# COMMENTS

# IMPERMISSIVE COUNTERCLAIMS: WHY NONRESIDENT PLAINTIFFS CAN CONTEST PERSONAL JURISDICTION IN UNRELATED COUNTERSUITS

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*The U.S. Supreme Court has consistently held that fairness is the guiding principle in determining whether, by his activities, a defendant has submitted to personal jurisdiction in a particular forum. However, this question has never been explicitly addressed with respect to unrelated counterclaims a defendant may bring against a plaintiff, where the plaintiff's only connection to the forum is his litigation with the defendant. While some have concluded that it would be fair to automatically subject a plaintiff to jurisdiction in the forum in which he chooses to sue, that conclusion is at odds with the Fourteenth Amendment Due Process Clause and modern understandings of fair play. This Comment, therefore, argues that an original nonresident plaintiff should have the right to contest personal jurisdiction when a defendant brings an unrelated counterclaim against him.*

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## INTRODUCTION

As any first-year law student knows, federal and state courts lack personal jurisdiction over a defendant who does not live within the court's state unless the plaintiff's lawsuit relates to the defendant's ties to that state. Yet under current doctrine, courts generally assume that if a plaintiff brings an action against a defendant, that plaintiff is then subject to a defendant's counterclaim for any matter, regardless of whether there is a connection between the counterclaim and the plaintiff's activities in the state. Indeed, some courts, practitioners, and scholars have maintained that the U.S. Supreme Court reached this conclusion in its 1938 decision *Adam v. Saenger*.[1] In fact, the counterclaim in *Saenger* was closely related to the plaintiff's claim, and thus did not directly raise the question. In any case, this view is at odds with the principles of fairness and justice that the Due Process Clause of the Fourteenth Amendment[2] requires, as articulated in the Court's decision in *International Shoe Co. v. Washington*[3] in 1945. *International Shoe* established our modern understanding of the constitutional underpinnings of personal jurisdiction, and it is time for courts to acknowledge that a broad reading of *Saenger* controverts that understanding.

Personal jurisdiction is a highly complex and often nebulous area of judge-made legal doctrine and one that has routinely emphasized

1. 303 U.S. 59 (1938).
2. U.S. CONST. amend. XIV, § 1.
3. 326 U.S. 310 (1945).

fairness as a central tenet of its theoretical underpinnings. This Comment argues that an original nonresident plaintiff has the right to contest personal jurisdiction when a defendant brings an unrelated counterclaim against him. The Supreme Court has only ruled that an original plaintiff facing a *compulsory* counterclaim, which is a claim arising from the same transaction or occurrence as the original claim, is subject to the jurisdiction of the forum where the original suit was brought.[4] The Court has never explicitly stated that the same logic applies to other counterclaims that lack a nexus to the original cause of action. Thus, the view embracing the submission doctrine enumerated in *Saenger*, which states that a plaintiff is subject to the jurisdiction of the court for all possible issues that arise between the parties,[5] rests on a false premise. Moreover, because an original plaintiff facing an unrelated counterclaim is in nearly the same position as an original defendant, he should have the right to contest jurisdiction as though the counterclaim was being considered separately from his initial litigation. Accordingly, courts should reject the view that a plaintiff implicitly or constructively submits to defend any countersuit after he commences an action of his own.

Part I of this Comment provides an overview of personal jurisdiction precedent. It then briefly highlights the rights of defendants with respect to civil procedure, examines the origins of the submission doctrine, and describes the doctrine's place within a modern understanding of jurisdiction based on fair play and substantial justice. Part II begins with a hypothetical situation illustrating the unique dilemma encountered by plaintiffs facing

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4. *See Saenger*, 303 U.S. at 67–68 (holding that it was fair for a state court to assume personal jurisdiction over a plaintiff for any counterclaims when the plaintiff voluntarily made use of the court's services in bringing the original suit against the defendant). The counterclaim in *Saenger* was compulsory because the issues were related. *See id.* at 65 n.1 (citing the relevant California law, which governed related counterclaims); FED. R. CIV. P. 13(a) (defining a compulsory counterclaim as a claim that "arises out of the same transaction or occurrence [as] the opposing party's claim").

5. *Saenger*, 303 U.S. at 67–68 ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."). The use of the word "submission" in this Comment necessarily subsumes what has been traditionally defined as "consent," "presence," and "purposeful availment," as each of these doctrines relate to submission to jurisdiction as pronounced in *Saenger*. Regardless of which label is applied to the rationale, as applied herein, fundamental fairness is equally applicable.

unrelated counterclaims in forums with which they have no other ties or connections. It argues that because a plaintiff facing an unrelated counterclaim and a defendant are similarly situated, they should be treated similarly for purposes of contesting personal jurisdiction. Part II then analyzes landmark personal jurisdiction cases and applies their logic and reasoning to the hypothetical situation. This Comment concludes that in light of both recent and historical personal jurisdiction jurisprudence, the most equitable approach is to forego efficiency in the name of fairness so that a plaintiff maintains the right to contest personal jurisdiction when a defendant brings an unrelated counterclaim against him.

## I. BACKGROUND

This Comment's primary argument is based on two interrelated jurisprudential narratives. Part A provides an overview of the history of personal jurisdiction theory from its inception to its current usage, and Part B details the submission doctrine as presently understood within the other bases for personal jurisdiction, including minimum contacts and fair play.

### *A. Personal Jurisdiction Doctrine: From Presence to the Present*

Jurisdiction is the power of a court to exercise its authority over certain persons or things.[6] Personal jurisdiction, or in personam jurisdiction, is the power of a court to decide cases and enter judgments against a particular person or business entity.[7] To this end, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to determine when a court can require a nonresident defendant to appear and defend himself.

In 1877, the Supreme Court developed the first traditional conception of jurisdiction in a case involving an out-of-state defendant who owned property in the state where the plaintiff brought suit. The Court reasoned that a defendant's physical presence—when accompanied by a valid service of process—was a

6. *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

7. *See Personal Jurisdiction*, BLACK'S LAW DICTIONARY, *supra* note 6 (stating that personal jurisdiction entails jurisdiction over a person's rights rather than property interests). General jurisdiction refers to a court's power to enter a judgment against a defendant for any cause of action, due to the defendant's systematic and continuous contacts with a state; specific jurisdiction requires a nexus between the cause of action and the defendant's contacts with the forum state. *Id.*

legitimate basis for in personam jurisdiction.[8] Moreover, the Court established that attachment of a nonresident's property within a state created in rem jurisdiction over the property and could be used to compel a defendant to appear.[9]

The second traditional basis for jurisdiction is implied consent. States can enact processes whereby nonresidents implicitly consent to authorizing a state official as an agent for service of process in suits arising from events that occurred in the state. For instance, nonresident motorists must submit to another state's jurisdiction when a plaintiff's suit arises from a collision or accident with that nonresident on the state's roads.[10] The third and final traditional basis is that a plaintiff may always invoke general personal jurisdiction in a state where a defendant is domiciled or, for a business, has its principal place of business or place of incorporation.[11]

Although each of these three traditional bases for personal jurisdiction are important, the modern standard set forth in *International Shoe* is most relevant to this discussion. There, the Supreme Court interpreted the Due Process Clause to mean that personal jurisdiction could be established through a defendant's minimum contacts with a state, such that maintenance of a suit would "not offend 'traditional notions of fair play and substantial justice.'"[12] The Court decided that a company headquartered in St. Louis, Missouri conducted "systematic and continuous" business in Washington, which established sufficient contacts and rendered it fair to subject the company to the jurisdiction of a Washington court for a case related to those business activities.[13]

Modern personal jurisdiction doctrine has evolved as these standards of minimum contacts, substantial justice, and fair play have been interpreted in various ways. In *Shaffer v. Heitner*,[14] the plaintiff held one share of stock in a Delaware corporation and filed a derivative action in Delaware state court against the corporation's officers.[15] With his complaint, the plaintiff filed a motion to

8. Pennoyer v. Neff, 95 U.S. 714, 724–25 (1877).

9. *Id.*

10. Hess v. Pawloski, 274 U.S. 352, 356 (1927); *see also infra* notes 40–65 and accompanying text (illustrating several cases involving implied jurisdictional consent).

11. Milliken v. Meyer, 311 U.S. 457, 462 (1940).

12. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing *Milliken*, 311 U.S. at 463).

13. *Id.* at 320.

14. 433 U.S. 186 (1977).

15. *Id.* at 189–90.

sequester the officers' stock—which the lower court said was physically located in Delaware—even though none of the officers were residents of Delaware and their stock did not relate to the underlying cause of action.[16] The Court held that strict "presence" jurisdiction was no longer fair and that a defendant's property had to relate to the plaintiff's cause of action before it could be attached to the lawsuit.[17] Further, the Court found that the defendants "simply had nothing to do with the State of Delaware" because being an officer and holding stock did not establish minimum contacts and, therefore, did not automatically confer jurisdiction under Delaware statute.[18] The "constitutional limitation on state power"[19] imposed in this case—that even traditional means of establishing personal jurisdiction must be fair—is the cornerstone for every important personal jurisdiction decision to date.

In certain instances, the fairness equation encompasses the concept of foreseeability. The general rule is that a defendant's ability to foresee being haled into court is insufficient on its own[20]; otherwise, every item that an individual or vendor sold would carry the possibility of suit wherever it went—an unfair result.[21] The Court established several factors to consider in determining whether exercising personal jurisdiction, or forcing a person to defend himself in a particular forum, is fair: (1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the interest of the interstate judicial system in obtaining efficient resolutions, and (5) the shared interest of states in furthering social policies.[22]

Three years after citing these fairness factors, the Court issued a fragmented decision in *Burnham v. Superior Court*[23] where no opinion commanded a majority. Two opinions have nevertheless become part of the personal jurisdiction canon and remain good law. Justice Scalia's plurality opinion reiterated the "firmly established

16. *Id.* at 190–92.
17. *Id.* at 213, 215.
18. *Id.* at 216.
19. *Id.* at 216–17.
20. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980) (stating that the foreseeability relevant to due process is "that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there").
21. *Id.* at 296.
22. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).
23. 495 U.S. 604 (1990).

principle[]" that physical presence in a state is enough to establish personal jurisdiction, seemingly counter to the Court's opinion in *Shaffer*; the opinion emphasized *traditional* notions of fair play and substantial justice.[24] However, Justice Scalia did admit exceptions to that rule, including fraud, kidnapping, and being tricked into entering the state.[25] A nonresident's participation in litigation proceedings is another historical personal jurisdiction exception to which most courts have adhered.[26]

Justice Brennan disagreed with Justice Scalia's rationale for finding jurisdiction, arguing in his concurrence that, even if a person is physically present in a state and served with process there, a court must still determine whether it is fair to subject that person to jurisdiction.[27] However, he based his reasoning on a theory of purposeful availment rather than minimum contacts, finding that a defendant's voluntary presence in a state—given that he would be taking advantage of the benefits and protections of that state's laws and that technology has made it increasingly easy to litigate in foreign jurisdictions—satisfies due process concerns.[28]

In 2014, the Court issued two decisions that further clarified the scope of both general and specific personal jurisdiction. *Walden v. Fiore*[29] reaffirmed that, when evaluating a defendant's minimum contacts, the relationship between the defendant and the forum state must arise out of contacts that the defendant himself created with the forum state.[30] This maintains the focus of the minimum contacts analysis squarely on the relationship between those contacts and the court's exercise of specific jurisdiction.[31] *Daimler AG v. Bauman*,[32] on

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24. *See id.* at 610–11, 613–14, 619 (plurality opinion) ("Particularly striking is the fact that . . . *not one* American case from the period (or, for that matter, not one American case until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction.").

25. *See id.* at 613 (listing fraud, force, and being a witness in an unrelated suit as a few of the traditional exceptions).

26. *See, e.g.*, Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (ruling that nonresident witnesses are exempt from service of process); *see also* Valley Bank & Trust Co. v. Marrewa, 237 N.E.2d 677, 678–79 (Mass. 1968) (reaffirming *Diamond*).

27. *See Burnham*, 495 U.S. at 629–30 (Brennan, J., concurring) (contending that Justice Scalia's reasoning had been preempted by the Court's decisions in *International Shoe* and *Shaffer*).

28. *Id.* at 637–39.

29. 134 S. Ct. 1115 (2014).

30. *Id.* at 1122.

31. *See id.* at 1121 (indicating that a State's exercise of specific jurisdiction only comports with due process if "the defendant's *suit-related conduct* . . . create[s] a substantial connection with the forum State" (emphasis added)).

the other hand, dealt with general jurisdiction and, in recognizing the reduced role that general jurisdiction has played in recent years,[33] limited its scope.[34] The Court found that Daimler was not "at home" in California and that its activity was not "so constant and pervasive" that it could reasonably be sued there.[35] Even if it was constant and pervasive, the Court reasoned, the concept of general jurisdiction should be limited to one easily identifiable place.[36] A formula that granted general jurisdiction over companies merely because they had "engage[d] in [a] substantial, continuous, and systematic course of business" would be "unacceptably grasping" if it applied over a multitude of states.[37]

In her concurrence, Justice Sotomayor endorsed a broad "fair and reasonable" test for general jurisdiction that *would* subject large companies with substantial business operations in many states to general jurisdiction in all of those states.[38] In her view, this expansion of general jurisdiction would not be unfair, considering that those companies had extensive contacts in those states.[39]

In sum, although jurisdiction based on purposeful availment is appropriate in certain situations, the main tenets of specific jurisdiction nevertheless provide limits to a defendant's ultimate submission by requiring a nexus between the plaintiff's complaint and the defendant's minimum contacts with a forum. Thus, with the exception of *Burnham*, the Court's stance seems to be evolving toward limiting jurisdiction where a cause of action has no relationship to the out-of-state defendant's contacts with the forum.

Part II of this Comment, consequently, will focus on the application of this principle to the question of whether mandating a plaintiff's submission to personal jurisdiction for unconnected counterclaims is constitutionally sound. First, however, a brief

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32. 134 S. Ct. 746 (2014).

33. *See id.* at 757–58 (acknowledging that specific jurisdiction questions had been far more frequent and that "general jurisdiction [had] come to occupy a less dominant place in the contemporary scheme").

34. *See id.* at 758–60 (rejecting the Ninth Circuit's application of the agency theory, which would have greatly expanded the reach of general jurisdiction over foreign entities by attributing a domestic subsidiary's contacts to its foreign parent company).

35. *Id.* at 751.

36. *Id.* at 760.

37. *Id.* at 760–61.

38. *Id.* at 770–71 (Sotomayor, J., concurring).

39. *See id.* at 771, 773 (criticizing the majority's view for placing less risk of harm on large corporations and more risk on individuals wishing to bring suit).

discussion of a defendant's rights with respect to contesting and submitting to jurisdiction is necessary.

### *B. Contesting Personal Jurisdiction and the Submission Doctrine*

A defendant ordinarily has the right to contest personal jurisdiction as an affirmative defense in lawsuits brought against him, either by motion or in a responsive pleading.[40] However, a defendant waives that right by failing to timely raise the defense,[41] and, unlike subject matter jurisdiction, a court cannot review a waiver of the defense sua sponte.[42]

Several situations illustrate the bounds of a defendant's ability to contest a plaintiff's invocation of a court's jurisdiction. The Supreme Court has unequivocally ruled that personal jurisdiction is a legal right intended to protect the individual, but the actions of an individual may amount to submission to suit whether voluntary or not.[43] Thus, by presenting additional claims against a plaintiff after litigation has already begun, a defendant subjects himself to all of the consequences of his appearance relating to those claims.[44] However, even when a defendant files an unrelated counterclaim[45] with his

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40. FED. R. CIV. P. 12(b)(2).

41. FED. R. CIV. P. 12(h).

42. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982).

43. *See id.* at 703–05 (holding that a plethora of legal arrangements and actions can indicate express or implied consent to personal jurisdiction, including contracts, stipulations, and arbitration agreements); *see also* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 517–18 & n.229 (1987) (asserting that, based on *Adam v. Saenger*, plaintiffs may be forced to defend even unrelated counterclaims).

44. *See* Alexander v. Hillman, 296 U.S. 222, 241 (1935) (citing Gen. Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 435 (1932)). In this case, the district court ordered a holding company to be dissolved and appointed receivers to collect and disburse its assets to shareholders. *Id.* at 230. Individuals who were formerly directors and officers of a coal company in which the holding company owned stock brought claims against those receivers. *Id.* at 231–35. When the receivers brought counterclaims against the officers for mismanagement and misuse of assets, the officers specially appeared to contest personal jurisdiction because they lived in a different state. *Id.* at 235–37.

45. Under the Federal Rules of Civil Procedure, counterclaims are either compulsory or permissive; compulsory claims generally arise from the same subject matter—the same transaction, occurrence, or series of transactions or occurrences—of the original claims, and permissive claims do not. FED. R. CIV. P. 13. Some states, like California, have similar distinctions; others, like New York, make no distinctions or mandatory designations about the nexus between the claim and the counterclaim. *Compare* CAL. CIV. PROC. CODE § 428.10 (West Supp. 2015) (differentiating between related and unrelated causes of action against the party who filed the complaint),

motion to dismiss for lack of personal jurisdiction,[46] merely filing that claim does not constitute a forfeiture of his right to contest personal jurisdiction, provided that the defense is otherwise properly presented.[47]

This Comment focuses on whether the submission doctrine in the context of permissive counterclaims—that is, counterclaims that do not arise out of the same transaction or occurrence that is the basis for the plaintiff's claims—can be considered constitutionally fair. In addition to *Hess v. Pawloski*,[48] several historical cases regarding implicit submission and its applicability in state laws granting jurisdiction over specific issues are particularly relevant. General commercial litigation and patent infringement suits between technology companies are among the types of cases where the issue of implied submission most frequently arises.

In 1931, the Supreme Court considered in *Frank L. Young Co. v. McNeal-Edwards Co.*[49] a Massachusetts state law that allowed its courts to automatically acquire personal jurisdiction over a nonresident plaintiff for counterclaims that a defendant brought against it.[50] The plaintiff—a Massachusetts company that bought oil drums from the

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*with* N.Y. C.P.L.R. § 3019 (McKinney Supp. 2015) (providing no distinction between related and unrelated claims). Part II of this Comment focuses on the constitutional nexus requirement and is, therefore, applicable in all jurisdictions, regardless of whether the procedural scheme is set up as compulsory and permissive, or no such distinction is made. For the sake of consistency with the language of certain cases, this Comment treats as functionally equivalent the terms compulsory and related, and permissive and unrelated, when describing counterclaims.

46. Every state has a procedure in place allowing defendants to contest personal jurisdiction. Under the Federal system, the applicable rule is Rule 12(b)(2). FED. R. CIV. P. 12(b)(2).

47. *See* Rates Tech. Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1307–08 (Fed. Cir. 2005) (declaring the rule, that filing either type of counterclaim does not waive the right to object to personal jurisdiction, to be valid); Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147, 1149 (5th Cir. 1987) (adopting the rule and characterizing it as the majority view). *But see* Textile Tech. Exch., Inc. v. Davis, 611 N.E.2d 768, 769 (N.Y. 1993) (holding that a defendant waives his right to contest jurisdiction when he brings a counterclaim unrelated to the plaintiff's initial cause of action).

48. 274 U.S. 352 (1927).

49. 283 U.S. 398 (1931).

50. *See* MASS. GEN. LAWS ch. 227, § 2 (2015) (stating that nonresident plaintiffs "shall be held to answer any counterclaim brought against him by the defendant or defendants" in the original action even if the plaintiff could not be served with adequate process). At the time, Massachusetts's law, as quoted by the Supreme Court, had a qualification that the defendant's demands in the counterclaim were "of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other." *Frank L. Young Co.*, 283 U.S. at 399. This previous iteration of the law confirms that the two matters had to relate to the same transaction or occurrence.

defendant, a Virginia company—sued for breach of warranty.[51] Later, the Virginia company sued the Massachusetts company for conversion of the drums when it failed to return them pursuant to their agreement.[52] The Massachusetts company then commenced a second suit against the Virginia company for the same cause of action as before.[53] The Court held that the Massachusetts law applied to federal district court proceedings such that the nonresident Virginia company could not contest personal jurisdiction.[54] However, because the counterclaim arose out of the same contract as the original claim, the Court limited its holding to apply only to compulsory counterclaims.[55]

A year after *Frank L. Young Co.*, the plaintiff in *Leman v. Krentler-Arnold Hinge Last Co.*,[56] which lost on a defendant's compulsory counterclaim, was charged with civil contempt for violating an injunction imposed by the prior suit.[57] The Supreme Court held that by initially bringing suit, the plaintiff submitted itself to the jurisdiction of the court for "all issues embraced in the suit," which included the defendant's counterclaim, because traditionally states had the power to bind plaintiffs on subsequent orders.[58]

Therefore, when a defendant brings counterclaims closely related to the original cause of action and seeks equitable remedies against a plaintiff's infringement, the plaintiff is generally subject to the jurisdiction of the court in which he brought the initial claim. Accordingly, in affirming *Leman*, the Court in *General Electric Co. v. Marvel Rare Metals Co.*[59] made an important distinction between a plaintiff who hales someone into court and a defendant who asserts a

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51. *Frank L. Young Co.*, 283 U.S. at 399.

52. *Id.*

53. *See id.* (explaining that the first lawsuit failed because the attachment of the drums to the suit was the limit of the court's jurisdiction).

54. *See id.* at 399–400 ("Giving the counterclaim the formality of a separate suit hardly is a sufficient reason for refusing to apply the local policy and law.").

55. *Id.* at 400.

56. 284 U.S. 448 (1932).

57. *Id.* at 449–51. The plaintiff-respondent sued the defendant for patent infringement, and the defendant countersued the plaintiff for the same. *Id.* at 450. The defendant won both suits, and the lower court enjoined the plaintiff from making, selling, and using the defendant's patented materials. *Id.* The plaintiff then created a "new" product, and the defendant brought an action claiming that the plaintiff was in civil contempt of court for violating the injunction. *Id.* The plaintiff contested the court's exercise of personal jurisdiction over it in the new suit. *Id.*

58. *See id.* at 451–52 (asserting that "[t]he decree upon the counterclaim bound the [plaintiff] personally," and that it applied everywhere "continuously and perpetually" in the United States, not just in the jurisdiction where the case was heard).

59. 287 U.S. 430 (1932).

counterclaim in a court of the plaintiff's choosing.[60] This distinction seems to indicate that a plaintiff who chooses the forum has fewer rights than a defendant who did not. Even so, the rule of submitting to jurisdiction applies to all issues of the case, including injunctions granted to successful counterclaiming defendants in patent infringement litigation.[61]

In 1938, the Supreme Court explicitly affirmed that, based on state statutes and an interpretation of the Due Process Clause, plaintiffs automatically submitted to personal jurisdiction for counterclaims brought against them. The Court in *Saenger* upheld a state's power to hear a counterclaim against the plaintiff even though he claimed a lack of sufficient contacts between that forum and the defendant's counterclaim.[62] The California statute authorizing counterclaims referred to claims that "relat[ed] to or depend[ed] upon the contract, transaction, matter, happening or accident upon which the action is brought."[63] Therefore, even though the Court found that "[t]here is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure" automatically allowing for jurisdiction over such compulsory counterclaims, the Court never overtly ruled on counterclaims unrelated to the original action.[64] The opinion concluded with this statement:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, *submitted himself* to the jurisdiction of the court, there is nothing arbitrary or unreasonable in *treating him as being there* for all purposes *for which justice to the defendant requires his presence*. It is the price which the state may exact as the condition of opening its courts to the plaintiff.[65]

Some legal scholars and practitioners have interpreted this case—by way of this quote in particular—as applicable to related and unrelated counterclaims alike.[66] At least two New York courts have held this view, relying on the state's liberal counterclaim rule,[67] albeit

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60. *Id.* at 431, 435. The defendant, responding to a patent infringement claim, brought a counterclaim alleging patent infringement against the plaintiff. The plaintiff moved to dismiss the counterclaim for lack of personal jurisdiction because it did not provide any legitimate jurisdictional basis for the suit.

61. *Id.* at 435.

62. 303 U.S. 59, 61–62 (1938).

63. *Id.* at 65 n.1.

64. *See id.* at 67.

65. *Id.* at 67–68 (emphasis added).

66. *See infra* Part II (providing an analysis of unrelated counterclaims).

67. N.Y. C.P.L.R. § 303 (McKinney Supp. 2015).

in dicta.[68] The U.S. Court of Appeals for the Second Circuit, in distinguishing an intervening defendant from original defendants, has also ruled that it would be fair for a plaintiff to "surrender . . . his privilege to be sued elsewhere" in counterclaims by the original defendant.[69] This interpretation is flawed and produces an unconstitutional mandate with respect to unrelated claims.

Florida state courts have endorsed a view contrary to this popular reading of *Saenger*. In 1939, the year after the Supreme Court decided *Saenger*, the Florida Supreme Court embraced the idea that a court only has automatic personal jurisdiction over counterclaims against the plaintiff that are related to the original claim.[70] In essence, submission to a court's jurisdiction is only implied for counterclaims that arise out of the same transaction or occurrence of the original suit.[71] Relying on this reasoning, Florida district courts of appeal have consistently held that finding automatic jurisdiction for anything other than related counterclaims would violate due process.[72] A federal district court in Pennsylvania has also taken this view with respect to defendants who have previously litigated in a state.[73] Merely because a person defended a suit before, the court

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68. *See* Evergreen Sys., Inc. v. Geotech Lizenz AG, 697 F. Supp. 1254, 1257 (E.D.N.Y. 1988) (explaining that a defendant may file a counterclaim containing any assertion against the plaintiff); Rockwood Nat'l Corp. v. Peat, Marwick, Mitchell & Co., 406 N.Y.S.2d 106, 106 (App. Div. 1978) (implying that a state court may read the New York statute to cover permissive counterclaims).

69. Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., 75 F.2d 472, 472–73 (2d Cir. 1935), *aff'd sub nom.* Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53 (1935).

70. Glass v. Layton, 192 So. 330, 332–33 (Fla. 1939).

71. *Id.*

72. *See* Gibbons v. Brown, 716 So. 2d 868, 870–71 (Fla. Dist. Ct. App. 1998) (holding that a defendant's prior litigation was not a bar to his ability to contest personal jurisdiction in a separate suit); Beach Park Dev. Corp. v. Remhof, 673 So. 2d 912, 914 (Fla. Dist. Ct. App. 1996) (same); Edwards v. Johnson, 569 So. 2d 473, 473–74 (Fla. Dist. Ct. App. 1990) (same); Burden v. Dickman, 547 So. 2d 170, 172 (Fla. Dist. Ct. App. 1989) (same); Palm Beach Towers, Inc. v. Korn, 400 So. 2d 110, 111 (Fla. Dist. Ct. App. 1981) (same). Although these Florida courts were interpreting the Due Process Clause of the Florida Constitution as opposed to the U.S. Constitution, the clauses are nearly identical. *Compare* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."), *with* FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law . . . .").

73. Wallace v. Int'l Lifestyles, Inc., Civil Action No. 06-1468, 2008 WL 623811, at *5 (E.D. Pa. Mar. 6, 2008).

reasoned, did not mean that the person was automatically subject to personal jurisdiction in subsequent, unrelated suits.[74]

Overall, a plaintiff can be said to submit to personal jurisdiction for unrelated counterclaims because of presence, implied consent, purposeful availment, or fairness. The next Part discusses why each of these theories fail.

## II. ANALYSIS

Imagine a scenario in which a woman from New York named Pam takes a road trip. Beginning in New York City, Pam drives her own car across the country to see Seattle and the great Pacific Northwest. From there, she plans to take scenic Highway 101 down the coast, through Oregon and California, ending in sunny San Diego. As Pam drives through San Francisco, she gets into a car accident with a California driver. The accident is clearly the California driver's fault. As the drivers get out of their cars, they realize that they know each other; the California driver is Dwight, a man who spends a few weekends every summer in upstate New York in Pam's hometown. Quite coincidentally, a few years ago, Dwight purchased a house next to Pam's, making them neighbors for roughly three months of the year. Pam recently built a brand new deck off the back of her house, and a surveyor hired by Dwight informed him that the deck encroaches onto his property by roughly three inches.

After the accident, Pam opts to sue Dwight for the damage to her car. Because the collision happened in California, Pam decides to sue there, hires an attorney in San Francisco to handle the case, and flies home. When Dwight receives notice of the suit, he is furious. Dwight decides that if Pam is going to sue him, he is going to sue her, too. With his answer to Pam's claim, he asserts a counterclaim seeking an equitable remedy for the continuing trespass of Pam's deck onto his property in New York. Relying on the Supreme Court's rationale in *Saenger* and the reasoning from several other lower courts, his basis for personal jurisdiction over Pam is that she has voluntarily initiated litigation in California and has, therefore, submitted herself to the court's jurisdiction for all issues for which justice to Dwight requires her presence. Thus, Pam is not given occasion to contest personal jurisdiction over that claim because,

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74. *Id.*; *see also* Kulko v. Superior Court, 436 U.S. 84, 93 (1978) (explaining that an unrelated and temporary visit to California many years before could not form the basis for California's jurisdiction).

according to the court, she has already constructively submitted to jurisdiction in California by commencing her action against Dwight there.

This hypothetical scenario requires a multi-part analysis to determine whether California's exercise of jurisdiction is likely to be appropriate. Pam unquestionably has a legitimate jurisdictional basis to sue Dwight in California: Dwight has established his domicile in California, so he can be sued there for any cause of action;[75] and Pam did not have an alternate forum in which she could assert her claim.[76] Pursuant to California procedural rules, Dwight can assert an unrelated counterclaim with his answer to Pam's suit.[77] Pam engaged in purposeful activity in California both by driving within the state and initiating a lawsuit related to that activity.

While these propositions seem relatively straightforward, others that follow from their logical extension are not so intuitive. Pam exercised her right to recover in the only forum in which she was able, subjecting her to any claims Dwight had against her. If Dwight's cause of action would otherwise only be valid against Pam in New York, the claim is suddenly given life in California purely because Pam took a trip there and initiated a suit solely related to that trip. Along the same lines, even if Pam had a choice of forum—perhaps instead of Dwight the individual, the defendant is a company that Pam sues in its place of incorporation or principal place of business—none are palatable choices because they might not be places she would otherwise go. The illusion of choice does not seem to matter.

Two final questions are appropriate. The first is whether the car accident and Pam's deck, barring the parties involved, have anything to do with one another. The answer is, quite obviously, "no." The second and ultimate question is whether it is actually reasonable to say that Pam constructively submitted to defend an unrelated suit by bringing her own action. If not, then there must be another legal basis for jurisdiction—fairness, presence, purposeful availment, or something else.

Since *Saenger*, courts commonly acknowledge that a plaintiff submits himself to the court's jurisdiction with respect to compulsory

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75. Milliken v. Meyer, 311 U.S. 457, 462 (1940).

76. Pam cannot sue Dwight in New York because the state's long-arm statute would not bring Dwight within its courts' jurisdiction for such an accident occurring in California. *See* N.Y. C.P.L.R. § 302(a)(4) (McKinney Supp. 2015) (allowing for personal jurisdiction over a defendant who "owns, uses or possesses any real property situated within the state" but only if the cause of action arises from that ownership, use, or possession).

77. CAL. CIV. PROC. CODE § 428.10(a) (West Supp. 2015).

counterclaims,[78] claims that relate to the original lawsuit, and it seems fair to do so under the rationale articulated in *International Shoe*. But few courts have confronted the unique dilemma of a plaintiff who wishes to contest jurisdiction regarding an unrelated counterclaim brought against him. Given that the Supreme Court has consistently subscribed to the longstanding principles of fair play and substantial justice, a plaintiff availing himself of a forum's judicial system for one issue arguably cannot be said to submit himself to that court's jurisdiction for any and all claims that may be brought against him.

The Supreme Court's stance on personal jurisdiction seems to be continually evolving. Yet some principles are repeatedly cited as crucial to the "traditional notions of fair play and substantial justice" expounded in *International Shoe*.[79] These principles include minimum contacts, the nexus requirement, and foreseeability.[80] Given the cost and relative inconvenience of litigation, the Court also generally has an eye toward judicial economy.[81] Because none of these concepts have been directly applied to unrelated counterclaims in the context of contesting personal jurisdiction, however, it is worth examining each concept to synthesize a view that comports with the fairness and justice required by the Due Process Clause.

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78. *See* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 542 & n.75 (1991) (citing *Saenger* as the authority from which this view is derived); Ernest L. Folk, III & Peter F. Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 791 n.243 (1973) (interpreting *Adam v. Saenger* to apply to unrelated counterclaims); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 726 & n.148 (1983) (construing the Court's apparent approval of *Saenger* in *Insurance Corp. of Ireland* as an indication that a finding of a plaintiff's forum contacts is not required for counterclaims).

79. 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

80. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980) (concluding that the foreseeability relevant to due process is "that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there"); Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (concluding that jurisdiction based on unrelated property in a state was unconstitutional because there was not a sufficient nexus between the contact and the claim).

81. *See* Asahi Metals Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (finding that the interstate judicial system's interest in obtaining efficient results must be considered when determining whether to exercise personal jurisdiction).

### *A. Application of Modern Minimum Contacts and Fair Play Rationales to Unrelated Counterclaims*

One of the most basic fairness principles the Court has enunciated is the requirement that there must be a nexus or connection between a defendant's presence in a forum and the cause of action for which he is being sued. Accordingly, if a plaintiff's presence through his litigation factors into a minimum contacts analysis, that presence must be related to the cause of action for which a defendant wishes to bring a counterclaim. In *International Shoe*, the defendant company employed between eleven and thirteen salesmen who resided in Washington.[82] Although the company was incorporated in Delaware, had its principal place of business in St. Louis, Missouri, and kept no stock of its merchandise in Washington, the company still conducted substantial business in Washington with yearly commissions exceeding $31,000.[83] Moreover, the salesmen rented either permanent or temporary display rooms to showcase products, and the company covered the costs.[84]

With these activities in mind, the Court explained four general rules with respect to the activities of a potential defendant. First, where the defendant's presence "ha[s] not only been continuous and systematic, but also give[s] rise to the liabilities sued on," even though the defendant did not explicitly consent to suit, courts will almost always have personal jurisdiction over the defendant.[85] Second, and contrarily, a defendant's "casual presence," which means either a single and isolated activity or possibly a series of isolated activities, is "not enough to subject it to suit on causes of action unconnected with the activities there."[86] Third, general jurisdiction—subjecting a defendant to suits unrelated to its presence in a forum—may be appropriate if the defendant's actions are so extensive and substantial such that the suit is justified.[87] Fourth and finally, depending on the

82. *Int'l Shoe Co.*, 326 U.S. at 313.

83. *Id.*

84. *Id.* at 314.

85. *Id.* at 317.

86. *Id.* (reasoning that requiring a defendant to defend itself "away from its home" violates due process by imposing "too great and unreasonable a burden").

87. *Id.* at 318; *see also* Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917–18 (N.Y. 1917) (holding that the defendant corporation's business in the state, involving eight salesmen and other employees at an office in New York whose work resulted in regular and systematic shipments from Pennsylvania to New York, subjected it to jurisdiction in New York).

"nature and quality" of a defendant's activities, it may be fair to imply a defendant's consent or submission to suit.[88]

Tension exists between the second and fourth rules. The Court has not specifically decided whether, in light of a plaintiff's affirmative litigation, it is fair and reasonable to think that her decision to file suit on one matter opens her up to counterclaims by the defendant on unrelated matters; or rather, whether it is simply casual activity that must bear a relationship to the new claims. However, given the Court's focus on the nexus requirement in cases after *International Shoe*, it is more equitable to automatically confer jurisdiction only for related counterclaims. In *Shaffer*, the Court discussed whether owning property in a state was a sufficient basis for jurisdiction for unrelated claims and concluded that it was not.[89] In deciding which standard to apply to jurisdictional questions, the Court held that given the ease with which it could apply the *International Shoe* fairness test in most cases, it would be too costly and could violate due process to simplify litigation by avoiding the minimum contacts question.[90] Thus, the Court affirmed that the minimum contacts fairness test applied in every situation: due process requires a defendant to have contacts with the state *and* a nexus between those contacts and the plaintiff's cause of action.[91]

More recent cases similarly suggest that a nexus between claim and presence should always be required for unrelated litigation. A unanimous Court in *Walden v. Fiore* stressed that a defendant's relationship with a plaintiff alone cannot be the basis for jurisdiction[92]; therefore, a Nevada court's exercise of jurisdiction over a defendant was inappropriate because his conduct occurred entirely in Georgia and merely affected the plaintiffs in Nevada.[93] With respect to the parties, the Court reasoned that their "relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state or federal court exercises jurisdiction."[94]

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88. *Int'l Shoe Co.*, 326 U.S. at 318; *see also* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (out-of-state drivers); Lafeyette Ins. Co. v. French, 59 U.S. 404, 407 (18 How. 1855) (nonresidents with property insurance).

89. *See supra* notes 14–19 and accompanying text.

90. Shaffer v. Heitner, 433 U.S. 186, 211 (1977).

91. *See id.* at 212 (concluding that transient jurisdiction based on unrelated property in a state was unconstitutional).

92. Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014).

93. *Id.* at 1124.

94. *Id.* at 1123 (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1980)).

The instances in which a plaintiff actually has valid minimum contact grounds for contesting an unrelated counterclaim—and also wishes to contest jurisdiction based on the lack of minimum contacts—are few and far between. Despite this scenario's rarity, courts have expressly identified the issue in a few cases.

A New York appellate division court, though declining to decide the issue apart from the holding, recognized in dicta that New York's liberal counterclaim rule comported with a broad reading of *Saenger*.[95] In New York, a nonresident who commences an action automatically designates his attorney as an agent for service of summons in *any* separate action, as long as that action could have been brought as a counterclaim against him.[96] The court dismissed the defendant's counterclaim because the action was commenced in federal court, which New York Civil Procedure Law section 303 does not address, but acknowledged that the constitutional issue remained open.[97] A similar ruling occurred in the U.S. District Court for the Eastern District of New York, where a district judge broadly pronounced section 303 as allowing personal jurisdiction over any cause of action, so long as it could have been brought as a counterclaim.[98] These two decisions seem to indicate that, at least in New York courts, a plaintiff is automatically subject to jurisdiction if a defendant decides to bring any counterclaim.

Before *Saenger* was decided, the Second Circuit also had occasion to consider the fairness of subjecting a plaintiff to unrelated countersuits. Writing for the three-judge panel, Judge Learned Hand reasoned that a defendant had an interest in consolidating litigation in one forum so that he did not have to seek out the plaintiff in a separate forum away from his home.[99] The opinion further explained that a plaintiff probably knows about other unresolved disputes between him and the defendant, so by attacking the

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95. Rockwood Nat'l Corp. v. Peat, Marwick, Mitchell & Co., 406 N.Y.S.2d 106, 107 (App. Div. 1978).

96. N.Y. C.P.L.R. § 303 (McKinney Supp. 2015); *Rockwood Nat'l Corp.*, 406 N.Y.S.2d at 106.

97. *Rockwood Nat'l Corp.*, 406 N.Y.S.2d at 106.

98. Evergreen Sys., Inc. v. Geotech Lizenz AG, 697 F. Supp. 1254, 1257 (E.D.N.Y. 1988). The case was dismissed because the original action was brought pursuant to an arbitration agreement; section 303 did not apply because the arbitration agreement did not authorize counterclaims, so a separate action could not have been brought as a counterclaim. *Id.*

99. *See* Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., 75 F.2d 472, 472 (2d Cir. 1935), *aff'd sub nom.* Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53 (1935) (describing the initial forum as one where the suit has necessarily been brought).

defendant, the plaintiff could foresee—and therefore assumes the risk of—facing a counterclaim in that same forum.[100] Like *Saenger*, this opinion was issued before *International Shoe*, so the same fairness analysis was not applied.

On the other hand, Florida state courts have consistently interpreted fairness from the state constitution's due process clause to contradict an all-encompassing submission reading of *Saenger*. While the last Florida Supreme Court decision on this issue explicitly reasoned that personal jurisdiction can only be exercised over a plaintiff with respect to the subject matter of the original claim,[101] it did not have occasion to extend that reasoning and consider unconnected counterclaims. Although this case was decided before *International Shoe* and *Shaffer*, the fairness logic is consistent with those cases.

In 1990, a Florida district court of appeal unequivocally pronounced that unless a statute authorized personal jurisdiction over specific counterclaims—generally compulsory claims—personal jurisdiction must still be established:

> Under the foregoing authorities, [the plaintiff] did not thereby automatically waive any objections to personal jurisdiction he might have as to matters raised in a permissive counterclaim. While he could have voluntarily submitted to the jurisdiction of the court by responding to the merits of [the defendant's] counterclaim, he clearly did not do so. It therefore became [the defendant's] burden to show that personal jurisdiction could be obtained under [the applicable Florida statute] . . . .[102]

This reasoning provided the groundwork for later cases. In *Beach Park Development Corp. v. Remhof*,[103] for example, the court found that even though "the subject matter [was] clearly one within the jurisdiction of the court," the court was still required to analyze personal jurisdiction with respect to what it determined was an unrelated permissive counterclaim.[104] The same court held in another case that a "current defendant's prior decision to bring a suit in Florida should not act indefinitely as a sword of Damocles hanging perilously over the head of that defendant if she later challenges

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100. *Id.* at 472–73.
101. Glass v. Layton, 192 So. 330, 332 (Fla. 1939).
102. Edwards v. Johnson, 569 So. 2d 473, 474 (Fla. Dist. Ct. App. 1990).
103. 673 So. 2d 912 (Fla. Dist. Ct. App. 1996).
104. *Id.* at 914. In fact, the plaintiff Remhof was actually a resident of Florida, so even if he had contested personal jurisdiction, he would have lost. *See id.*

jurisdiction in a separate suit."[105] A Pennsylvania district court, following these Florida cases, held that even if the second suit arose from the same subject matter as the first, a plaintiff would not automatically waive the right to contest personal jurisdiction.[106] These cases all embody the fairness logic explicated in *International Shoe* and its progeny, which requires a nexus or close connection between a defendant's presence and the plaintiff's cause of action.

A plaintiff like Pam, who faces an unrelated counterclaim in a forum away from home, falls either into the second or fourth category of *International Shoe* litigants. Under the second rule, casual contact that is unrelated to the cause of action is not enough to establish personal jurisdiction.[107] As opposed to Pam's casual contact with California that brought rise to her lawsuit against Dwight, the defendant in *International Shoe* engaged in extensive business activity that directly gave rise to a lawsuit involving state-related taxation questions. Dwight's lawsuit, on the other hand, had nothing to do with Pam's casual contacts in California; a court's jurisdiction could only be premised on her unrelated litigation with Dwight on the theory that she submitted to it by bringing her initial claim.

There can be no doubt that Pam voluntarily brought her lawsuit in California. She alone invoked the jurisdiction of the court, affirming that it was her own affiliation with the state that created her contacts. To some, this might indicate that because she purposefully brought a case in the forum, it would be fair for Dwight to force her to defend an unrelated action in the same forum. Nonetheless, because a claim, and correspondingly an unrelated counterclaim, must actually arise from Pam's contacts, there is no nexus between her contacts and Dwight's encroachment action; therefore, it is constitutionally unfair.[108] In plain terms, there is no connection between Pam suing

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105. *See* Gibbons v. Brown, 716 So. 2d 868, 870–71 (Fla. Dist. Ct. App. 1998) (holding that by itself, filing a suit two years prior to the action in question would not satisfy any jurisdictional bases allowed in the relevant state statute because a single suit did not constitute "substantial activity," especially given the length of time between suits and the fact that the defendant was not a party in the prior case).

106. Wallace v. Int'l Lifestyles, Inc., Civil Action No. 06-1468, 2008 WL 623811, at *5 (E.D. Pa. Mar. 6, 2008).

107. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

108. *See* Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014) (emphasizing that a "defendant's relationship with a plaintiff[,] . . . standing alone, is an insufficient basis for [personal] jurisdiction"); *see also* Xerox Corp. v. SCM Corp., 576 F.2d 1057, 1059, 1061 (3d Cir. 1978) (adopting a logical relation test similar to Florida's); Whigum v. Heilig-Meyers Furniture Inc., 682 So. 2d 643, 646 (Fla. Dist. Ct. App. 1996) (explaining that in Florida, there must be a logical relationship between the claim

for the car accident in California and Dwight is suing for a continuing trespass in New York, so it would be unfair to subject Pam to a suit in California that has nothing to do with California.[109] Consequently, Pam's chance lawsuit in California would be an inappropriate basis upon which a California court could exercise personal jurisdiction.

This interpretation is wholly consistent with the nexus requirement established in *International Shoe* and continued by *Shaffer*.[110] If the plaintiff's initial litigation did relate to the defendant's counterclaim, the action would almost certainly proceed without a personal jurisdiction question.[111] Personal jurisdiction over compulsory or related claims is generally implied because if the claim arises from the same transaction or occurrence of the original suit, a finding of minimum contacts would likely be redundant.[112] But, given that the

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and the counterclaim for the counterclaim to be considered compulsory and therefore related, and that what was fairly deemed an unrelated permissive claim could be safely severed from the original suit due to a lack of that logical relationship).

109. *See Walden*, 134 S. Ct. at 1123 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985))); *see also* Shaffer v. Heitner, 433 U.S. 186, 207, 212 (1977) (concluding that every assertion of jurisdiction must be consistent with the minimum contacts standard).

110. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (emphasizing that obligations that arise from activities in a state must be connected to those activities).

111. *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938) (authorizing personal jurisdiction over counterclaims related to the cause of action). For another example of implied consent to countersuits based on a plaintiff's actions, see Nat'l City Bank of New York v. Republic of China, 348 U.S. 356, 364 (1955), holding that bringing suit to recover constitutes a waiver to sovereign immunity from a counterclaim. *But see id.* at 369–71 (Reed, J., dissenting) (arguing that only an act of Congress restricting China's sovereign immunity could subject China to direct lawsuits, and that allowing these suits to be brought in the absence of such a statute overruns the bounds of a U.S. court's jurisdiction).

112. *See* Arch Aluminum & Glass Co. v. Haney, 964 So. 2d 228, 236 (Fl. Dist. Ct. App. 2007) (recognizing that the rule automatically conferring jurisdiction in Florida over compulsory counterclaims promotes judicial economy). *But see* Hillis v. Heineman, 626 F.3d 1014, 1018 (9th Cir. 2010) (deciding that a defendant does not waive any of the Rule 12(b) affirmative defenses by filing any type of counterclaim and that such a view is increasingly common); Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967) (concluding that because a defendant has no choice but to bring his compulsory claims or risk losing them, his assertion of those claims does not waive his jurisdictional defenses); Nelson v. World Wide Lease, Inc., 716 P.2d 513, 516 (Idaho Ct. App. 1986) (noting that "[t]he preferred rule is that a compulsory counterclaim does not waive jurisdictional defenses"). In *Nelson*,

Court adopted a nexus requirement even with respect to unrelated property in *Shaffer*, the same requirement should be extended to unrelated litigation.

A plaintiff facing a permissive counterclaim and a defendant are similarly situated, so it is logical and fair to treat them similarly for purposes of contesting personal jurisdiction. The Court's decision in *Walden* supports this deduction and shows why unconnected actions should be subject to a minimum contacts analysis.[113] When a plaintiff becomes a defendant by facing a counterclaim, he should be subject to the rule that, without more, the relationship between the parties cannot be the basis for jurisdiction. Simply because Pam had *some* conduct in California by way of a lawsuit does not mean she should be treated differently than an ordinary defendant. Under the *International Shoe* framework, she would still be within the second rule concerning casual and non-systematic contacts.

A defendant bringing an unrelated counterclaim could theoretically bring it at a later time in any forum in which he is able. The plaintiff, now a defendant in the separate suit, would clearly have the right to contest personal jurisdiction. Therefore, he should have that right no matter when or where the counterclaim is brought, so long as the new claim can be conceptually severed from the original claim.[114] Moreover, a defendant generally maintains the right to contest personal jurisdiction even when he answers with a permissive counterclaim.[115] If the defendant wins on his motion to contest

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the court reasoned that World Wide Lease, a Washington company authorized to do business in Idaho, brought a compulsory counterclaim because a portion of plaintiff Nelson's complaint referred to their lease agreement; thus, the claim arose from the same transaction or occurrence as the original claim. *Id.* However, World Wide Lease fell under the state's long-arm statute because it actually conducted business in Idaho and had appointed a resident agent who was later served with process, which was enough for the court to establish jurisdiction. *Id.*

113. *See Walden*, 134 S. Ct. at 1123 (holding that a defendant should only be haled into court based on his affiliation with the state).

114. *See* Stanley E. Cox, *Would That* Burnham *Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 524 n.102 (1991) (beginning with the premise that establishing personal jurisdiction solely by one's presence in a forum, or transient jurisdiction, is unconstitutional, and concluding by extension that a plaintiff's presence in a forum that is unrelated to a counterclaim is similarly unconstitutional).

115. *See* Rates Tech. Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1307–08 (Fed. Cir. 2005) (reasoning that a contrary ruling "would effectively eliminate the unqualified right provided by Rule 12(b) of raising jurisdictional defenses either by

personal jurisdiction, the unrelated claim would stand alone, making him the sole plaintiff.[116] If he can bring suit in one instance and contest jurisdiction in another, why should courts decline to afford an original plaintiff the same right?

On the other hand, if a plaintiff fits into *International Shoe*'s fourth category, a court would have to find that the nature and quality of his litigation—and litigation in general—made it so a plaintiff impliedly submitted to defending any unrelated countersuit brought by the defendant. An original plaintiff's litigation should not constitute this submission, nor should it factor into a minimum contacts analysis. A plaintiff who conducts activities in a state certainly enjoys the "benefits and protection of the laws of that state,"[117] which includes a right to use that state's court system to protect his own rights pursuant to those activities.[118] It follows that access to those benefits may create certain obligations arising from his activities.[119] Extending the submission rationale in *Saenger* to apply to the fairness test in *International Shoe*, by "voluntarily recogniz[ing] the legitimacy of a state's judicial mechanism" by filing a suit, it might be argued that a plaintiff should not later be allowed to skirt the obligations that come with his recognition of that legitimacy[120]; namely, he should be compelled to defend all lawsuits filed against him within that forum.[121]

However, participation in litigation is a unique activity and is different in kind than business operations or physical presence.[122]

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motion or answer"); Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147, 1149 (5th Cir. 1987) (adopting the "prevailing view" that filing a counterclaim constitutes a waiver of personal jurisdiction); *see also* Neifeld v. Steinberg, 438 F.2d 423, 428 (3d Cir. 1971) (noting that if the court were to hold that a defendant waives his right to contest jurisdiction by presenting an affirmative claim for relief, it would be impermissibly "engrafting a judicial exception to Rule 12(b)").

116. FED. R. CIV. P. 13(i) (allowing a court to rule on a counter claim "even if the opposing party's claims have been dismissed . . . .").

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

118. *See id.* at 319–20 (characterizing the defendant's large volume of interstate business as "systematic and continuous," thereby entitling it to benefits including using the state's court system).

119. *Id.* at 319.

120. Collins Perdue, *supra* note 78, at 542–43.

121. *See id.* (analyzing the question in terms of all other claims—brought by anyone—as opposed to only compulsory or permissive claims brought by the same party in the initial suit).

122. *See, e.g.*, Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (explaining that the rule exempting nonresident witnesses from being served with process exists to protect the witnesses from "unreasonable obstacles . . . thrown in the way of their freely coming into court to give oral testimony").

The Supreme Court has made this abundantly clear with respect to nonresident litigants and witnesses who visit other states to participate in lawsuits:

> The general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another, is founded, not upon the convenience of the individuals, but of the court itself. . . . As commonly stated and applied, it proceeds upon the ground that the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.[123]

While the rule with respect to witnesses is undisputed,[124] there is considerable disagreement about whether a nonresident plaintiff is similarly immune to service of process that would otherwise be the basis for personal jurisdiction.[125] Some courts have held that a plaintiff may only be served for issues relating to the matter that he is already litigating—in essence, compulsory claims.[126] Other courts have gone as far as holding that a plaintiff never has immunity from suits in which the counterclaimant is a party in his initial action,[127] but this view does not seem to have been followed by any courts in recent years.

For the purposes of physical presence jurisdiction, even if business operations were held to be in the same category as litigation, they

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123. Lamb v. Schmitt, 285 U.S. 222, 225 (1932) (citations omitted) (adding that the privilege "should be extended or withheld only as judicial necessities require").

124. Recent Cases, *Constitutional Law—Due Process of Law—Constitutionality of the Federal Youth Corrections Act in Its Application to Youthful Criminal Offenders*, 12 VAND. L. REV. 482, 488 n.3 (1959); *see* Stewart v. Ramsay, 242 U.S. 128, 129 (1916) (affirming that witnesses are exempt from receiving a summons while attending a trial to encourage voluntary participation in the administration of justice).

125. *See* Rizo v. Burruel, 202 P. 234, 236–37 (Ariz. 1921) (declining to rule on the issue but providing an overview of competing viewpoints).

126. *See* Livengood v. Ball, 162 P. 768, 770 (Okla. 1916) (holding that nonresident plaintiffs who voluntarily commenced an action were not immune from service by the defendants in a matter related to the subject of their own litigation); *see also* Tiedemann v. Tiedemann, 129 P. 313, 313–14 (Nev. 1913) (holding that a father who had been denied custody of his child could not claim immunity from his wife's divorce suit seeking to gain full custody of their child).

127. *See, e.g.*, Guynn v. McDaneld, 43 P. 74, 74–75 (Idaho 1895) (ruling that a nonresident who brought suit against a resident of Idaho was not immune from service of a summons by that Idaho resident in district court because "[i]f the courts of Idaho [could], in the opinion of a litigant, protect his rights in one case, it would seem that they ought to be equally adequate in another").

should still be treated the same. The courts in California have personal jurisdiction over Pam for related counterclaims because there is a nexus between her suit and potential related counterclaims. Likewise, anyone conducting business in California would be subject to suit for any claim related to that activity, but not for claims regarding unrelated activity. The plaintiff is only present for the purposes of the lawsuit, and an unrelated counterclaim does not concern that presence. Once the lawsuit is over, the plaintiff would leave the forum and sever his contacts. But for the suit, the plaintiff would have no reason to be in the state. Justice Scalia's reasoning in *Burnham* allows for the possibility that personal jurisdiction for unrelated counterclaims could be another exception to physical presence jurisdiction.[128] An individual who appears in a forum only to defend himself cannot be served for an unconnected claim,[129] so it follows that it would be fair to treat a plaintiff similarly for subsequent unconnected counterclaims.[130] If Justice Scalia did not allow for the exception, he would likely hold that physical presence, even for a single lawsuit, is enough contact to allow a court to exercise personal jurisdiction over a plaintiff.[131] In his view, because traditional notions of fair play and substantial justice include physical presence, it is conceivable that the implied consent from *Hess* for the purposes of motor vehicles could be analogized to the voluntary use of a state's court system and initiating litigation if it were authorized by statute.[132] Justice Brennan's approach in *Burnham* is more consistent with

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128. *See* Burnham v. Superior Court, 495 U.S. 604, 613 (1990) (plurality opinion) (listing the exceptions to physical presence jurisdiction); *id.* at 618–19 (relying on *Pennoyer v. Neff* to justify the long-standing tradition of jurisdiction based on physical presence alone). In this context, physical presence jurisdiction—referred to as "transient jurisdiction" by some legal commentators and Justices alike—means that a defendant automatically submits to personal jurisdiction when he is served with process in the plaintiff's desired forum.

129. RESTATEMENT (SECOND) OF JUDGMENTS § 9 (AM. LAW INST. 1982).

130. *See* Cox, *supra* note 114, at 524 n.102, 552 (arguing that allowing a plaintiff to sue for one cause of action but to contest jurisdiction for a different cause of action does not necessarily constitute improper "asymmetry" because nonresident litigants can only use a state's court system for appropriate actions).

131. *Burnham*, 495 U.S. at 610–11 (determining that the early view that a nonresident's presence in a state is a legitimate basis for personal jurisdiction was firmly established and still valid, "no matter how fleeting [the defendant's] visit").

132. *But see* Hess v. Pawloski, 274 U.S. 352, 355 (1927) (maintaining that a nonresident's simple transaction of business in a state "does not imply [his] consent to be bound by the process of its courts"). Again, because *Burnham* contradicts the modern fairness conception, the difference between presence, voluntary affiliation, and implied consent is not entirely clear.

fairness, especially when considering the nexus requirement discussed above.[133] If a court evaluated a defendant's physical presence with respect to the fairness of imposing a suit based on that presence, the same evaluation would apply to a plaintiff facing an unrelated action.[134]

### *B. Foreseeability, Efficiency, and Fairness*

Foreseeability, in the context of one isolated instance of litigation that did not arise as a result of the plaintiff's original claim, cannot be the basis of personal jurisdiction because foreseeability alone is an insufficient basis upon which to establish jurisdiction. Yet Judge Learned Hand asserted that the foreseeability of pending disputes between parties, in conjunction with the desirability of solving those disputes in one forum, can justify imposing unrelated countersuits on original plaintiffs.[135] Regardless of the forum in which a plaintiff brings a claim, a plaintiff can clearly foresee that a defendant might bring an unrelated claim against him. However, the limitation of that foresight is circumscribed by jurisdictional considerations. Thus, despite the seemingly broad scope of unrelated counterclaims, given jurisdictional constraints, it is unlikely that a plaintiff could or would be expected to foresee having to defend a lawsuit in a forum with which he has no connections other than his own unrelated litigation.[136]

Moreover, other disputes between the parties may arise during the course of litigation that were unforeseen, so the plaintiff would be subject to jurisdiction away from home simply because he sued first. From the hypothetical, Dwight is immediately granted the convenience of both defending and attacking in his home state

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133. *See supra* Part II (discussing the nexus requirement between the plaintiff's complaint and the defendant's minimum contacts with the forum).

134. *Burnham*, 495 U.S. at 629 (Brennan, J., concurring) ("Unlike Justice Scalia, I would undertake an 'independent inquiry into the . . . fairness of the prevailing in-state service rule.'" (quoting Hurtado v. California, 110 U.S. 516, 621 (1884))).

135. Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., 75 F.2d 472, 472–73 (2d Cir. 1935), *aff'd sub nom.* Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53 (1935).

136. *See* Kulko v. Superior Court, 436 U.S. 84, 93 (1978) (elaborating on the defendant's presence in California and noting that "[t]o hold such temporary visits to a State a basis for the assertion of in personam jurisdiction over unrelated actions arising in the future" would clearly be unacceptable and undermine prevailing interpretations of the Due Process Clause); *see also* Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 20 (1982) (viewing the Court's decision in *Kulko* as indicative of the fact that physical presence in certain cases "may . . . fail to sustain the invocation of in personam jurisdiction").

merely because Pam brought her suit in California—the only forum in which she could bring her claim—before Dwight brought his suit for encroachment in New York.

Even if the plaintiff may "reasonably anticipate being haled into court"[137] to defend an unrelated counterclaim, that does not necessarily mean he should forfeit the right to contest jurisdiction—a right that a defendant being haled would have. If the rule were otherwise, every lawsuit that a plaintiff initiated would be the basis of unlimited personal jurisdiction in that forum.[138] Justice White in *World-Wide Volkswagen Corp. v. Woodson*[139] identified two interests that due process is intended to protect: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[140] As a defendant in a countersuit in a jurisdiction away from home, Pam certainly seems to be a person that these dual aims seek to shelter. One response to Pam's situation might be, "Didn't you read *Saenger*?" However, there is no reason to believe that a plaintiff who goes into a jurisdiction out of necessity would submit to an unrelated suit there, especially when she has no other ties to that jurisdiction.

The parties' interests in attaining a fair result outweigh the interstate judicial system's interest in attaining efficiency. The Court's five fairness factors from *Asahi Metal Industry Co. v. Superior Court*[141]—the burden on the defendant, the forum state's interest, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining efficient resolutions, and the states' shared interest in furthering social policies—as applied to permissive counterclaims indicate that courts must choose an appropriate balance between the burdens on the parties while giving due consideration to concerns about judicial economy. The burden on

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

138. *See* Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945 (4th Cir. 1994) ("To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism."); *cf.* Collins Perdue, *supra* note 78, at 543–44 (questioning whether voluntarily traveling through a state should be enough to subject one to suit in that state for any matter, and concluding that voluntary affiliation is insufficient on its own).

139. 444 U.S. 286 (1980).

140. *Id.* at 291–92.

141. 480 U.S. 102, 113 (1987) (plurality opinion) (outlining the five factors courts must consider to determine the reasonableness of exercising jurisdiction).

the original plaintiff facing a permissive counterclaim is potentially quite large. One commentator argued that it would be unfair to "subject [a plaintiff] to unrelated suits that could trigger choice of law rules or other litigation realities [he] could not have expected" if the suit had been brought in a forum with which the plaintiff had substantial connections.[142] He may have to hire a new lawyer in that forum and incur additional travel costs. The interest of the defendant bringing the unrelated action in obtaining relief, however, would also be strong because he would be allowed to conveniently consolidate litigation in the forum of his choice without paying mind to issues of personal jurisdiction. Similarly, the counterclaiming defendant's home state may have a strong interest in providing a resident with a forum to litigate claims, especially when his adversary—a nonresident—has already invoked the jurisdiction of the court. But the state's interest likely diminishes if the defendant's severed counterclaim cannot stand on its own jurisdictional grounds in the state's courts.

As mentioned above, the pursuit of judicial economy looms on the other side of the fairness argument. Because one of the Court's fairness factors is, in fact, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies,"[143] it could be argued that foreseeability, judicial economy, and the fairness to a defendant in allowing him to sue someone who sues him justifies imposing a requirement that a plaintiff submit to suits in that forum. However, this argument overlooks the fifth fairness factor: "the shared interest of the several States in furthering fundamental substantive social policies."[144] A policy that subjects a plaintiff to jurisdiction for *any* and *all* countersuits against him hardly seems like a policy that the interstate judicial system could consider fair, even in the name of efficiency.[145] It might seem unfair to a defendant to

142. Cox, *supra* note 114, at 524 n.102.

143. *Asahi*, 480 U.S. at 113, 115 (considering efficiency against the burden to a foreign defendant and remarking that the status of the defendant as an alien should not diminish the importance of the balancing test).

144. *Id.* at 113.

145. *See* Attaway v. Omega, 903 N.E.2d 73, 79 (Ind. Ct. App. 2009) (rationalizing the lower court's attachment of jurisdiction to a defendant based on the shared interests of the states). The defendant entered into a contract with an Indiana resident to purchase a car, had the car driven to Idaho, and then rescinded his payment. *Id.*; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 9 (AM. LAW INST. 1982) (explaining that "[a] court may exercise jurisdiction" over a nonresident defendant for an additional claim only when "the claim involved arose out of the transaction that is the subject" of the original action or "is one that may in fairness be

make him go into another forum to bring his permissive counterclaim, but by the same token, a plaintiff is situated similarly to a new defendant facing a claim, and the fairness factors are centered around the contacts of the defendant—he is the one for whom personal jurisdiction is an issue.[146] Thus, those factors should focus on the original plaintiff for the purposes of the additional unrelated claim.

### *C. Practical and Theoretical Problems*

The first problem with forcing a plaintiff to submit to personal jurisdiction each time he files suit in a new forum is that, like Pam, he may have no other forum in which to litigate his claim.[147] It would be contrary to the interests of truth, justice, and fairness to discourage lawsuits for fear of being sued for unrelated issues, especially if that forum is the only one in which a plaintiff can seek the administration of justice.[148] Moreover, the submission rationale has never been explicitly applied by a higher federal court to unrelated, permissive counterclaims, either before or after *Saenger*. The existing precedent holds sway only with regard to counterclaims that have a nexus to the plaintiff's presence, whether relating to the same contract, transaction, or occurrence in the initial action, or claims that have been previously authorized under state statutes. One critic has argued that "consent" is generally a fictional legal concept and can assume what it sets out to prove,[149] so analyzing fairness is the only way to keep a state in check when delimiting the territorial boundaries of its personal jurisdiction reach.

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determined concurrently with that action"). Thus, for an unrelated suit, a defendant is protected from being served with process if he is only physically present for the purposes of the initial action. *Id.*

146. *See Asahi*, 480 U.S. at 114 (admitting that in some cases the interests of the plaintiff and forum state will outweigh the defendant's burden, but then focusing primarily on the defendant's contacts and his burden in being haled into a foreign jurisdiction).

147. *See* Arthur John Keeffe & John J. Roscia, *Immunity and Sentimentality*, 32 CORNELL L.Q. 471, 478–79 (1947) (positing that, in general, a plaintiff is acting in his own interests and not the court's).

148. *See, e.g.*, Crusco v. Strunk Steel Co., 74 A.2d 142, 143–44 (Pa. 1950) (recognizing that justice is better served by allowing a defendant to appear in a forum to defend himself for criminal actions without subjecting him to service of process for unrelated civil actions).

149. *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304–05 (1989) (posing a hypothetical situation in which England decides to exercise jurisdiction over anyone who resides in France or owns a French residence and refuting the notion that even if its jurisdictional reach was expected by the rest of the world, that would not make it any more legitimate).

If a court were to hold that personal jurisdiction is automatically acquired over a plaintiff who brings suit against a defendant for the purposes of the defendant's permissive counterclaim, it would essentially create a new form of general jurisdiction between the parties. This is precisely the situation that the Florida courts attempted to avoid by adopting a rule allowing original plaintiffs to contest jurisdiction for unrelated matters.[150] The notion that a court could have plenary power to assert personal jurisdiction over a party that sued once in that state, and not because the party declared its domicile, principal place of business, incorporation, or had substantial systematic and continuous activity there, does not comport with traditional notions of fairness. If a person or company litigated in a forum such that it became systematic and continuous, it may be fair to declare that forum one in which the person or company was subject to general personal jurisdiction, and therefore, any suit,[151] but even Justice Sotomayor in *Bauman* probably would not hold that one or even a few instances of litigation would be grounds for personal jurisdiction.[152] Applying the "one case" rule, if a plaintiff had

150. *See, e.g.*, Gibbons v. Brown, 716 So. 2d 868, 870–72 (Fla. Dist. Ct. App. 1998) (per curiam) (rejecting the notion that a court automatically gains jurisdiction over a defendant when he brings a counterclaim, and requiring the defendant's actions to meet both Florida's long-arm statute and constitutional due process to permit personal jurisdiction); Beach Park Dev. Corp. v. Remhof, 673 So. 2d 912, 914 (Fla. Dist. Ct. App. 1996) (finding that the plaintiff was a resident alien of Florida, and therefore, properly subject to suit in Florida for permissive counterclaims); Edwards v. Johnson, 569 So. 2d 473, 474 (Fla. Dist. Ct. App. 1990) (following the rule in Florida that allows a citizen to raise objections to personal jurisdiction in counterclaims unrelated to the original suit); Burden v. Dickman, 547 So. 2d 170, 172–73 (Fla. Dist. Ct. App. 1989) (extending personal jurisdiction to nonresident plaintiffs because they petitioned the court and thereby "submitted themselves to the court's jurisdiction" for the suit and subsequent court orders related to the suit); Palm Beach Towers, Inc. v. Korn, 400 So. 2d 110, 111 (Fla. Dist. Ct. App. 1981) (declining to confer automatic personal jurisdiction simply because the plaintiff filed suit and subjected themselves to the authority of the court and instead remanding for the trial court to determine jurisdiction consistent with Florida law).

151. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 770 (2014) (Sotomayor, J., concurring) (finding "nothing unpredictable" about a rule in which general jurisdiction is borne from continuous corporate contacts with a forum).

152. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion) (highlighting the burden placed on the defendant in having to litigate or continuously litigate in the forum as a reasonableness factor in permitting personal jurisdiction). However, in the context of a large business and/or multiple suits by an individual, repeated and continuous litigation might be enough to constitute minimum contacts. Big businesses likely would have other contacts in the forum state, so the litigation would merely factor into the analysis in determining general jurisdiction and whether the company was at home in that particular forum.

litigated in a state, a defendant (or anyone) could potentially sue him there at any time for anything he did anywhere. This is clearly at odds with the fairness factors required by the Due Process Clause analysis.[153]

As the *Saenger* Court stated, "there is nothing arbitrary or unreasonable in treating [the plaintiff] as being there for all purposes for which justice to the defendant requires his presence."[154] Arguably, because an unrelated counterclaim could theoretically be severed from the original claim with no consequence, and because a defendant does not forfeit his right to bring the counterclaim if he declines to join it with his contemporaneous claims, justice to the defendant does not necessarily *require* the plaintiff's presence in that particular forum. In other words, because there are other, more appropriate forums in which the parties could litigate the permissive counterclaim, "the price which the state may exact as the condition of opening its courts"[155] is too costly to apply to unrelated claims that may have nothing to do with that forum. Again, this hinges on the appropriate balance between fairness and judicial efficiency, but it is clear that providing a convenient forum for a defendant when it might not be convenient or fair for a plaintiff-turned-defendant is not a solution that would meaningfully contribute to solving the problem of economizing litigation between parties.

## CONCLUSION

In light of the foregoing analysis, the most equitable approach, and the approach most consistent with recent personal jurisdiction cases, is to reject the view that a plaintiff constructively submits to any suit when he initiates litigation in a particular forum. Instead, a court should always analyze a plaintiff's connections with the forum, first with respect to minimum contacts and second with respect to traditional notions of fairness, to determine whether the court can exercise personal jurisdiction over him.

The reasons for this treatment are manifold. Because a plaintiff facing an unrelated counterclaim and a defendant are similarly situated, it is logical and fair to treat them similarly for purposes of contesting personal jurisdiction. Further, litigation alone is

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153. *See id.* Here, the burden on the defendant (the plaintiff who is now facing a permissive counterclaim) is absurdly high. *See id.* at 114 (stating that the distance the defendant would have to travel to defend itself, as well as having to navigate a foreign legal system, taken together were "severe" burdens).

154. Adam v. Saenger, 303 U.S. 59, 67–68 (1938).

155. *Id.* at 68.

insufficient to establish personal jurisdiction. If the plaintiff's instance of litigation is isolated and a defendant brings a claim that is unrelated to the initial lawsuit, the plaintiff's activity should not constitute submission to personal jurisdiction, nor should it automatically imply submission to any future suit. Even though the plaintiff voluntarily affiliated with a forum and directed purposeful activity there in commencing an action, the action must be related to the defendant's counterclaim for the plaintiff's minimum contacts to satisfy the Supreme Court's fairness tests. Key among the fairness inquiry is the notion of foreseeability, and while a plaintiff could foresee that a defendant might bring a permissive action against him, foreseeability alone is not enough to make it fair for a court to establish jurisdiction over a plaintiff.

Moreover, concerns of fairness outweigh the interstate judicial system's interest in efficiency. Although it may be desirable to consolidate litigation between two parties in one forum, due process considerations have always controlled and should control in this instance as well. The Court has consistently adhered to five fairness factors, and its primary focus is on the burden to the parties and the interest of the state in resolving controversies. A plaintiff who is forced to defend an unrelated permissive counterclaim should be given the most consideration under the fairness factors because it is likely that his burden will be the highest. Both practical and theoretical problems suggest that a plaintiff should maintain his right to contest jurisdiction for permissive counterclaims, given that he does not have any other ties with the forum state. This view follows the Supreme Court's trajectory in tending to limit personal jurisdiction since *International Shoe*, and it is supported by legal precedent and logic alike.