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Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process

Jennifer A. Schwartz†

INTRODUCTION

With the expansion of international commerce and the proliferation of multinational corporations, corporate structures that involve alien (non U.S.) parents and U.S. subsidiaries have become increasingly common. Multinational corporations often establish subsidiaries and other affiliated corporate structures to benefit from tax, accounting, legal, political, and administrative advantages benefits of having such an arrangement. By
establishing subsidiary corporations in other countries, a parent corporation can reap the gains from expanding abroad while limiting its exposure to legal and economic risk. Multinational corporations limit their risk by establishing entities that function independently in other countries while remaining part of an integrated conglomerate group. Yet as corporate structures become increasingly fragmented and complex, ascertaining the allocation of responsibility, authority, and control among affiliated corporations becomes challenging. Courts are asked to make that difficult determination anytime a member of a conglomerate group is named as a defendant in a legal dispute. In attempting to do so, courts are forced to work within the limitations of jurisdictional rules that are inadequately tailored to address modern corporate structures.

The prevalence of cross-border litigation involving multinational corporate groups raises the important question as to when the alien corporate affiliate of a U.S. entity should be subject to the jurisdiction of a U.S. court. Plaintiffs frequently bring lawsuits involving multinational corporations in the U.S. because of the advantages a U.S. forum offers. These advantages include a plaintiff-friendly jury system, choice of law rules available in the fifty state jurisdictions, the availability of standards of liability and damage theories, and generous damage awards.

Personal jurisdiction over alien corporations in general and alien parent corporations in particular is an important and controversial area that lies at the intersection of civil procedure and corporate law. Personal jurisdiction, the power of a court to hear a dispute and render a valid judgment that will be recognized by other courts, is a crucial procedural determination made by the judge at the outset of litigation. The outcomes of defendants' initial challenges to jurisdiction often have more significant implications for cross-border litigation than for domestic litigation. Defendants fear U.S. courts for the same reasons that plaintiffs seek them out. In particular, U.S. courts have uniquely broad discovery obligations and plaintiff-friendly rules of decision, often

4. William A. Voxman, Comment, Jurisdiction Over a Parent Corporation in its Subsidiary's State of Incorporation, 141 U. PA. L. REV. 327, 368 (1992) (“Since the purpose of creating a subsidiary is to limit the substantive liability of the parent for actions of the subsidiary, a parent might reasonably expect that it will not be forced to defend itself in the subsidiary’s state of incorporation absent some sort of piercing of the corporate veil.”).

5. See Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) (stating that since technological progress has increased the flow of commerce between nations, the need to assert personal jurisdiction over nonresidents in transnational legal disputes has also increased).


making the defendant's exposure much higher in an American court than it would be at home.9 Further, jurisdictional outcomes in cross-border cases may have broad implications for foreign affairs, diplomatic relations, and international trade.10

In cross-border cases involving affiliated corporate defendants, the most controversial and intensely-litigated issue can be whether the conduct or presence of a domestic corporation will subject its alien affiliate to jurisdiction in a U.S. court, thereby exposing the alien corporation to liability for actions of its affiliate.11 The issue of piercing the corporate veil for jurisdictional purposes often arises in product liability actions brought against alien parent corporations that operate U.S. subsidiaries.12 A plaintiff's ability to assert jurisdiction against a parent corporation is especially critical when the assets of a subsidiary are insufficient for the plaintiff to obtain complete recovery of a judgment. The standard employed by U.S. courts to assess personal jurisdiction has significant implications for business incentives and strategies as alien multinational corporations engage in strategic jurisdictional planning.

The ability of U.S. courts to assert personal jurisdiction over foreign defendants is constrained by the Due Process Clause of the U.S. Constitution, which precludes a court from subjecting a defendant to the binding judgment of a forum with which he has no meaningful contacts, ties or relations.13 Generally speaking, analyzing the constitutionality of asserting jurisdiction over foreign defendants requires an examination of two distinct requirements. First, the purposeful availment requirement restricts the assertion of personal jurisdiction to circumstances in which a foreign defendant has fair warning that it may be subject to suit in a particular forum.14 Requiring purposeful availment ensures that "defendants will have a significant measure of voluntary control over where they will be required to defend a suit."15 Once a defendant has crossed that purposeful availment threshold, it is said to have established "minimum contacts" with a forum.16 Second, jurisdiction over foreign defendants must be reasonable; it must not offend "traditional notions of fair play and substantial

13. See Alexander, supra note 6, at 394.
15. Alexander, supra note 6, at 397.
16. Id. at 395.
Due process concerns over the reasonableness of asserting jurisdiction have particular resonance when applied to defendants from foreign countries, as the Supreme Court articulated in Asahi Metal Industry Co. v. Superior Court. Although some scholars argue that aliens cannot claim due process protection, many U.S. courts afford aliens that protection. This Comment presumes that aliens are guaranteed due process protection under the U.S. Constitution.

United States courts use jurisdictional veil-piercing to assert personal jurisdiction over alien parent corporations that operate U.S. subsidiaries. This doctrine provides courts with a limited exception to the traditional constitutional analysis for personal jurisdiction. It enables courts to reach a foreign parent that, standing alone, lacks the requisite contacts for personal jurisdiction in a cause of action arising out of a subsidiary’s activities in the forum. The doctrine may only be used when personal jurisdiction over the subsidiary has been established and the relationship between the parent and subsidiary is sufficiently close. Thus, unlike the traditional constitutional analysis for personal jurisdiction, jurisdictional veil-piercing evaluates the nature and character of the relationship between a parent corporation and its subsidiary entity. If a court finds sufficient grounds to pierce the corporate veil for jurisdictional purposes, the court imputes the minimum contacts of the subsidiary to the parent and thereby asserts personal jurisdiction over the foreign parent corporation.

This Comment examines the divergent approaches to jurisdictional veil-piercing taken by courts and proposes a new jurisdictional veil-piercing


19. For example, Gary A. Haugen argues that pursuant to the Supreme Court case of United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), only aliens with “substantial connections” to the United States are entitled to due process protections and that due process protections under the Fourteenth Amendment do not protect aliens abroad. Gary A. Haugen, Personal Jurisdiction and Due Process Rights for Alien Defendants, 11 B.U. INT'L L.J. 109, 110 (1993). However, Verdugo-Urquidez is a restricted ruling involving search and seizure, finding that property owned by a nonresident alien and located in a foreign country is not subject to Fourth Amendment protection. Chief Justice Rehnquist noted that cases cited by the defendant involving protection of aliens under the First, Fifth, Sixth, and Fourteenth Amendments establish that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” 494 U.S. at 271. Although the “substantial connections” standard is left undefined in Verdugo-Urquidez, a parent-subsidiary relationship where “minimum contacts” meet jurisdictional veil-piercing standards likely implies that the alien parent has “substantial connections” with the United States and is therefore entitled to due process protection.

standard. As a substitute for the traditional minimum contacts inquiry, the jurisdictional veil-piercing standard should be brought in line with the Supreme Court's constitutional due process standard for personal jurisdiction. This Comment outlines a proposed standard with two coordinate elements. First, the proposed standard will satisfy the minimum contacts inquiry by offering a "substitute for doing business" test. Under this test, the corporate veil is pierced for jurisdictional purposes only if there is a degree of economic integration between an alien parent corporation and its domestic subsidiary indicating that the subsidiary acts as the parent's substitute for doing business in the forum. Second, the proposed standard will require that courts examine the reasonableness of asserting jurisdiction over the foreign parent as a distinct element of its analysis. Separating these analyses will further bring jurisdictional veil-piercing in line with constitutional due process.

The scope of this Comment focuses on jurisdictional veil-piercing jurisprudence related to alien parents of U.S. subsidiary corporations in the context of specific jurisdiction. The proposed standard is most relevant to litigation involving allegations of breach of contract and unintentional torts such as products liability, as opposed to effects-based personal jurisdiction analysis used in cases alleging intentional torts such as libel and defamation. While the proposed standard may also be useful to understanding jurisdictional veil-piercing analyses involving out-of-state parent corporations, it is specifically formulated to address heightened due process concerns invoked by extending jurisdiction to alien parent corporations.

This Comment is organized as follows. First, I provide an overview of the constitutional contours of personal jurisdiction, which is bypassed through the use of jurisdictional veil-piercing in certain cases. Second, I present the jurisdictional veil-piercing mechanism, a legal tool which plaintiffs use to bring foreign corporate defendants into court without having to make a constitutional showing of personal jurisdiction over the alien parent corporation. Third, I critique the current lack of consensus in jurisdictional veil-piercing approaches and propose a standard that comports with constitutional due process.

I

THE MINIMUM CONTACTS DOCTRINE AND ALIEN DEFENDANTS

An understanding of the evolution of the minimum contacts doctrine, the principal test for personal jurisdiction over foreign defendants, is necessary to build a foundation to assess jurisdictional veil-piercing. Jurisdictional veil-piercing bypasses the traditional personal jurisdiction inquiry for an out-of-state or alien parent corporation when a subsidiary has sufficient contacts in the state for the court to establish jurisdiction directly. Personal jurisdiction rests

fundamentally on the goal of preserving a defendant’s procedural due process rights. If it is to be used as a substitute framework for asserting personal jurisdiction, jurisdictional veil-piercing must recognize that same goal.

Litigation scholars draw a distinction between two different ways of asserting personal jurisdiction: “specific jurisdiction” and “general jurisdiction.” Specific jurisdiction permits the adjudication of only those claims that relate to or arise out of the defendant’s contacts with the forum state, evaluated under the minimum contacts doctrine. Specific jurisdiction arises from a relationship between the claim and the contacts a party has in a forum state. For instance, an Oregonian who speeds into California in his convertible and hits another car would be subject to jurisdiction in California under the theory of specific jurisdiction, even if the driver had previously never been to the state. Often, plaintiffs pursue specific jurisdiction in contract or tort litigation, especially in products liability actions where foreign products make their way into a particular forum. In contrast, general jurisdiction arises based on the party’s contact with the forum and confers a court with power to adjudicate any claims against a defendant, even claims unrelated to the defendant’s contacts with the forum state, if the defendant’s contacts with the forum are sufficiently continuous and systematic.

A court may only exercise specific jurisdiction that is authorized by a federal or state statute, limited by due process. States’ long-arm statutes prescribe the legislative basis for jurisdiction over foreign defendants in state courts. When long-arm statutes extend jurisdiction to the full constitutional limits permissible, jurisdiction under a long-arm statute often need not be analyzed as a separate inquiry from the constitutional limitations on the assertion of jurisdiction. However, when state statutes establish narrower requirements for asserting jurisdiction over foreign defendants, a court must supplement its constitutional analysis with a statutory one.

The Supreme Court established the minimum contacts doctrine in *International Shoe Co. v. Washington*, which reflected a departure from the territorial theory of personal jurisdiction that had previously dominated jurisdictional analysis. In *International Shoe*, the Court ruled that personal

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22. *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984) (finding that even though the defendant, a Columbia corporation, negotiated and purchased helicopters from plaintiff, a Texas manufacturer, and sent personnel to Texas for systematic and continuous training, such acts were not sufficiently substantial to establish general jurisdiction).

23. *See Wells Fargo & Co.*, 556 F.2d at 414.


25. Under the territorial approach, the dominant approach used prior to *International Shoe*, territorial limits set the boundaries of the exercise of jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (establishing that “every State possesses exclusive jurisdiction and sovereignty over
jurisdiction over a nonresident defendant is proper when "certain minimum contacts with [the forum] exist so that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" When a defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," the defendant demonstrates minimum contacts that are sufficient to confer jurisdiction.

The test for specific personal jurisdiction has been refined to become a two-pronged inquiry: (1) whether the defendant purposefully availed itself of the protections and benefits of the forum's laws by establishing minimum contacts with the forum state; and (2) whether the assertion of jurisdiction over the defendant is reasonable. This test is a flexible standard that assesses on a case-by-case basis whether personal jurisdiction is appropriate. The evolution of the minimum contacts doctrine for alien defendants has generally paralleled that for out-of-state defendants.

A. Purposeful Availment: The Basis for Jurisdictional Veil-Piercing

The purposeful availment requirement restricts the assertion of personal jurisdiction to the types of contacts that would give a nonresident defendant fair warning that it may be subject to suit within a particular forum, as opposed to "random," "fortuitous," or "attenuated" contacts over which the defendant had no control. The purposeful availment requirement seeks to ensure that defendants have a significant measure of voluntary control over where they may be required to defend themselves in a lawsuit and protects defendants from unfair surprise.

The stream of commerce doctrine applies minimum contacts analysis in the context of products liability litigation, where a nonresident manufacturer has placed its product into the "stream of commerce" and that product has

persons and property within its territory. . . . no State can exercise direct jurisdiction and authority over person or property without its territory").

29. See Int'l Shoe, 326 U.S. at 319 (noting that the existence of personal jurisdiction must depend "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure"). See also Randall B. Weill, The Internet and Personal Jurisdiction in the United States, in INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS 209, 213 (Dennis Campbell et al. eds., 1999) ("The determination of whether minimum contacts exist 'is one in which few answers will be written 'in black and white. The grays are dominant and even among them the shades are innumerable.'")(quoting Kulko v. Super. Ct., 436 U.S. 84, 92 (1978)).
32. See Alexander, supra note 6, at 397.
caused injury. It is not legally clear what actions by a defendant will satisfy the minimum contacts requirement and thus constitute purposeful availment of a forum state by way of the stream of commerce. The Supreme Court in World-Wide Volkswagen Corp. v. Woodson reasoned that the defendant’s conduct and connection with the forum must be such that he should “reasonably anticipate being haled into court.” Additionally, the Court rejected a straightforward foreseeability test, requiring instead that, to give rise to minimum contacts, the defendant have knowledge that its product would be purchased or used in a forum state. However, in applying World-Wide Volkswagen, the Supreme Court has been unable to agree on one particular formulation of minimum contacts. The three vastly different views offered in separate opinions issued in Asahi Metal Industry Co. v. Superior Court of California has left lower courts with little guidance, resulting in significant analytical variations and divergent applications among lower courts.

33. World-Wide Volkswagen, 444 U.S. at 288-89, 297 (ruling that a New York Volkswagen dealership and a Volkswagen distributor selling cars in the northeastern United States would not be subject to jurisdiction in Oklahoma based on plaintiff’s involvement in an accident in Oklahoma in a car the plaintiff had purchased in New York because the defendants had engaged in no contacts with Oklahoma and had not availed themselves of the benefits of Oklahoma law).

34. A plurality opinion by Justice O’Connor and three other Justices argued that the defendant placing a product into the stream of commerce does not alone constitute an act purposefully directed at the forum state. The opinion required foreseeability plus “additional conduct” indicating an “intent or purpose to serve the market in the forum State” in order to assert personal jurisdiction. 480 U.S. 102, 112 (1987) (plurality opinion). Examples of “additional conduct” listed by Justice O’Connor include “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.” Id. In contrast, Justice Brennan and three other Justices asserted that World-Wide Volkswagen should not be interpreted to require “additional conduct” beyond placing a product into the stream of commerce and the defendant’s awareness that the final product is being marketed in the forum state is sufficient to assert personal jurisdiction. Id. at 117 (Brennan, J., concurring in part and concurring in judgment). Justice Stevens and three other Justices argued that the question of purposeful availment was moot, since it would be “unreasonable and unfair” under World-Wide Volkswagen for California to exercise jurisdiction over Asahi. Justice Stevens stated that if the Court were to reach the question of purposeful availment, the focus of the inquiry should be on “the volume, value, and hazardous character of the components.” Id. at 121-22 (Stevens, J., concurring in part and concurring in judgment).

35. Lower courts have adopted varied and inconsistent interpretations of the requirements to assert personal jurisdiction over foreign defendants after the Supreme Court’s plurality decision in Asahi. Some courts have endorsed Justice O’Connor’s “forseeability plus” approach. See, e.g., Guinness Import Co. v. Mark VII Distribs., Inc., 153 F.3d 607, 615 (8th Cir. 1998). Other courts have adopted Justice Brennan’s approach. See, e.g., Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992). Some courts even renounce any precedential impact of Asahi and apply pre-Asahi interpretations of World-Wide Volkswagen. See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994). When disputing jurisdiction, alien defendants tend to draw upon O’Connor’s approach in Asahi for support whereas U.S. plaintiffs tend to cite Brennan’s standard or renounce Asahi altogether. See generally Reisenfeld, supra note 8, at 79 ("Jurisdiction analysis remains a varied and unpredictable area of jurisprudence. There is no bright-line test for determining whether a defendant has purposefully availed itself of the protections and benefits of the forum state or country, and courts vary significantly in the weight..."
B. The Reasonableness Inquiry

The scope of personal jurisdiction is further limited by the requirement that the assertion of personal jurisdiction be reasonable pursuant to the constitutional guarantee of due process set forth in the Fifth and Fourteenth Amendments of the U.S. Constitution.\(^{36}\) State court jurisdiction is limited by the Fourteenth Amendment;\(^{37}\) federal jurisdiction is limited by the Fifth Amendment.\(^{38}\) As established in *International Shoe*, even if sufficient minimum contacts exist, a court cannot assert jurisdiction over a defendant if doing so would offend ""traditional notions of fair play and substantial justice.""\(^{39}\)

After the Supreme Court's ruling in *Asahi*, factors that courts may consider in assessing the reasonableness of asserting jurisdiction include: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) states' shared interest in furthering fundamental social policies.\(^{40}\) This non-exhaustive list of factors invites a highly fact-dependent, totality of the circumstances examination of the interests of all of the litigants and the forum state.\(^{41}\) Factors that "may strongly indicate that a case should be tried in a forum within the United States" include the presence of evidence in the U.S., the plaintiff's interest in a convenient forum, party joinder possibilities, and the applicability of domestic law.\(^{42}\)

Reasonableness considerations carry substantial weight when courts consider whether to exercise personal jurisdiction over alien defendants, who face additional costs and inconveniences that must be overcome when defending a suit in another country.\(^{43}\) The Supreme Court ruling in *Asahi* is particularly instructive with respect to the reasonableness of asserting

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\(^{36}\) U.S. CONST. amend. V; U.S. CONST. amend. XIV.

\(^{37}\) See *World-Wide Volkswagen*, 444 U.S. at 291.


\(^{41}\) As Lilly explains, "'[a] strong regulatory interest in the forum state, the desirability of providing the plaintiff with a convenient forum, the ability of the defendant to mount a defense without an undue economic burden, and the presence of evidence in the proximity of the forum would all substantiate reasonableness.'" Lilly, *supra* note 30, at 100. See also Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1407 (1996).

\(^{42}\) Lilly, *supra* note 30, at 125.

\(^{43}\) Courts continue to recognize and respect this augmented burden on alien defendants despite technological advances in commerce, communication, and travel since the reasonableness standard was set forth in *International Shoe*. See Alexander, *supra* note 6, at 402.
jurisdiction over alien corporate defendants. In Asahi, a Taiwanese tire tube manufacturer (Cheng Shin) had sought indemnification from a Japanese tire valve assembly manufacturer (Asahi) for a product liability suit arising out of a motorcycle accident in California attributed to a defective tire manufactured by Cheng Shin. Although the Justices disagreed as to whether Asahi had sufficient minimum contacts with the forum, the Court concluded unanimously that asserting jurisdiction over Asahi would be "unreasonable and unfair." In Asahi, the Supreme Court implies that questions of personal jurisdiction over aliens should be subject to stricter scrutiny than those over domestic defendants: "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." The additional burdens borne by alien defendants who litigate in the United States include broad discovery in the U.S., the jury trial system, different approaches to fee shifting, relatively greater damage awards in the U.S., and travel and language difficulties. Broader policy considerations that bear on the reasonableness of asserting personal jurisdiction over alien defendants include enforcement issues abroad, effects on international relations, and possible retaliation by foreign nations.

Concerns over the reasonable exercise of personal jurisdiction over an alien corporate defendant shaped the Supreme Court's plurality opinion in Asahi, which held that even if minimum contacts were established between the defendant Japanese manufacturer and the forum state, it would not comport with due process to force the defendant to litigate in California. The Court invoked the goals of fairness, judicial administration, and international comity to support its ruling that the exercise of jurisdiction over Asahi would be unreasonable. The plaintiff's and forum state's interests were minimal

45. Asahi, 480 U.S. at 115.
46. Id. at 114.
48. Asahi, 480 U.S. at 115 (recommending that a court "consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" and that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field"); Born, supra note 9, at 126 (3d ed. 1996) ("The hardship resulting from U.S. jurisdiction is usually greater for defendants in international cases than in domestic ones. International cases also usually affect both foreign nations, and U.S. international relations, in ways that domestic cases do not."). But see Haugen, supra note 19, at 126-28 (arguing that alien defendants should not be entitled to constitutional due process protection, let alone the heightened due process protection set forth in Asahi).
49. See Asahi, 480 U.S. at 116. The original plaintiff settling by the time the case reached the Supreme Court may have affected the outcome of the ruling, since the only remaining issue was Cheng Shin's cross-claim for indemnification by Asahi.
50. Id. at 113-116.
because the original plaintiff—the California resident injured in the motorcycle accident—had settled, the indemnification was based on a transaction that occurred in Taiwan, and Asahi had shipped its components from Japan to Taiwan.\textsuperscript{51} In contrast, the burden imposed on the Japanese manufacturer was severe because not only would Asahi have been forced to travel the distance between Japan and California, but also would have had to submit its dispute with Cheng Shin to a foreign judicial system.\textsuperscript{52}

Lower courts addressing questions of personal jurisdiction often note that the precedential strength of \textit{Asahi} lies not in the variations of the stream of commerce test offered in the plurality rulings, but in the eight Justices' reaffirmation of the reasonableness prong's place in a due process analysis of personal jurisdiction.\textsuperscript{53} However, some courts have been reluctant to decline jurisdiction based on reasonableness concerns for alien defendants that have established the requisite minimum contacts.\textsuperscript{54} Courts may justify the assertion of jurisdiction on the grounds that alien corporations can purchase insurance, pass on litigation costs to customers, and curtail commercial activities in a forum when the risk and potential cost of litigation is too high.\textsuperscript{55} Change of venue motions and \textit{forum non conveniens} motions also protect alien defendants from being subject to undue burdens by allowing an alternate means to challenge a particular U.S. forum.\textsuperscript{56}

Yet after \textit{Asahi}, reasonableness considerations have often led courts to exercise greater restraint in extending personal jurisdiction over alien defendants than over domestic out-of-state defendants.\textsuperscript{57} For example, in

\begin{itemize}
\item[51.] \textit{Id.} at 114 (noting that "Cheng Shin ha[d] not demonstrated that it [was] more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan").
\item[52.] See \textit{id}.
\item[53.] See, \textit{e.g.}, Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1321 (Fed. Cir. 2005).
\item[54.] \textit{See generally BORN, supra note 9, at 142; Parrish, supra note 10, at 23 ("Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances."). See, \textit{e.g.}, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99 (2d Cir. 2000) (finding the burden imposed on European parent corporations to litigate in New York to be insufficient to preclude the imposition of personal jurisdiction); Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 629 (6th Cir. 1998) (noting the minimal burden imposed Canadian defendants litigating in the United States in light of modern transportation and communication methods and the similarity between the U.S. and Canadian legal systems).
\item[56.] See \textit{Aronofsky, supra note 11, at 45, 48-49.
\item[57.] \textit{See Asahi, 480 U.S. at 114-15. But see Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d. 843, 850-51 (11th Cir. 1998) (holding that any inconvenience imposed on defendants by subjecting them to jurisdiction in the Northern District of Georgia is overridden by the greater inconvenience of requiring a Georgia plaintiff to litigate in a foreign forum); Deutsch v. W. Coast Mach. Co., 497 P.2d 1311 (Wash. 1972) (asserting that the same standard should be applied when determining whether jurisdiction should be asserted over an alien party or a domestic party).
Core-Vent Corp. v. Nobel Industries AB, the Ninth Circuit affirmed the district court’s denial of jurisdiction over the Swedish defendant because the exercise of jurisdiction would not comport with fair play and substantial justice and would therefore be unreasonable.\(^{58}\) The court observed that haling the Swedish doctors into court would impose substantial burdens because the doctors had no ongoing connection to or relationship with the U.S., and the assertion of jurisdiction interfered with the sovereignty of a foreign nation.\(^{59}\) In Falkirk Mining Co. v. Japan Steel Works, Ltd., the Eighth Circuit declined jurisdiction over a Japanese dragline crane manufacturer in a product liability action, finding the facts analogous to Asahi.\(^{60}\) Since the Japanese company had no office, agents, employees, or property in North Dakota and had not otherwise solicited business in the state, the court found jurisdiction to be unreasonable.\(^{61}\) In both cases, the courts noted heightened concerns over the reasonableness of asserting jurisdiction over aliens as opposed to domestic out-of-state defendants.

II

PIERCING THE CORPORATE VEIL TO ASSERT PERSONAL JURISDICTION OVER ALIEN PARENTS: A SUBSTITUTE FOR MINIMUM CONTACTS ANALYSIS

Plaintiffs frequently sue both an alien parent corporation and its U.S. subsidiary in a claim arising out of the actions of the subsidiary. In cases where the subsidiary has sufficient minimum contacts with the forum but the alien parent does not, courts forgo the traditional minimum contacts analysis with respect to the parent. Instead, they examine the relationship between the parent and subsidiary to assess whether there are grounds to pierce the corporate veil for jurisdictional purposes. If the corporate veil is pierced, the court disregards corporate separation and the subsidiary’s minimum contacts are imputed to the parent corporation to assert jurisdiction indirectly over the parent. Cases that invoke the jurisdictional veil-piercing mechanism should be distinguished from cases in which alien parent corporations themselves have sufficient direct contacts with the forum to meet the minimum contacts requirement. Where the alien parent has the requisite minimum contacts, the court may assert personal jurisdiction directly over the parent without engaging in a veil-piercing analysis.

Veil-piercing in general is an exception to the overarching presumption of limited shareholder liability, one of the key attributes of the corporate form.\(^{62}\)

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58. The plaintiff had brought antitrust and libel claims alleging that the defendant Swedish doctors wrote and published articles in international medical journals that contained false and misleading comparisons of plaintiff’s and its principal competitor’s implants. 11 F.3d 1482 (9th Cir. 1993).
59. Id. at 1488-90.
60. 906 F.2d 369 (8th Cir. 1990).
61. Id. at 375.
62. See Daniel G. Brown, Comment, Jurisdiction over a Corporation on the Basis of the
Corporate law is founded on the principle that corporations are legal entities distinct from their shareholders. Justifications for limited shareholder liability include encouraging capital investment by making investments less risky, shifting the burden of risk to better risk bearers, stimulating entrepreneurial risk-taking and risk diversification, and facilitating gains from economies of scale by encouraging the formation of larger corporations.

The same presumption of limited liability is also at the heart of parent-subsidiary relationships. Indeed, the rise of multinational corporate groups is partially explained by the economic gains a firm can realize by internalizing costs while at the same time reaping the benefits of legal separation of corporate constituents. Hence, when a U.S. subsidiary carries on business in a particular forum, the alien parent is generally shielded from personal jurisdiction (and by extension, liability) for the actions of its subsidiary in the forum state. Alien corporations therefore have a strong legal incentive to


63. See Alexander, supra note 6, at 390.


65. See generally JOSE ENGRACIA ANTUNES, LIABILITY OF CORPORATE GROUPS: AUTONOMY AND CONTROL IN PARENT-SUBSIDIARY RELATIONSHIPS IN US, GERMAN AND EU LAW: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE 240-41 (1994) ("The imposition of liability on parent corporations for the settlement of debts of its subsidiaries would thus rest on a disregard of the corporate separateness of these two corporations, which should only be undertaken very 'reluctantly' and only before most 'exceptional,' 'unusual' or 'rare' circumstances.").

66. In addition to maximizing economic efficiency and benefiting from limited liability, other factors also contribute to the rise of multinational corporate groups. For instance, tax incentives to move income from high-tax to low-tax countries or to reduce the aggregate impact of export and import duties may drive the expansion of multinational corporate groups. Political factors such as shifting accounting income from a profitable subsidiary to its affiliates or parent located in other countries may also alter the creation or behavior of corporate groups in order to avoid local resentment or backlash in particular countries. See BLUMBERG, THE MULTINATIONAL CHALLENGE, supra note 64, at 139-40. See also William O. Douglas & Carrol M. Shanks, Insulation From Liability Through Subsidiary Corporations, 39 Yale L.J. 193, 193 (1929).

67. See Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902 (1st Cir. 1980) (noting that the mere fact that the subsidiary company does business in a state does not automatically confer jurisdiction over its nonresident parent, even if the parent is the sole owner of the subsidiary); United States v. Arkwright, Inc., 690 F. Supp. 1133 (D.N.H. 1988) (noting that when determining whether a court can subject a nonresident parent corporation to jurisdiction through its resident subsidiary, there is a presumption of corporate separateness that can be overcome only by clear evidence that the parent controls the subsidiary). See also Mark A. Olthoff, Beyond the Form - Should the Corporate Veil be Pierced?, 64 UMKC L. Rev. 311, 320 (1995) ("In the context of a piercing case, even if personal jurisdiction exists with respect to the subsidiary corporation, the parent company or other stockholder may be beyond the reach of the court.").
establish and operate distinct subsidiary entities in the United States. By doing so, they can minimize their own direct contacts with the United States and thereby limit their risk of liability. 68 Yet in limited instances, sufficient grounds exist to pierce the corporate veil for jurisdictional purposes. In these cases, courts will disregard corporate separation and assert personal jurisdiction over a parent corporation in litigation arising out of the actions of its subsidiary. 69 This jurisdictional veil-piercing mechanism has also been used to assert jurisdiction over foreign parents of U.S. distributors, franchises, and other corporate siblings. 70 Unfortunately, the Supreme Court has not yet considered the problem of veil-piercing for jurisdictional purposes in light of its ruling in Asahi.

An articulation of a jurisdictional veil-piercing test is set forth in Hoffman v. United Telecommunications, Inc. 71 The district court in Kansas laid out a typical three-factor test:

First, the court must search for factors which establish whether or not any relationship exists between the affiliated corporate parties. Second, the court must search for factors which establish direction or control from the forum, and, third, the court must look for factors which establish a flow of benefits or funds to and from the forum such that the defendant may be said to have purposefully availed itself of the benefits and protections of the forum. 72 If a court applying this test finds that the factors point to a lack of separation between the subsidiary and parent's actions in the forum, the court will pierce the corporate veil and impute jurisdiction over the parent. As the test demonstrates, by piercing the corporate veil of a foreign parent corporation a court may treat the parent and subsidiary as one entity for the purpose of asserting jurisdiction. Using this substitute analysis in place of the traditional minimum contacts inquiry, the court considers the alien parent corporation to have purposefully availed itself of the particular forum and thus justifies exercising jurisdiction.

Courts generally use one of three approaches to examine the nature of the parent-subsidiary relationship in order to determine whether to pierce the

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68. See Aronofsky, supra note 11, at 31 ("The [continued economic potency of multinational enterprises] depends in part upon adequate legal liability risk assessment for the acts of their corporate constituents, which requires an ability by the enterprise legal planner to predict when courts will apply the doctrine of limited liability.").


70. See Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 615 (8th Cir. 1994) (explaining that given the globalization of international commerce, "it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states").


72. Id. at 1472 (applying these factors to a parent-subsidiary relationship in an employment discrimination suit and finding that the plaintiff had established a prima facie case for asserting jurisdiction over the parent corporation).
corporate veil for jurisdictional purposes. Under the corporate formalities approach, a court asks whether the parent and subsidiary fail to observe formal corporate separation. Under the control approach, a court asks whether the parent exercises a high degree of control over the subsidiary. Under a hybrid approach, a court examines both corporate formalities and indicia of control, possibly in conjunction with other considerations. The factors examined and standards used under any of these approaches will vary substantially; modifications are often adopted by courts depending on the jurisdiction or even the facts of a particular case. Under any approach, if a court determines that sufficient grounds exist to pierce the corporate veil and to treat the parent and subsidiary corporations as "really 'the same' legal entity," the minimum contacts of the subsidiary are imputed to the foreign parent.

Although there are wide variations between courts in approaching jurisdictional veil-piercing questions—and thus the results of judicial decisions—some consensus has emerged through the jurisprudence. Under any of the standards described above, the mere existence of a parent-subsidiary relationship alone does not meet the minimum contacts test or confer personal jurisdiction over the parent. Pursuant to the Supreme Court ruling in

73. Other jurisdictional veil-piercing mechanisms, such as alter ego theory and agency theory, also exist, but these alternative mechanisms often use identical analytic tests to veil-piercing, but are framed as metaphorically distinct doctrines. Alter ego status may be predicated either on the absence of corporate formalities or the parent's exercise of a high degree of control over the subsidiary. Personal jurisdiction arising from agency theory generally requires that the foreign corporation conduct business in the forum through the assistance of another party (which may or may not be an affiliated corporate entity) acting as its agent. Conspiracy, ratification, and guaranty are other distinct but less common theories used to exercise jurisdiction over foreign parent companies. A detailed analysis of these alternative mechanisms is beyond the scope of this Comment. See Tomasso, Inc. v. Armor Constr. & Paving, Inc., 447 A.2d 404, 421 (Conn. 1982) (Borden, J., dissenting) (noting that alternative theories to piercing the corporate veil are merely "slightly different roads to the same destination"); BLUMBERG, THE LAW OF CORPORATE GROUPS, supra note 3, at § 1.02 ("The metaphors are no more than conclusory terms, affording little understanding of the considerations and policies underlying [a] court's action and little help in predicting results in future cases."); Voxman, supra note 4, at 340 (observing that the "tests which . . . courts use to evaluate parent-subsidiary relationships for jurisdictional purposes often vary in their terminology, but the tests are actually very similar").


75. See, e.g., Vega Glen v. Club Mediterranee S.A., 359 F. Supp. 2d 1352 (S.D. Fla. 2005) (finding service of process on French parent corporation through its Florida subsidiary was improper because the plaintiff had presented no evidence that the parent company exercised control over the subsidiary).


77. Alexander, supra note 6, at 401 (quoting Lea Brilmayer & Kathleen Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 CALIF. L. REV. 1, 25 (1986)).

Shaffer v. Heitner, mere ownership of stock in the subsidiary does not satisfy the minimum contacts test and therefore will not automatically subject the foreign parent corporation to the forum's jurisdiction. 79

A. The Corporate Formalities Approach

The corporate formalities approach examines the parent and subsidiary's failure to observe formal corporate separation. 80 Factors considered by courts include issuing separate stock, holding separate director and shareholder meetings, maintaining separate bank accounts, books, filing systems and offices, and printing separate advertisements, business cards and stationery. 81 For example, in O.S.C. Corp v. Toshiba America, Inc., the Ninth Circuit employed the corporate formalities approach in a California-focused inquiry and found genuine corporate separateness between the Japanese parent company and its U.S. subsidiary because the parent did not utilize the subsidiary's property, bank accounts, employees, or representatives in California, and had never done business directly in the forum. 82 Since external manifestations of corporate separateness are fairly easy to maintain, foreign parent corporations are likely to make every effort possible to retain appearances of formal corporate separation in order to avoid exposure to suit in jurisdictions where subsidiaries operate.

Courts employing the corporate formalities approach draw upon the Supreme Court's ruling in Cannon Manufacturing Co. v. Cudahy Packing Co. 83 In Cannon, the Court found that "a parent corporation that retains 'formal' and 'real' separation from its subsidiary will not be subject to jurisdiction in a forum just because the subsidiary is subject to jurisdiction in that forum." 84 Despite complete identity of interest and exercise of control by the parent

with its U.S. subsidiary did not predicate jurisdiction and noting that the parent only manufactured unidentified components rather than the final product; Ne. Power Co. v. Balcke-Durr, Inc., 49 F. Supp. 2d 783 (E.D. Pa. 1999) (finding a German parent corporation was not the alter ego of its subsidiary because the parent did not control the day-to-day operations of the subsidiary, maintained separate corporate records, and filed separate tax returns).

79. 433 U.S. 186, 216 (1977) (ruling that the defendant's ownership shares of a Delaware corporation was insufficient to subject it to quasi in rem jurisdiction in a shareholder derivative action).


82. 491 F.2d 1064 (9th Cir. 1974).

83. 267 U.S. 333, 335 (1925) (ruling that the formalities of corporate separation was "in all respects observed" between Cudahy, a Maine corporation, and its Alabama subsidiary, Cannon, and thereby declining to assert jurisdiction over Cudahy in a breach of contract action in North Carolina).

84. Voxman, supra note 4, at 331.
corporation, the Court did not impose jurisdiction because the two corporate affiliates had been kept carefully distinct and observed all corporate formalities.\footnote{85 See id. at 335 (noting that the books of the Alabama subsidiary were kept separate and all transactions between the two corporations were represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations).}

However, the validity of \textit{Cannon} has been challenged on two separate grounds. Some argue that \textit{Cannon} is an example of federal common law, which was later ruled to be subordinate to state common law in \textit{Erie R.R. v. Tompkins}.\footnote{86 See 304 U.S. 64 (1938). See Brown, supra note 62, at 617.} Others argue that the \textit{Cannon} doctrine was superseded by the minimum contacts test set forth by \textit{International Shoe}, and that direct minimum contacts by the parent corporation are necessary to establish jurisdiction.\footnote{87 See Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1419 (E.D. Wis. 1983) (noting that “the constitutional analysis under \textit{International Shoe} permits consideration of a non-resident’s contacts with the forum state through its wholly-owned subsidiaries without regard to whether the affiliated corporations have maintained a formal separation of corporate identities.” The Wisconsin court could constitutionally exercise jurisdiction over two Japanese parent corporations because they had purposefully availed themselves of the jurisdiction by selling products in Wisconsin through their wholly owned subsidiaries.); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978) (dismissing the validity of \textit{Cannon} because its holding relied on the physical presence approach of \textit{Pennoyer v. Neff}). See also Brown, supra note 62, at 611-16; Voxman, supra note 4, at 336, 339.}

In response, proponents of the \textit{Cannon} doctrine argue that questions about jurisdiction over foreign parent corporations require an analysis distinct from the minimum contacts test. When the foreign parent lacks direct minimum contacts, jurisdiction may be asserted by piercing the corporate veil of its U.S. subsidiary.\footnote{88 See Voxman, supra note 4, at 337-38 (noting that the Supreme Court has never repudiated \textit{Cannon} despite opportunity to do so and may have implicitly upheld the case in \textit{Keeton v. Hustler Magazine}, Inc., 465 U.S. 770 (1984)).} Many state and federal courts continue to follow the corporate formalities approach asserted in \textit{Cannon} when making jurisdictional decisions involving both out-of-state and alien parent corporations.\footnote{89 See, e.g., Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902, 905 (1st Cir. 1980) (adhering to the \textit{Cannon} doctrine in determining whether the court had jurisdiction over the New Jersey parent of a wholly owned Puerto Rican subsidiary and noting that “[t]he mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary”).} Although the validity of \textit{Cannon} is debated, the case continues to be cited frequently to support decisions where courts refrain from piercing the corporate veil to assert jurisdiction over a foreign parent.\footnote{90 See BLUMBERG, \textit{THE LAW OF CORPORATE GROUPS}, supra note 3, at § 3.03 (stating that the \textit{Cannon} doctrine continues to have “considerable, if dwindling, influence”); Aronofsky, supra note 11, at 36.}

Formulations of the corporate formalities approach vary substantially. One court took a restrictive view, requiring that the subsidiary be a “mere instrumentality” of the parent to pierce the corporate veil and confer jurisdiction. In that case, the parent corporation had used the corporate form to
shield itself from tort liability. Another court denied jurisdiction when the subsidiary had "preserved some semblance of independence from the parent." However, in cases where a U.S. subsidiary is operating as a division or distribution agent of the foreign parent, the standard for veil-piercing may be relaxed; courts may not require that the subsidiary is a "mere instrumentality" of the parent. Some courts are reluctant to pierce the corporate veil absent proof of undercapitalization, fraudulent intent, manifest injustice, or lack of corporate independence.

B. The Control Approach

As the Cannon doctrine has eroded and been criticized over time, more courts have employed the control approach to piercing the corporate veil in order to impute minimum contacts to the parent. This approach is particularly useful in cases in which legitimate corporate separation is preserved. The control approach asserts jurisdiction based on the degree of de facto supervision and control exercised by a parent over its U.S. subsidiary, notwithstanding formal corporate separation.

The Supreme Court established the control approach in United States v. Scophony Corp. of America. In Scophony, the Court ruled that an alien parent is subject to jurisdiction when a case arises from the acts of its U.S. subsidiary if the parent exercises a high degree of control over the subsidiary and

93. For example, in Stokes v. Geismar, the court ruled that a foreign parent corporation is generally found to have purposefully availed itself of the laws of the forum state if it created the U.S. subsidiary to act as its U.S. distribution agent. 815 F. Supp. 904, 907 (E.D. Va. 1993) (finding a French corporation purposefully availed itself of the American corporate form in litigation involving corporation's breach of the implied warranty of merchantability because its wholly-owned U.S. subsidiary was the sole distributor of the parent's merchandise in the U.S.).
94. See, e.g., Newman v. Motorola, Inc., 125 F. Supp. 2d 717 (D. Md. 2000) (finding that even though the parent companies' involvement in their subsidiary included control of important decisions, appointment of board members, and filing consolidated tax and financial statements, these factors were insufficient to establish jurisdiction over the parents because none of them showed that the corporations were fraudulently incorporated or undercapitalized); Velasquez v. P.D.I. Enters, Inc., 141 F. Supp. 2d 189 (D.P.R. 1999) (ruling that the court will not pierce the corporate veil without proof of "lack of corporate independence, fraudulent intent, and manifest injustice"); Weight v. Kawasaki Motors Corp., 604 F. Supp. 968 (E.D. Va. 1985) (piercing the corporate veil of a Japanese parent that knowingly placed defective products into the stream of commerce through its American subsidiary in Virginia).
95. See BLUMBERG, THE LAW OF CORPORATE GROUPS, supra note 3, at § 3.06.1 (explaining that more courts are rejecting the Cannon approach and instead focusing on the "mutual dependence" between components of a corporate group).
96. See Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983) (citing the Cannon doctrine with approval but also inquiring into the parent corporation's control over the operations of its subsidiary); NEALE & STEPHENS, supra note 2, at 130 (1988); Alexander, supra note 6, at 400 (explaining that a "significant degree of actual control" by the shareholder or parent over the corporation is necessary to permit the attribution of contacts).
intervenes in the subsidiary's affairs. The Court asserted jurisdiction over the British parent company Scophony based on the parent's "constant supervision and intervention beyond normal exercise of shareholders' rights" over its American subsidiary. Critics of the corporate formalities approach argue that the Supreme Court's ruling in Scophony casts considerable doubt on the validity of the Cannon doctrine.

Factors courts look to when determining the extent of the parent's control include: whether a parent arranges financing for and capitalization of a subsidiary; whether the corporations keep separate books, tax returns, and financial statements; whether officers or directors are the same; whether the parent holds its subsidiary out as an agent; the method of payment made to the parent by the subsidiary; and the extent of control by the parent over the daily affairs of the subsidiary. For example, in In re Teletronics Pacing Systems, Inc., some of the factors cited in establishing that the Australian parent company had substantial control over its Delaware subsidiary included: the parent's approval of large capital expenditures; the parent's requirement of monthly reports; the subsidiary's chief executive officer's duty to report to the parent company; the companies' centralized banking; and the occasional guarantying of loan obligations by the parent. Courts are generally more likely to assert jurisdiction when there is evidence that the subsidiary was undercapitalized or the plaintiff would suffer injustice absent personal jurisdiction over the foreign parent.

Using the control approach, courts have employed various standards to assert jurisdiction over a foreign parent corporation. Some courts follow a strict standard, requiring both a finding of fraud and that the parent "fully controls" or has complete domination over the subsidiary. Other courts require "actual

98. See id. at 816-18.
99. Id. at 816.
100. See Blumberg, The Law of Corporate Groups, supra note 3, at § 3.03.
103. See, e.g., Luc v. Krause Werk GMBH & Co., 289 F. Supp. 2d 1282 (D. Kan. 2003). However, inadequate capitalization alone, demonstrated by the subsidiary's inability to function independently without financial assistance from the parent, is unlikely to justify a disregard of corporate separation for jurisdictional purposes. See generally Blumberg, The Law of Corporate Groups, supra note 3, at § 1.02 (explaining the tendency of courts to treat the subsidiary as a "creature of the parent...[lacking] separate legal existence").
104. See, e.g., Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292 (6th Cir. 1964); Am. Wholesalers Underwriting, Ltd. v. A. Wholesale Ins. Group, Inc., 312 F. Supp. 2d 247 (D. Conn. 2004) (asserting that jurisdiction in Connecticut over the North Carolina parent corporation through its two Connecticut subsidiaries would not be established unless the parent corporation fully controls the subsidiary corporation); Exter Shipping Ltd. v. Kilakos, 310 F. Supp. 2d 1301 (N.D. Ga. 2004) (declining to pierce the corporate veil because the Libyan trading company did not exercise complete control over its U.S. subsidiary with respect to the transaction at issue and because control was not used to commit fraud).
day-to-day control” over the subsidiary to assert jurisdiction over the parent.₁⁰⁵

Finally, some courts require added elements of misuse of control as well as harm or loss resulting from it in order to subject the foreign parent to jurisdiction in that forum using the jurisdictional veil-piercing mechanism.₁⁰⁶

On the other hand, some courts have eschewed this strict notion of control and adopted much more liberal tests. For instance, one court asserted jurisdiction over a Japanese auto-maker based on “business contacts” and “potential for control” over the affairs of its wholly owned American subsidiary, which was engaged in the distribution of its motor vehicles.₁⁰⁷

Another court ruled that forum contact and substantial subsidiary activities under parental supervision in the forum state are sufficient “control” to assert jurisdiction over the parent.₁⁰⁸

These varying standards demonstrate that the control approach is not particularly formalistic. It focuses on assessing various activities within a corporate group and studying the effects of these activities on the interactions between affiliated corporations. Some courts have endeavored to bring that flexibility to the corporate formalities analysis by employing a hybrid approach to jurisdictional veil-piercing which combines both the corporate formalities and control approaches.

C. Hybrid Approaches: Corporate Formalities plus Control

Some courts integrate both corporate formalities and control factors to analyze whether to pierce the corporate veil of a foreign parent. Many courts continue to apply the Cannon doctrine but have broadened their examination from solely corporate formalities to an analysis that also considers the extent of control exercised by the parent.₁⁰⁹

Bulova Watch Co. v. K. Hattori & Co. examined the character of the U.S. subsidiary’s business in addition to corporate formalities and control factors.₁¹⁰

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₁⁰⁸. Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983) (asserting that jurisdiction over a foreign parent is appropriate where the parent must approve significant decisions of the domestic subsidiary).
₁⁰⁹. See, e.g., Jazini v. Nissan Motor Co., 148 F.3d 181 (2d Cir. 1998); Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983); Harris v. Deere & Co., 223 F.2d 161, 162-63 (4th Cir. 1955) (per curiam); Weiss v. La Suisse, 69 F. Supp. 2d 449 (S.D.N.Y. 1999); Cronin v. Eipper Aircraft, Inc., No. 89-0483B, 1990 U.S. Dist. LEXIS 13208, at *6 (D.R.I. July 17, 1990) (upholding the validity of Cannon but asserting that a court should examine “all relevant facts and circumstances,” including whether the officers and directors of the two corporations are the same and the extent of control by the parent over the day-to-day operations of the subsidiary, in determining whether the corporate fiction between a parent and subsidiary should be disregarded for jurisdictional purposes).
*Bulova Watch* involved a Japanese conglomerate (Hattori), which owned all the stock of Seiko Corporation of America, a New York corporation. The court found that Hattori was subject to jurisdiction in New York in an unfair competition suit, noting that it is insufficient to merely consider corporate formalities. The opinion emphasized that real relationships must be considered alongside formal relationships in order to make a "realistic appraisal of subtle economic and power connections" when asserting jurisdiction over corporate affiliates.

In *Bulova*, the Eastern District of New York examined whether the parent and subsidiary were part of a "single economic entity" by analyzing: (1) the significance of the New York business to the parent's overall activities; (2) the degree of control between the parent and subsidiary; (3) the benefit derived by the parent from the subsidiary's profits; (4) the significance of the subsidiary in the organizational life of the parent; and (5) the extent to which the subsidiary does for the parent what the parent itself would do if the parent were present in New York. With respect to the first factor, the *Bulova* court noted that a substantial amount of revenue was derived for the Japanese company by exporting watches, with its largest export market being the United States.

The fifth factor in *Bulova*—the "substitute for doing business" factor—is an interesting addition to jurisdictional veil-piercing jurisprudence. In applying it, a court examines the character of the subsidiary's business, looking for effective substitution of the subsidiary for the parent in the jurisdiction and then imputing the subsidiary's minimum contacts to the parent. As such, the *Bulova* court asserted jurisdiction over Hattori because Seiko functioned as its substitute for doing business in New York, based on parental ownership of all subsidiary stock, overlapping directors and officers, inter-company loans, consolidated financial statements, and joint publicity campaigns.

Whether a court purports to be applying a corporate formalities or control approach, its analysis is likely to borrow elements from both tests and therefore applies what is essentially the hybrid framework. In any event, the court's inquiry will be fact dependent, discretionary, and difficult to predict. The factors laid out under each analysis give the court an opportunity to examine the relationship between the parent and subsidiary in detail and render a decision based on its overall impression.

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111. *Id.*
112. See *id.* at 1335.
113. *Id.* at 1340.
114. See *id.* at 1334-37.
115. See *id.* at 1329.
116. *Id.* at 1344-45 (noting that "while a subsidiary establishes and expands a parent's market position then, so long as that activity is being conducted, and with respect to those activities furthering the parent's ends, the parent is doing business in New York").
117. *Id.*
III
JURISDICTONAL VEIL-PIERCING STANDARDS:
CRITIQUES AND A NEW PROPOSAL

Given the variety of standards and analytical tools that courts employ when faced with a jurisdictional veil-piercing question, the fact that their analyses reach vastly different conclusions should come as no surprise. Outcomes in veil-piercing cases are fraught with inconsistency and clear trends are difficult to deduce even within individual jurisdictions. As Antunes explains, "it is not rare to find cases, virtually identical as to their facts, where courts reached completely opposite results." Uncertain jurisdictional prospects and probabilities have particularly detrimental implications for alien corporate defendants with subsidiaries in the United States. To be sure, unpredictability is also a problem for corporations that are entirely domestic organizations, but this concern is amplified for alien parents because the variance in exposure between any American court and a court abroad far exceeds the difference between different courts within the United States. First, courts have latitude to adopt a variety of approaches and standards on an ad hoc basis. Under the current system, courts may disregard corporate separation between an alien parent and its U.S. subsidiary and thereby assert jurisdiction over the parent at the court’s will. Thus, corporations may be deprived without notice of the benefits and protections that they planned for when structuring subsidiary groups.

Second, alien corporations with U.S. subsidiaries incur additional costs because they cannot alter their corporate structures and behavior in ways that will insulate the parent corporation from jurisdiction (and thus limit the prospect of incurring liability for the acts of the subsidiary) in a predictable manner. The uncertainty of outcomes under the various jurisdictional veil-piercing standards detracts from productivity and profit maximization for multinational corporations.

Third, uncertainty in jurisdictional outcomes raises the costs of litigation for litigants and is burdensome for courts. When faced with jurisdictional questions, litigants must gather and present a wide range of evidence because it is unclear which standard will be invoked and what evidence will be necessary to prove or disprove grounds for jurisdictional veil-piercing. Production can

118. See Blumberg, The Law of Corporate Groups, supra note 3, at § 1.02 (concluding that "we are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible"); Aronofsky, supra note 11, at 31 ("The limited liability doctrine has unfortunately spawned large numbers of inconsistent, often illogical, and increasingly unpredictable decisions from courts confronted by the issue whether to pierce the corporate veil.").
119. Antunes, supra note 65, at 221.
120. See supra note 9 and accompanying text.
121. See Vagts, supra note 2, at 741.
122. As noted by the court in Hargrave, only a prima facie showing is required on a
include evidence on marketing, advertising, distribution, consumer support services, sales, corporate organizational structures, and communications between affiliated corporations. Subjecting alien defendants to extensive discovery over a preliminary jurisdictional question is burdensome, expensive, and inefficient.123

In addition to the costs and uncertainties engendered by the use of inconsistent standards by courts, current approaches to jurisdictional veil-piercing often fail to comport with the constitutional due process limitations on personal jurisdiction. Standards that facilitate assertion of jurisdiction at the will of the court violate the purposeful availment requirement, which posits that defendants have a significant degree of voluntary control over where they will be subject to personal jurisdiction. Further, courts often neglect to conduct a distinct analysis into the reasonableness of jurisdiction over the alien parent corporation. Instead courts assume that when jurisdiction over the subsidiary is reasonable, jurisdiction over the alien parent is also reasonable. As a substitute for the traditional minimum contacts approach, any jurisdictional veil-piercing mechanism must be consistent with the constitutional guarantee of due process with respect to each potential defendant.

In order to remedy these problems, I offer a conjunctive, two-part jurisdictional veil-piercing standard that is consistent with the constitutional underpinnings of personal jurisdiction. First, I propose that courts pierce the corporate veil for jurisdictional purposes only if the degree of economic integration between the parent and subsidiary is such that the subsidiary is the parent's "substitute for doing business" in the forum. I argue that the proposed "substitute for doing business" standard better satisfies the purposeful availment requirement than currently-employed formulations of jurisdictional veil-piercing. Second, I argue that the test should include a distinct analysis of the reasonableness of asserting jurisdiction over the alien parent, even if sufficient grounds exist to pierce the corporate veil of the U.S. subsidiary. Incorporating the reasonableness inquiry as a distinct analysis will further bring jurisdictional veil-piercing in line with due process and compel courts to consider the greater burdens alien corporations face in defending suits in U.S. jurisdictions.

jurisdictional motion precisely to avoid an investigation into the merits of a case over a procedural question at the onset of litigation. Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1161 (5th Cir. 1983).

123. See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 545 (1987) ("American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."); Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 946 (2000) ("Foreign nationals usually should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists.").
A. Bringing Jurisdictional Veil-Piercing in Line with Purposeful Availment

As an inquiry that bypasses or substitutes for minimum contacts analysis, any jurisdictional veil-piercing standard must be consistent with the purposeful availment requirement. The purposeful availment requirement seeks to ensure that defendants have a significant degree of control over which jurisdictions they will be subject to. It precludes jurisdiction based on "random," "fortuitous," or "attenuated" contacts over which the defendant has no control. Consequently, courts must take particular care not to over-assert jurisdictional veil-piercing since doing so may violate the purposeful availment requirement.

Courts have struggled to reconcile jurisdictional veil-piercing with purposeful availment because jurisdictional veil-piercing is by nature a departure from the traditional minimum contacts inquiry. In contrast to the traditional analysis of jurisdiction over a foreign defendant, which is based on a defendant's contacts with a particular forum, jurisdictional veil-piercing focuses on the defendant's relationship with an affiliated corporate entity. Nonetheless, it is possible to formulate a cohesive jurisdictional veil-piercing standard based on an analysis of the parent-subsidiary relationship that is consistent with the purposeful availment requirement.

It seems clear that some form of jurisdictional veil-piercing is necessary. Absent such an approach, courts would be left with one of two unattractive alternatives. Either courts could abandon the notion of limited jurisdictional liability between corporate parents and subsidiaries entirely, or it could keep the corporate veil intact no matter how thin it might be.

Under the first approach, any court with jurisdiction over a subsidiary would also have jurisdiction over the parent. A plaintiff would always be entitled to join both parties as defendants in a suit against the subsidiary. The potential for transgressing due process is apparent, as plaintiffs would have an unqualified right to hale parents into courts where they would not have anticipated litigating. For that reason, this approach increases the cost of doing business and decreases the incentive for foreign corporations to operate in the U.S. Thus, eliminating jurisdictional limited liability is burdensome for both courts and litigants. While piercing the corporate veil as a matter of course would not pose serious administrative hurdles, no court currently employs such an approach, most likely due to the judicial burdens, litigation costs, and due process violations that would ensue.

At the other extreme, if the corporate veil could never be pierced for jurisdictional purposes, parent corporations would be entirely shielded from liability. However, this approach ignores the business reality that some

125. See Alexander, supra note 6, at 398.
subsidiaries indeed operate as mere alter egos of the parent. Absent the possibility of veil piercing, alien parents have an incentive to create undercapitalized dummy subsidiaries to eliminate the risk of being haled into court in a particular jurisdiction and potentially incurring legal liability. Hence, the real work lies in crafting a standard that strikes an appropriate balance between these two extremes.

1. The Proposed "Substitute for Doing Business" Standard

In order to create a jurisdictional veil-piercing mechanism that satisfies the purposeful availment requirement, courts should employ a "substitute for doing business" standard to analyze the relationship between an alien parent and U.S. subsidiary.\(^1\)\(^2\) The proposed "substitute for doing business" standard for jurisdictional veil-piercing of alien parents of U.S. subsidiaries would stipulate:

the corporate veil of an alien parent corporation will be pierced for jurisdictional purposes if the degree of economic integration between the parent and subsidiary, demonstrated by a failure to respect corporate formalities, an undue degree of control by the parent, or some combination thereof, is such that the subsidiary is the parent's substitute for doing business in the forum and assertion of jurisdiction over the parent does not violate traditional notions of fair play and substantial justice.

This proposed jurisdictional veil-piercing standard requires such a degree of economic integration between the alien parent and U.S. subsidiary that the presence of the subsidiary is a mere formality and it is serving as the parent's "substitute for doing business" in the United States. Consequently, the subsidiary's minimum contacts with the forum state are attributable to the alien parent corporation for jurisdictional purposes and the parent can be haled into a U.S. court on a cause of action arising out of the acts of its subsidiary.


In applying this proposed standard, courts would examine the degree of economic integration between the parent and subsidiary by assessing both formal corporate separation and the realities of day-to-day control by the parent to determine whether the subsidiary is operating as a substitute for the alien parent's direct doing of business in the United States.\(^1\)\(^2\) This standard would enable courts to assess the realities of how multinational corporate groups structure and carry out business activities in the United States.

\(^2\) The "degree of economic integration" approach has been advocated by several scholars, including Phillip I. Blumberg. See Blumberg, The Law of Corporate Groups, supra note 3, at § 3.05.3.
Although examining the degree of economic integration outwardly resembles the hybrid approaches used by courts, the proposed standard frames the analysis in a way that guides courts to look at the economic realities of the parent-subsidiary relationship, rather than simply asserting veil-piercing jurisdiction based on any indicia of disregarded corporate formalities and/or control. This proposed standard is more effective than the corporate formalities approach because the substitute for doing business standard captures those situations in which all appearances of corporate formal separation are retained but the existence of the subsidiary is merely a pretense for the alien parent. It is also more effective than the control approach, which leaves courts with too much discretion as to when veil-piercing for jurisdictional purposes should be exercised because all parent corporations exert at least some degree of control over subsidiaries, and the ability to retain control is one of the benefits of forming a parent-subsidiary corporate arrangement.129

This proposed standard does not set forth a laundry list of factors for judges to use in determining whether to pierce the corporate veil for jurisdictional purposes. The purpose of the proposal is to avoid a limited, arbitrary list of factors that give way to excessive judicial discretion and thus "blur the totality of that relationship into mere listing of irrelevant factual items."130 This proposal articulates a clear standard with definite boundaries but includes flexibility for a judge to conduct an effective, fact-dependent inquiry. While legal standards employing checklists work in some circumstances, this approach is not useful in the jurisdictional veil-piercing context given the wide range of affiliated corporate relationships that courts must assess.131 An ad hoc examination of a checklist of factors can result in inconsistent, irreconcilable judgments, leaving alien parent corporations with U.S. subsidiaries with little control over where they may be subject to personal jurisdiction and thereby violating the purposeful availment requirement.

The "doing business" formulation dates back to as early as 1909 in the tax law field, when the Corporation Tax Act stipulated that any alien corporation,

129. See Vagts, supra note 2, at 742.
130. ANTUNES, supra note 65, at 247. See also BLUMBERG, THE LAW OF CORPORATE GROUPS, supra note 3, at § 1.02.1 (criticizing checklist approaches to jurisdictional veil-piercing because they indiscriminately give equal weight to elements of vastly unequal importance and overly simplify complex fact-based exercises of judgment); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1069.4 (2d ed. 1987) ("Each fact pattern sheds light on the viability of arguments for extending jurisdiction from parent companies that are within the jurisdictional reach of the forum to their nonresident subsidiaries."); Aronofsky, supra note 11, at 39 (discussing critiques of veil-piercing "analysis by checklist" as ineffective and giving rise to uncertain outcomes).
131. As Olthoff explains: "Courts have struggled for years to develop and refine their analyses of these [veil-piercing] claims. However, each new action brings a different set of facts and circumstances into the equation and a separate determination must be made as to whether the plaintiff has adduced sufficient evidence of control and domination, improper purpose, or use and resulting damage." Olthoff, supra note 67, at 336.
“engaged in business in any State or Territory of the United States . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business.” The “doing business” standard is used in tax law to determine whether a state has the right to impose taxes on a foreign corporation. It is designed to prevent businesses incorporated in other states or countries from gaining an unfair tax advantage.

Some courts have used conceptions similar to the “substitute for doing business” standard when assessing questions of jurisdictional veil-piercing. In *Hargrave v. Fibreboard Corp*, for example, the Fifth Circuit observed that “in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent ‘does business’ in a jurisdiction through the local activities of its subsidiaries.” Other courts have used a similar standard, asserting jurisdiction only when the subsidiary performs all of the services that the foreign parent would if the parent were present in the forum state. The “substitute for doing business” standard is one of the most stringent approaches to jurisdictional veil-piercing. Activities that might constitute “substitute for doing business” by a parent corporation include the retention of counsel, the opening and maintenance of bank accounts, and business solicitation and financial negotiations.

3. Justifications for the Proposed Standard

None of the current standards for jurisdictional veil-piercing give alien corporations sufficient notice of their exposure to litigation in U.S. jurisdictions. The proposed “substitute for doing business” approach solves this problem by invoking purposeful availment. If an alien parent uses its U.S. subsidiary as a substitute for doing business directly in the United States, the court can infer that the parent has fair warning that it may be subject to suit. If adopted by state courts, a cohesive standard for jurisdictional veil-piercing consistent with purposeful availment would reduce uncertainty. It would create...
a more coherent body of law and enable alien corporations to alter their business strategies, structures, and activities accordingly. Alien corporations could legitimately isolate certain aspects of their operations through subsidiaries and thereby reduce the potential number of forums where they may be subject to jurisdiction and liability. Reducing judicial uncertainty would thus have the effect of promoting economic activity. Furthermore, the new standard would enhance judicial efficiency by limiting the number of ancillary and unnecessary parties involved in the adjudication of disputes.

This formulation of the jurisdictional veil-piercing mechanism also furthers the goals of limited liability. Limited liability involves both procedural and substantive legal considerations, since a parent corporation may avoid both personal jurisdiction and liability by forming a legally distinct corporate entity. These benefits represent the underlying incentives to form corporate affiliates. Since veil-piercing is an exception to the general rule of limited liability, overassertion of veil-piercing causes overdeterrence (by discouraging the pooling of capital) and thereby hampers economic growth. As several courts have recognized, courts must exercise restraint in piercing the corporate veil for jurisdictional purposes.\(^\text{138}\) For instance, some courts adopt a restrictive approach, declaring it unreasonable to subject the parent to personal jurisdiction unless the plaintiff cannot obtain full redress from the subsidiary.\(^\text{139}\) Justifications for low veil-piercing standards, such as (1) the parent corporation being a deeper pocket for recovery and therefore a better risk bearer than the subsidiary or (2) the international expansion of integrated multinational conglomerate groups, are not valid reasons to overassert what should be the exception rather than the rule.

One challenge for formulating a standard for jurisdictional veil-piercing that accurately captures the situations in which an alien parent should be liable for the acts of its subsidiary is the wide range of corporate forms, business practices, and relations between multinational corporate affiliates. At one extreme, a parent and its subsidiary may blatantly disregard formal corporate separation, making it fairly easy to conclude that the parent corporation should be subject to jurisdiction based on the subsidiary's activities in the forum. At the other extreme, domination and control by the parent corporation over the subsidiary may be so obtrusive, despite the strict observance of formal

138. See, e.g., Alexander v. CIGNA Corp., 991 F. Supp. 427, 443 (D.N.J. 1998) (stating that New Jersey courts are "extremely reluctant to pierce [the] corporate veil . . . absent compelling circumstances"); Hermetic Seal Corp. v. Savoy Elecs., Inc., 290 F. Supp. 240, 244 (S.D. Fla. 1967) (warning that "caution must be used before piercing the corporate veil of a subsidiary," disregarding the identities of the parent and subsidiary as separate corporate entities, and "treating its acts as the acts of the parent"), aff'd, 401 F.2d 775 (5th Cir. 1968).

139. See Samuels v. BMW of N. Am., Inc., 554 F. Supp. 1191, 1193-94 (E.D. Tex. 1983) (declining jurisdiction, when plaintiff sued German car manufacturer in addition to its Texas subsidiary for injuries caused by allegedly defective brakes, because the claims could be relieved by asserting jurisdiction over just the solvent subsidiary).
corporate separation, that the "separation" is clearly a bookkeeping arrangement and the subsidiary's distinct existence is merely a pretense. However, most cases do not fall at either extreme, making it difficult to formulate an effective standard that captures cases in the middle ground. In fact, many parent-subsidiary relationships in these cases demonstrate some unique combination of significant assertion of control and failure to observe corporate formalities. For that reason, a flexible standard better suits the highly fact-dependent, circumstantial nature of the jurisdictional veil-piercing inquiry. 140

B. Formal Incorporation of the Reasonableness Inquiry

1. Concerns Raised by Current Jurisdictional Veil-Piercing Approaches that Violate Due Process

Although due process is the constitutional underpinning of personal jurisdiction, courts often fail to analyze the reasonableness of asserting jurisdiction when applying the veil-piercing mechanism to an alien parent corporation. Some courts presume that if an in-state subsidiary's minimum contacts may be imputed to its foreign parent based on veil-piercing requirements, the reasonableness of asserting jurisdiction may also be imputed from the subsidiary to the parent. 141

The questionable logic often used by these courts is as follows. First, the court concludes that the subsidiary corporation has sufficient minimum contacts with the forum state and that it is reasonable to assert jurisdiction over the subsidiary. Second, the court finds adequate grounds to pierce the corporate veil (using any approach to the inquiry) and therefore imputes both the minimum contacts and the reasonableness of asserting jurisdiction to the foreign parent. Consequently such approaches relax the due process requirement, settled law since International Shoe, with respect to foreign corporations. 142

This reasoning is problematic because the constitutional exercise of jurisdiction under either the traditional minimum contacts analysis or its veil-piercing substitute must comport with the Due Process Clause with respect to

140. See NANDA & PANSIUS, supra note 44, at 1-68 (explaining that given the fact-dependant nature of the reasonableness inquiry, bright-line tests are inappropriate for due process analysis of personal jurisdiction).

141. Some courts purport to conduct a distinct reasonableness inquiry but do so in an extremely cursory fashion leading to a presumptory conclusion that that asserting jurisdiction over the alien defendant is reasonable. See, e.g., In re Telecommunications Pacing Sys., Inc., 953 F. Supp. 909 (S.D. Ohio 1997) (concluding that the due process requirement is met to assert jurisdiction over the Australian corporation because there were sufficient grounds to pierce the corporate veil for jurisdictional purposes).

142. See MORTIMER M. CAPLIN, DOING BUSINESS IN OTHER STATES III-IV (1959).
each defendant in question. 143 Even if there are grounds to treat affiliated corporations as one entity for jurisdictional purposes, this does not necessarily imply that the reasonableness of asserting jurisdiction over a subsidiary should be imputed to its foreign parent. Indeed, whether the parent and subsidiary are actually one entity for substantive liability purposes is a question of fact assessed at a later stage by the jury. 144

Failing to conduct a separate reasonableness inquiry for the parent creates a more expansive rule than the traditional minimum contacts approach, violating both public policy and constitutional due process. Imputing a subsidiary’s contacts to its foreign parent and forcing the foreign parent corporation to litigate claims in a jurisdiction with which it has limited contact might impose additional costs and undue burdens on the parent corporation. Specifically, attorney’s fees for local counsel, travel expenses incurred for litigation, and costs accumulated in becoming familiar with the laws of a particular forum. 145 These costs and burdens are greater if the parent corporation is from another country as opposed to another U.S. state. Although the existence of a local subsidiary mitigates some of the inconveniences of defending an action abroad, an alien parent is nonetheless burdened when haled into a U.S. court to defend itself in litigation. 146

Further, without a reasonableness inquiry distinct from the veil-piercing question, there is greater risk that an alien parent corporation will be subject to suit in a forum where the parent has no fair warning, violating due process. The Court in World-Wide Volkswagen highlighted how fundamental concerns of due process shape the ability to engage in effective jurisdictional planning: “[t]he Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” 147 Due process is both the starting and ending point to any personal jurisdiction inquiry. 148

2. Heightened Due Process Concerns for Alien Defendants

Due process analysis reviews “the quality and nature of the activity in

143. Rush v. Savchuk, 444 U.S. 320, 330-32 (1980) ("The requirements of International Shoe, however, must be met as to each defendant over whom a state court exercises jurisdiction."); Aronofsky, supra note 11, at 52 (noting that the "constitutionality of a court's exercise of personal jurisdiction depends upon a defendant's forum ties, and not those of the plaintiff or of the action itself").
144. See generally Born, supra note 9, at 153; Brown, supra note 62, at 607-08 ("In situation involving liability of the parent rather than jurisdiction over the parent, courts require a higher degree of interrelationship between the parent and subsidiary before the separateness will be disregarded.").
145. See Voxman, supra note 4, at 344 n.92.
146. See Blumberg, The Law of Corporate Groups, supra note 3, at § 3.05.4.
148. See Parrish, supra note 10, at 3-4.
relation to the fair and orderly administration of the laws."\textsuperscript{149} Reasonableness analysis should focus on the particular "relationship among the defendant, the forum, and the litigation" in each case.\textsuperscript{150} The due process analysis must take into account the heightened inconveniences and burdens to which alien defendants are subject. Fairness concerns, particularly the unique burdens borne by the defendant in defending a suit in a particular forum, should be the foremost consideration in a court's assessment of the reasonableness of asserting jurisdiction.\textsuperscript{151}

The "unique burdens" borne by alien corporate defendants, recognized by the Supreme Court in \textit{Asahi}, also demonstrate why the reasonableness inquiry must be a distinct analysis when applying veil-piercing mechanism to alien defendants. According to \textit{Asahi}, the unique burdens borne by alien defendants should have "significant weight" when assessing whether to subject the alien to jurisdiction in the United States.\textsuperscript{152} The costs of transnational discovery, additional expenses of defending a suit in the United States, and travel and language difficulties are all heightened burdens with respect to alien defendants.\textsuperscript{153} From a procedural perspective, suits against alien defendants raise distinct obstacles, such as problems in serving process and executing judgments abroad.\textsuperscript{154} In light of these burdens, international cases involving alien parties mandate not only a distinct but also a heightened inquiry into the reasonableness of asserting jurisdiction.\textsuperscript{155}

3. Framing the Reasonableness Inquiry as a Distinct Component of Jurisdictional Veil-Piercing Analysis

In order to align jurisdictional veil-piercing with the due process limitations on personal jurisdiction for alien defendants, I propose incorporating the reasonableness inquiry as a distinct component of the jurisdictional veil-piercing mechanism. The reasonableness analysis should involve balancing interests, with the burden the jurisdiction places on the defendant being the primary concern.\textsuperscript{156} Formally incorporating the reasonableness inquiry will serve as a check on jurisdictional veil-piercing, just as it serves as a check on the minimum contacts inquiry. Just as cases exist in which courts decline to assert jurisdiction over foreign defendants because of

\begin{itemize}
\item \textsuperscript{149} Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
\item \textsuperscript{150} Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
\item \textsuperscript{151} See Kulko v. Super. Ct., 436 U.S. 84, 92 (1978) (characterizing fairness to the defendant as the "essential criterion in all cases").
\item \textsuperscript{152} See Asahi Metal Indus. v. Super. Ct., 480 U.S. 102, 114 (1987) (plurality opinion).
\item \textsuperscript{153} See Born, \textit{supra} note 47, at 24 n.102; Hornbeck, \textit{supra} note 41, at 1415.
\item \textsuperscript{154} See Lilly, \textit{supra} note 30, at 117-18.
\item \textsuperscript{155} See Born, \textit{supra} note 47, at 28.
\item \textsuperscript{156} See generally World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995) (stipulating that the burden on the defendant bears heavy weight in assessing reasonableness).
\end{itemize}
unreasonableness, despite their minimum contacts with the state, there should also be cases in which courts decline to assertion jurisdiction over foreign parent corporations because of unreasonableness despite sufficient grounds to pierce the corporate veil for jurisdictional purposes. By recognizing the unique burdens borne by alien defendants forced to litigate in the United States, this approach will likely make the reasonableness requirement more rigorous, which is necessary both to comport with due process and as a matter of public policy.

Some courts have, in fact, treated the questions of jurisdictional veil-piercing and reasonableness as two distinct inquiries when an alien parent corporation is the defendant. The court in Energy Reserves Group, Inc. v. Superior Oil Co.\footnote{157} recognized that alter ego and reasonableness are two distinct analyses that bear little relation to each other.\footnote{158} It further noted that since both the veil-piercing standard and reasonableness requirement must be satisfied to assert jurisdiction over foreign parent corporations, "the power to pierce the corporate veil must be 'exercised reluctantly and cautiously.'"\footnote{159} Hoffman v. United Telecommunications, Inc.\footnote{160} upheld the Energy Reserves approach; stating that the existence of a relationship between a foreign parent and domestic subsidiary close enough for jurisdictional veil-piercing constitutes a minimum contact \textit{if} the relevant factors balance in that direction.\footnote{161} The factors considered in the due process inquiry, but excluded or absent in the veil-piercing analysis, include inconvenience of litigation for the parent in the forum and concerns about the fair and orderly administration of laws.\footnote{162} Thus, even if grounds exist to pierce the corporate veil for jurisdictional purposes, the ultimate question is the reasonableness of asserting jurisdiction over the parent.

Some courts have also explicitly used the reasonableness inquiry after \textit{Asahi} when presented with alien corporate defendants in jurisdictional veil-piercing cases. For instance, in \textit{Gray v. Riso Kagaku Corp.},\footnote{163} the court ruled that although the Japanese parent and its U.S. subsidiaries failed to observe some corporate formalities, jurisdiction over the parent Riso Kagaku was

\begin{footnotes}
\item [157.] 460 F. Supp. 483 (D. Kan. 1978). The court in Energy Reserves did not employ the veil-piercing mechanism because it found that the defendant Nevada Corporation, with its principal place of business in London, had established sufficient direct minimum contacts for personal jurisdiction. \textit{Id.} at 490-491.
\item [158.] \textit{Id.} at 506, 508 ("[R]eliance on alter ego principles as a constitutional prerequisite to jurisdiction makes little sense in terms of logic or the fundamental fairness analysis of \textit{International Shoe}. . . . Following the decision in \textit{Shaffer}, corporate law analysis offers nothing that concludes or forecloses the constitutional analysis of the factors of forum ties, convenience and judicial administration that control the reasonableness of requiring a litigant to answer in the forum.").
\item [159.] \textit{Id.} at 506 (quoting Amoco Chems. Corp. v. Bach, 567 P.2d 1337, 1341 (Kan. 1977)).
\item [161.] \textit{See id.} at 1472.
\item [162.] \textit{Id.} at 1472.
\end{footnotes}
impermissible because it was unreasonable. The court balanced the plaintiff's interest in the case with the "unique burdens" borne by Riso Kagaku and found that the plaintiff's interest in adjudicating the action in South Carolina was outweighed by the distance that Riso Kagaku would have to travel to defend the action and the disadvantages that Riso Kagaku would face in South Carolina due to language and cultural barriers. Consequent-ly, the court declined to pierce the corporate veil for jurisdictional purposes because doing so would violate the fairness prong of the due process standard.

The reasonableness test is appealing to courts. As an open-ended, balancing inquiry, it gives courts the flexibility and discretion to decline jurisdiction over foreign defendants when doing so would offend due process. This is important in an inquiry that is so dependent on the specific facts of each case. Any court capable of applying the reasonableness standard in an ordinary personal jurisdiction determination should be able to do so in the veil-piercing context as well.

CONCLUSION

As a substitute analysis that bypasses the traditional minimum contacts analysis, jurisdictional veil-piercing must comport with the goals and constitutional underpinnings of personal jurisdiction. The proposed jurisdictional veil-piercing standard seeks to align a court's inquiry with due process requirements, while also reducing the inconsistency and uncertainty of current approaches. One of the fundamental goals of any jurisdictional test is to provide a framework that will yield predictable and consistent results. Although both the jurisdictional veil-piercing and reasonableness inquiries are heavily fact-dependent, it is not impossible for courts to adopt a cohesive standard and build sufficiently clear and detailed precedents that will achieve predictable, fair outcomes. The proposed jurisdictional veil-piercing standard gives courts flexibility and discretion to assess the realities of affiliated corporate arrangements on a case-by-case basis. Adopting this proposed standard would have positive effects on business incentives that shape the corporate structures and activities of alien multinational corporations with operations in the United States. Furthermore, a clearer standard will promote judicial efficiency in deciding jurisdictional questions.

164. Id. at *11-12.
165. Id. at *12.
167. See Jennifer Babbin, Note, The Fiduciary Shield Doctrine: Minimum Contacts in a Special Context, 65 B.U. L. REV. 967, 994 (1985) ("Because any due process inquiry is inexact, courts should retain some discretion in applying the doctrine so as to ensure that it remains consistent with the general parameters for the constitutional exercise of personal jurisdiction set out by the Supreme Court.").