INTERNET JURISDICTION AND THE LAW OF THE LAND: *BURGER KING'S* DOUBLE WHOPPER

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INTRODUCTION 916
A. The Rise of Virtual Communications 917
B. Traditional Jurisdiction Framework & Web-Based Modifications 920
C. Lower Court Handling of Virtual Contacts 923
D. Due Process and Jurisdiction 924
I. CONSTANCY IN CONTINUING OBLIGATION AND RELATIONSHIPS 925
A. Problems in Current Law 926
B. Prior Legal Challenges for "New" Communication Methods 935
C. Continuing Relationships and Obligations 940
D. Continuing Obligations and Relationships for Virtual Conduct 942
II. HYPOTHETICAL OUTCOMES 945
A. One-Time Attenuated Relationship 945
B. Virtual Temporary Employee 946
C. Virtual Long-Term Employee 947
D. The Joint Venture 947
III. LIMITATIONS OF THE PROPOSAL 948
A. Requires Judges to Reconceive Settled Jurisdiction Law 948
B. Potential for Inconsistent Outcomes 949
IV. SOLUTIONS UNTIL RESOLUTION 949
CONCLUSION 951

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INTRODUCTION

> So where does [existing law] leave us with Internet jurisdiction? Almost nowhere. In some respects, we are approaching universal personal jurisdiction depending on how the court characterizes a certain website and its effect. In my view, there is no coherent theme in jurisdiction cases, and the risk is that we may be heading toward nationwide jurisdiction.[1]
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> – *Honorable M. Margaret McKeown*
> *United States Court of Appeals for the Ninth Circuit*

The Supreme Court's personal jurisdiction doctrine has continuously evolved alongside mankind's increasing ability to maintain a virtual presence in a jurisdiction without actual physical entry. The Coronavirus Pandemic brought explosive use of virtual communications, a trend continuing post-pandemic. While the Court has recognized that virtual relationships may create distinct jurisdictional issues, the Court has left those issues for another day.

Jurisdictional questions occurring within virtual facts are often nebulous because the foundations of personal jurisdiction law were established in a more physical world. The ever-growing complexity of personal jurisdiction law has coincided with novel forms of virtual presence to create questions with answers as clear as mud.

This comment argues for the adoption of Burger King's continuing relationships and obligations framework for personal jurisdiction analyses in virtual settings in lieu of looking for significant activity within the forum. The continuing relationships and obligations test is simple, elegant, and measures the defendant's perceived benefit in the forum state. Most importantly, this framework comports with the due process principles of legal consistency and foreseeable outcomes.

This comment provides hypotheticals based on a current personal jurisdiction dispute to demonstrate the continuing relationships and obligations framework. Lastly, a discussion of

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[1] M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 135, 146 (2014).

forum selection clauses is provided for practical assistance until the issue is resolved.

A. The Rise of Virtual Communications

When *International Shoe* established the personal jurisdiction framework in 1945, business communication occurred through telegram and telephone.[2] Fax machines were futuristic. Zoom-style virtual communication was science fiction.

Before 2020, businesses were becoming increasingly reliant on virtual communications.[3] During the 2008 recession, the business world relied on virtual forms of communication as a convenient, cost-saving measure.[4] Then came Coronavirus, and many businesses completely relied on virtual communications to sustain operations.[5]

Presently, around 25% of employees worldwide work in 100% remote settings.[6] Over seventy million Americans believe they could perform their current jobs from home.[7] Employees increasingly prefer remote work, as Coronavirus changed our views about the workplace.[8] Today, remote work is so ingrained in

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[2] Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[3] Participation in virtual work teams increased by twenty-five percent between 2010 and 2018. James Anthony, *70 Virtual Team Statistics You Can't Ignore: 2023 Data Analysis, Benefits & Challenges*, FINANCES ONLINE, https://financesonline.com/virtual-team-statistics/ [https://perma.cc/7QCM-8HH3] (Dec. 21, 2023) [hereinafter FINANCES ONLINE].

[4] *Business Meetings: The Case for Face-to-Face*, FORBES (2009), https://images.forbes.com/forbesinsights/StudyPDFs/Business_Meetings_FaceToFace.pdf [https://perma.cc/6Z8T-VBYF].

[5] Allison Pohle & Lauren Weber, *Business Travel Lives Again, as Many Are Hitting the Road*, WALL ST. J. (Mar. 29, 2022, 5:30 AM), https://www.wsj.com/articles/business-travel-covid-omicron-airlines-hotels-conferences-11648490926?st=b79owmk30m6z1pl&reflink=desktopwebshare_permalink [https://perma.cc/46UU-6SWD].

[6] FINANCES ONLINE, *supra* note 3.

[7] Ben Wigert & Sangeeta Agrawal, *Returning to the Office: The Current, Preferred and Future State of Remote Work*, GALLUP (Aug. 31, 2022), https://www.gallup.com/workplace/397751/returning-office-current-preferred-future-state-remote-work.aspx [https://perma.cc/5QYT-NXTH].

[8] *See, e.g.*, *id.*; Lynn Kier, *Virtual Communication Is Vital to Business Resilience*, FORBES (Sep. 16, 2020, 8:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2020/09/16/virtual-communication-is-vital-to-business-resilience/?sh=59b4c50f7d15 [https://perma.cc/L6YV-HW42].

business that some Gen Z-ers have held long-term company jobs without ever entering an office or seeing their coworkers' faces.[9]

Virtual communication includes a myriad of technologies of varying familiarity. Most familiar forms of virtual communication include email and text messages.[10] These days, video conferencing is an all-too-familiar form of virtual communication. Alexander Graham Bell's company first conceptualized video conferencing in the 1870s.[11] AT&T developed a prototype system of two-way video communication known as the "Picturephone" in 1959.[12] By the late 1990s, high-quality, simultaneous video conferencing over the internet was possible.[13]

Less familiar to most people, but included in virtual communications, are newer technologies like the Metaverse, which serves as an interactive information-sharing platform.[14] Users can interact directly with each other in the Metaverse, and companies are able to market their products within virtual reality.[15] As businesses look to incorporate the Metaverse into the workplace, the Metaverse could revolutionize our working environments.[16]

Video conferencing has already found its way into jurisdiction cases. In *Rincon Etal Investments, Inc., v. Coughran*, a California defendant managed an Arizona-based company by conducting

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[9] Alex Janin, *Thanks to Remote Work, Many in Gen Z May Never Work in an Office. Will It Matter?*, WALL ST. J. (Feb. 20, 2022, 5:30 AM), https://www.wsj.com/articles/remote-lets-generation-z-work-without-any-office-will-matter-11645220523?st=88gry27uyg8q78j&reflink=desktopwebshare_permalink [https://perma.cc/ZU6L-TQTF].

[10] Craig Hyslop, *Virtual Communication: An In-Depth Guide [Including Tips & Tools]*, GLASSCUBES (Oct. 19, 2022), https://www.glasscubes.com/virtual-communication/#:~:text=Chat%2C%20phone%20calls%2C%20and%20video,work%20better%20in%20certain%20situations [https://perma.cc/3RST-7TQ5].

[11] Andy Patrizio, *The History and Evolution of Video Conferencing*, TECHTARGET (Aug. 17, 2021), https://www.techtarget.com/whatis/feature/The-history-and-evolution-of-video-conferencing [https://perma.cc/2ZT8-2BBJ].

[12] *Id.*

[13] *Id.*

[14] John Griffin, *Communication in the Metaverse and How It Is Evolving,* FLEKSY (July 2022), https://www.fleksy.com/blog/communication-in-the-metaverse-and-how-it-is-evolving/ [https://perma.cc/7QLH-A8ML].

[15] *See, e.g., id.*

[16] Jo Eyre, *Four Ways the Metaverse Could Change the Face of Remote Employee Communication*, FORBES (Aug. 15, 2022, 7:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2022/08/15/four-ways-the-metaverse-could-change-the-face-of-remote-employee-communication/?sh=95356e031b56 [https://perma.cc/X2F8-XRJX].

virtual meetings, phone calls, and sending emails from California.[17] Despite having never traveled to Arizona for work, the California defendant was subject to the jurisdiction of Arizona courts due to his virtual contacts in the forum.[18]

In *Tiverton Advisors, LLC v. AgriFruit, LLC*, another California-based defendant transacted to borrow money from a North Carolina company to support its business.[19] The parties' draft contract anticipated an exchange of $29 million over the duration of seven years but fell through before it was solidified.[20] The plaintiff-lender attempted to hale the California company into a federal district court in North Carolina for damages related to the alleged breach of confidentiality agreements surrounding the negotiations.[21] The parties facilitated their transaction through ninety emails, forty-five virtual meetings, forty-seven phone calls, sixty text messages, and one in-person meeting in California.[22] Relying on factors that included "whether the defendant made in-person contact with a resident of the State regarding the business relationship," the court found that the California defendants were not subject to jurisdiction in North Carolina.[23]

Meanwhile, in *Yorktown Systems Group, Inc., v. Threat Tec, LLC*, a long-term joint venture business relationship, facilitated almost entirely through phone, email, and virtual meetings, sufficiently conferred jurisdiction outside the defendant's home forum.[24] There, the parties' multi-year, mentor-protégé relationship gave rise to negotiations and future consequences that supported jurisdiction despite the defendant's claims that it never physically entered the forum state.[25] The defendant could not escape the foreseeability of being subjected to Alabama's

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[17] Rincon Etal Invs. Inc. v. Coughran, No. CV-21-00426-TUC-SHR (DTF), 2022 WL 2702538, at *4-*5 (D. Ariz. July 12, 2022).

[18] *Id.*

[19] Tiverton Advisors, LLC v. AgriFruit, LLC, No. 5:22-CV-51-FL, 2022 WL 3022135, at *1 (E.D.N.C. July 29, 2022).

[20] *Id.* at *6.

[21] *Id.* at *4-*8.

[22] *Id.* at *6.

[23] *Id.* at *4-*5 (quoting Sneha Media & Ent., LLC v. Associated Broad. Co. Ltd., 911 F.3d 192, 198-99 (4th Cir. 2018)).

[24] Yorktown Sys. Grp. v. Threat Tec, LLC, No. 5:22-CV-0496-LCB, 2022 WL 16629959, at *7 (N.D. Ala. Sept. 22, 2022).

[25] *Id.*

jurisdiction because the defendant knew that the plaintiff "was an Alabama company and reasonably should have known that [contractual requirements] would be performed from Alabama."[26]

B. Traditional Jurisdiction Framework & Web-Based Modifications

Courts are resolving internet jurisdiction issues with a mix of traditional and internet-specific tests.[27] Jurisdiction was originally conceptualized in the context of hard and fast physical boundaries.[28] Initially, personal jurisdiction issues were defined by full faith and credit concerns.[29] The issue became doctrinal, though not completely recognizable, with *Pennoyer* in 1877.[30] The decision in *Pennoyer* was completely conceptualized upon physical facts: physical, in-hand service was required to hale person or property into the courts of a given state.[31]

Enter the corporate "person," and physical presence became more nebulous.[32] As a legal fiction, corporations themselves cannot walk across state lines, even if their agents do. *International Shoe* was primarily an attempt to free courts of the rigid physical boundaries mandated by *Pennoyer*.[33] Forty years after *International Shoe*, the Court firmly stated that lack of physical

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[26] *Yorktown Sys. Grp.*, 2022 WL 16629959, at *7.

[27] Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 118-26 (2019).

[28] Robin J. Effron, *Doctrinal Redundancy and the Two Paradoxes of Personal Jurisdiction*, 88 FORDHAM L. REV. ONLINE 117, 119 (2019).

[29] *Id.* at 120.

[30] *Id.*

[31] Pennoyer v. Neff, 95 U.S. 714, 726 (1877) ("If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.").

[32] *See* Effron, *supra* note 28, at 121; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. . . . For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." (citations omitted)).

[33] Effron, *supra* note 28, at 121.

presence, as required by *Pennoyer,* was not dispositive for finding personal jurisdiction over nonresident defendants.[34] This improved the substance of personal jurisdiction, by compelling courts to devote greater focus to the defendant's rights rather than a defendant's happenstance physical presence in a given state.[35]

In *International Shoe*, the court began carving out two categories of personal jurisdiction: general and specific.[36] General jurisdiction[37] is an all-purpose form of jurisdiction where defendants can be hauled into court regardless of the connection between their conduct and the particular cause of action.[38] Meanwhile, specific jurisdiction requires that the suit arise "out of or [be] related to the defendant's contacts with the forum."[39] The Supreme Court recognized the dichotomy of these types of jurisdiction in the 1980s and began referring to them by name at that time.[40]

For specific jurisdiction, courts may exercise power over nonresident defendants only when the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[41] In *Hanson v. Denckla,* the Court elaborated that the focus is on the extent of the defendant's purposeful availment into a jurisdiction; that is, when the defendant enjoys the

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[34] Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985).

[35] Niesel, *supra* note 27, at 104.

[36] *Int'l Shoe*, 326 U.S. at 317 (these categories were distinct but unnamed at the time) ("'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."); *id*. at 318 ("Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." (citations omitted)).

[37] Author Note: In general jurisdiction, virtual relationships do not matter because the defendant is subject to suit in that jurisdiction regardless of virtual communication. As such, this comment only discusses specific jurisdiction to a further extent.

[38] Helicopteros Nacionales de Colom. v. Hall, 466 U.S. 408, 414 n.9 (1984).

[39] *Id.* at 414 n.8.

[40] Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 519 (2019); *see also Helicopteros Nacionales de Colom.*, at 414 n.8-9.

[41] *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

benefits and protections of the forum state's laws.[42] Additionally, courts must balance the interests of the forum state with those of defendants.[43]

The Supreme Court has created a number of variations of the test for specific jurisdiction designed to accommodate fact-specific settings.[44] *Burger King v. Rudzewicz* created a framework for interstate contracts performed largely outside the forum state.[45] *Calder v. Jones*, as limited by *Walden v. Fiore*, provides an effects-based framework for jurisdiction in cases involving intentional torts.[46] *Asahi Metal Industry v. Superior Court of California*, as elaborated by *Ford v. Montana Eighth Judicial District*, provides jurisdiction for products traveling through a stream of commerce, causing harm in particular jurisdictions.[47]

Despite the Supreme Court's favorability to create fact-specific jurisdiction tests, the Court has not created a test for virtual contacts. The *Walden* Court recognized in a footnote that minimum contacts may be established through virtual means, but left the question for another day.[48] Last year, the Court offered another footnote indicating that internet transactions may raise their own doctrinal questions, but the Court has yet to elaborate further on the subject.[49]

Lack of clarity is problematic for lower courts because, as the Supreme Court recognized, the minimum contacts test is not black and white; rather, "greys are dominant and even among them the shades are innumerable."[50] The boundary line between jurisdiction and no jurisdiction "cannot be simply mechanical or quantitative."[51] As such, district courts are tasked with a tall order in determining

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[42] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[43] *See* McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957)

[44] *See* Nash, *supra* note 40, at 520-21.

[45] Burger King v. Rudzewicz, 471 U.S. 462 (1985).

[46] *See generally* Calder v. Jones, 465 U.S. 783 (1984); Walden v. Fiore, 571 U.S. 277 (2014).

[47] *See generally* Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102 (1987); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S.Ct. 1017 (2021).

[48] *Walden*, 571 U.S. at 290-91 n.9 ("We leave questions about virtual contacts for another day.").

[49] *See Ford Motor Co.*, 141 at 1028 n.4 (2021).

[50] Kulko v. Superior Ct. of Cal., 436 U.S. 84, 92 (1978) (quoting Estin v. Estin, 334 U.S. 541, 545 (1948)).

[51] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

the constitutionality of jurisdiction in cases involving virtual contacts where factually similar cases are few and far between.

C. Lower Court Handling of Virtual Contacts

Because the Supreme Court has yet to address the issue of minimum contacts in virtual relationships, lower courts have developed several approaches to the issue.[52] The foremost of these tests is *Zippo*, which presently has been cited in 1,665 cases, 46 trial court orders, and 11 other decisions that can be found within Westlaw.[53] The *Zippo* test is a sliding scale of activity wherein:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[54]

The Third, Fifth, and Ninth Circuits have recognized *Zippo* as the seminal authority on personal jurisdiction issues deriving from web-based relationships.[55] The Fourth, Sixth, and Eighth Circuits use *Zippo* to measure purposeful availment in a more limited

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[52] Niesel, *supra* note 27, at 115.

[53] Citing References for Zippo Mfg. v. Zippo Dot Com, 952 F.Supp. 1119 (W.D. Pa. 1997), WESTLAW, www.next.westlaw.com [https://perma.cc/53NS-Z9DU] (Sign into Westlaw with a personal accout, type full case citation in search bar, case will appear as the first option, then click 'Citing References', and the results can be filtered by the last accessed date) (last accessed Dec. 19, 2022).

[54] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (citations omitted).

[55] Niesel, *supra* note 27, at 118 (citing Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); and Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997)).

sense.[56] Meanwhile, the Second Circuit has rejected *Zippo* as a dispositive test for web-based jurisdiction issues, choosing to rely on the traditional framework.[57] For the Second Circuit, *Zippo* is a mere framing tool for its jurisdictional inquiry.[58] The Seventh Circuit also rejected *Zippo* as a dispositive test, holding "that the traditional due process inquiry . . . is not so difficult to apply in cases involving Internet contacts that courts need some sort of easier-to-apply categorical test."[59]

D. Due Process and Jurisdiction

Personal jurisdiction tests derive from the Fifth and Fourteenth Amendments due process mandates.[60] The Constitution contains no description of processes forbidden by the due process mandate.[61] Neither does it describe applicable due process principles.[62] Known as procedural due process, the doctrine was first discussed in *Murray's Lessee v. Hoboken Land & Improvement Co.*[63]

In interpreting what due process means, the *Hoboken* Court looked to the Constitution itself, and the settled usages of the term in England prior to the Revolution. In particular, the Court looked to England's specific procedures of the sort that were at issue in *Hoboken* to determine if they violated due process.[64] Since then, procedural due process has been mentioned in personal jurisdiction

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[56] Niesel, *supra* note 27, at 118 (citing Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003); ALS Scan, Inc. v. Dig. Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002); and Neogen Corp. v. Neogen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002)). See Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1150 (2015) for a detailed table of *Zippo*'s treatment in each federal circuit.

[57] Niesel, *supra* note 27, at 118, 125 (citing Best Van Lines v. Walker, 490 F.3d 239 (2d Cir. 2007)).

[58] Best Van Lines, Inc. v. Walker, 490 F.3d 239, 251 (2d Cir. 2007).

[59] Niesel, *supra* note 27, at 125-26 n.190 (quoting Illinois. v. Hemi Grp., 662 F.3d 754, 759 (7th Cir. 2010)).

[60] *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877); Int'l Shoe v. Washington, 326 U.S. 310, 325 (1945); Zippo Mfg. v. Zippo Dot Com, 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

[61] Den ex dem. Murray v. Hoboken Land & Imp., 59 U.S. 272, 276 (1855).

[62] *Id.*

[63] *See generally* Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272 (1855).

[64] *Id.* at 276-77.

cases without significant depth as to the doctrine's historic principles.[65]

In the most basic form, procedural due process means that courts must abide by the law of the land.[66] Though little effort has been devoted to pinning down the philosophical understanding of procedural due process, it is understood to contain the principles of fairness, reasonableness, and efficiency as applied to various circumstances.[67] Despite the pervasiveness of due process principles, the theory is not altogether intuitive, and has arguably failed to make its way into many of the seminal personal jurisdiction cases.[68]

I. CONSTANCY IN CONTINUING OBLIGATION AND RELATIONSHIPS

Elusive is a succinct and complete framing of the deeper problems of personal jurisdiction and virtual contacts. This is due, in part, to the complexity of personal jurisdiction itself. The entire personal jurisdiction doctrine lacks a coherent vision because the Court's fact-specific approach to the entirety of jurisdiction has created "an ever-widening doctrinal morass" of legal rules.[69] Additionally, our expectations for what the law *should* be are muddied by an often-incomplete understanding of due process.[70] This complexity and lack of understanding makes the search for a perfect rule a task to be achieved from within Plato's cave.

Nevertheless, a recitation of the specific shortcomings of *Zippo* and the current law as applied to virtual contacts is simple. As the Honorable M. Margaret McKeown of the Ninth Circuit put it,

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[65] Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 163 (2017) ("After the Magna Carta, the scope of 'due process' continued to evolve, and the phrase appears in literally thousands of Supreme Court opinions. In many of those opinions, the phrase operates as nothing more than a passing reference . . . .'").

[66] JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 7-8 (Univ. Press Kan. 2003).

[67] Grossi, *supra* note 64, at 155-58.

[68] *Id.* at 176-77.

[69] Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014).

[70] Grossi, *supra* note 65, at 156-57. Few scholarly articles are entirely devoted to the concept of procedural due process. True understanding and investment in the principle is wanting, as most scholars merely provide historical overviews of rights created by procedural due process.

internet jurisdiction is an arena of "mess and confusion."[71] As discussed in this section, this mess and confusion is constitutionally untenable because it violates the due process consistency objective.[72] In particular, *Zippo* is problematic because it does not address individuals' actual relationships—only a reflection of that relationship that might be seen in a website.[73] Going forward, the number of inconsistent outcomes will only worsen as virtual relationships continue to grow. It is time to rethink personal jurisdiction and its application to virtual relationships.

Within current law, a potential solution lies in *Travelers*, and its application to the largely wire-based business relationship in *Burger King*. There, the Court measured minimum contacts by the defendants' continuing relationships and obligations with the opposite party in the forum state.[74] This test, which amounts four plain English words, is an under looked corner of current law that can effectively balance the interests of defendants and forums. Without violating *International Shoe*'s rejection of quantitative, rigid jurisdiction tests, this test offers a clear measure of defendants' minimum contact and comports with procedural due process. To demonstrate this straightforward rule, a series of hypotheticals and applications are presented at the end of this section. Lastly, a discussion of appropriate forum selection clauses is provided to offer guidance to current practitioners, given the unlikelihood for resolution of the issue in the immediate future.

A. Problems in Current Law

Despite the at least 26-year existence[75] of this issue, the Supreme Court has yet to offer guidance as to their implications with personal jurisdiction, despite recognizing that internet

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[71] McKeown, *supra* note 1, at 143.

[72] *See* discussion *infra* notes 189-215 and accompanying text.

[73] *See* discussion *infra* notes 75-99 and accompanying text.

[74] *See* discussion and cases cited *infra* notes 174-185.

[75] *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (trademark infringement claim involving jurisdiction and business transacted across the internet).

transactions "may raise doctrinal questions of their own."[76] One source of tension in the current law stems from its creation at a time when the internet was poorly understood—or not understood at all. In its early days, the internet was a difficult subject for the bench.[77] The first published appellate opinion pertaining to web-based issues referred to the internet as "INTERNET, a national computer network."[78] At that time, "internet" had yet to earn an article.[79]

By the early 2000s, some attorneys suggested that, for the purposes of jurisdiction, that the internet could be perceived as spiderwebs and highways.[80] As a spiderweb, defendants' websites could subject them to jurisdiction in any location where the website may be accessed.[81] As a highway, the internet could be viewed as a road where people are virtually "traveling" to destinations.[82] Nevertheless, the Supreme Court was still looking for clarification on the differences between pagers and e-mail well into this century.[83]

In 1997, the answer to internet jurisdiction came not in a silver bullet, but a silver cigarette lighter. *Zippo*'s foothold on internet jurisdiction through the present day is remarkable, given the level of understanding of the internet at the time.[84] *Zippo* recognized that the internet was in "its infant stages" and a "global revolution [was] looming on the horizon" at the time it was decided.[85] Regardless, it remains the seminal authority in three jurisdictions,

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[76] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 n.4 (2021); *see also* Walden v. Fiore, 571 U.S. 277, 290 n.9 (2014) (recognizing that virtual presence can translate into contacts with a forum, but deemed such questions "very different" from those at hand).

[77] *See* McKeown, *supra* note 1, at 138-39.

[78] *Id.* (quoting United States v. Morris, 928 F.2d 504, 505 (2d Cir. 1991)).

[79] *See id.* at 139.

[80] Beth I. Boland & Diane Gwin, *The Internet and Personal Jurisdiction Under the Constitution: In What State, Exactly, Is The Internet Located?*, 44 BOSTON BAR J. 16, 16-17 (2000).

[81] *Id.*

[82] *Id.* at 17.

[83] McKeown, *supra* note 1, at 141 (citing oral arguments from City of Ontario v. Quon, 560 U.S. 746 (2010)).

[84] *Zippo* has been cited 49 times within the prior twelve months of writing this comment. Citing References for Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), WESTLAW, www.next.westlaw.com (last visited Dec. 19, 2022).

[85] Zippo Mfg. v. Zippo Dot Com, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

and plays a decisive role in personal jurisdiction tests in three others.[86] This, despite dramatic changes in the internet since 1997.

Many scholars question *Zippo*'s soundness as law.[87] Issues range from confusion about the test's scope and applications, to its inability to adapt to twenty-five years of internet evolution.[88] A myriad of solutions have been proposed, ranging from expansion of the stream of commerce test,[89] to a return to the founding principles of personal jurisdiction,[90] codification of the entire law of personal jurisdiction,[91] and opening the door to national jurisdiction.[92] Nevertheless, when harm resulting from internet relationships is intangible, the currently available jurisdiction tests begin to unravel.[93]

One obvious deficiency is *Zippo*'s agedness. Using the Internet Archive's Wayback Machine, one can access the websites at issue in *Zippo* as they were in 1997. These websites, designed to accommodate dialup connections, contain all the effects of the last century's internet without the trademark blip and burr dialup sound that would have been heard when accessing them.[94] In 1997, zippo.com consisted mostly of blue hyperlinks against a grey speckled boarder, along with a clip art image sprinkled in here and there.[95] Despite a four-star site ranking by Magellan and a

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[86] Niesel, *supra* note 27, at 118.

[87] *Id.* at 126 (arguing that *Zippo* is a "product of an internet that no longer exists"); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, U. ILL. L. REV. 71, 87 (2006) (arguing that *Zippo* is problematic because a) the idea that the internet broadcasts information indiscriminately is a fiction, b) there exists a lack of clarity between the relationship of website interactivity and traditional personal jurisdiction analysis, and c) the test focuses on the website rather than the conduct achieved through the website).

[88] Niesel, *supra* note 27, at 119.

[89] James M. Westerlind, *The Magna Carta Meets the Twenty-First Century: Personal Jurisdiction and the Internet*, 15 ST. J. C.R. & ECON. DEV. 223 (2000); Zainab R. Qureshi, *If the Shoe Fits: Applying Personal Jurisdiction's Stream of Commerce Analysis to E-Commerce—A Value Test*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 727 (2018).

[90] Justin Angotti, Comment, *Everywhere and Nowhere: Reframing Personal Jurisdiction to Meet the Realities of an Increasingly Boundaryless Society*, 28 GEO. MASON. L. REV. 1513, 1534 (2021).

[91] Grossi, *supra* note 69.

[92] Nash, *supra* note 40.

[93] Trammell & Bambauer, *supra* note 56.

[94] *See The Daily News*, ZIPPO DOT COM (Feb. 10, 1997), https://web.archive.org/web/19970210062430/http://www.zippo.com/ [https://perma.cc/WP7D-KQAL].

[95] *Daily News*, *supra* note 94.

determination as being "interactive" by the United States District Court of the Western District of Pennsylvania, Zippo Dot Com's 1997 website appears archaically dissociated from anything that would be considered online human interaction in the present decade.[96] In *Zippo*'s time, the internet existed mostly as a vehicle where users could receive information passively posted on a website.[97] Today, platforms like Facebook, Zoom, and Slack allow users to communicate directly and immediately in ways more akin to the telephone and fax of *Zippo*'s era.

As such, applying *Zippo*'s "bright line" instructiveness test has yielded less than bright-line results.[98] For example, some courts have used the test in the realm of general jurisdiction, a purpose never intended for *Zippo*.[99] Within specific jurisdiction, courts are inconsistent as to what features of a website determine its interactivity.[100] Many disputes applying *Zippo* involve internet-based transactions.[101] While most courts consider an exchange of money over a website sufficient interactivity to confer personal jurisdiction in the user's forum, some allow the mere ability to make purchases through a defendant's website to confer jurisdiction.[102]

Zippo is additionally ineffective because it adds nothing usable to the traditional personal jurisdiction analysis.[103] At the low end of *Zippo*'s scale is a passive website effectively functioning as a billboard, which is already insufficient to confer jurisdiction.[104] E-commerce sits at the high end of *Zippo*'s scale—and such websites would already be subject to jurisdiction per the stream of commerce test.[105] The "interactivity" range in the middle of *Zippo*'s scale, where courts are to measure information transfer via website, is

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[96] *Id.*; Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125 (W.D. Pa. 1997).

[97] Niesel, *supra* note 27, at 128.

[98] *Id.* at 119.

[99] *See id.* (citing Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003); *see also* Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002) (showing that *Zippo* was not intended to be extended as a test for general jurisdiction).

[100] Niesel, supra note 27, at 121-22.

[101] *See id.* at 123.

[102] *Id.*

[103] Trammell & Bambauer, *supra* note 56, at 1148.

[104] *See id.*

[105] *See id.*

insufficient because "interactivity" is neither defined by *Zippo* nor rooted in the principles of personal jurisdiction doctrine.[106]

Regardless of whether a defendant's website content is used as the seminal authority on internet-based relationships, a test of purposeful availment, or a jurisdictional framing tool, the test is problematic because it assumes that a defendant's website is an actual reflection of the defendant's connection to the forum. Assessing a defendant's passively created website *could* fail to measure the defendant's intent to form connections in a forum if the website does not mention the forum explicitly. Further, allowing the exchange of money to serve as a primary factor for interactivity allows *de minimis* transactions to confer jurisdictional standing.

In commenting on the *Zippo* test, Judge M. Margaret McKeown said, "So where does that leave us with Internet jurisdiction? Almost nowhere."[107] Recognizing "no coherent theme" in internet jurisdiction cases, Hon. McKeown found that one risk of the current trajectory is nationwide jurisdiction.[108] *Zippo* focuses not on the parties' actual relationship or intentions with each other, but on the websites they design. Perhaps most ironic, the *Zippo* sliding-scale test was unnecessary to resolve the jurisdictional facts at hand in *Zippo*.[109] The website at issue fell into *Zippo*'s self-proclaimed e-commerce category, which undoubtedly conferred jurisdiction.[110]

Jurisdictions applying traditional common law have similar problematic outcomes in regards to consistency. For example, in situations involving intentional torts occurring over the internet, some courts have attempted to synthesize or amalgamate *Calder* and *Zippo*, applying either or both of them in circumstances that are factually indistinguishable.[111] Meanwhile, other courts have looped in *Burger King*'s purposeful availment test which focuses on

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[106] *See id.* at 1149.

[107] McKeown, *supra* note 1, at 146.

[108] *Id.*

[109] *See* Trammell & Bambauer, *supra* note 56, at 1146.

[110] *See id.*

[111] *See* C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 616-17 (2006) (noting that no distinction justifies separate jurisdictional tests in certain Ninth Circuit cases).

the defendant's intentionality to determine whether a defendant had knowledge of where the harm of his tortious activity would be felt.[112] This amalgamation of various tests is largely the result of *Zippo*'s inadequacies to address actual human behavior.[113] As discussed, this fails the due process mandate of having established and predictable law.[114]

In other areas, the Supreme Court has extended, withdrawn, and suppressed various facets of personal jurisdiction doctrine.[115] With each additional decision, personal jurisdiction has become a more technical and specialized practice.[116] This increasing complexity has resulted in the following problematic outcomes of applying current law to novel fact patterns.

Two district court cases from within the Ninth Circuit, which involve virtual contact but do not conduct a *Zippo* analysis, demonstrate inconsistent outcomes resulting from application of current law to settings involving virtual contact.[117] In *Alexis v. Rogers*, Plaintiff Alexis entered into an oral agreement with Defendant Rogers to provide consulting services as a project manager for Rogers's company.[118] Alexis was domiciled in California and performed all of her work—excluding four out-of-state business trips—from San Diego, California.[119] Alexis's work for Rogers was facilitated through email, text messages, phone calls, and Skype meetings that spanned across eighteen months.[120] Rogers was a United States citizen who resided in Singapore.[121] Rogers' company was organized in Delaware and headquartered in New York, New York.[122]

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[112] Floyd & Robinson, *supra* note 111, at 620 (citing Pavlovich v. Superior Court, 58 P.3d 2 (Cal. 2002)).

[113] *See id.* at 622.

[114] *See* discussion *supra* notes 66-68, 215.

[115] *See* Grossi, *supra* note 69, at 629-36.

[116] *Id.* at 624 (citation omitted).

[117] *Compare* Alexis v. Rogers, No. 15CV691-CAB-BLM, 2016 WL 11707630 (S.D. Cal. Feb. 26, 2016), *with* Serenium, Inc. v. Zhou, No. 20-CV-02132-BLF, 2021 WL 3111758, at *4 (N.D. Cal. July 22, 2021).

[118] *Alexis*, 2016 WL 11707630, at *1.

[119] *Id.*

[120] *Id.* at *6.

[121] *Id.*

[122] *Id.*

Alexis alleged that, throughout their business relationship, Rogers made inappropriate sexual advances during various business encounters.[123] After Rogers terminated Alexis's employment, Alexis sent emails to Rogers expressing her concerns about termination and Rogers' unwarranted sexual conduct.[124] Unsatisfied, Alexis filed this action against Rogers in the United States District Court for the Southern District of California.[125] Rogers moved to dismiss for lack of personal jurisdiction in California because he had no business operations, bank accounts, property, or residence in California.[126]

The *Alexis* Court analyzed jurisdiction in the context of rules designed for intentional torts.[127] As such, the court looked for Rogers' purposeful availment in California, his intentional acts, and whether he expressly aimed these actions in California with knowledge that harm would be felt in California.[128] Part of this analysis included an examination of Rogers' virtual contacts with Alexis, which the court found ultimately supported exercising jurisdiction.[129]

Here, the virtual contacts alleged by Plaintiff are even more compelling than . . . on-line sales or interactive websites . . ., as Plaintiff engaged in direct (email, phone and text) contacts with Defendants for over a year. Moreover, those virtual contacts were for the purpose of Plaintiff performing work for the benefit of Defendants, and Defendants knew that Plaintiff was performing the work in California. These virtual contacts are deliberate actions on the part of Defendants purposely directed at California.[130]

As such, it mattered not to the court where Rogers was located while Alexis performed her work.[131] Rogers' contacts with California, which arose out of her one-year business relationship with Alexis that included work Alexis performed in California and Rogers' communications that reached Alexis in California, were not

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[123] *Alexis*, 2016 WL 11707630, at *1
[124] *Id.*
[125] *Id.*
[126] *Id.* at *1-2.
[127] *See id.* at *3.
[128] *Alexis*, 2016 WL 11707630, at *4-7.
[129] *Id.* at *9.
[130] *Id.*
[131] *Id.* at *8.

merely "'random, fortuitous, or attenuated.'"[132] Despite the fact that all of Rogers' allegedly tortious acts were performed outside the forum, and Alexis performed her consulting work from her house in California, Rogers was subject to jurisdiction in California courts.[133]

Meanwhile, in the context of breach of contract, the United States District Court for the Northern District of California found it could not exercise jurisdiction over a foreign defendant that had a virtual relationship with a California plaintiff.[134] In *Serenium Inc., v. Zhou*, Serenium, a California-based technology company was approached by a Chinese billionaire, Jason Zhou, to form a joint venture focused on developing and marketing new sleep apnea technologies.[135]

In the early stages of their relationship, Serenium and Zhou's company entered into a nondisclosure agreement.[136] Within the parties' two years of negotiations, they agreed to a "framework contract" that required Zhou to form a jointly-owned holding company in Hong Kong as a means to market Serenium's technology to Asian countries.[137] However, the holding company was never formed despite Serenium's sharing of proprietary information, which included business plans, testing equipment, and trade secrets, with Zhou's company.[138] Eventually, Zhou's company terminated the framework contract and refused to return Serenium's proprietary information.[139]

Serenium and Zhou facilitated their business relationship through hundreds of phone calls and virtual meetings.[140] Additionally, virtual communications in the form of "WeChat" messages and email messages were sent directly between Zhou's

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[132] *Alexis*, 2016 WL 11707630, at *7 (citing Walden v. Fiore, 571 U.S. 277, 286 (2014)).

[133] *Id.* at *8, *12.

[134] *See generally* Serenium, Inc. v. Zhou, No. 20-CV-02132-BLF, 2021 WL 3111758 (N.D. Cal. July 22, 2021).

[135] *Id.* at *1.

[136] *Id.*

[137] *Id.*

[138] *Id.* at *2.

[139] *Id.*

[140] Brief of Plaintiff in Opposition to Defendants' Motion to Dismiss or in the Alternative to Compel Arbitration, *Serenium*, 2021 WL 3111758 [hereinafter Brief of Plaintiff]

agents in China and Serenium employees in California.[141] Patient data was also transferred from China to California.[142]

Despite multiple contemplated agreements, a joint venture, and hundreds of hours of direct communication into California, the court found that Zhou and his businesses did not avail themselves of doing business in California.[143] Even though the framework contract contemplated continuing obligations and a future relationship by forming a jointly owned business between the parties, the court rejected Serenium's breach of contract claim.[144] The court never analyzed the parties' relationship under *Burger King*'s on-point continuing obligations and relationships framework for contracts, but instead relied on *Walden*—a case pertaining to intentional courts—to narrowly find that requisite, minimum contacts flowed from the parties' nondisclosure agreement.[145]

Like the plaintiff in *Alexis v. Rogers*, Serenium's action included claims for intentional torts relating to appropriation of trade secrets.[146] There, the court found that Zhou and his businesses could not be subject to jurisdiction in California due to the lack of expressly aimed conduct.[147] The court distinguished *Alexis v. Rogers* on a factual basis, calling it "a far cry from the factual allegations before the Court here," even though *Alexis* involved intentional torts that occurred outside California, but that were felt in California.[148]

The different outcomes in *Alexis* and *Serenium* are difficult to reconcile. Both cases involved relationships built on written agreements and involved tortious claims.[149] Although the parties in *Alexis* met in person on four occasions, none of the tortious conduct occurred directly within the forum state.[150] Additionally, the in-person meetings in *Alexis* were an insignificant portion of the

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[141] Brief of Plaintiff, *supra* note 140.

[142] *Serenium*, 2021 WL 3111758, at *3.

[143] *Id.* at *4.

[144] *Id.* at *5.

[145] *Id.*

[146] *Id.*

[147] *Id.* at *6.

[148] *Compare Serenium*, 2021 WL 3111758, at *8, *with* Alexis v. Rogers, No. 15CV691-CAB-BLM, 2016 WL 11707630, at *8 (S.D. Cal. Feb. 26, 2016).

[149] *See Alexis*, 2016 WL 11707630, at *1; *Serenium*, 2021 WL 3111758, at *2.

[150] *Alexis*, 2016 WL 11707630, at *1.

court's analysis.[151] The largest distinction in the *Serenium* court's view was the defendants' purposeful availment in California. In *Alexis*, hiring a Californian consultant was enough to amount to "intentional acts" directed in the forum.[152] In *Serenium*, the parties' joint venture, involving fifteen months of frequent communications into California, was not enough to form a substantial connection between Zhou and the forum.[153]

Both cases involved voluntarily created business relationships between foreign parties and Californians. Both defendants allegedly benefited from these relationships with Californians. Both relationships involved extensive communications and expectations of future obligations and ongoing relationships. The facts and law hardly explain the different outcomes. No single dispositive fact reconciles the different reasoning. These different outcomes demonstrate the problem of applying the normal minimum contacts analysis to virtually-based business relationships. As discussed later in this section, these unexplainable outcomes violate due process principles of consistency and predictability.[154]

B. Prior Legal Challenges for "New" Communication Methods

Though we are prone to perceive the internet as something new, which it undoubtably is, the internet's purpose is merely an extension of an age-old desire to improve the quality, efficiency, and rapidity of human communication. It begs the question: how did courts resolve jurisdictional issues in distant business relationships prior to the internet? In the age of snail mail, telephone, and facsimile, Justice Brennan opined that, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."[155] Despite common references to the internet as being within some imaginary "cloud" in the sky or space, internet communications travel mostly across ground and

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[151] *Alexis*, 2016 WL 11707630, at *4.
[152] *Id.*
[153] *Serenium*, 2021 WL 3111758, at *4, *8.
[154] *See* discussion *infra* notes 66-68, 215.
[155] Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985).

seabed wires—just like fax and telephone transmissions.[156] Prior to dichotomizing the internet as an entirely new creation deserving its own, unique legal rules, we should consider the similarities of prior advancements and their reconciliation within the law.

In 1950, the Supreme Court first recognized that minimum contacts could be found in a jurisdiction without actual physical presence.[157] Travelers Health Association, a Nebraska nonprofit membership association, provided health insurance as a mail-order company.[158] As such, Travelers had no paid corporate agents.[159] When the State Corporation Commission of Virginia attempted to enforce a cease and desist order against Travelers for violating the state's Blue Sky Law, Travelers claimed it could not be subject to jurisdiction in Virginia because it had no physical activities there.[160] Nonetheless, as Travelers had insured roughly 800 Virginians when the proceedings were initiated, the Court held that Travelers could be subject to jurisdiction in Virginia because of its "continuing relationships and obligations with citizens" in the forum.[161]

Travelers made an attempt to distinguish its case from *International Shoe*, on which the lower courts principally relied.[162] The argument was premised on physicality —unlike the facts of *International Shoe*, none of Travelers' agents were ever present in Virginia.[163] In response, the Virginia Attorney General argued that under the police powers of the state, Virginia could regulate these

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[156] For additional information about the transmission of internet communications, see NICOLE STAROSIELSKI, THE UNDERSEA NETWORK 1-25 (2015) and Bertie Atkinson, *How Does Data Travel on the Internet?*, MALEVUS (Sept. 21, 2022), https://malevus.com/how-does-data-travel-on-the-internet/ [https://perma.cc/ZY95-G2YA].

[157] *See* Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950).

[158] *Id.* at 645-46.

[159] *Id.* at 646.

[160] *Id.* at 645-47.

[161] *Id.* at 646-48

[162] Statement as to Jurisdiction at 10-12, Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950) (No. 76), 1949 WL 50422, at *10-12.

[163] *Id.* at *15 ("It is submitted that a reasonable interpretation of the Stipulation of Facts and the exhibits on which this case was heard does not warrant the conclusion that the Appellants either undertook to investigate claims by the use of persons physically present in Virginia who were agents or employees of the Association or otherwise.").

commercial transactions regardless of Travelers' actual presence in Virginia because Travelers had merely chosen a postman as its promotional agent in lieu of a direct agent of the company.[164] As such, Travelers had the same sort of contact with Virginia as International Shoe Company did with Washington.[165] Those "contacts, ties or relations" would become the basis of the Supreme Court's formulated test.[166]

Travelers argued it had no minimum contacts in Virginia to support jurisdiction, despite some 800 insurance customers.[167] On very narrow reasons, Travelers argued that it did not actually solicit customers in Virginia, but merely invited its existing customers to solicit new customers themselves.[168] Thus, Travelers argued that it should only be subject to the laws of the jurisdiction where its activity *physically* occurred: Nebraska.[169] Travelers' activities were, of course, legal in Nebraska.[170] As such, Travelers' activities were legal where the decisions were made, in Nebraska. But where the decisions had an impact, in Virginia, they were illegal.

Resolving the arguments of Travelers and Virginia, the Supreme Court articulated the following rule:

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[164] Statement as to Jurisdiction at 19, Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950) (No. 76), 1949 WL 50422, at *19.("If a State can regulate such solicitation and promotional activities when carried on through an agent present in the State and the use of the mails does not exempt the promoter's activities from regulation, there is no reason why such promotional activities are not subject to regulation simply because the promoter has chosen a postman as his agent to deliver his promotional material rather than some other individual.").

[165] *Id.* at *36-37.

[166] *Id.*

[167] Brief for Appellants at 7, 19, Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950) (No. 76), 1949 WL 50425, at *7, 19 (U.S., 2006) ("In its effort to bring the present case within the 'minimum contact' rule of the *International Shoe Company Case*, the Virginia court found that Appellants (1) had *solicited* new members there through its present members, (2) had *consummated* membership contracts there, (3) had *investigated* claims in Virginia, and (4) had *discharged* the obligations of the Association there. Neither the Virginia Commission in its opinion supporting the order here appealed from nor the Attorney General of Virginia, either orally or in his brief on behalf of the State before the Virginia Supreme Court of Appeals, asserted that any of these activities took place in the State.").

[168] *Id.* at 22-23.

[169] *Id.* at 32.

[170] *Id.*

> But where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional "consent" in order to sustain the jurisdiction of regulatory agencies in the latter state. And in considering what constitutes "doing business" sufficiently to justify regulation in the state where the effects of the "business" are felt, the narrow grounds relied on by the Court in [prior cases] cannot be deemed controlling.[171]

At a glance, continuing relationships and obligations may seem a revolutionary way of viewing the minimum contacts analysis. However, that language was only cited in five cases over the thirty-five years between *Travelers* and *Burger King*.[172]

Where *Travelers* involved the indirect solicitation of business in a forum, *Burger King* involved a direct business relationship between two parties across state lines.[173] *Burger King* involved a franchise agreement between John Rudzewicz, a Michigander, and Burger King, a Florida corporation.[174] Rudzewicz and a business partner sought a franchise to operate a Burger King restaurant in Michigan through Burger King's local Michigan office.[175] Rudzewicz's franchise application was forwarded to Burger King's corporate headquarters in Miami, Florida, and Rudzewicz later negotiated and obtained concessions with the Miami office.[176] The franchise Rudzewicz operated in Michigan was successful for a year until it was stymied by a recession.[177] As such, Rudzewicz defaulted on his franchise payments to the Miami office and prolonged negotiations ensued between Rudzewicz and the Miami office.[178]

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[171] *Travelers*, 339 U.S. at 647.

[172] Citing References for *Travelers*, 339 U.S. 643, WESTLAW, www.next.westlaw.com [https://perma.cc/BV5Q-SEP2] (Date last accessed Dec. 19, 2022).

[173] *Compare Travelers*, 339 U.S. at 646 (Travelers Health Association had no paid agents in Virginia—new customers were recruited by the efforts of existing customers. As such, Travelers efforts in Virginia were indirect, as the company accepted customers after they had been solicited by non-agents), *with* Burger King v. Rudzewicz, 471 U.S. 462, 466 (1985) (Defendant Rudzewicz applied for a Burger King franchise directly with the Burger King corporation in Florida).

[174] *Burger King*, 471 U.S. at 464-66.

[175] *Id.* at 466.

[176] *Id.* at 467.

[177] *Id.* at 468.

[178] *Id.*

The negotiations failed, and Burger King filed suit against Rudzewicz in a United States district court in Florida for Rudzewicz' alleged breach of the parties' franchise agreement.[179]

The Florida court rejected jurisdiction over Rudzewicz. Burger King appealed, arguing that the continuing relationships and obligations framework in *Travelers* granted jurisdiction over Rudzewicz in Florida.[180] Burger King's brief opined that Rudzewicz subjected himself to jurisdiction in Florida not simply [by] conferring an economic benefit on a Florida corporation, not simply by promising to arbitrate in Florida, or to send money and notices to Florida, and not simply by signing three separate contracts which conferred upon him the benefits and responsibilities prescribed by Florida law.

In addition to all of this, he did so by agreeing to conduct a substantial portion of his business *in* Florida, to the extent that the finest details of his enterprise were prescribed and enforced *from* Florida. He did so because the conduct of his business was foreseeably dependent on decisions and instructions made elsewhere – in the context of an ongoing relationship. And because of that relationship, we suggest that jurisdiction in Florida would have been appropriate in this case . . . .[181]

Even though Rudzewicz only traveled to Florida once for a brief training,[182] applied for his Burger King franchise through a local Michigan office,[183] and was sued for acts and omissions that occurred in Michigan, Rudzewicz was subject to jurisdiction in Florida due to his continuing relationships and obligations there.[184]

The *Burger King* Court revisited *Travelers'* continuing relationships and obligations framework and suggested that it was

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[179] *Burger King*, 471 U.S. at 468.
[180] Brief of Appellant at 22, *Burger King*, 471 U.S. 462 (No. 83-2097).
[181] *Id.* at 38-39.
[182] *Burger King*, 471 U.S. at 479.
[183] *Id.* at 466.
[184] *Id.* at 480.

applicable to two circumstances: interstate contractual obligations and evaluating purposeful availment.[185]

Burger King's reasoning did not dethrone the minimum contacts analysis, which remains the "constitutional touchstone" of the doctrine.[186] Rather, the Court articulated a rule indicating that minimum contacts may be derived from significant physical activity in the forum, or through continuing relationships and obligations.[187] When continuing relationships and obligations between the defendant and forum exist, it is presumptively reasonable that due process has not been violated.[188]

C. Continuing Relationships and Obligations

The exact extent and purpose of *Travelers* continuing relationships and obligations framework is unclear because it has garnered relatively little attention from scholars and courts. Again, the Constitution does not directly address the limits of personal jurisdiction.[189] As of 2006, no scholar had reconciled *Burger King*, *Walden*, and *Zippo*.[190] The author of this comment was unable to locate a single source exploring the deeper meaning or use of *Burger King*'s continuing relationships and obligations framework within the context of virtual conduct.

Although *Burger King*'s test has been largely interpreted as pertaining only to the purposeful availment element of personal jurisdiction,[191] the Court's language suggests the test could apply

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[185] *Id.* at 473 ("And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." (emphasis added) (quoting Travelers Health Ass'n v. Virginia, 399 U.S. 643, 647 (1950))); *id.* at 475-76 ("Thus where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (emphasis added)).

[186] *Id.* at 474, 480.

[187] *Burger King*, 471 U.S. at 475-76.

[188] *Id.* at 476.

[189] *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252 (2017).

[190] Floyd & Baradaran-Robison, *supra* note 111, at 604.

[191] *See id.* at 605-10.

to finding the existence of sufficient contacts as well: "[t]hus where the defendant 'deliberately' has engaged in significant activities within a State, *or* has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there . . . ."[192]

In a formulaic sense, the above indicates that purposeful availment may be found in *either* "significant activity" or "continuing obligations."[193] The use of the word "or" is disjunctive. As such, continuing obligations themselves can yield purposeful availment without significant activity in a forum.[194] This means, implicitly, that continuing obligations can also yield sufficient minimum contact on their own. If a defendant has the requisite continuing obligations as to have availed itself in a forum, then it would be irrational to claim that the defendant did not have the requisite minimum contact. This understanding of the test spans wider than some scholars' interpretation that the test is merely used to measure a defendant's intentionality.[195] Some scholars have recognized continuing relationships and obligations as a test for the existence of minimum contacts.[196]

The *Burger King* Court's arguable support for this notion can be found in the first sentence of the succeeding paragraph: "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State."[197] As long as the defendant's activity was purposefully directed toward the forum, absence of physical contact alone is not dispositive in the jurisdictional inquiry.[198]

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[192] *Burger King*, 471 U.S. at 475–76 (emphasis added) (alternation in original).

[193] *Id.* at 476.

[194] *Burger King*, 471 U.S. at 476.

[195] *See* Floyd & Baradaran-Robison, *supra* note 111, at 620. However, *id.* at 633 states, "[u]nder *Burger King* the defendant is required to purposefully direct his activities toward the forum, or to purposefully establish minimum contacts with the forum, or to have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum state.'" *Id.* at 633 (alteration in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-75 (1985)).

[196] Richard S. Geller, *Civil Procedure —Expanding the Minimum Contacts Doctrine*, 64 TEMP. L.R. 1025, 1025 n.2 (1991) ("In describing how to determine what constitutes 'minimum contacts,' the Supreme Court has evoked a number of equally vague standards: 'reach out between one state and create continuing relationships and obligations with citizens of another state.'") (quoting *Burger King*, 471 U.S. at 473).

[197] *Burger King*, 471 U.S. at 476.

[198] *Id.*

D. Continuing Obligations and Relationships for Virtual Conduct

In developing a new jurisdictional test for virtual contacts, an appropriate starting place is to ask "what is jurisdiction *for* . . . ?"[199]

Burger King's test is relevant to virtual settings, and continuing obligations and relationships should be adopted as the exclusive framework for measuring minimum contacts. Recognizing that "modern commercial life" in 1985 allowed substantial business activities to occur through wire communication, obviating the need for physical presence, the Court articulated the rule.[200] Also under these settings, the court recognized that physical presence was not a litmus for minimum contacts.[201]

The same can be said of virtual relationships. Virtual relationships are the same sorts of relationships that would often yield minimum contact for physical presence, but the physical presence is nonexistent merely because it is not needed. In this sense, the defendant's willingness to purposefully avail themselves to the benefits and protections of a forum's laws is unchanged. As shown, the internet is a mere extension of people's interest in more efficient distant communication.[202] Tests designed to evaluate a defendant's minimum virtual contacts need not reinvent the wheel, but make it possible to reach a justified answer according to the defendant's actual intentions and connection to the forum.

As such, courts may adopt *Travelers* continuing relationships and obligations test, as applied in *Burger King*, to evaluate the constitutionality of exercising jurisdiction over defendants in settings that were the virtual relationships of their time. *Burger King*'s description of changes brought by modern technology in 1985 is the same sort of change that is experienced by virtual relationships today.[203]

Burger King's test need not be limited to evaluating purposeful availment—for if a defendant has purposefully availed themselves in a virtual setting, the defendant should be deemed to have the

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[199] Effron, *supra* note 28, at 117.
[200] *Burger King*, 471 U.S. at 476.
[201] *Id.*
[202] *See* discussion *supra* notes 2-16.
[203] *Burger King*, 471 U.S. at 478.

requisite minimum contacts. The *Burger King* court conceived this test with aspirations of developing a "highly realistic" approach as opposed to "conceptualistic . . . theories of the place of contracting or performance."[204] The Court's approach in *Travelers* was also realistic in this sense—avoiding a fictional consent to jurisdiction.[205] What was a highly realistic approach *then* could be a highly realistic approach *today*.

Adopting continuing relationships and obligations for virtual settings would also serve the interests of procedural due process. The original meaning of the words "due process" can be traced to the 1215 version of the Magna Carta, which provided that no man could be imprisoned, persecuted, or ruined without "lawful judg[e]ment of his peers *or by the law of the land*."[206] It was the 1354 revision of the Magna Carta that saw the invention of the term "due process."[207] Thomas Cooley summed up the requirements of procedural due process as having processes that fall within the bounds of protectory landmarks.[208] As such, to comply with the Fourteenth Amendment's due process requirement, any test developed to accommodate jurisdiction in virtual relationships should derive from the law of the land—and not fall out of the theoretical stratosphere.

Of course, due process could not require that the law never change. If that were the case, our law would have never changed after the adoption of the Fourteenth Amendment. As applied, the concept is therefore flexile.[209] The principle does not demand exactness but a balance of fairness and efficiency as a whole.[210] Some scholars have described the overarching principles of due process as fairness, reasonableness, and efficiency as applied to various circumstances.[211] As such, due process is not just merely *stare decisis*; it is also a balance of the interests of the defendant

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[204] *Id.* at 478-79 (alteration in original) (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316 (1943)).

[205] Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 647 (1950).

[206] ORTH, *supra* note 66, at 7 (emphasis added).

[207] Grossi, *supra* note 65, at 162.

[208] *Id.* at 165 (quoting Hurtado v. California, 110 U.S. 516, 527-29 (1884)).

[209] *Id.* at 177.

[210] *Id.*

[211] *Id.*

and the forum's ability to enforce the laws for the protection of its citizens.

With the principles of due process in mind, the continuing obligations and relationships framework is attractive when weighed against *Zippo* and other applications of current law. Regarding *Zippo*, as discussed, the interactivity test struggles to effectively analyze defendants' actual contact and availment in a forum due to the evolution of the internet.[212] As in *Alexis* and *Serenium*, many virtual relationships do not occur on static websites but on interactive platforms like Zoom, WeChat, and social media. Even if *Zippo*'s age were not an issue, it could only cover a limited range of web-based connections that were initiated from websites like those at issue in *Zippo*.

Zippo is also problematic as a matter of due process because it fails to account for parties' actual relationships. Aside from *Zippo*, jurisdiction tests have sought to evaluate a defendant's actual conduct that occurs within or affects a forum. *Zippo* substitutes a defendant's actual conduct with an evaluation of the defendant's website—which may only describe a defendant's reach into a forum in an inferential sense. This is a great departure from settled law and possibly violates the due process principle of following the law of the land.

Finally, *Zippo* is difficult for bench and bar to understand.[213] Given that the remainder of personal jurisdiction is derived from due process' concept of natural justice and natural rights, it is difficult to conceptualize its place without the remainder of our current jurisdictional framework.[214] This has resulted in problematic outcomes because applying law designed for the internet of twenty-five years ago to the internet today is a highly technical task. Additionally, the amalgamation of *Zippo* with other jurisdictional law has created a convoluted framework of internet jurisdiction that could violate due process' principle of consistency.

As shown by *Alexis* and *Serenium*, current law also clashes with due process principles because of inconsistent outcomes. Due

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[212] *See* discussion *supra* notes 103-114.

[213] McKeown, *supra* note 1, at 143.

[214] For a discussion of the relationship between due process and natural rights, see Jay Conison, *What Does Due Process Have to Do with Jurisdiction*, 46 RUTGERS L. REV. 1071, 1076 (1994).

process favors law that allows individuals to conform their conduct to predictable results. Foreseeability is "critical" to the due process analysis.[215] Whether you have continuing obligations and relationships is more foreseeable than where your website might be reached.

II. HYPOTHETICAL OUTCOMES

The following hypotheticals demonstrate the potential outcome of exclusive reliance on the continuing relationships and obligations test.

A. One-Time Attenuated Relationship

John, a retired mechanic who lives in Memphis, Tennessee, makes money on the side by purchasing car parts on Facebook Marketplace. John conducts all his business within the state of Tennessee but regularly interacts with customers from nearby towns in Mississippi and Arkansas. However, most of John's customers make a single purchase after reaching out to him on his Facebook website.

George, who lives just across the state line in Arkansas, contacts John about a steering column listed on John's Facebook page. John and George agree to a price, and John ships the steering column to George's address in Arkansas. John's parts fail, George's car runs off the road, and George's car is deemed to be totaled by George's insurance company. Since John had promised that his parts would fit and operate correctly in George's car, George sues John in the Eastern District of Arkansas.

Under the continuing obligations and relationships framework, John will probably not be subject to jurisdiction in Arkansas. This is because John did not anticipate any future relationship with George after he sold George the steering column. This outcome makes sense because one-time, attenuated transactions are generally insufficient to confer jurisdiction.[216] However, if John provided George with a warranty, he would be deemed to have a continuing obligation to pay George for product failures, and be subject to jurisdiction in George's forum.

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[215] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[216] *See Ex parte* No. 1 Steel Prods., Inc., 76 So. 3d 805, 810 (Ala. 2011).

Otherwise, a one-time transaction that was facilitated through a website would not require the defendant to submit to the jurisdiction of another state. George would need to sue John in the Western District of Tennessee.

B. Virtual Temporary Employee

Sally is a freelance media consultant who lives in Boston, solicits business using a website, and conducts work from her home office. One of Sally's means of soliciting business is targeted ads on social media platforms. The ads target business executives in all fifty states and advertise Sally's expertise in crisis communications management.

Terrence, an executive of Big Bank, Inc., sees one of Sally's ads while working in his Atlanta, Georgia office. George becomes interested in Sally's work, especially because Big Bank currently faces charges of discriminatory hiring practices. Last week, the local news station uncovered Big Bank's charges of discrimination and has been airing interviews of aggrieved former employees every day. Terrence reaches out to Sally through one of her Facebook ads to see if she can help.

Sally and Terrance meet over Zoom a few times to discuss Big Bank's scandal and potential solutions. Eventually, Sally sends a proposal to Terrance, complete with line-item tasks and costs of services. Their agreement requires that Sally complete a full assessment of Big Bank's risks, along with a memorandum about potential messaging solutions, within one week. After completion, Big Bank is required to pay Sally via an electronic bank account.

Sally and Terrance meet over Zoom daily to discuss the local public response to Big Bank's allegations. Terrence is increasingly impressed by Sally's intelligence and wit during their weekly meetings and begins complimenting her more and more every day. Sally enjoys Terrence's kindness and responds positively. But during their last scheduled meeting, Terrance decides it is "now or never" and makes explicit comments to Sally. Terrance asks Sally to date him, but Sally refuses Terrance's advances. Out of embarrassment, Terrance does not tell anyone about his new "situation" with Sally at work and never arranges for payment to be sent to her.

Having not received her payments under their agreement, Sally sues Big Bank in the United States District Court for the District of Massachusetts. Big Bank has no offices in Massachusetts, no account holders in Massachusetts, and no other business activities or relationships in Massachusetts. Is Big Bank subject to the jurisdiction of Massachusetts courts?

Probably yes. Under the agreement, Big Bank had a continuing obligation to reimburse Sally for her consulting services. Prior to the litigation, Terrance and Sally also had a continuing relationship, with obligations on each side. They communicated on a daily basis. Further, Terrance, as Big Bank's agent, initiated the relationship with Sally for Big Bank's benefit. As such, it was also foreseeable that Big Bank could be subject to jurisdiction in Massachusetts, where it received the benefits of the services of a Massachusetts resident.

C. Virtual Long-Term Employee

The same fact pattern as above, except Sally's contract did not contain an end date, and the agreement stipulated Sally would provide additional crisis communication consulting services from time to time if her first month was successful. Would Big Bank be subject to jurisdiction in Massachusetts courts?

Definitely yes. In this setting, there are relationships and obligations that continue up through the current litigation. The anticipated future consequences of the parties' agreement offer additional support for jurisdiction over Big Bank in Massachusetts.

D. The Joint Venture

Patton, a retired Army General, decides to enter the defense contracting business by starting a company designed to provide reconnaissance training to military personnel. He forms Sentinel, Inc. with a few former colleagues. Within three years, Sentinel is performing $150 million in government contracts. All of Sentinel's trainings are performed virtually via webcams in its California headquarters.

Unfortunately, Sentinel's rapid growth now prevents it from bidding on government contracts reserved for small businesses. As such, Patton reaches out to a colleague who runs a similar but

smaller business in Florida called Grifter, Inc. Sentinel and Grifter enter into a joint venture that allows Sentinel to continue performing work on contracts earmarked for small businesses.

Given the ability to perform all trainings virtually, agents from Sentinel and Grifter never physically visit each other's place of business. Still, they communicate daily via Zoom meetings and exchange thousands of emails and calls. This is until, of course, Grifter begins poaching Sentinel's highly specialized, key employees before ultimately kicking Sentinel off the joint government contracts.

Sentinel sues Grifter in California, accusing Grifter of breaching agreements, fiduciary duties, and a litany of other tort claims. Is Grifter subject to suit in California?

Yes. As above, both parties have continuing relationships and obligations. Even if Grifter argues that litigating in California is burdensome, the benefits Grifter received by partnering with a California company would likely outweigh this burden.

III. LIMITATIONS OF THE PROPOSAL

A. Requires Judges to Reconceive Settled Jurisdiction Law

As discussed, the current law surrounding personal jurisdiction is overly complex and difficult to apply to virtual settings. This Comment does not suggest an entire paradigm shift in personal jurisdiction law—only those portions that relate to virtual business relationships. A myriad of tests have previously been created to address various specialized situations. One shortfall of this proposal is that it adds yet another test to an overly complicated body of law.

As such, asking hundreds of judges to perform fact-intensive analyses under a new rule, which has nuances of its own, would likely only solve some of the problems of existing jurisdiction law. The ability of defendants to conduct themselves in a manner that produces predictable outcomes within the law is stymied by a new, less-familiar test. Defendants who thought they could not be hauled into court because they intentionally avoided significant activity in a forum may suddenly find themselves subject to a foreign court's jurisdiction because of their continuing relationship or obligations to the plaintiff.

B. Potential for Inconsistent Outcomes

In a similar fashion, this new rule could create inconsistent outcomes, much like the current law. The continuing relationships and obligations test is not a black or white, on or off switch, but a sliding scale. As such, grey areas will likely be difficult to resolve and could lead to inconsistent outcomes. As *International Shoe* remarked, the quantity of a defendant's conduct is overshadowed by the quality of the conduct. As such, further research should consider a list of factors that may inform the quality of obligations and relationships.

IV. SOLUTIONS UNTIL RESOLUTION

Until the Supreme Court adopts a framework for analyzing jurisdiction in virtual settings, practitioners can employ forum selection clauses to avoid unintended results. Freely bargained-for forum selection clauses are generally enforceable so long as there is no strong showing that they should be set aside.[217] These clauses also generally bar claims of inconvenient forums.[218] Like virtual relationships, forum selection clauses can be highly flexible. One option is mandatory clauses, which require dispute resolution in a specified place.[219] Meanwhile, permissive clauses authorize

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[217] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). All federal circuits enforce clauses as "prima facie valid . . . unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." James Stewart & Bea Swedlow, *Enforce This: Forum Selection Clauses in Federal Courts*, 60 FED. LAW., 66, 67 (2013) (quoting *Zapata*, 407 U.S. 1, 10).

[218] A claim of inconvenience must carry great weight to overcome a forum selection clause. *See Zapata*, 407 U.S. at 16-17.

[219] *See* GEORGE W. THOMPSON, TRANSNATIONAL CONTRACTS § 3A:9 (Nov. 2022 Update). Use of the words "shall" or "will" in the drafting generally indicate a mandatory clause. IAC/InterActiveCorp v. Roston, 44 F.4th 635, 643 (7th Cir. 2022). Additionally, mandatory clauses should be drafted with clear language specifying the mandatory forum. *See* THOMPSON, *supra*, § 3A:9.

jurisdiction in a given forum without prohibiting litigation elsewhere.[220]

Thompson Reuter's Practical Law offers substantial guidance on selecting an appropriate forum selection clause.[221] In regards to mandatory clauses, Practical Law offers a discussion of clauses that are fixed and floating.[222] Fixed clauses, which constitute most mandatory selection clauses, select a specific forum regardless of the specific facts or circumstances that give rise to litigation.[223] Meanwhile, floating clauses do allow selection of a forum based on future events, facts, and circumstances.[224] Floating clauses can mandate jurisdiction in certain forums in cases of assignment and activity.[225]

Drafters of forum selection clauses should caution against drafting ambiguous clauses.[226] The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits have endorsed the principle that forum selection clauses should expressly identify a particular venue.[227] In other words, drafters should avoid ambiguous and non-express language such as "parties agree to submit to the jurisdiction of any court of competent jurisdiction" or

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[220] *In re* Veros Energy, LLC, 587 B.R. 134, 150 (Bankr. N.D. Ala. 2018). Additionally, some jurisdictions recognize "hybrid" or "mandatory consent to jurisdiction" forum selection clauses that are permissive to the plaintiff's choice, but mandatory to litigants once a forum is chosen. *Id.* (citing Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, LLC, 526 F.3d 1379, 1381 (11th Cir. 2008) and Signature Fin., LLC v. Neighbors Glob. Holdings, LLC, 281 F. Supp. 3d 438, 447 (S.D.N.Y. 2017)). Note that transfer for forum non conveniens and removal to federal court are not specifically barred by permissive clauses. *See* PRACTICAL LAW COMMERCIAL TRANSACTIONS, *Choice of Law and Choice of Forum: Key Issues,* https://us.practicallaw.thomsonreuters.com/7-509-6876 [https://perma.cc/RN2N-GTM7] (last accessed Dec. 12, 2022).

[221] *See generally,* PRACTICAL LAW COMMERCIAL TRANSACTIONS, *General Contract Clauses: Choice of Forum*, https://us.practicallaw.thomsonreuters.com/1-508-2288?view=hidealldraftingnotes [https://perma.cc/M8QL-JJC4] (last accessed Dec. 12, 2022).

[222] PRACTICAL LAW COMMERCIAL TRANSACTIONS, *supra* note 220.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] For a collection of decisions regarding the enforceability of forum selection clauses in various forums, see Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4th 404 (1984).

[227] Stewart & Swedlow, *supra* note 217, at 67.

a court having "subject matter jurisdiction."[228] Use of the terms "shall," "only," and "must" demonstrate exclusivity.[229] Naming the forum explicitly is a best practice; otherwise mandatory clauses may be deemed to be permissive if ambiguity exists.[230]

CONCLUSION

Though often understated in courts' reasoning, the principles of due process should be the guiding principle of all jurisdictional rules. Consistency and predictability cannot be forgotten. Additionally, the law should be clear enough that individuals can adjust their behavior to conform with outcomes they desire under the law. Currently, the personal jurisdiction framework surrounding virtual contacts falls short of these aspirations. Given the convolutedness of the current law, dramatic change and lofty aspirations would not only be ineffective, but could possibly worsen current problems. Drawing from our current body of law, while emphasizing the Due Process principles that undergird the entire personal jurisdiction framework, is an attainable solution.

Continuing relationships and obligations is a real and measurable test for minimum contacts. Rather than examining significant activity, with its implication of physicality, the continuing relationships and obligations test focuses on parties' actual intent—their purposeful availment—or lack thereof. Further, it ties into the entire body of the personal jurisdiction analysis without redundancy.

As the internet continues to evolve in ways that are not predictable to us now, we can be certain that continuing relationships and obligations can account for human activity behind the device. Artificial intelligence and its kin aside, this test can stand the test of time, unlike *Zippo*.

For the time being, practitioners should incorporate forum selection clauses into any agreements involving virtual business to resolve potential ambiguities. Unless the circumstances demand otherwise, specific forum selection clauses are preferable because

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[228] *See* Stewart & Swedlow, *supra* note 217, at 68.
[229] *Id.*
[230] *Id.*

they are highly enforceable and most likely to result in an outcome desirable to both parties.