hare’s two-level utilitarianism, is presented as a viable alternative for personal jurisdiction jurisprudence in the modern information age.

BACKGROUND

I. WHAT IS UTILITARIANISM?

Utilitarianism is an ethical philosophy postulating that the morally “right” action is the one that best maximizes “utility.”⁶ But how is “utility” defined? Jeremy Bentham, the father of modern utilitarianism, defined “utility” as that which maximizes pleasure and minimizes pain.⁷ Bentham named this “the principle of utility,” although it is often referred to as the “felicific calculus.”⁸ Bentham conceptualized pleasure and pain as the two “sovereign masters” with complete control over what a person should do and what a person ought to do.⁹

A. Felicific Calculus

The abstract principles of “pleasure” and “pain” leave much to the imagination. Is pleasure defined purely as that which most activates the brain’s reward system? Or is it defined more broadly as that which is pro-social? Is it that which progresses humanity forward, rather than backwards? If the latter, how is pro-social defined? If “pro-social” can be

6. BENTHAM, *supra* note 1, at 1–2.

7. *Id.* at 2.

8. *See id.* at 1, n.1; *see also* Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 557 (1987) (“Bentham postulated the felicific calculus, a method of codifying the law based on the ‘greatest happiness’ utility principle.”).

9. BENTHAM, *supra* note 1, at 1–2.

defined, who defines it?¹⁰ Fortunately, Jeremy Bentham provided us at least some guidance:

By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.¹¹

Indeed, Bentham's felicific calculus accounts for goodness of the individual and goodness of society as a whole.¹² Bentham defined society as a fictitious construct consisting of individual "members," and defined the "good of society" as the sum of the good of society's members.¹³ Therefore, the distinction between individual-level utility and societal utility collapses in Bentham's utilitarianism, because in his conception, societal utility encapsulates individual-level utility.¹⁴

Bentham uses "pleasure" as a metaphor for that which has a greater tendency to augment than diminish the happiness of the community, and "pain" as a metaphor for that which has a greater tendency to diminish than augment the happiness of the community.¹⁵ Bentham even applied his felicific calculus to the law more broadly, using the phrase "law or dictate of utility" as a useful phrase to describe laws conforming to the principle of utility.¹⁶

10. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.") *But see id.* at 2605 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.").

11. BENTHAM, *supra* note 1, at 2.

12. *See id.*

13. *See id.* at 3.

14. *See id.* ("The interest of the community then is, what?—the sum of the interests of the several members who compose it. . . . It is in vain to talk of the interest of the community, without understanding what is the interest of the individual.").

15. *See id.* at 4 ("A thing is said to promote the interest, or to be for the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains."); *see also id.* at 2. Bentham explains:

By the principle of utility it is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.

Id.

16. *See* BENTHAM, *supra* note 1.

The felicific calculus can be understood, in the context of governmental action, with the following set of rules. First, a governmental action is a dictate of utility if it maximizes pleasure and minimizes pain.¹⁷ Second, pleasure is that which has a tendency to augment the happiness of the community, and pain is that which has the tendency to diminish the happiness of the community.¹⁸ Third, the happiness of the community is the sum of the happiness of its individual members.¹⁹ Therefore, if a governmental action has a greater tendency to augment the sum happiness of the members of society than diminish that happiness, then that governmental action is a dictate of utility.²⁰ Yet, this formulation still leaves two unanswered questions: First, how is a governmental action's tendency to augment or diminish happiness calculated? Second, how is "governmental action" defined? Jeremy Bentham provides us an answer to the first question, but no specific answer to the second.

B. The Seven Factors of Happiness

Bentham articulated seven factors through which a governmental action's tendency to augment or diminish happiness could be calculated.²¹ These are: (1) intensity, (2) duration, (3) probability, (4) remoteness, (5) fecundity, (6) purity, and (7) extent.²²

The first four factors are simple and mostly self-explanatory. The first factor, intensity, refers to the strength of the pleasure or pain. For example, it is not uncommon for physicians to ask incoming patients to describe their pain on a scale of one to ten.²³ Such a scale is analogous to Bentham's "intensity" factor. The second factor, duration, refers to the length of time for which the pleasure or pain lasts. The third factor, probability, refers to the likelihood that the pleasure or pain will result. The fourth factor, remoteness, refers to the pleasure or pain's proximity to the present.

These four factors are not wholly distinct, but rather blend together to form the heart of the felicific calculus. For example, highly improbable but highly intense pain could have wildly different values depending upon the duration of the pain. Furthermore, the probability of a pleasure or pain could increase or decrease depending upon the other three factors. Driving

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* at 22.

22. *Id.*

23. *See* Warren Grant Magnuson Clinical Center, *Pain Intensity Instruments* (2003) (available on file with the National Institutes of Health).

over the speed limit is a particularly illustrative example. At just a few miles over the speed limit, the most probable pains are those that are relatively non-intense and short lasting, such as speeding tickets. As the speeding increases ten, twenty, or thirty miles over the speed limit, the likelihood of more intense, long-lasting pains, such as death, increase.

Similarly, the same amount of remoteness can tip the scale in different directions in different circumstance. In other words, both pressing and remote pleasures or pains can be blessings or curses depending upon the situation. Some pains are better handled in the present, and some pleasures become more intense as time progresses. Conversely, frontloading pain can decrease its intensity, and momentary, fleeting pleasures often evolve into intense, long-lasting pain. Thus, remoteness can be best understood as a factor modifying the other six factors in different ways in different situations.

The next two factors, fecundity and purity, are less self-explanatory. Fecundity, in the contexts of human demography and population demography, refers to the reproductive capacity of an organism or population.²⁴ Fecundity has a similar meaning in the context of Bentham's felicific calculus.²⁵ Here, it refers to the pleasure's probability of causing further pleasure, and the pain's probability of causing further pain.²⁶ Fecundity can thus be articulated as a result's self-reproductivity.²⁷ Purity is the mirror-image of fecundity, and refers to the probability that the pleasing or painful act *itself* will not cause the opposite.²⁸ Purity can thus be articulated as the improbability of unintended negative consequences of pleasures and silver linings of pains.²⁹

An illustrative example of fecundity is drug addiction. In the case of heroin addiction, as the number of usage experiences increases, the likelihood of the negative effects of heroin being duplicated in the future increases, precisely because addiction makes it likelier for the user to use the substance again in the future. Addiction is also an illustrative example of *impure* pains and pleasures. Although recreational drugs can be addictive and lead to deleterious life-outcomes (pain), they are used and abused primarily for their euphoric effects (pleasure). Conversely, their euphoric effects (pleasure) incentivizes the addiction (pain) in the first place.

24. See, e.g., U.N. ASIAN DEV. INST., A GLOSSARY OF SOME TERMS OF DEMOGRAPHY 30 (2003).

25. See BENTHAM, *supra* note 1, at 22.

26. See *id.*

27. See *id.*

28. See *id.*

29. See *id.*

The last factor, extent, refers to the pleasure or pain's spread across the community.³⁰ In other words, extent refers to how particularized or generalized a pleasure or pain is.³¹ For example, drug addiction would have a lower extent if drug addiction was concentrated to a small portion of a society. Conversely, drug addiction would have a greater extent if it had reached epidemic proportions.

C. "Governmental Action": Act and Rule Utilitarianism

Still unanswered in the felicific calculus is the definition of "governmental action." Are we asking if a *singular* governmental action conforms to the principle of utility, or are we asking if the principle or law *underlying* that action conforms to the principle of utility? These are problematic questions for utilitarianism not just in the governmental context, but elsewhere as well. Should an individual, in following Bentham's felicific calculus, perform the calculus as to each *individual action* they take, or should the individual follow a set of *rules or principles* that, if followed, will maximize utility?

The individual action approach to the felicific calculus looks appealing at first glance. An accurate calculation of happiness can be more readily achieved if the decision-making process is unconstrained with bright-line rules. Many decisions will have new circumstances and variables that a rule would be unable to account for. A rule may over-emphasize some of Bentham's seven factors, while de-emphasizing others, leading to inaccurate calculations when the de-emphasized factors are acutely important, and vice versa. Thus, although a rule approach to the felicific calculus may maximize happiness in most circumstances, the individual act approach could in theory lead to that maximization in all circumstances.

The individual act approach is not, however, without its flaws. One flaw of the individual approach is decision fatigue. Decision fatigue refers to the diminished ability to make sound decisions after a long series of decisions.³² In the words of Roy Baumeister, "[m]aking decisions uses the very same willpower that you use to say no to doughnuts, drugs, or illicit sex."³³ In felicific calculus terms, decision fatigue means that as the number of successive decisions increase, the utility of the actor's actions will decrease. Therefore, if decision fatigue exists as a phenomenon, the

30. *See id.*

31. *See id.*

32. *See* Drake Baer, *The Scientific Reason Why Barack Obama and Mark Zuckerberg Wear the Same Outfit Every Day*, BUSINESS INSIDER (Apr. 28, 2015, 9:47 AM), <http://www.businessinsider.com/barack-obama-mark-zuckerberg-wear-the-same-outfit-2015-4>.

33. *See id.*

rule approach to the felicific calculus could overcome its shortcomings by counteracting the decision fatigue inherent in the individual approach to the felicific calculus.

Politics and law provide two excellent examples of decision fatigue. In the political world, Barack Obama's wardrobe represents a concerted effort to avoid decision fatigue.³⁴ While he was President, Mr. Obama wore only two suit colors: gray or navy.³⁵ His wardrobe's limited color scheme was predicated on an understanding of decision fatigue.³⁶ In other words, because a President must make numerous decisions every day involving the safety, security, and prosperity of 320 million people, it would be unwise to use time and energy on something as mundane as attire.³⁷

In the realm of law, evidence of decision fatigue can be seen in judicial decision-making.³⁸ For example, a study of parole board decisions found that prisoners seeking parole are less likely to receive parole if a parole board decides their case later in the day, after the board has already made numerous decisions throughout the day.³⁹ By contrast, prisoners seeking parole earlier in the day were far likelier to receive their requested relief.⁴⁰

These examples showcase the downside of the act-based utilitarianism while simultaneously showcasing the benefits of a rule-based utilitarianism. In rule-based utilitarianism, no individual decisions are made. Rather, the only decision to be made is what rule or standard to follow. Rule-based utilitarianism can thus be described as frontloading the felicific calculus in anticipation of decision making, as opposed to performing the calculus at every decision fork. Although any rule or standard that guides actions will always produce results that, in some instances, are not dictates of utility, a rule based approach to utilitarianism can overcome this flaw by limiting or eliminating the deleterious effects of decision fatigue.⁴¹

34. *Id.*

35. *Id.*

36. *See id.*

37. *See id.*

38. *I Think It's Time We Broke for Lunch...*, THE ECONOMIST, (Apr. 16, 2011), <https://www.economist.com/science-and-technology/2011/04/14/i-think-its-time-we-broke-for-lunch>.

39. *Id.*

40. *See id.*

41. *See* R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 39 (1981) ("A further reason for relying in much of our moral conduct on relatively general principles is that, if we do not, we expose ourselves to constant temptation to special pleading. In practice, especially when in haste or under stress, we may easily, being human, 'cook' our moral thinking to suit our own interest.") (citation omitted).

This tension between act utilitarianism and rule utilitarianism can be seen throughout the land of the law.⁴² Often, disputes in legal discourse turn on whether a court of law applies a bright line rule or a multi-factored standard.⁴³ In such instances, bright-line rules closely mirror rule utilitarianism, and factor-tests or standards lean closer to act utilitarianism.⁴⁴ Act and rule utilitarianism are not, however, diametrically opposed poles with no place in between. Rather, these two approaches to the felicific calculus can be synthesized, each being used in different circumstances.⁴⁵ This synthesis is called two-level utilitarianism.⁴⁶

D. Two-Level Utilitarianism

R.M. Hare first conceptualized two-level utilitarianism in his book, *Moral Thinking*, in 1981.⁴⁷ According to Hare, there existed two extreme poles of people: “archangels” and “proles.”⁴⁸ Archangels are those human beings whose superior intellectual and cognitive abilities allowed their every decision to be a dictate of utility, thus eliminating their need for guiding rules or principles.⁴⁹ Archangels would never succumb to decision fatigue and represent Hare’s personification of act utilitarianism.⁵⁰

Hare also described “proles”: people who because of their intellectual inability to perform the felicific calculus, act by guiding principles in every instance to conform to the principle of utility.⁵¹ Proles thus represent Hare’s personification of rule utilitarianism.⁵² It is important to note, however, that archangels and proles were not designed to be real people, but rather mental constructs personifying two-level utilitarianism.⁵³ Further, Hare believed that most human beings fell somewhere between archangels and proles.⁵⁴

42. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985) (“[D]isputes that pit a rule against a standard are extremely common in legal discourse.”).

43. *See id.*

44. *See id.*

45. HARE, *supra* note 41, at 43 (“The two kinds of utilitarianism, therefore, can coexist at their respective levels . . .”).

46. *Id.* at 43.

47. *Id.*

48. *Id.* at 44–45.

49. *See id.* at 44.

50. *See id.* Hare refers to the archangel’s use of act utilitarianism as “critical moral thinking.”

51. *See id.* at 45.

52. *See* HARE, *supra* note 41. Hare refers to the prole’s use of rule utilitarianism as “intuitive moral thinking.” *Id.*

53. *See id.*

54. *See id.* (“[W]e all share the characteristics of both to limited and varying degrees and at different times.”).

Hare contended that to conform to the principle of utility, one must act as an “archangel” in some circumstances and a “prole” in others.⁵⁵ In other words, act and rule utilitarianism could be synthesized such that the positives of both could be realized and the negatives of both could be diminished.⁵⁶ In furtherance of this synthesis, Hare contended that one should act as a prole in every situation that did not fall into one of three special categories: (1) when guiding principles conflict with one another; (2) when unusual circumstances make the otherwise applicable principle inapplicable; and (3) when the situation requires you to *select* a guiding principle.⁵⁷

Although the utilitarianism of both Bentham and Hare has wide-ranging applications to the law generally, it has an especially close relationship with personal jurisdiction. However, this relationship is countered in modern jurisprudence by the blunt axe of federalism. The succeeding sections discuss these personal jurisdiction doctrines and contend that Hare’s two-level utilitarianism provides the best model for a *new* personal jurisdiction doctrine.

II. WHAT IS PERSONAL JURISDICTION?

A. *Limitations on a Court’s Coercive Power*

Both state and federal courts in the United States have a limited ability to hale non-residents into their courts. State courts are limited by the constraints of their own state’s laws. The exercise of personal jurisdiction over an out-of-state defendant by both state and federal courts is limited by the Due Process Clause of the Fourteenth Amendment.⁵⁸

State courts are normally granted jurisdiction by state statutes.⁵⁹ Statutes that grant state courts’ the ability to assert jurisdiction over non-resident defendants are commonly referred to as “long-arm” statutes.⁶⁰

55. *See id.* at 46–47.

If we wish to ensure the greatest possible conformity to what an archangel would pronounce, we have to try to implant in ourselves and in others whom we influence a set of dispositions, motivations, intuitions, prima facie principles (call them what we will) which will have this effect. We are on the whole more likely to succeed in this way than by aiming to think like archangels on occasions when we have neither the time nor the capacity for it.

Id.

56. *See id.*

57. *See HARE, supra* note 41.

58. U.S. CONST. amend. XIV, § 1; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Note, however, that the Due Process Clause’s limitation on a federal district court’s exercise of personal jurisdiction is indirect, through the Federal Rules of Civil Procedure. FED. R. CIV. P. 4.

59. *See, e.g., CAL. CIV. PROC. CODE* § 410.10 (West 2017).

60. *See id.*

Each state places their own conditions on its courts' exercise of "long-arm" jurisdiction through these statutes.⁶¹ For example, the State of Mississippi's long-arm statute limits its courts' long-arm jurisdiction to cases involving a defendant doing business in the state, committing a tort in the state, or making a contract with a resident of the state to be performed in whole or in part in the state.⁶² In contrast, California's long-arm statute places no additional limitations on its courts' long-arm jurisdictions beyond the limitations in the Due Process Clause of the Fourteenth Amendment.⁶³

The Due Process Clause of the Fourteenth Amendment precludes a state's ability to deprive a person of life, liberty, or property without due process of law.⁶⁴ The Supreme Court has interpreted this language to apply to a state court's exercise of power over a non-resident defendant. In *International Shoe*, it articulated the following test:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'⁶⁵

This often-quoted language from *International Shoe* is referred to as the "minimum contacts" test, and its requirements must be met for a state court to render a valid judgment against a non-resident defendant.⁶⁶ This same test applies to a United States District Court's exercise of jurisdiction over a defendant.⁶⁷ If the minimum contacts test is satisfied, the court can then exercise either "specific" or "general" jurisdiction over the out-of-state defendant.⁶⁸

B. General Jurisdiction

General jurisdiction, occasionally referred to as "all-purpose" jurisdiction, exists where a defendant's contacts with the forum state are so "continuous and systematic" that the defendant can fairly be regarded

61. *See id.*

62. MISS. CODE ANN. § 13-3-57 (West 2017).

63. *See* CAL. CIV. PROC. CODE § 410.10 (West 2017).

64. U.S. CONST. amend. XIV, § 1.

65. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *compare Int'l Shoe*, 326 U.S. at 316, *with Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a state court could only exercise jurisdiction over a non-resident defendant if that defendant held property in the forum state).

66. *See Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91 (1978); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

67. FED. R. CIV. P. 4.

68. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

as being “at home” in the forum state.⁶⁹ These contacts with the forum state do not have to be related to the underlying controversy being litigated.⁷⁰ In the case of an individual defendant, the court will have general jurisdiction over the defendant if that defendant is a citizen of that state.⁷¹ In the case of a corporate defendant, a court will have general jurisdiction over the defendant if the defendant is incorporated in that state or if the defendant has its “principal place of business” in that state.⁷² However, a court can, in exceptional circumstances, exercise general jurisdiction over a corporate defendant even where the defendant is not incorporated and does not have its principal place of business in the forum state.⁷³

C. *Specific Jurisdiction*

The minimum contacts test can also be satisfied where the defendant’s contacts are connected to the underlying controversy. Exercise of jurisdiction in these circumstances is referred to as “specific jurisdiction.”⁷⁴ General jurisdiction analyses typically examine the volume and quantity of a defendant’s connections with the forum state.⁷⁵ By contrast, in specific jurisdiction analyses, a court will examine the affiliation between the forum state and the underlying controversy at hand.⁷⁶ Specific jurisdiction could perhaps be characterized as a tripartite relationship between the defendant, the forum, and the litigation.⁷⁷

Although Supreme Court precedent is clear that tangential, tenuous, or limited connections with a forum state will not suffice for specific jurisdiction, it has yet to endorse a specific test to determine the sufficiency of a defendant’s contacts for specific jurisdiction. Two differing, and at times conflicting, tests appear in Supreme Court precedent: the “purposeful availment” test and the “stream of commerce” test.

Under the purposeful availment test, a defendant’s contacts with a forum state will be deemed sufficient for specific jurisdiction where the defendant has “purposefully availed themselves” of the laws of the forum

69. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984).

70. *Daimler AG v. Bauman*, 571 U.S. 117, 123–24 (2014).

71. *Id.* at 137.

72. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984).

73. *See Daimler*, 571 U.S. at 128–31.

74. Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

75. *See Daimler*, 571 U.S. at 128–31.

76. *See id.*

77. *See Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

state.⁷⁸ This entails some purposeful action by the defendant that establishes ties between the defendant and the forum state.⁷⁹ By contrast, it is insufficient under this test that the defendant could foresee the possibility of suit in the forum state.⁸⁰ Therefore, unilateral actions by third parties, such as other companies, subsidiaries, or the plaintiff, are also insufficient under this purposeful availment test.⁸¹

For example, in *Asahi*, the plaintiff was injured in an automobile accident, and claimed as the cause of the accident a defective product by a Taiwanese manufacturer.⁸² After the plaintiff sued the Taiwanese manufacturer in California state court, the manufacturer indemnified the original creator of the defective part, Asahi, a Japanese corporation.⁸³ Eventually, the original lawsuit settled, with only the indemnity action remaining.⁸⁴ Under the purposeful availment test, the court found Asahi's contacts with California insufficient for a finding of specific jurisdiction.⁸⁵ The court reasoned that Asahi's only real contact with California was its affiliation with the Taiwanese manufacturer, and because unilateral actions by third parties were insufficient under the purposeful availment test, Asahi did not have minimum contacts with California and could not be brought to suit there.⁸⁶

The proponents of the "purposeful availment" test point to two primary concerns in their support of the test: notice and predictability. By requiring that a defendant must have directed some purposeful action into the forum state, proponents reason that defendants will almost always be on notice of when and where they could possibly be brought to suit.⁸⁷ It is further reasoned that if a defendant is on notice of when and where it can be brought to suit, it can thereby do things to avoid litigation if it so chooses, such as purchasing liability insurance or passing the costs of litigation onto

78. See *Asahi Metal Indust. Co. v. Superior Court of Cal.* 480 U.S. 102, 110 (1987).

79. *Id.* at 108; see also *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

80. See *Asahi*, 480 U.S. at 109.

81. *Id.*

82. *Id.* at 105–06.

83. *Id.*

84. *Id.*

85. *Id.* at 112.

86. *Id.* Although Justice O'Connor authored the "majority" opinion, she was only joined by three other justices in her endorsement of the purposeful availment test. *Asahi*, 480 U.S. at 105. Justice Brennan authored a concurring opinion endorsing a version of the "stream of commerce" test for specific jurisdiction. *Id.* at 116 (Brennan, J., concurring).

87. *Id.* at 110.

the consumer vis-à-vis higher prices.⁸⁸ Because the purposeful availment test is relatively concrete and predictable, corporate defendants can thereby make reasoned, calculated decisions regarding where and how to do business.⁸⁹

Only four justices endorsed “purposeful availment” in *Asahi*, not a fully majority.⁹⁰ Instead, there exists another test to determine whether a corporate defendant’s contacts are sufficient for specific jurisdiction: the “stream of commerce” test.⁹¹ The stream of commerce test states that where a corporate defendant has placed its product into the “regular and anticipated flow of products from manufacture to distribution to retail sale,” and that product injures someone in the forum state, minimum contacts will be satisfied so long as the defendant is aware that its products are being marketed or sold in the forum state.⁹²

This test is somewhat broader than the “purposeful availment” test, as a corporate defendant’s actions can be less direct under the stream of commerce test; although Justice Brennan did not believe that this would lead to a differing outcome in the *Asahi* case.⁹³ Justice Brennan opined that, under the stream of commerce test, a defendant will not be presented with a “burden for which there is no corresponding benefit,” meaning that a corporate defendant should not be able to escape the clutches of a court’s coercive arm if they have benefited economically from product sales in that forum state.⁹⁴

D. ‘Fair Play and Substantial Justice’

However, the minimum contacts test is not the only component of personal jurisdiction under the Due Process Clause. In *International Shoe*, the Court stated that the defendant must have minimum contacts with the forum such that the maintenance of the suit does not offend “*traditional notions of fair play and substantial justice*.”⁹⁵ In *Burger King Corp. v. Redzewicz*, the Court interpreted this to mean that once a court has run through a minimum contacts analysis, the court must then consider the defendant’s contacts in light of the reasonableness of exercising

88. *Id.*

89. *See id.*

90. *See id.* at 105–06.

91. *See id.* at 116 (Brennan, J., concurring); *see also* *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 473 (1985).

92. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring).

93. *Id.*

94. *Id.* at 117.

95. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (emphasis added).

jurisdiction over that defendant.⁹⁶ A number of factors will be considered in determining the reasonableness of exercising jurisdiction, including

“[T]he burden on the defendant,” “the forum [s]tate’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interests of the several [s]tates in furthering fundamental substantive social policies.”⁹⁷

However, the burden on the defendant is the most important of these factors.⁹⁸

E. Connection to the Litigation

So far, this note has discussed several different theories under which a defendant can have minimum contacts and thereby can legally be haled into a court. A court can exercise general jurisdiction over a corporate defendant who is “at home” in the forum state, and specific jurisdiction over a defendant when that defendant’s contacts with the forum state are related to the controversy underlying the litigation. But does there exist a grey area between specific and general jurisdiction? What happens when a corporate defendant has extensive forum contacts that are insufficient for general jurisdiction and contacts connected with the litigation but insufficiently so for specific jurisdiction?

Suppose, for example, that a corporate defendant had extensive contacts with a forum state. The defendant sells products in the state, markets in the state, and even owns facilities in the forum state, but is incorporated in Delaware and has its principal place of business elsewhere. Under such circumstances, the forum state would not have personal jurisdiction over the defendant under a general jurisdiction theory.⁹⁹ Of course, the defendant could probably be haled into court under a theory of specific jurisdiction if an injury occurred at one of its in-state facilities or if one of its products sold in-state injured someone in-state. But in modern times, many large corporations sell their products across the entire United States, and some of these products will inevitably injure individuals in multiple states. If the product injures individuals in both states A and B, and the individuals from B sue in state A, what outcome would result under a specific jurisdiction analysis?

96. *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 476 (1985).

97. *Id.* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

98. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1786 (2017).

99. *See Daimler AG v. Bauman*, 571 U.S. 117, 132 (2014).

One possible solution is a “sliding scale” approach to specific jurisdiction.¹⁰⁰ Under this theory, the factors pursuant to “traditional notions of fair play and substantial justice” could make an exercise of personal jurisdiction reasonable under a lesser showing of minimum contacts.¹⁰¹ For example, if an exercise of jurisdiction over a defendant would place virtually no burdens on that defendant, then a lesser showing of minimum contacts may be acceptable.¹⁰² Contrastingly, if the exercise of personal jurisdiction would place a heavy burden on the defendant, a greater showing of minimum contacts may be necessary.¹⁰³

A possible extension of this sliding scale approach could be utilized whereby these “reasonableness” considerations could serve to establish reasonableness of jurisdiction upon a lesser showing of a defendant’s contacts being *connected to the litigation*.¹⁰⁴ The Supreme Court of California formerly endorsed this theory of specific jurisdiction, but their theory was ultimately struck down by the Supreme Court of the United States.¹⁰⁵ Although this theory would still require that the defendant’s contacts with the forum state bear some relation to the underlying controversy, this connection could be more indirect if the defendant’s contacts with the forum state were extensive.¹⁰⁶

This twilight zone between general and specific jurisdiction featured in the recent Supreme Court case *Bristol-Myers Squibb v. Superior Court*.¹⁰⁷ Bristol-Myers Squibb is a pharmaceutical company that sold a drug named “Plavix” across the United States.¹⁰⁸ Ultimately this drug caused injuries to certain individuals, and some of these individuals filed suit in California.¹⁰⁹ Some of these individuals bought the drug in California and were ultimately hurt by the drug in California.¹¹⁰ Some of the plaintiffs, however, were located in thirty-three other states.¹¹¹ Bristol-Myers Squibb is incorporated in Delaware, and has its principal place of business in New York, so California does not have general jurisdiction over Bristol-Myers

100. *Burger King*, 471 U.S. at 476–77.

101. *See id.* at 477 (“These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”).

102. *See id.*

103. *See id.* at 477–78.

104. *See Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 891 (Cal. 2016).

105. *Compare Bristol-Myers Squibb*, 377 P.3d 874 (Cal. 2016), with *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

106. *See Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1097 (Cal. 1996).

107. *See generally Bristol-Myers Squibb*, 137 S. Ct. 1773.

108. *Id.* at 1777–78.

109. *Id.* at 1778.

110. *Id.*

111. *Id.*

Squibb.¹¹² This is despite Bristol-Myers Squibb’s extensive contacts with California: they maintained multiple facilities in the state, employed over 150 employees in the state, and sold the drug in the state.¹¹³ Therefore, personal jurisdiction over Bristol-Myers Squibb for the California claims was a non-issue.¹¹⁴ However, personal jurisdiction over the non-resident claims was less obvious.¹¹⁵

The Supreme Court of California followed its sliding scale approach in finding that California courts had specific jurisdiction over the Oklahoma claims.¹¹⁶ It reasoned that although the injuries occurred in other states, the injuries were related to Bristol-Myers Squibb’s California contacts indirectly in that the two tort claims are identical.¹¹⁷

The Supreme Court of the United States, however, reversed.¹¹⁸ It explicitly rejected the “sliding scale” approach employed by the Supreme Court of California, finding it incompatible with Supreme Court precedent on specific jurisdiction.¹¹⁹ The court firmly stated that the defendant’s contacts must still bear a direct relationship to the underlying controversy, and that these reasonableness factors could not establish specific jurisdiction on a lesser or tenuous connection.¹²⁰ The Supreme Court held, therefore, that a California state court could not exercise personal jurisdiction over the non-residents’ claims against Bristol-Myers Squibb given these facts.¹²¹

ANALYSIS

I. A CLASH OF PRINCIPLES

From its inception, utilitarianism has had an intimate connection with the law. Indeed, in *An Introduction to the Principles of Morals and Legislation*, Bentham even applied his felicific calculus to the law broadly, postulating that when governmental action conforms to the felicific calculus, it is a “law or dictate of utility.”¹²² Intentionally or not, the American legal system is brimming with rules, principles, and standards that mirror Bentham’s calculus in some fashion, balancing the pro-social against the anti-social.

112. *Id.* at 1777, 1780.

113. *Id.* at 1778.

114. *Bristol-Myers Squibb*, 137 S. Ct. at 1782.

115. *Id.*

116. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 889–90 (Cal. 2016).

117. *See id.* at 890–91.

118. *Bristol-Myers Squibb*, 137 S. Ct. at 1773.

119. *Id.* at 1781.

120. *Id.* at 1782.

121. *Id.* at 1783.

122. *See BENTHAM*, *supra* note 1, at 3.

For example, when deciding whether to grant a preliminary injunction, a court, as a part of its analysis, will balance the harm of the movant should the injunction be denied against the non-movant's harm should it be granted.¹²³ Similarly, in analyzing a claim of violation of procedural due process under the Fifth and Fourteenth Amendments, a court will weigh the private interest affected by the challenged official action, and the governmental interest that would be burdened if the court were to place new procedural requirements on the government.¹²⁴ Broadly speaking, balancing tests, found in every corner of the law, all closely mirror the principle of utility formulated by Jeremy Bentham. The principle of utility is, however, contoured by other philosophical principles. This clash of principles can be seen in the doctrines of personal jurisdiction.¹²⁵

Our current personal jurisdiction doctrine contains utilitarian principles. With the “fair play and substantial justice” factors, the court balances all interests involved to effectively reach the solution that maximizes utility. The other half of our personal jurisdiction doctrine, the concept of “minimum contacts connected to the litigation,” is rooted firmly in principles of federalism. Ultimately, when these two sets of principles have clashed in the Supreme Court's personal jurisdiction jurisprudence, federalism has trumped utilitarianism.

The principles of utilitarianism can be seen in the concept of “fair play and substantial justice.” The factors inherent in traditional notions of fair play and substantial justice include the

“[B]urden on the defendant,” “the forum [s]tate's interest in adjudicating the dispute,” “the plaintiff's interest in obtaining convenient and effective relief,” “the interstate judicial system's interest in obtaining the most efficient resolution of controversies,” and the “shared interests of the several [s]tates in furthering fundamental substantive social policies.”¹²⁶

Through these factors, a court effectively balances the interests of all parties and institutions, reaching a solution that maximizes pleasure and minimizes pain. These factors can preclude a state court's exercise of personal jurisdiction even where a defendant has minimum contacts with the forum state connected to the litigation.¹²⁷ However, these factors

123. See *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

124. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

125. See generally *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017).

126. *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

127. See *id.*

cannot give a state personal jurisdiction over a defendant where this minimum contacts test has not been met.¹²⁸

As noted above, personal jurisdiction analyses first begin by asking what contacts, if any, the defendant has with the forum state, and whether, through these contacts, the defendant has purposefully availed themselves of the laws of the forum state.¹²⁹ Furthermore, these contacts must be connected to the litigation, or “systematic” enough to render the defendant “at home in the forum state.”¹³⁰ This analysis does not involve any balancing of interests. Rather, this “minimum contacts” analysis is a bright-line rule, whereby a forum will not have personal jurisdiction over a defendant that does not meet this test even where other interests, such as those inherent in “fair play and substantial justice,” would point towards the court exercising personal jurisdiction.¹³¹

This bright line rule is predicated on principles of federalism.¹³² The American political system divides power not only between the three branches of the federal government, but also between the federal government and the many states.¹³³ This principle is enshrined in the Tenth Amendment to the United States Constitution.¹³⁴ The many states thereby “retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.”¹³⁵ The retainment of this power by the many states implies a negative limitation on the power of the other states.¹³⁶ Therefore, even where a certain state would be the most fair or utilitarian place to litigate a case, the principle of federalism can foreclose that state’s exercise of personal jurisdiction.¹³⁷

Although our current personal jurisdiction jurisprudence does contain elements of utilitarianism, these principles are countered by the blunt axe of federalism. This raises three questions. First, does this ordering of principles make sense doctrinally? Second, does this ordering of principles

128. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780 (“And at times, this federalism interest may be decisive. . . . even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another [s]tate . . .”).

129. *See id.*

130. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

131. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780.

132. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“[R]estrictions [on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant limitation. They are a consequence of territorial limitations on the power of the respective States.”).

133. *See id.*

134. U.S. CONST. amend. X.

135. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

136. *Id.*

137. *Id.*

make sense pragmatically? Third, if the answer to either of the first two questions is no, what system, doctrine, or rule should replace our current personal jurisdiction jurisprudence?

II. THE PROBLEM

A. Doctrinal Issues with Current Personal Jurisdiction Jurisprudence

In *Shaffer v. Heitner* and *World-Wide Volkswagen*, Justice Brennan's dissents advanced a more liberal interpretation of *International Shoe* than is currently accepted by the Supreme Court.¹³⁸ In *Shaffer*, he noted,

Nonetheless, when a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.¹³⁹

If we follow Justice Brennan's liberal interpretation of personal jurisdiction under the Due Process Clause, modern personal jurisdiction jurisprudence's ordering of federalism over the more utilitarian values of "fair play and substantial justice" is inconsistent with *International Shoe*. Our current personal jurisdiction jurisprudence focuses too tightly on contacts, instead of the forum State's interests and the actual inconvenience to the defendant that form the crux of the concept of "fair play and substantial justice."¹⁴⁰ Instead of focusing solely on a defendant corporation's contacts with the forum state, *International Shoe* focused on fairness and reasonableness, contacts with the forum state being merely one way of showing fairness or reasonableness.¹⁴¹

Furthermore, *International Shoe* did not separate the concepts of "contacts" and "federalism" as concepts above and beyond the more utilitarian values of fair play and substantial justice.¹⁴² Instead, these concepts helped inform the determination of whether or not a state court's exercise of jurisdiction comported with due process.

For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts

138. Compare *World-Wide Volkswagen*, 444 U.S. at 299–313 (Brennan, J., dissenting), with *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

139. *Shaffer v. Heitner*, 433 U.S. 186, 225–26 (1977) (Brennan, J., Dissenting).

140. *World-Wide Volkswagen*, 444 U.S. at 299–300 (Brennan, J., dissenting).

141. *Id.* at 300.

142. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945).

will deem to be sufficient to satisfy the demands of due process. These 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.¹⁴³

Although *International Shoe* notes that one-off or tangential contacts unrelated to the litigation are not enough to satisfy due process, it states so not because such contacts would fall below a rigid “minimum contacts” formula, but rather because a state court’s exercise of jurisdiction would be unreasonable in such circumstances.¹⁴⁴

International Shoe explicitly rejected the idea of a rigid formula for personal jurisdiction under the due process clause. Instead, *International Shoe* held that a defendant’s contacts must be evaluated “in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”¹⁴⁵ Under this liberal interpretation of *International Shoe*, a lesser showing of contacts would be sufficient if other considerations helped establish the reasonableness of the particular forum.¹⁴⁶ These other considerations include the interests of the forum state and other interested parties, discussed previously.¹⁴⁷ The actual burden on the defendant is another one of these considerations.¹⁴⁸ Furthermore, if there exists less burden on the defendant, a lesser showing of contacts would be sufficient for a state court to exercise personal jurisdiction.¹⁴⁹

Although this different, more liberal interpretation of personal jurisdiction does not place federalism on a pedestal, that is not to say that federalism would never come into play in the “fair play and substantial justice” calculus; it would only be relevant insofar as it helped determine whether a state court’s exercise of jurisdiction was reasonable. If, for example, a state’s interest in hearing a cause of action were so small that it would point towards an exercise of jurisdiction not being constitutional, federalism would then become a cognizable interest in this liberal personal jurisdiction calculus. It is important to note, however, that even the

143. *Id.*

144. *Id.* at 317 (“To require the corporation to defend the suit in such circumstances . . . has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.”) (emphasis added).

145. *Id.* at 319.

146. *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting).

147. *Id.*; see also *Shaffer v. Heitner*, 433 U.S. 186, 222–23 (1977) (Brennan, J., concurring in part, dissenting in part) (“I believe that our cases fairly establish that the State’s valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action.”).

148. *World-Wide Volkswagen*, 444 U.S. at 300–01 (Brennan, J., dissenting).

149. *Id.* at 301.

Supreme Court’s current personal jurisdiction jurisprudence does not require an exercise of personal jurisdiction to be in the *best* forum state possible.¹⁵⁰ Additionally, a state court’s exercise of personal jurisdiction isn’t constitutionally impermissible merely because multiple states could, theoretically, exercise jurisdiction over the cause of action.¹⁵¹

It is worth emphasizing that although Federalism is embodied in our constitutional system through the Tenth Amendment, it is found nowhere in the text or history of the Due Process Clause specifically.¹⁵² The Supreme Court, before *Bristol-Myers Squibb*, even noted as such, stressing that although personal jurisdiction does in fact restrict state power, “it ‘must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause’ rather than as a function ‘of federalism concerns.’”¹⁵³ This stands in stark contrast to the Court’s pronouncement in *Bristol-Myers Squibb* that “this federalism interest may be decisive . . . ‘even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another [s]tate.’”¹⁵⁴

B. Pragmatic Issues with Current Personal Jurisdiction Jurisprudence

However, even if we accept Justice Brennan’s more liberal interpretation of *International Shoe*, there is a fair argument that this test is obsolete. Justice Brennan even admitted as such in *World-Wide Volkswagen*, noting that the “principle, with its almost exclusive focus on the rights of defendants, may be outdated.”¹⁵⁵ As Justice Marshall commented in the majority opinion of *Shaffer*,

“Traditional notions of fair play and substantial justice” can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are

150. See *Schaffer*, 433 U.S. at 228.

151. See *World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting) (“Under even the most restrictive view of *International Shoe*, several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.”).

152. See Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114 (1981) (“These limitations on state authority are imposed in the name of the clause, regardless of whether private parties—the ultimate beneficiaries of these protections—are in danger of suffering real injustice.”).

153. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, n.13 (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03, n.10 (1982)).

154. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

155. *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting).

inconsistent with the basic values of our constitutional heritage.¹⁵⁶

As noted above, *International Shoe* represented a step in a long process of liberalizing personal jurisdiction jurisprudence.¹⁵⁷ This change was predicated on the monumental shift in the national economy between the times of *Pennoyer v. Neff* and *International Shoe*:

In part, this is attributable to the fundamental transformation of our national economy over the years. Today, many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.¹⁵⁸

Justice Brennan recognized these economic changes, and as early as 1980, noted that the world forming the backdrop of *International Shoe* no longer existed:

The model of society on which the *International Shoe* Court based its opinion is no longer accurate. Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of a very few days. . . . I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience.¹⁵⁹

If the economy had fundamentally changed between the time of *International Shoe* and 1980, it has certainly changed between 1980 and the present day, especially considering the heralding of the information age. Much like the industrial revolution of the nineteenth century, the advent of information technology in the late twentieth century has fundamentally rearranged the economic ordering of society.¹⁶⁰ With the advent of the internet, the changes in the national economy are becoming ever more pressing. With the click of a button, an individual in St. Louis, Missouri, can, by using their computer, send data to a corporation based in

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

157. *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting).

158. *McGee v. Int'l Life Ins.*, 355 U.S. 220, 222–23 (1957).

159. *World-Wide Volkswagen*, 444 U.S. at 309 (Brennan, J., dissenting).

160. Peter F. Drucker, *The Age of Social Transformation*, THE ATLANTIC MONTHLY 53 (Nov. 1994).

Seattle, Washington,¹⁶¹ in order to purchase a product produced in China, to be transported by another corporation located in Atlanta, Georgia.¹⁶²

Personal jurisdiction doctrine has not remained static over time. Instead, the doctrine has evolved from a rigid formula to the relatively more flexible doctrine exhibited by *International Shoe* and its progeny.¹⁶³ Personal jurisdiction, as conceptualized in *Pennoyer*, looked quite different than the doctrine we see today. Under *Pennoyer*, in order for a state court to have personal jurisdiction over an out-of-state defendant, that defendant must have been physically present in the forum, or must bring themselves into the state voluntarily. *International Shoe* dispensed with this rigid formula, creating the personal jurisdiction doctrine taught to first-year law students today.¹⁶⁴

A cornerstone of constitutional interpretation is the evolution of doctrine to fit the economic realities of the current times.¹⁶⁵ Technological and economic development is the primary catalyst behind this change in doctrine.¹⁶⁶ In the personal jurisdiction context, the *Pennoyer* rule became impractical as commerce between the several states increased, considering the technological progression throughout the nineteenth and early twentieth centuries.¹⁶⁷

In the 1930s, the Supreme Court overturned prior precedent surrounding the Commerce Clause to allow for more expansive regulation of the national economy.¹⁶⁸ The background behind this change was

161. This hypothetical scenario is referencing Amazon, which in 2015 became more valuable than Walmart. See Jodi Kantor & David Streitfield, *Inside Amazon: Wrestling Ideas in a Bruising Workplace*, N.Y. TIMES (Aug. 15, 2015), <https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html>. As the economy shifts into the digital age, more individuals are purchasing goods and services through the internet instead of walking down the street to the local grocery store, implicating corporations across state boundaries.

162. *Privacy Notice*, UPS.COM, <https://www.ups.com/us/en/help-center/legal-terms-conditions/privacy-notice.page>.

163. *Compare* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *with* *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a state court could only exercise jurisdiction over a non-resident defendant if that defendant held property in the forum state).

164. *See Int'l Shoe*, 326 U.S. at 316.

165. *See* *Katz v. United States*, 389 U.S. 347, 352 (1967) (noting that the dictates of the Fourth Amendment must keep pace with technological and societal changes in order for its protections to be effective).

166. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

167. *See* *McGee v. Int'l Life Ins.*, 355 U.S. 220, 222–23 (1957) (“[T]oday many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).

168. *Compare* *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *with* *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), *and* *Wickard v. Filburn*, 317 U.S. 111 (1942).

predicated, in large part, by changes in the national economy, which prompted both state government and the federal government to enact new laws and regulations concerning the economy.¹⁶⁹ Naturally, these new regulations were challenged on constitutional grounds.¹⁷⁰

The coming of the information age has similarly catalyzed changes in established Supreme Court precedents. In 2018, the Supreme Court overruled fifty-one years of prior precedent when it held that a state can impose a sales tax on online retailers without violating the Dormant Commerce Clause.¹⁷¹ Previously, the Dormant Commerce Clause prevented states from imposing a sales tax on mail order resellers or online retailers unless those entities had a physical presence in the state.¹⁷² The South Dakota legislature instituted such a sales tax anyway, declaring a state of emergency over its diminishing tax revenue.¹⁷³

However, the Court in *Wayfair* recognized that *stare decisis* is not an “inexorable command,”¹⁷⁴ especially where changed circumstances suggest its inapplicability,¹⁷⁵ overturning *Bellas Hess* and *Quill*. Specifically, the Court recognized that the modern information economy necessitated the reconsideration of *Bellas Hess* and *Quill*.

Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the ‘far-reaching systemic and structural changes in the economy’ and ‘many other societal dimensions’ caused by the Cyber Age. . . . When it decided *Quill*, the Court could not have envisioned a world in which the world’s largest retailer would be a remote seller.

The Internet’s prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled \$180 billion. Last year, e-commerce retail sales alone were estimated at \$453.5 billion. Combined with traditional remote sellers, the total exceeds half a trillion dollars.¹⁷⁶

169. See *Wickard*, 317 U.S. at 121–24.

170. See *id.*

171. See *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018) (overturning *National Bellas Hess v. Illinois*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

172. See generally *Bellas Hess*, 386 U.S. 753; *Quill*, 504 U.S. 298.

173. *Wayfair*, 138 S. Ct. at 2088.

174. *Id.* at 2096 (“Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command.”) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

175. See *id.*

176. See *id.* at 2097 (citations omitted).

It is time for such a change in our doctrines of personal jurisdiction. But if our current conception of personal jurisdiction should be scrapped, what new doctrine or framework should replace it? In the next section, such a new framework will be discussed.

III. THE SOLUTION

In light of the foregoing considerations, a new formula for personal jurisdiction should be established, modeled after two-level utilitarianism: under the Due Process Clause, a state court can exercise personal jurisdiction over a corporate defendant in every instance where the defendant has (1) placed their products in the stream of commerce, (2) those products have wound up in the forum state, and (3) the defendant could reasonably foresee the products ending up in the forum state; however, a state court can also exercise jurisdiction over a corporate defendant where that exercise of jurisdiction is reasonable under utilitarian principles.

The stream of commerce component represents the archangel half of this new formulation. The stream of commerce, as articulated by Justice Brennan in *Asahi*,¹⁷⁷ is a better fit in today's interconnected, multi-jurisdictional world. In today's world, the practical distinction between a corporation purposefully availing themselves and inserting their products into the stream of commerce collapses when one removes "connected to the litigation" from the analysis.¹⁷⁸ The reasonableness component represents the prole half of this new formulation. It returns the personal jurisdiction analysis to its utilitarian core: the reasonableness of the state court's exercise of jurisdiction.

177. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring).

178. As an example, let us say that an online store sold widgets in all fifty states. By selling widgets in all fifty states, it has purposefully availed itself of the laws of all fifty states. A plaintiff could hypothetically buy the widget in state A and then travel to state B where the harm occurs, a state for which the online store has already "purposefully availed" itself.

CONCLUSION

With economic change comes the evolution of constitutional doctrine. With the coming of the information age and the advent of one-click shopping, bright-line rules resting upon vague notions of federalism are impractical for determining if and when a state court can constitutionally exercise its coercive power over an out-of-state defendant. Instead, the Supreme Court should look to Two-Level Utilitarianism as a guide, being an “archangel” unless fair play and substantial justice command it to be a prole.