The Jurisdictional Paradox: Does Textualism Provide an Answer?

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THE JURISDICTIONAL PARADOX: DOES TEXTUALISM PROVIDE AN ANSWER?

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*The Supreme Court in Helicopteros Nacionales de Columbia, S.A. v. Hall provided a standard for specific jurisdiction analysis that a claim should “arise out of” or “relate to” contacts the defendant has with the forum state. But the Court did not expound on these terms, leaving the several circuits to devise their own peculiar jurisdictional methodology by focusing significantly on this language. Without any further guidance, the circuits will continue to respond to the problem by borrowing different tests from tort law to measure a defendant’s activity within a state. The result is that a defendant can be subject to a different standard from circuit to circuit. In light of this, the Court should take the opportunity to address the issue and provide a single jurisdictional standard. In this article I argue that, based on case law, the Third Circuit has rendered the truest test for specific jurisdiction.*

I. INTRODUCTION

The Supreme Court in Helicopteros Nacionales de Columbia, S.A. v. Hall provided a standard for specific jurisdiction analysis that a claim

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should “arise out of” or “relate to” contacts the defendant has with the forum state. But the Court did not expound on these terms, leaving the several circuits to devise their own peculiar jurisdictional methodology by focusing significantly on this language. Without any further guidance, the circuits will continue to respond to the problem by borrowing different tests from tort law to measure a defendant’s activity within a state. The result is that a defendant can be subject to a different standard from circuit to circuit. In light of this, the Court should take the opportunity to address the issue and provide a single jurisdictional standard. In this article I argue that, based on case law, the Third Circuit has rendered the truest test for specific jurisdiction.

II. THE CURRENT STATE OF AFFAIRS

For the first time in over a quarter of a century, the Supreme Court has granted certiorari to two cases involving the “stream of commerce” theory used by state courts to justify lawsuits against foreign companies whose products end up injuring state residents. Whether or not the Court will use the opportunity to resolve the discrepancy among the circuits over the “arise out of” or “related to” language is unclear. In the meantime, the various approaches taken by the several circuits in light of these phrases are still in play, and companies will have to remain wary of when and where they will be subject to jurisdiction.

For example, some circuits, such as the First and the Eighth, apply the proximate-cause test, while others such as the Sixth, Seventh, and Ninth apply the looser but-for test to determine a causal relationship between the defendant’s contacts and the plaintiff’s claim. The Second Circuit does not subscribe to either test. Instead, it employs a test that

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2 Id. at n.10.
3 Id. at n.10. The Court’s decision not to expound results from the fact that they received no briefing on the issue of specific jurisdiction. Plaintiffs stipulated that this was not a case of specific jurisdiction.
primarily considers the totality of circumstances, utilizing a “sliding scale” with general and specific jurisdiction as diametrically opposed endpoints.9

III. INCONSISTENCIES IN HYBRID APPROACHES

The Third Circuit, however, observed that “hybrid” tests such as the sliding-scale omits the causation element.10 It found that since this approach considers the “totality of the circumstances,” there is no distinction between general and specific jurisdiction.11 Contacts are measured quantitatively along a “sliding scale” with general and specific jurisdiction at the endpoints.12 As a result, the Third Circuit has not adopted sliding-scale tests used to gauge personal jurisdiction.13

The Third Circuit deemed “hybrid approaches” too manipulable, offending the separate, dichotomous spheres of specific and general jurisdiction.14 Consequently, it rejects their use for jurisdiction analysis.15 The criticism stems from the uncontrolled flexibility of “hybrid” tests, which allow courts to “vary the scope of the relatedness requirement” according to the “quantity and quality of the defendant’s contacts.”16 In criticizing the Second Circuit’s use of a “sliding scale” in Chew, the Third Circuit opined in O’Connor that, as a result of using a “hybrid approach,” “[g]eneral and specific jurisdiction merge, and the result is a freewheeling totality-of-the-circumstances test. Our cases, however, have always treated general and specific jurisdiction as analytically distinct categories, not two points on a sliding scale.”17

To the Third Circuit, the Supreme Court clearly made two distinctions. If the defendant makes systematic and continuous “affiliations” with the forum, then general jurisdiction is found.18 On the other hand, if the defendant’s contacts are anything less than the general standard, then “at least one contact must give rise or relate to the plaintiff’s claim.”19 When using “hybrid approaches,” the court determined, “all

(D.C. Circuit also applies a “hybrid” approach).

10 Id.
11 Id. at 320.
12 Id.
13 O’Connor, 496 F.3d at 321.
14 Id. (citations omitted).
15 Id.
16 Id.
17 Id.
18 O’Connor, 496 F.3d at 321: “Whatever the merits of [a sliding scale test] it is clear that a fairly sharp dichotomy between [specific and general jurisdiction] still expresses the view of the Supreme Court.”). See also EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS 306 (4TH ED).
19 Id. (emphasis added).
factors come together in ‘a sort of jurisdictional stew.’”20 The Third Circuit’s reasoning is persuasive, because adopting a test that does not confine contacts to two discernable spheres fails to place defendants on notice of where they stand. As a result, they would not be able to, as the Third Circuit says, “control their jurisdictional exposure.”21

IV. THE THIRD CIRCUIT’S HEIGHTENED “BUT-FOR” TEST

The Third Circuit test provides a more balanced approach since it maintains the distinction between general and specific jurisdiction; thus it is in harmony with Supreme Court precedent. This is not to say that the Third Circuit adopted a textualist philosophy in interpreting Supreme Court precedent; however, the court’s specific jurisdiction test most closely follows the text of Helicopteros. The Third Circuit rejects using a “hybrid” approach, holding that sliding-scale tests are in tension with the Supreme Court’s distinction between specific and general jurisdiction.22 It considers the test too variable, because it focuses too much on the quantity and quality of the defendant’s activity.23 Because a sliding-scale test creates such uncertainty, it makes it difficult for a defendant to know whether or not it will be subject to jurisdiction.24 Instead, the Third Circuit created a heightened but-for standard, which compensates for the disparity between the proximate-cause and the but-for tests, while maintaining the causation requirement.

The Third Circuit acknowledged that there is no consensus among the circuits as to the meaning of the phrase “arise out of or related to” in specific jurisdiction analysis, because the Supreme Court has not “explained the scope of this requirement.”25 As a result of the lack of specificity from the Supreme Court, the Third Circuit noted the three standards used by the various circuits to resolve the problem.26 It focused on the third standard, which focuses on hybrid approaches such as: “the

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20 O’Connor, 496 F.3d at 321.
21 Id. (The court noted, “As long as out-of-state residents refrain from continuous and substantial forum contacts, they can conduct their affairs ‘confident that transactions in one context will not come back to haunt them unexpectedly in another.’” This is not the case under a sliding-scale. The court further held, “A standard so formless has no place in our relatedness inquiry.”)
22 O’Connor, 496 F.3d at 320–21.
23 Id. at 321.
24 Id. “The Due Process Clause is supposed to bring a degree of predictability to the legal system.”
25 Id. at 318; see also Helicopteros, 466 U.S. at 415 n.10. (explaining, “We do not address . . . whether the terms ‘arising out of’ and ‘related to’ describe different connections . . . . Nor do we reach the question whether, if the two types of relationship differ, a forum’s exercise of personal jurisdiction in a situation where the cause of action ‘relates to,’ but does not ‘arise out of,’ the defendant’s contacts with the forum should be analyzed as an assertion of specific jurisdiction.”)
26 O’Connor, 496 F.3d at 319.
substantial connection test,” the “discernible relationship test,” and the “the sliding-scale test” used by the Second Circuit. This is an area where the Third Circuit departs from its sister circuit.

In the end, the Third Circuit opined that the but-for test was the better test to “preserve the distinction between general and specific jurisdiction,” since “[the] but-for cause does not shift with the strength of the defendant’s contacts, nor does it slide along a continuum. Rather it draws a bright line separating the related from the unrelated.” The court reasoned, however, that the but-for test has its weaknesses and therefore it requires a more “direct causal connection”.

Primarily, the court found the test can be over-inclusive, explaining, “[The but-for test has . . . no limiting principle; it literally embraces every event that hindsight can logically identify in the causative claim.” The court admonished that “but-for” causes must have a “meaningful relationship” to the “scope of the ‘benefits and protection’ received from the forum;” and, therefore, since some but-for causes “do not relate to their effects in a jurisdictionally significant way,” the relatedness inquiry cannot end with ascertaining a “but-for” cause alone. “If but-for causation sufficed, then defendants’ jurisdictional obligations would bear no meaningful relationship to the scope of the ‘benefits and protection’ received from the forum. As a result, the relatedness inquiry cannot stop at but-for causation.” Therefore, the court answered the dilemma by buttressing the but-for test with the reciprocity principle (or the “quid pro quo” principle) found in Burger King: “The causal connection can be somewhat looser than the tort concept of proximate causation, but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.”

V. TEXTUAL JUSTIFICATION FOR THE THIRD CIRCUIT’S TEST

Textualism as a jurisprudential method of precedent interpretation can arguably derive one standard from a plain reading of the terms as they are. But textualism has historically been linked to statutory interpretation

27 Id.
28 Id. at 323.
29 Id.
30 Id. at 322, 23.
31 Id. at 322.
32 Id. at 323: “We thus hold that specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test . . . But in the course of this necessarily factsensitive inquiry, the analysis should hew closely to the reciprocity principle upon which specific jurisdiction rests. . . The relatedness requirement’s function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact closely tailored to that contact’s accompanying substantive obligations.”
33 Id. at 323.
and not necessarily to a court’s interpretation on the law. Variations of interpreting the Helicopteros’s language led to different results in terms of the relationship between the contacts and the forum state. Textualism has traditionally extended to interpretation of statutes, constitutions and other legal texts; however, its tenets may shed some light here. The courts have read the language to mean to apply one test over the other. Regardless whether the Court declined to decide whether there was a distinction, the circuits have certainly focused on the meaning and application of those terms. Therefore, in cases where there is much focus on the Court’s teaching, reading the text as one would a statute might

34 “If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. I do the same with statutes, by the way, which is why I don't use legislative history. The words are the law.” Justice Antonin Scalia, Associate Justice of the United States Supreme Court, “A Theory of Constitutional Interpretation” Remarks at The Catholic University of America Washington, D.C. (Oct. 18, 1996) (transcript available at Court TV Online) (opining on statutory and constitutional textualism).

35 “The most common way of distinguishing textualism from its principal judicial rival, ‘intentionalism,’ purports to identify a basic disagreement about the proper goal of statutory interpretation: intentionalists try to identify and enforce the ‘subjective’ intent of the enacting legislature, while textualists care only about the ‘objective’ meaning of the statutory text.” Caleb Nelson, What is Textualism? 91 Va. L. Rev. 347 (2005).

36 Helicopteros, 466 U.S. at 415 n.10.

37 “In the United States, however, the common law is embarking on a path towards becoming increasingly textual, just as statutes have been for hundreds of years. It is no exaggeration to say that in this country, the common law consists of what judges write in their opinions. What they think or what they say during the proceedings before them is almost entirely irrelevant. As a result, it is less and less necessary to search for the holding or ratio decidendi of a case; the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does. As a consequence, legal reasoning is gradually being supplanted by close reading . . . . The end result of these two centuries of development in the United States is that what an appellate judge says - for example, during or after oral argument - is completely irrelevant. What matters, for legal purposes, is what judges write in their opinions. Because the text comes straight from the horse's mouth, so to speak, lawyers focus intently on the judges' exact words. The practice of having a single majority opinion, when possible, imbues the text of the opinion with greater power, since it is normally no longer necessary to extract a ratio decidendi from two or more opinions that reach the same result but differ in their reasoning.” Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1188, 1247.

38 “The observation that the Supreme Court has become inclined to set clear guidelines for lower courts to follow, often via multi-part tests, is not novel. Robert Nagel has observed the tendency of the Court during the past few decades to use a ‘formulaic style’ of opinion writing in constitutional cases, a style that makes much use of ‘elaborately layered sets of ‘tests’ or ‘prongs’ or ‘requirements’ or ‘standards’ or ‘hurdles.’ He suggests that the elaborateness and detail of the formulae in constitutional cases is ‘an obvious effort to achieve control and consistency.’ Unlike an earlier era, where judges were subject to ‘simple and undefined maxims,’ modern courts are bound by ‘rules that are specific and multiple.’ Frederick Schauer has also addressed the notion that modern judicial opinions, especially in constitutional cases, ‘read more like statutes than like opinions of a court.’ Schauer’s view is that it is especially courts lower in the hierarchy that are likely to interpret a judicial opinion like a statute: ‘It is not what the Supreme Court held that matters, but what it said . . . One good quote is worth a hundred clever analyses of the holding.’
yield a clearer and fairer result.

Lower courts have to take direction from higher courts and arguably biases or misunderstandings can skew the results of a lower court applying the teachings of a higher court. Many times, as in in the case of jurisdiction for example, having a variety of interpretations can destroy the universal promulgation of law. Thus, courts should be urged to read case law in a rational way through the practice of interpretatio objectificata, or “objectified interpretation.”39

A rational reading of the Court’s jurisprudence on the subject of jurisdiction clearly leads two separate spheres: specific and general. Sliding-scale tests do not comply with that distinction. Therefore, to objectively interpret what the Court means by that a contact must “arise out of or relate to” a claim, a lower court can start with a dictionary definition. The terms “arise out of” mean that the claim must arise, or “come into being” (to originate from a particular source or natural consequence) from the contact. 40 In turn, the terms “related to” mean, in the context of the entire sentence, claims that relate or are associated (the way in which one thing is associated with another; to show nor establish a logical or causal connection between) to a defendant’s activities within the forum state.41 This suggests a more relaxed standard than the former. Therefore, the result is that sometimes specific jurisdiction can be found through a more direct, intimate relationship between a contact and a claim, and at other times, a looser relationship between a contact and a claim is warranted.

One reading of the text calls for using two separate tests. The proximate-cause and but-for tests could be used, as it is now, in separate, exclusive applications.42 The inconsistent results in doing so, however, are apparent in the present circuit split. The problem with applying proximate-
cause alone is that the test is too restrictive. Notwithstanding in the Third Circuit’s qualified version, the problem with the but-for test, as the Third Circuit says, is that it is over-inclusive,\(^{43}\) where unfettered application could result in hauling an unwary defendant into court from contacts too attenuated to the claim.

A second way to keep specific and general jurisdiction distinct would be to apply both the proximate-cause test and the but-for test consecutively within an analysis. The problem here is that if at first the proximate-cause test yielded a negative result for jurisdiction and a subsequent application of the but-for test yielded a positive result for jurisdiction on the same facts and circumstances, the application of the but-for test will render the proximate-cause test superfluous. As a result, applying the two tests consecutively would simply make the relevant test the looser one.

There is another, more natural reading of the language which suggests something in between a strict connection and a looser one. It suggests a test that is broad enough to separate the related from the unrelated, while limiting any over-inclusive effects. The Third Circuit test compensates for the but-for’s inherent limitless application, and thus is consistent with a natural reading of the “arise out of or related to” language.\(^{44}\) When it articulated its version of the test, the court opined that while the but-for test “draws a bright-line between the related and unrelated,” it cautioned against the test’s “overinclusiveness.”\(^{45}\) Therefore, in order to separate the related from the unrelated while applying the “but for” test, a court should examine whether the “causal connection [is] . . . intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.”\(^{46}\)

VI. CONCLUSION

The Supreme Court is constitutionally charged with the responsibility to interpret the law. “Interpretation of the law is its genuine explanation according to the mind of the lawgiver.”\(^{47}\) Textualism provides that law’s interpreter should adhere as close to the text as objectionably and

\(^{41}\) O’Connor, 496 F.3d at 322.

\(^{42}\) Id. at 323; see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2514 (2007) (Scalia, J., concurring) (“The Court and the dissent criticize me for suggesting that there is only one reading of the text. They are both mistaken. I assert only that mine is the natural reading of the statute (i.e., the normal reading), not that it is the only conceivable one.”); Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (reasoning that, “When interpreting . . . we must give words their ‘ordinary or natural’ meaning.”).

\(^{43}\) O’Connor, 496 F.3d at 322.

\(^{44}\) Id. at 323.

\(^{46}\) Id. at 323.

as reasonably as possible. Therefore, a plain, objective and rational reading of the law should not only apply to statutes and constitutions, but also to Court precedent.

It is clear that specific and general jurisdiction are constitutionally distinctive and involve separate analyses; and, as a result of the nonconformity to the meaning of the plain text of Helicopteros, the circuits remain divided. Circuits which exclusively use the proximate-cause test when determining specific jurisdiction may find it difficult to apply it in all circumstances. Conversely, circuits that exclusively adopt the but-for test may find it easier to apply it in all circumstances. The problem there is that indiscriminate application of the but-for test may at times result in jurisdiction over a defendant with contacts too attenuated to the claims. On the other hand, sliding-scale tests blur the divide between the two, as the Third Circuit opines, and make it even more difficult to place a potential defendant on notice as to when they could be hauled into court.

The Third Circuit’s qualified but-for test for jurisdiction, however, tracks closer to a natural reading of the “arise out of or related to” language from Helicopteros. It allows for jurisdiction in cases where the contacts fail to establish a proximate cause to the claim but that nonetheless were a foreseeable consequence of the defendant’s activity. As a result, the test is in harmony with Supreme Court precedent that there remain two dichotomous spheres of jurisdiction; and, it is a more effective barometer to use to place defendants on notice of where they stand.

Substantial justice tempered by fair play is at the heart of due process. What is certain is that having a variety of approaches to resolving jurisdictional questions creates a daunting task for defendants to ascertain the boundaries of their activity. This necessitates the adoption of a uniform standard. Reading cases through objectified interpretation will yield more consistent results and thus preserve the universal promulgation of law.