REVIEW ESSAY

Part I—Casad’s Jurisdiction in Civil Actions
Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction.

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JURISDICTION IN CIVIL ACTIONS; By Robert C. Casad.
Pp. xxi, 794. $65.00.

Robert Casad has written a superb book on jurisdiction over the person and property.1 This should not surprise those who are familiar with his work: two books2 and numerous articles3 on jurisdiction and judgments. In the author’s own words, the topic of jurisdiction is a hole that you can dig as deep as you want. In Jurisdiction in Civil Actions, Casad has dug it not only deep but wide as well. The book is nearly six hundred pages long, not including a one-hundred page statutory appendix.4 Thus, the first question to ask in evaluating it is whether there is a need for such a treatment of jurisdiction. The answer is clearly yes; in fact, it seems surprising that no one has treated the whole of the topic before Casad. There are, to be sure, fine discus-

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1. At the outset, the topic needs to be distinguished from the related concept of subject-matter jurisdiction or competence. A working, though not airtight, distinction is this: Jurisdiction over the person and property (also called “territorial jurisdiction” by the RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982)) deals with the power of the sovereign (state or federal) to hear the case and render a judgment binding on the person or property in question. Subject-matter jurisdiction (or competence) deals with the division of the judicial business by subject-matter category among the sovereign’s courts; the division is typically accomplished by the jurisdiction’s constitution and statutes. Professor Casad’s book is concerned almost exclusively with the first question.
4. The Appendix reprints the Uniform Interstate and International Procedure Act, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Foreign Sovereign Immunities Act, the Uniform Child Custody Jurisdiction Act, and the long-arm statutes of all of the states, the District of Columbia, and Puerto Rico.
sions in treatises on conflict of laws⁵ and civil procedure,⁶ but they tend
to concentrate principally on the common law, and the constitutional
limits on the states’ ability to exercise jurisdiction. They rarely contain
detailed discussions of the mass of statutory law on the subject. Two
leading treatises on federal courts⁷ contain impressive treatments of ju-
risdiction over the person and property in federal courts, and there are,
of course, discussions of state statutes and cases in state treatises and
cyclopedias.⁸ Before Casad, however, there was no comprehensive
scholarly treatment of the law of jurisdiction that included the constitutional
and statutory limits on jurisdiction, the procedure for asserting
and challenging jurisdiction, and a treatment of jurisdiction in federal
courts. Professor Casad’s book thus fills a significant need. The first
Part of this Essay considers Casad’s book and the contributions it
makes to the study of jurisdiction. The second Part offers a technique
for refining and supplementing the distinction between general and
specific jurisdiction.

I

The volume is divided into nine chapters, but those really fit into
four groups. The first analyzes basic jurisdictional concepts and the
constitutional limits on state-court jurisdiction. The second treats
traditional and long-arm bases for jurisdiction and the constitutional
and statutory requirements for adequate notice. The third surveys various
areas of substantive law, highlighting fact patterns where jurisdic-
tion is likely or unlikely. The fourth addresses the jurisdiction of
federal courts and challenges to jurisdiction.

A. Basic Concepts and Constitutional Limitations

Chapters 1 and 2 contain a discussion of the basic concepts and
vocabulary of jurisdiction and a careful treatment of the constitutional
limits upon state courts’ exercise of jurisdiction. The discussion of ba-
sic concepts is crisp and clear, in an area not without taxonomical con-
troversy. Although scholars have suggested various alternatives to the

⁵ E.g., R. Leflar, American Conflicts Law §§ 19-53 (3d ed. 1977); W. Richman &
W. Reynolds, Understanding Conflict of Laws §§ 9-43 (1984); E. Scales & P. Hay, Con-
flict of Laws §§ 5.1-11.19 (1982); R. Weintraub, Commentary on the Conflict of Laws
⁶ E.g., M. Green, Basic Civil Procedure 32-62 (1979); F. James & G. Hazard, Civil
⁷ 2 J. Moore, J. Lucas, H. Fink & C. Thompson, Moore’s Federal Practice §§ 4.01-
4.46 (3d ed. 1984); 4 C. Wright & A. Miller, Federal Practice and Procedure §§ 1061-
⁸ See, e.g., 4 S. Harper, Anderson’s Ohio Civil Practice §§ 150.29-150.49 (1973); 22
traditional terminology,\(^9\) the courts seem by and large to use the old-fashioned labels; the chance to utter such a mouth-filling oath as “jurisdiction quasi-in-rem of the second type” is not to be abandoned lightly. Professor Casad deals with the problem sensibly by using the older, more familiar terminology but including succinct discussions of two of the more influential innovations.\(^{10}\)

The discussion of the constitutional limits on state-court jurisdiction is organized along historical lines. Using the themes of power and fairness, Professor Casad traces jurisdictional theory from the territorial orthodoxy of *Pennoyer v. Neff*\(^{11}\) to the modern emphasis on “minimum contacts” and “fair play and substantial justice.” On these familiar themes, Casad plays several interesting variations.

First, in the discussion of *International Shoe Co. v. Washington*,\(^{12}\) he carefully distinguishes two separate themes in the courts’ interpretations of the famous formula: “certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”\(^{13}\) On the one hand, some courts have emphasized the “minimum contacts” language and have accordingly insisted on some prelitigation connection between the defendant and the forum. Other courts, by contrast, have emphasized “fair play and substantial justice” and have looked to a broader range of circumstances (the plaintiff’s interest, the forum’s interest, the defendant’s actual inconvenience, choice-of-law issues) in measuring an exercise of jurisdiction (¶ 2.02[4][a],[b]).\(^{14}\) The observation is insightful, yet with characteristic caution, Professor Casad avoids overstating it:

This is not to say that courts have consciously followed two different theories in applying the *International Shoe* standard. Virtually all have tended to quote the same passage, to speak of both minimum contacts

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\(^{10}\) Casad treats the Second Restatement’s use of the term “territorial jurisdiction” and von Mehren and Trautman’s division of jurisdiction between general and specific jurisdiction and between limited and unlimited jurisdiction (¶ 1.02). See supra note 9 for the sources for these innovations.

\(^{11}\) 95 U.S. 714 (1878). In actuality the discussion starts out before *Pennoyer* and the adoption of the 14th amendment when the only limitation on the states’ jurisdiction was the full faith and credit clause (¶ 2.01).

\(^{12}\) 326 U.S. 310 (1945).

\(^{13}\) Id. at 316.

\(^{14}\) Perhaps the zenith of the fairness (noncontacts) approach was *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), in which jurisdiction was found where the defendant had only one contact with the state and the controversy arose from that contact.
and fair play and substantial justice. The difference is subtle, a difference in the manner of interpreting what those words mean, and there are plausible explanations for both approaches (¶ 2.02[4][b]).

A second variation on the familiar theme is Casad's treatment of Hanson v. Denckla. Long regarded as an aberration in jurisdictional theory, Hanson has come to be considered a significant holding as a result of recent Supreme Court opinions. Professor Casad goes further in this direction than most commentators. He identifies as the rule of Hanson the proposition that "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (¶ 2.02[4][e]). This requirement can be satisfied by the defendant's physical activities in the forum or, absent that, by some contact with the forum that is a result of the defendant's own purposeful conduct. Professor Casad alludes to this requirement again and again in his discussions of recent Supreme Court cases and statutory materials. Ultimately, he accords Hanson a status almost equal to that of International Shoe—speaking often of the "International Shoe-Hanson standard" (¶¶ 2.04[2][c], 4.01[1][b]).

B. Statutory Jurisdictional Bases

A second major portion of Jurisdiction in Civil Actions is the treat-
ment of the mass of statutory law on traditional and long-arm bases for jurisdiction and on service of process. Here Professor Casad's contribution is truly unique. Scholarly treatises seldom contain detailed discussions of the statutory restrictions on jurisdiction. Periodical articles may treat in detail the language and interpretation of a particular state long-arm statute, but before Casad no one had attempted such an exhaustive (about 250 pages) scholarly treatment of the statutory law on jurisdiction from a national perspective. The reason for the lack of a comprehensive work on the subject is no doubt the difficulty of the enterprise. Each state has statutes dealing with the traditional bases for jurisdiction, the long-arm bases for jurisdiction, and the methods for serving process; the variation among the statutes and the incredible volume of the interpretive case law pose a monumental organizational difficulty. Professor Casad clearly appreciates the problem, and has adopted a series of themes and devices to solve it.

The most obvious organizational device is the separation of the traditional jurisdictional bases (chapter 3) from the long-arm bases (chapter 4). Within chapter 4, Casad distinguishes the two main varieties of long-arm statutes, the “any constitutional basis” statutes and the “enumerated act” statutes, and the sub-classes of each (¶ 4.01). Finally, he dissects the statutes and analyzes in considerable detail the judicial interpretations of the key phrases. For instance, he treats the reader to twenty-five pages on the analysis of “transacting business” (¶ 4.02[1]) and twenty pages on the concept of “a tortious act” or a “tortious injury by an act or omission” (¶ 4.02[2]). Further, recognizing that helpful generalization is not always possible, he alerts the reader to the problem rather than papering over the differences. Thus, failing to find useful general principles to explain when the cases find a parent corporation to be “doing business” through a subsidiary, Professor Casad reports that fact, and provides three full pages of case citation (organized by result and by state) to help the researcher find cases factually similar to his own (¶ 3.02[2][b][ix]).

21. In the preface Casad argues that, despite the subject's unwieldiness, it can be handled usefully in a treatise:

Most of the long-arm statutes contain provisions that are similar. Moreover, courts in every state are bound to observe the constitutional limitations on the basis of jurisdiction and the process of invoking it. There are, then, enough common features among the cases decided under different states' laws to warrant a study of jurisdiction on a nationwide basis.

(p. v); see also ¶ 4.02.
The power and elegance of these organizational techniques allow Professor Casad to develop a depth and breadth of analysis and documentation that is at times intimidating. Thus, he can spend some thirty pages and 130 footnotes analyzing the defendant’s appearance or submission as a jurisdictional basis (¶ 3.01[5]) and still be able to include such peripheral topics as jurisdiction over national banks (¶ 3.04). The documentation is not only thorough, but also recent. In the preface, Professor Casad indicates he has cited over 3,900 jurisdiction cases, most decided since 1960 (p. v). This wealth of research is apparent since there is scarcely a single issue, no matter how minor, that is not carefully isolated, researched, and analyzed.22

C. Jurisdictional Patterns

Complementary to the discussion of the long-arm statutes in chapter 4 are chapters 7, 8 and 9, which analyze the factual settings of long-arm cases and attempt to draw conclusions about which patterns typically do and do not support jurisdiction (¶ 7.01).23 Chapter 7 treats torts; chapter 8, contracts; and chapter 9, property, domestic relations, and ten other areas.24 Given Professor Casad’s already demonstrated thoroughness, the result is some two hundred pages and countless citations covering nearly every factual setting imaginable.

With the change in focus comes a change in tone; these chapters are, of course, much more reportorial and much less analytical than the earlier ones. The major analytical contribution consists of picking the right categories for the cases and placing them in the right order. Here, Professor Casad uses two main techniques, categorizing the cases by subject matter and by forum connection. For example, in the chapter on torts he first separates out intentional torts and then subdivides them into three categories by forum connection: “act and injury in the forum state,” “foreign act causing forum state injury,” and “act and injury outside forum state” (¶ 7.02). This method of proceeding often permits the author to isolate a key fact that is highly predictive of courts’ behavior. Professor Casad points out, for example, that jurisdiction over

22. For attention to minutiae, my personal favorite is a short (about 1200 words) but scrupulously researched (including over 60 citations to cases and other authorities) essay on what types of conduct by the defendant constitute a general as distinct from a special appearance and thus a waiver of any objection he may have to jurisdiction. (¶ 3.01[5][a][i]).

23. The author makes frequent use of introductory comments that help the reader appreciate the organizational scheme and anticipate future discussion. Casad apparently believes, as do most who teach in this difficult area, that you must “tell them what you’re going to tell them, tell them, and then tell them what you told them.”

24. The ten additional section headings are: Corporate Affairs, Consumer Actions, Automobile Dealers’ Day in Court Actions, Actions Against Labor Unions, Actions Under Civil Rights Statutes, Private Antitrust Actions, Patent, Copyright, and Trademark Actions, State Regulatory Civil Actions, Interpleader Actions, and Class Actions.
a purchaser of manufactured goods, who otherwise has little connection with the forum, may depend upon whether the product is a stock item or one made to the purchaser's order (¶ 8.01[2][b][ii]).

These analytical techniques and the organization of the three chapters provide a uniquely valuable tool for the practitioner. Using these chapters along with chapters 3 and 4, the practitioner has two alternative routes to explore any jurisdiction problem—statutory language and factual setting. The law of jurisdiction in any one state is likely to be underdeveloped on many issues. The combination of chapters 3 and 4, and 7, 8 and 9 gives the researcher a way out of such blind alleys, enabling him to place the issue in national perspective, and cite authority, commentary, and arguments from other jurisdictions.

D. Federal Courts and Jurisdictional Challenges

Chapters 5 and 6 concern two peripheral topics in the field of jurisdiction: the territorial jurisdiction of the federal courts and the procedure for challenging a court's jurisdiction. Oddly enough, a question so fundamental as the territorial jurisdiction of the federal courts is anything but clear and simple.

“Minimum contacts” appears to be the constitutional test, but it is not entirely clear whether the defendant must have minimum contacts with the state where the federal court sits or with the United States as a whole. Further, the federal court's jurisdiction is also limited by Rule 4 of the Federal Rules of Civil Procedure, whose complex provisions and references to state and federal law generate different results depending on how the defendant is served with process and whether the plaintiff's claim is based on diversity or federal question jurisdiction. Professor Casad handles these complexities admirably. In about fifteen pages he indicates which constitutional and statutory issues are resolved and which are not, which have practi-

25. It is important to point out that although Professor Casad is able to pick out key factual connections, he is not attempting rigidly to conceptualize jurisdictional thinking into a collection of discrete rules in the way Professor Beale dealt with choice-of-law theory in the Restatement (First) of Conflict of Laws (1934). See also J. Beale, A Treatise on the Conflict of Laws (1935). The goal here is not a set of mechanical prescriptive rules, but a series of predictive working hypotheses in the best realist tradition (¶ 7.01). These rules of thumb are not only useful, but occasionally achieve the relief of humor—not an inconsequential virtue in a 600-page treatise on jurisdiction. Thus, discussing jurisdiction based on injury suffered by the plaintiff outside the forum, Professor Casad observes wryly: “One other consistent thread can be seen in the fact that Walt Disney World Co. has been able to avoid jurisdiction in every state outside of Florida where it has been sued for injuries sustained in Florida by non-resident patrons.” (¶ 7.02[2][e][viii]).

26. Although chapter 5 is the book's main treatment of the jurisdiction of federal courts, the topic also comes up elsewhere. See ¶¶ 3.01[5][b], 6.02[1].

27. Other authors have dealt with this thicket. See, e.g., 4 C. Wright & A. Miller, supra note 7, § 1075; Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 127-45 (1983).
cal consequences and which have only theoretical interest. Another major portion of chapter 5 concerns an area that is clearer, although still quite intricate—the law surrounding the nationwide and worldwide service of process statutes. Here Professor Casad, adopting the strategy he used in discussing state long-arm statutes, carefully treats the language of the statutes and the judicial interpretations of the crucial phrases.

The organizing principle for chapter 6—"Challenging Jurisdiction"—is the procedural vehicle that is used to make the jurisdictional challenge; thus the discussion first treats preliminary challenges (¶ 6.01) and then direct and collateral attacks made after judgment (¶ 6.02). Throughout, Professor Casad also distinguishes between challenges to the basis for the court's jurisdiction (the connection between the defendant and the forum) and challenges directed to the process for asserting jurisdiction. Of particular interest is Casad's solution to a minor but intriguing conundrum. Sometimes the jurisdictional question in a case coincides with the merits of the controversy. For instance, where a long-arm statute requires that the defendant "contract to supply goods or services" in the state, the existence of the contract is crucial to the merits as well as the jurisdictional inquiry. In that situation, some courts require that the plaintiff make only prima facie proof of the contract, with the final ruling on the question of jurisdiction to abide the litigation of the merits. Professor Casad points out that this procedure results in the anomaly of a jurisdictional dismissal (with no claim-preclusive effect) following full litigation of the merits. He recommends a commonsensical solution: at the preliminary hearing, some intermediate measure of proof—"reasonable likelihood," for example—should be required. If it is met, jurisdiction exists, regardless of the outcome on the merits; if later the plaintiff cannot prove the contract at trial, the dismissal is on the merits and not simply jurisdictional (¶ 6.01[3][c]).

As must be clear from the preceding paragraphs, Jurisdiction in Civil Actions is a very impressive piece of work. Its value to the practitioner has already been pointed out here and elsewhere. At this point, then, it is appropriate to comment upon its value to jurisdiction scholars. First, it makes several advances in jurisdictional theory;
perhaps these advances are molecular, rather than molar, but in a field as thoroughly treated as this one, revolutionary insights are rare indeed. A second major contribution is the incredible collection and organization of decisional and statutory authority. Theory in any field must be informed by and checked against the reality it purports to describe and predict. In this field, that reality is the cases and statutes that deal with jurisdictional issues. Future scholars, therefore, will owe a debt to Professor Casad for collecting the raw material out of which their theories must be forged. The final and most significant contribution of *Jurisdiction in Civil Actions*, however, is one that is entirely original. In chapters 3, 4, 7, 8, and 9, Casad has invented a new scholarly discipline: the systematic study of long-arm statutes and cases from a national perspective.

II

Not too long ago, a scholar could write a book on jurisdiction confident in the knowledge that important decisions, at least from the Supreme Court, would not immediately follow his work. Indeed, for twenty years the Court did not decide a major case dealing with the constitutional limits on state court jurisdiction.\(^32\) Recently, however, the Court's interest in the area seems to have increased dramatically;\(^33\) thus Professor Casad's decision to supplement his book is a wise one (p. vi).\(^34\) Since publication of the book, the Court has decided three jurisdiction cases. Part II of this Review is a short essay on a theme raised by one of those decisions.

Since *International Shoe Co. v. Washington*,\(^35\) it has been clear that a state can exercise jurisdiction over a defendant in at least two sorts of situations. At one extreme, when the defendant's connections with the forum are very extensive, the court can exercise jurisdiction over him based on any cause of action, even one entirely unrelated to his forum-state connections. Thus, a state can exercise jurisdiction over a domiciliary, a domestic corporation, or a corporation "doing business" in the state based on a cause of action that has nothing to do with the

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32. There were no major opinions between Hanson v. Denckla, 357 U.S. 235 (1958) and Shaffer v. Heitner, 433 U.S. 186 (1977).
34. Professor Casad notes that state law on jurisdiction, both statutory and decisional, also seems to be developing quite rapidly.
35. 326 U.S. 310 (1945).
defendant's activities in the state.³⁶ At the other extreme, a state can exercise jurisdiction over a defendant whose connection with the state is quite minimal, but only with respect to a cause of action that arises out of or is closely connected to the defendant's in-state activities.³⁷

In 1966, Professors Arthur von Mehren and Donald Trautman significantly reformulated much of the thinking on the law of jurisdiction.³⁸ As part of this project they recognized these two sorts of cases and supplied some useful labels.³⁹ "General jurisdiction" is the tag they placed on the situation where the defendant's contacts with the state are sufficient to support jurisdiction even in an unrelated action; "specific jurisdiction" describes the other case, where the defendant's forum contacts are few but the cause of action arises out of them. The terms have proved popular among scholars and courts,⁴⁰ and in several recent cases the Supreme Court has begun using them as well.⁴¹ The advantage of these terms, of course, is that they permit much more economical discussion of both the defendant's forum connections and the relationship between those connections and the plaintiff's cause of action.

An issue that surfaces from time to time is whether jurisdiction is proper in a case that falls between these two paradigms: one where the defendant has substantial contacts with the forum, but not so many as to justify general jurisdiction, and where the plaintiff's cause of action does not arise out of the defendant's forum activities, although it is not totally unrelated to them.⁴² In other words, is jurisdiction proper where the case fails to satisfy the requirements for either general or

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³⁸ Von Mehren & Trautman, supra note 9.
³⁹ In addition, they reformulated the distinction between in rem and in personam jurisdiction as a distinction between "unlimited jurisdiction" (when the judgment affects all of the defendant's assets) and "limited jurisdiction" (when the judgment affects only specified assets). Id. at 1136. For a succinct explanation of the four terms, see Casad's discussion of them (¶ 1.02[1]).
⁴² The discussion of the intermediate cases in this essay is limited to the constitutional issue: does an exercise of jurisdiction in these circumstances violate the due process clause? Often there will be statutory problems as well because the long-arm statutes of many jurisdictions require the plaintiff's claim to arise out of the defendant's forum contacts. See, e.g., UNIF. INTERSTATE & INT'L PROC. ACT § 1.03, 13 U.L.A. 466 (1980).
specific jurisdiction, but partially satisfies the requirements for both?\textsuperscript{43} In such a case, can the court "blend"\textsuperscript{44} or combine the defendant’s claim related and non-claim related contacts with the forum?

In \textit{Helicopteros Nacionales de Colombia v. Hall (Helicol)},\textsuperscript{45} the United States Supreme Court missed a marvelous opportunity to explore this issue. Consorcio, a Peruvian consortium and also the alter-ego of an American joint venture (Williams-Sedco-Horn) had agreed with Petro Peru to construct a pipeline from the interior of Peru to the Pacific Ocean. For that project, it needed helicopters to transport personnel and material. Accordingly, it contacted the defendant Helicol, a Colombian corporation engaged in supplying helicopter transportation to businesses in South America. Defendant sent a representative to Houston to negotiate with Consorcio; the result of these negotiations was a contract for the defendant to supply helicopter service to Consorcio in South America. Later, after the defendant had begun performing, the contract was formally executed in Peru; it recited that Peru was to be considered the residence of all parties and that all controversies would be submitted to the jurisdiction of the Peruvian courts. During the performance of the contract, one of the defendant’s helicopters crashed in Peru, killing four employees of Consorcio who were American citizens but not domiciliaries of Texas. Plaintiffs, representatives of the four decedents, sued the defendant in Texas. In addition to the negotiation session in Houston, the defendant had other contacts with Texas. For several years it had purchased approximately eighty percent of its helicopters and spare parts (total purchases of about $4,000,000) from Bell Helicopter Company in Fort Worth. It also sent employees to Fort Worth to be trained and to ferry helicopters to South America.

Thus, in \textit{Helicol}, the defendant had significant (but not overwhelming) contacts with Texas, and the plaintiffs’ cause of action, while not entirely unrelated to the defendant’s Texas contacts, did not directly arise out of them. \textit{Helicol}, therefore, would have been a perfect case to develop a conceptual scheme for cases that fall between the paradigms of general and specific jurisdiction. The Court ignored the opportunity; it treated only the issue of general jurisdiction and had

\textsuperscript{43} The issue has attracted relatively little attention from the commentators. See W. Reese \& M. Rosenberg, \textit{Conflict of Laws—Cases and Materials} 112-15 (8th ed. 1984); E. Scolles \& P. Hay, \textit{supra} note 5, § 8.30; Brilmayer, \textit{supra} note 40; Lewis, \textit{A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards}, 37 \textit{VAND. L. REV.} 1, 34-38 (1984); Comment, \textit{The Cornellison Doctrine: A New Jurisdictional Approach}, 14 \textit{SAN DIEGO L. REV.} 458 (1977). Professor Casad treats the question in several places. (fff 2.02[3][c], 2.02[4][a], 2.05, 4.02[1][b], 4.02[3][a]).

\textsuperscript{44} The term is Harold Lewis’. See Lewis, \textit{supra} note 43.

\textsuperscript{45} 104 S. Ct. 1868 (1984).
little difficulty concluding that Helicol's connections with Texas were insufficient for that purpose. It failed to consider the issue of specific jurisdiction, and, a fortiori, a combination of the two approaches, because the parties had not argued the issue.\textsuperscript{46} In footnote 10, the opinion indicates exactly what was not decided:

Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.\textsuperscript{47}

Thus Helicol serves only to enhance the awareness of the issue; the opinion does little to advance its analysis.

Some commentators take the view that there should not be jurisdiction in cases that do not satisfy one of the two paradigms.\textsuperscript{48} Either the defendant's forum contacts must be sufficient to support jurisdiction in an entirely unrelated cause of action, or the plaintiff's cause of action must directly "arise out of" the defendant's contacts. For Professor Brilmayer, that conclusion seems to be compelled by her rigorous definition of a "related contact." She holds that the only contacts that are "related to" the plaintiff's cause of action are those that would be relevant in a purely domestic dispute:

A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact. In contrast, an occurrence in the forum State of no

\textsuperscript{46} Id. at 1873 & n.10. In the text of the opinion, the majority indicates that the parties "conceded" that the plaintiff's claims did not arise out of and were not related to the defendant's Texas activities. The citation to respondents' (plaintiffs') brief provides only weak support for this assertion. \textit{See} Brief of Respondents at 4, Helicopteros Nacionales de Columbia v. Hall, 104 S. Ct. 1868 (1984). The Court's statement in footnote 10 that the issue was not briefed is closer to the mark, but still debatable. Respondents' brief did not argue for specific jurisdiction. However, Petitioner's brief argues against it. Brief for Petitioner at 11-12. Further, in the state court proceedings the dissenting opinion of Justice Pope of the Supreme Court of Texas argued vigorously that, as a matter of statutory interpretation, the plaintiff's cause of action did not "arise out of" the defendant's Texas contacts. Hall v. Helicopteros Nacionales de Colombia, 638 S.W.2d 870, 881 (1982). \textit{See also} Justice Pope's majority opinion of February 24, 1982, included in Petition for a Writ of Certiorari to the Supreme Court of Texas, at 46a. On hearing, the vote on the case changed; thus in the case's final posture, Justice Pope became a dissenter.

\textsuperscript{47} Helicol, 104 S. Ct. at 1873 n.10.

\textsuperscript{48} \textit{See} E. Scoles & P. Hay, \textit{supra} note 5, \S 8.31 ("In cases that fall between these extremes, courts should restrain themselves from entertaining cases which are only efforts to provide a resident plaintiff with a convenient forum."); Brilmayer, \textit{supra} note 40, at 80-88.
relevance to a totally domestic cause of action is an unrelated contact, a purely jurisdictional allegation with no substantive purpose.\textsuperscript{49} For Professor Brilmayer, then, claim-relatedness seems to be an all-or-nothing affair; like an electrical switch, it is either “on” or “off.” Contacts that don’t meet the specific jurisdiction test are important only if there are enough of them to justify general jurisdiction.

Justice Brennan in his dissent in \textit{Helicol} disagreed; he added a third category to the analysis of the relationship between the plaintiff’s claim and the defendant’s contacts with the forum. Some contacts are unrelated to the plaintiff’s claim, others “give rise to” the plaintiff’s claim in the sense that they represent elements of the underlying cause of action. Between these two extremes, Brennan saw a third discrete category where the plaintiff’s claim does not “arise out of” the defendant’s contacts but is nevertheless “related to” those contacts. This relationship, he argued, existed in \textit{Helicol} and should have been sufficient to support jurisdiction.\textsuperscript{50} Thus, Brennan seems to view claim-relatedness as a three position switch with two of those positions adequate for specific jurisdiction.

In fact, the relationship between the plaintiff’s claim and the defendant’s forum connections does not fit well into two or even three discrete categories; it resembles a continuum more than a two or three position switch. At one extreme are cases where an element of the plaintiff’s claim consists of some act by the defendant purposefully done in the forum.\textsuperscript{51} At the other extreme are cases where the plaintiff’s claim simply has nothing to do with the defendant’s forum contacts.\textsuperscript{52} In between the variations and gradations are too numerous to catalogue. For instance, some portion of the plaintiff’s claim might be closely connected with the defendant’s forum contacts while another portion might be unconnected.\textsuperscript{53} Or the plaintiff’s claim might arise from activities outside the forum that breached a duty created by a relationship centered in the forum.\textsuperscript{54} Or the plaintiff’s claim might

\textsuperscript{49}. Brilmayer, \textit{supra} note 40, at 82.
\textsuperscript{50}. \textit{Helicol}, 104 S. Ct. at 1878 (Brennan, J., dissenting).
\textsuperscript{51}. \textit{See, e.g.}, McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (defendant mailed an offer to insure a Californian in California; plaintiff’s claim was for the death benefit under the policy); Hess v. Pawloski, 274 U.S. 352 (1927) (defendant drove his car in the forum and injured plaintiff, giving rise to a negligence claim).
\textsuperscript{52}. An example is an action in California against a California domiciliary based upon an automobile accident in Florida.
\textsuperscript{53}. This was the situation in Keeton v. Hustler Magazine, 104 S. Ct. 1473 (1984). The plaintiff was libeled in the defendant’s magazine, a few copies of which were circulated in New Hampshire. Because of the single publication rule, see W. KEeton, D. DOBBS, R. KEeton & D. OWen, \textit{ProSSer AND KEeton ON TORTS}, § 113, at 800-01 (5th student’s ed. 1984), the plaintiff was permitted to maintain an action in New Hampshire for all her damages everywhere, even though only a small portion of those damages arose out of the defendant’s New Hampshire activities.
\textsuperscript{54}. In Shaffer v. Heitner, 433 U.S. 186 (1977), for example, the defendants were officers and
arise from an extra-forum act of the defendant that nevertheless is part of an on-going activity that is significantly connected to the forum. It bears repetition; the variations seem endless.

A continuum model of the relationship between the plaintiff's claim and the defendant's forum contacts permits plotting that relationship against another phenomenon that is clearly a continuum—the extent of the defendant's connections with the forum. The result is a typical cartesian graph:

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55. See, e.g., Cornelson v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), where the defendant was an interstate trucker who regularly hauled goods into and out of California, and the plaintiff's claim concerned an automobile accident that occurred in Nevada near the California border while the defendant was bound for California. The California Supreme Court upheld jurisdiction.

56. For another attempt at graphing these two variables, see K. CLERMONT, CIVIL PROCEDURE 147 (1982).
The quantity and quality of the defendant’s contacts with the forum is plotted on the Y (vertical) axis, and the relationship between the plaintiff’s claim and the defendant’s forum contacts is plotted on the X (horizontal) axis. The horizontal dotted line indicates the point at which the defendant’s contacts with the forum are sufficiently extensive to justify exercising general jurisdiction. The vertical dotted line indicates the point at which the defendant’s contacts, however few, are so closely related with the plaintiff’s claim that specific jurisdiction is justified. C1 is a case where the defendant has very extensive contacts with the forum, but the plaintiff’s cause of action has nothing to do with the defendant’s forum connections. An example is an action in California against a California domiciliary based on an automobile accident in New York. The classic Supreme Court case is *Perkins v. Benguet Consolidated Mining Co.*, where the defendant, a Philippine corporation conducting extensive operations “in exile” in Ohio, was sued there on a cause of action arising out of activities in the Philippines. In C2, the defendant has very few connections with the forum, but the plaintiff’s claim arises directly out of those contacts. A well-known example is *McGee v. International Life Insurance Co.*, where the defendant’s only contact with California was an offer mailed into the state to insure a California domiciliary. The action, however, a claim for the death benefit under the policy, arose directly out of the one contact. C3 represents a situation that receives little comment because jurisdiction based on either theory is so clear. The defendant has numerous connections with the forum, and the plaintiff’s claim is closely related to those contacts. An example is an action in Ohio against an Ohio domiciliary based upon a contract made and performed in Ohio. The result in C4 is also uncontroversial, but in the other direction. The defendant has few contacts with the forum and the cause of action does not arise out of those contacts. Suppose, for example, a Canadian citizen, who has occasionally travelled through New York, is sued in New York based upon an automobile accident in Vermont. The case meets neither paradigm and jurisdiction does not exist.

C5, in the shaded area of the graph, is controversial since it satisfies neither paradigm. The defendant’s contacts with the forum are not so extensive as to justify general jurisdiction, nor does the plaintiff’s

claim directly arise out of the defendant’s forum contacts, thus justifying specific jurisdiction. Nevertheless, because the case is a near-miss on both paradigms, the exercise of jurisdiction is proper.60 Examples of cases like \( C_5 \) can be found,61 but a hypothetical makes the point more

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60. Cases that are similar but not identical to \( C_5 \) appear to be contemplated by the Unif. Interstate & Int’l Proc. Act \$ 1.03(a)(4), 13 U.L.A. 466 (1980), which provides that jurisdiction may be exercised over a defendant who causes “tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .” The statute does not cover a case exactly like \( C_5 \) because \$ 1.03(b) requires that the cause of action “arise out of” the causing of the tortious injury in the state. Nevertheless, the statute seems to support the thesis of this Essay because it endorses the concept of blending or combining the defendant’s claim related contacts (the tortious injury in the state caused by an act outside the state) with his non-claim related contacts (doing business, engaging in a persistent course of conduct, deriving substantial revenue) in order to assert jurisdiction over him.

61. Courts presented with jurisdictional facts that arguably lie within the shaded area of the graph have taken a variety of approaches. Some have held jurisdiction constitutionally permissible, frankly acknowledging that the case does not fit squarely within either category. See Lee v. Walworth Valve Co., 482 F.2d 297 (4th Cir. 1973), in which the plaintiff was a South Carolina resident whose husband was killed on the high seas because of a defective valve sold by the defendant. The valve was not sold or delivered in South Carolina, but the defendant did sell valves there and frequently sent salesmen and engineers there to service customers. The court upheld jurisdiction even though the cause of action did not arise out of the defendant’s South Carolina activities and even though the defendant was not amenable to general jurisdiction in South Carolina.

Other courts have held the exercise of jurisdiction unconstitutional in cases that appear to fall in the shaded area. See Ratliff v. Cooper Laboratories, 444 F.2d 745 (4th Cir. 1971), cert. denied, 404 U.S. 948 (1971); Seymour v. Parke, Davis & Co., 423 F.2d 584 (1st Cir. 1970). In each of these cases, the plaintiff was a nonresident of the forum who purchased and ingested outside of the forum drugs made outside of the forum by the defendant. In each case, the defendant’s forum contacts consisted of selling similar drugs in the forum through detail men. The courts in each case relied in part on the fact that the plaintiffs were not forum residents and that they had brought suit in the forum simply because of its long statute of limitations.

In still other cases, courts have not reached the constitutional issue because jurisdiction was disallowed under a long-arm statute that required that the plaintiff’s claim “arise out of” the defendant’s forum connections. See Bork v. Mills, 458 Pa. 228, 329 A.2d 247 (1974), in which the plaintiff, a Pennsylvania resident, sued the defendant, a Maryland resident who conducted much of his business in Pennsylvania, for injuries caused by an accident in Virginia. The court construed the Pennsylvania long-arm statute to impose a requirement that an action “arise out of” the defendant’s contacts, and thus denied jurisdiction. See also Dufour v. Smith & Hammer, Inc., 330 F. Supp. 405 (S.D. Me. 1971), in which the plaintiff, a resident of Maine, sued the defendant, a South Carolina corporation, for injuries sustained in a car accident in Canada. The truck was driving toward Maine, and the defendant had conducted a portion of its business in Maine. The court denied jurisdiction because the plaintiff’s claim did not “arise out of” the defendant’s forum connections as required by the Maine long-arm statute.

Finally, some courts have found jurisdiction when faced with facts that appear to fall within the shaded area, but not by acknowledging that jurisdiction may exist in cases that fall between the two paradigms. Rather, they have dealt with the case by expanding (sometimes with questionable justification) either the notion of general or specific jurisdiction. See, e.g., Southwire Co. v. Trans-World Metals & Co., 735 F.2d 440 (11th Cir. 1984), in which the defendant was found amenable to specific jurisdiction in Georgia based on a contract concluded by telephone between the plaintiff in Georgia and the defendant in New York. To supplement this weak connection with Georgia, the court relied on prior dealings in Georgia between the parties and upon a subse-
clearly. Suppose the defendant, an Illinois corporation, manufactures a nonprescription antacid tablet in Illinois. Its plant, warehouse, central offices, and sales manager are all in Illinois. It ships its product into every state, including California, and obtains substantial revenue from its sales there. Further, it has assigned five salesmen or detail men to the California territory; they call on doctors, hospitals, and pharmacies in California and solicit orders for the product. The plaintiff, a California resident who has taken the medication for years, attends a convention in New York, where he purchases the impure or adulterated drug and is injured. He sues the defendant in California.

The case satisfies neither paradigm. The plaintiff's claim does not arise out of the defendant's California contacts since both the purchase and the injury occurred in New York. Further, the defendant would not be amenable to the general jurisdiction of California. It would be absurd, for instance, to suggest that the defendant is amenable in California on a nuisance claim based on its Illinois manufacturing operation. Nevertheless, it seems fair to hold the defendant amenable to suit in California on the plaintiff's product liability claim. It has obtained substantial benefits from sales in California; it surely could have foreseen product liability actions in California; and it would not be any more inconvenienced by an action in California based on a New York purchase and injury than by a similar action based on a California purchase. Further, the defendant initiated the contact with the plaintiff by advertising and selling its product in California; the plaintiff would not have purchased the product in New York had he not been a regular

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quint negotiation in Georgia concerning the disputed contract. Similarly, in Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976), the plaintiff was injured by the defendant truck driver in an accident just over the California line in Nevada. Defendant regularly brought goods into California, and was headed there for a delivery at the time of the accident. Although the cause of action arose outside California, the court held that it could assert specific jurisdiction over the defendant. In Frummer v. Hilton Hotels Int'l, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967), the plaintiff was a New York resident injured in a hotel belonging to the English subsidiary of Hilton. Since the subsidiary depended, in part, upon advertising and reservation services conducted in the United States by another subsidiary, it was held to be "doing business" in New York, and thus amenable to that state's general jurisdiction. And finally, in Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965), the plaintiff was a New York resident injured by one of the defendant's planes in Paris. Although none of Finnair's flights began or ended in the United States, and no tickets were sold directly in the United States, the court assumed general jurisdiction on the basis of Finnair's advertising in the United States, and its maintenance of a small office in New York.

62. Of course, not all cases that fail to satisfy the two paradigms are proper for jurisdiction. Thus the shaded portion of the graph is only a small fraction of the lower left-hand quadrant. Nor is the argument here that every near-miss is one where jurisdiction should exist. Rather, the argument is that failure to meet one of the two paradigms should not necessarily defeat jurisdiction. The same factors that make jurisdiction fair in the two paradigm cases will occasionally make it fair in a case like C5. In each case the court should look directly to the underlying factors rather than just mechanically determining whether the case fits one of the two approved patterns.
Besides showing that there are cases where jurisdiction is proper even though neither paradigm is satisfied, the hypothetical is useful for another reason. It indicates some of the factors—the defendant’s benefits from the forum, the foreseeability of forum litigation, lack of inconvenience, and the defendant’s initiation of the relationship with the forum—that make the exercise of jurisdiction fair. It is these factors among others that, in one mix, make general jurisdiction fair and, in another mix, make specific jurisdiction permissible. It seems silly to suggest that no intermediate mixtures are permissible. “General jurisdiction” and “specific jurisdiction” are simply useful analytical tools that identify two situations where the basic underlying factors suggest that jurisdiction is proper. To encompass all the proper cases, they must be supplemented by a sliding scale model of the relationship between the two key variables: the extent of the defendant’s forum contacts on the one hand and the proximity of the connection between those contacts and the plaintiff’s claim on the other. As the quantity and quality of the defendant’s forum contacts increase, a weaker connection between the plaintiff’s claim and those contacts is permissible; as the quantity and quality of the defendant’s forum contacts decrease, a stronger connection between the plaintiff’s claim and those contacts is required. The concepts of general jurisdiction and specific jurisdiction are simply the two opposite ends of this sliding scale.

Besides accounting for the cases that fall between general and specific jurisdiction, the sliding scale model has an additional advantage. The view that requires a case to satisfy one of the two paradigms invites an excessively conceptualistic analysis of the notion of claim-relatedness. Reading Justice Brennan’s dissent in Helicol, it is easy to foresee careful scholarly and judicial treatments of this notion. Must an ele-

63. Another hypothetical is a contract case. Suppose the defendant is a New York corporation engaged in the business of selling stereo equipment. All of its activities are centered in New York, except that it employs salesmen who travel the country calling on retail merchants and soliciting orders for the defendant’s products. Seven of these salesmen serve the Ohio territory, and the defendant receives substantial revenue from their efforts. Plaintiff, an Ohio retailer and a regular customer of a particular salesman, attends an industry wide stereo trade fair in Nevada where that salesman sells him a portable radio. Plaintiff takes it back to Ohio where it malfunctions. Jurisdiction should exist in Ohio for the plaintiff’s breach of warranty claim even though the case fails to meet either paradigm. The argument for jurisdiction in this example and the one stated in the text is much stronger, for instance, than it is in Helicol. In Helicol, the plaintiffs were not forum residents, whereas in the hypotheticals they are. Further, in the hypotheticals, the defendants’ forum-connected activities are similar to the activities that generated the claim. That similarity is important to an assessment of the defendant’s expectations and his actual inconvenience. Finally, in both hypotheticals the defendant came to the plaintiff’s home state and initiated contact with the plaintiff; the facts in Helicol on this score are much less clear.

64. Although not fully developed, a sliding scale model has been suggested elsewhere. See W. Richman & W. Reynolds, supra note 5, § 25(a); E. Scales & P. Hay, supra note 5, § 8.31.
ment of the plaintiff's claim consist of one of the defendant's forum-connected acts, or are mere similarity and geographical proximity sufficient; must all or only part of the plaintiff's claim spring from the defendant's contacts with the forum? This sort of mechanical jurisprudence elevates characterization and conceptual manipulation to the level they once achieved under the choice of law regime of the original Restatement of Conflict of Laws. In fact, however, claim-relatedness, like general and specific jurisdiction, is simply an analytical tool—a convenient summary of some of the factors that make an exercise of jurisdiction fair or unfair. Because it does not treat claim-relatedness as an all-or-nothing phenomenon, the sliding scale reduces the temptation to manipulate that concept and thus helps the court keep its eye on the ball: the underlying factors that ensure the fairness of a particular exercise of jurisdiction.

65. The search for the place where the cause of action "arose" can be every bit as mechanical and policy blind as the search for the "place of making" of a contract. See Restatement of Conflict of Laws § 332 (1934). Further, the inquiry is just as susceptible to manipulation, characterization, and escape devices. For criticism of the original Restatement's susceptibility to these evils, see R. Leflar, supra note 5, §§ 86-88; W. Richman & W. Reynolds, supra note 5, §§ 53(b), 54(b), 55(c), 56. The classic attack on the "place of making" rule is Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958).