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Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery

Ryan W. Scott

Note

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French champagne magnate Claude Taittinger received the subpoena while visiting the Gagosian Art Gallery in New York City.[1] Taittinger's family-owned enterprise had entered high-profile securities litigation in Paris against American corporate raider Asher Edelman.[2] Taittinger lived and worked in France, but was not personally a party to the French lawsuit.[3] Undaunted, Edelman's lawyers demanded that Taittinger serve as a nonparty witness in the dispute by returning to the Southern District of New York for a deposition and surrendering documents he created and stored in France, citing a federal statute designed to obtain discovery in the United States for use in litigation abroad.[4]

Elsewhere in Manhattan, Takao Sasaki felt "ambushed."[5] As a general manager at Japanese reinsurer Aioi Insurance, Sasaki had just wrapped up unsuccessful negotiations aimed at avoiding a lawsuit with Fortress Re, a North Carolina reinsur-

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1. *In re* Edelman, 295 F.3d 171, 174 (2d Cir. 2002).

2. For a lively background on the dispute that precipitated the French litigation, see Dana Nigro, *Champagne's Taittinger Family Battles Corporate Raider*, WINE SPECTATOR, Jan. 31, 1999, http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,2047,00.html.

3. *Edelman*, 295 F.3d at 174.

4. *In re* Edelman, No. M19-70, 2001 WL 1877451, at *1 (S.D.N.Y. Feb. 28, 2001) (construing 28 U.S.C. § 1782 (2000)), *vacated by* 295 F.3d at 181–82.

5. *In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8-85, 2002 WL 1870084, at *2 (S.D.N.Y. Aug. 14, 2002).

ance underwriting firm already embroiled in litigation with some of Aioi's competitors.[6] As the meeting ended, lawyers for Fortress Re served a subpoena, demanding that Sasaki act as a nonparty witness in an ongoing lawsuit in North Carolina.[7] His attorneys vigorously protested, claiming that Fortress Re had "induced" Sasaki, a resident of Japan who made infrequent trips to the United States, to attend the meeting.[8]

Both men moved to quash the subpoenas, arguing that as nonparties, with few contacts in the forum state and no direct stake in the underlying litigation, the court lacked personal jurisdiction over them.[9] In both cases, the courts disagreed, finding that the witnesses "'knew, or should have known, that by' [traveling to] New York, [they were] 'risking exposure to personal jurisdiction in New York.'"[10] After all, the courts reasoned, if the state could properly exercise jurisdiction over them as defendants,[11] "there is no reason why service of a subpoena under Rule 45(b)(2), 'which is simply a discovery mechanism and does not subject a person to liability, requires more.'"[12]

Taittinger and Sasaki's experiences as nonparty witnesses highlights the uneasy relationship between nonparty discovery and personal jurisdiction. The courts in each case make two important assumptions: (1) that due process limits on personal jurisdiction apply to nonparties at all, and not just to defen-

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6. *Id.* at *1.

7. *See id.* at *2.

8. *Id.* at *3.

9. More accurately, Taittinger had the personal jurisdiction debate thrust upon him when the Second Circuit relied on the Supreme Court's personal jurisdiction case law in construing 28 U.S.C. § 1782(a). *See Edelman*, 295 F.3d at 179.

10. *Application for Order*, 2002 WL 1870084, at *2 (quoting First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20–21 (2d Cir. 1998)); *Edelman*, 295 F.3d at 179.

11. *See* Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (Scalia, J., plurality opinion) (holding that personal service of a defendant physically present in a forum state always confers constitutionally sufficient personal jurisdiction).

12. *Application for Order*, 2002 WL 1870084, at *2 (quoting *Edelman*, 295 F.3d at 179). Fortunately for Sasaki, the court accepted his alternative argument that the subpoena ran afoul of the 100-mile limit on depositions in Federal Rule of Civil Procedure 45(c)(3)(A)(ii). *Id.* at *5. The court quashed the subpoena on those grounds, while noting that personal jurisdiction would have been proper for other forms of discovery. *Id.* at *5–7. Taittinger was not so lucky, as the Second Circuit vacated the district court's order quashing the subpoena and remanded all other challenges. *Edelman*, 295 F.3d at 180–81.

dants;[13] and (2) that the Supreme Court's approach to personal jurisdiction over defendants is workable for nonparty discovery.[14] As the volume and complexity of international litigation in American courts grow,[15] such assumptions will come under sharp scrutiny, as parties increasingly seek testimony and documents from distant nonparty witnesses like Taittinger and Sasaki.

This Note tests both assumptions, arguing that courts' personal jurisdiction analysis must reflect the fact that nonparties have "no dog in the fight."[16] Part I recounts the development of the law of nonparty discovery and personal jurisdiction in the United States. Part II considers whether due process grants nonparties a constitutional right to avoid discovery for lack of personal jurisdiction and, if so, how courts should give effect to that right. The Note concludes that due process indeed imposes a personal jurisdiction limit on nonparty discovery, and that the "minimum contacts" test offers the best framework for evaluating such claims. It also proposes that courts revisit four aspects of the minimum contacts analysis before considering challenges by nonparty witnesses: specific jurisdiction, unilateral activity, transient jurisdiction, and the "fair play and substantial justice"[17] prong.

I. A DOG'S AGE

Any discussion of the intersection between nonparty discovery and personal jurisdiction must begin with a review of each subject. Part I lays this groundwork, and then describes federal and state court responses in cases where nonparty witnesses have objected to the personal jurisdiction of the court. First, it provides an overview of nonparty civil discovery, both at common law and under modern discovery regimes. Second, it traces the development of the minimum contacts analysis, from

13. *See Application for Order*, 2002 WL 1870084, at *2.

14. *See id.*

15. *See, e.g.*, John H. Robinson, *The Extraterritorial Application of American Law: Preliminary Reflections*, 27 J.C. & U.L. 187, 203 (2000); Lucinda A. Low, *Virtually All Areas of Law Profession Face Globalization*, NAT'L L.J., Aug. 5, 1996, at C9.

16. To have "no dog in the fight" or "no dog in the hunt" means to have no stake or interest in a conflict. *See, e.g.*, Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998).

17. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

International Shoe Co. v. Washington[18] to the Court's lone consideration of personal jurisdiction over nondefendants in *Phillips Petroleum Co. v. Shutts*.[19] Third, it summarizes recent federal and state court decisions evaluating personal jurisdiction for nonparty subpoenas. Part I reveals that courts, taking their cue from the disparate legal underpinnings of nonparty discovery and personal jurisdiction, have adopted a haphazard range of approaches when the two bodies of law collide.

A. DOGGING THE DOGLESS: NONPARTY CIVIL DISCOVERY IN AMERICAN COURTS

1. Where Certainty Wanteth: Nonparty Discovery at Common Law

Civil discovery in American courts originated in English Chancery courts as the bill of discovery.[20] Initially designed to facilitate pretrial discovery in equity suits,[21] the bill of discovery gradually made its way into actions at law.[22] Bills of discovery enabled any party to bring an action against a party or nonparty demanding testimony, documents, and other tangible things to assist in developing a case or defense.[23] While often styled as independent actions, bills of discovery were treated not as separate injunctive actions but as an extension of the inherent power of equity courts.[24] The Supreme Court formally endorsed the device in 1933,[25] but the bill of discovery was dis-

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18. *Id.*

19. 472 U.S. 797, 812 (1985).

20. Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring). While the subpoena ad testificandum gave courts at law a mechanism to secure the attendance of witnesses at trial, the device played no role in pretrial discovery. Colin Tapper, *Discovery in Modern Times: A Voyage Around the Common Law World*, 67 CHI.-KENT L. REV. 217, 220 (1991).

21. Discovery in Chancery courts began "as early as the reign of Henry VI," who proclaimed that "'[w]here certainty wanteth the common law faileth, but yet help is to be found in Chancery for it.'" 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 678 (1846) (quoting Statute of 36 Hen. VI 26) (alteration in original).

22. GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 12–13 (1932).

23. *See* Sarah N. Welling, *Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110, 131–32 (1983).

24. *See* Berger v. Cuomo, 644 A.2d 333, 337 (Conn. 1994).

25. *See* Sinclair Ref. Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 693 (1933) (stating that because "[a]t times, cases will not be proved, or will be proved clumsily or wastefully, if a litigant is not permitted to gather his evi-

placed by the first Federal Rules of Civil Procedure a few years later.[26]

Several common law limitations on the bill of discovery weakened its effectiveness with respect to nonparties. As a general rule, courts simply lacked the power to issue a bill of discovery against a nonparty.[27] While courts occasionally carved out exceptions, a bill of discovery would never lie against a "mere witness."[28] Under this restriction, courts could not order equitable discovery against a nonparty who had no interest in the underlying dispute,[29] although courts rarely defined the requisite interest with much precision.[30] Also, the common law fixation with preventing "fishing expeditions"[31] translated into a requirement that bills of discovery state with specificity the materials requested[32]—frequently a tall order for discovery

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dence in advance . . . a bill in equity is maintainable to give him what he needs" as long as "this necessity is made out with reasonable certainty").

26. FED. R. CIV. P. 26 advisory committee's note on subdivision (a) (1937); Welling, *supra* note 23, at 132 n.117.

27. *See* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1862, at 631–32 (James H. Chadbourn ed., 1976).

28. *E.g.*, Dehne v. Hillman Inv. Co., 110 F.2d 456, 458 (3d Cir. 1940) ("At common law a bill of discovery was demurrable if it lay against a defendant who was a mere witness."); Post v. Toledo, Cincinnati & St. Louis R.R., 11 N.E. 540, 547 (Mass. 1887) ("It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses."); Arcell v. Ashland Chem. Co., 378 A.2d 53, 71 (N.J. Super. Ct. Law Div. 1977) ("It is clear that a 'mere witness' cannot be named a defendant in an action for discovery."); 1 EDWARD BRAY, THE PRINCIPLES AND PRACTICE OF DISCOVERY 42 (Legal Books 1985) (1885) ("A mere witness cannot be made a party to an action however essential the discovery which he could give might be to the plaintiff.").

29. *See* 1 J. POMEROY, EQUITY JURISPRUDENCE § 199 (4th ed. 1918) (stating that courts require a nonparty to have "an interest in the subject-matter of the controversy in aid of which the discovery is asked").

30. *See Arcell*, 378 A.2d at 71; Welling, *supra* note 23, at 135 n.133 (speculating that the "mere witness" rule "reflects a notion that nonparties have a right not to be inconvenienced and drawn into others' litigation unless they have some interest in it"). Some authorities suggest that, historically, equity courts limited discovery to persons having "such an interest in the action that they would be directly affected by the decree," a rule "tantamount to saying that discovery could not be had from witnesses or from any other third persons not parties." RAGLAND, *supra* note 22, at 46–47.

31. *See Post*, 11 N.E. at 547 (noting that "a bill of discovery cannot be used to enable a plaintiff to fish for information of any causes of action . . . against other persons than the defendant"). *But see* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

32. Welling, *supra* note 23, at 133.

from nonparties with no interest in the case. As a result, historically, courts rarely forced nonparties to submit to discovery in civil disputes.[33]

2. Every Man's Evidence: Nonparty Discovery Today

The Federal Rules of Civil Procedure supplanted equitable bills of discovery in the federal courts in 1937, and as state courts adopted similar discovery regimes, the bill of discovery fell into disuse.[34] While courts today occasionally assert that the public has a "right to every man's evidence,"[35] that right is far from absolute.

Even under greatly liberalized modern discovery rules, nonparties enjoy considerable protection from burdensome discovery requests. Rule 45, for example, places an express 100-mile territorial limit on subpoenas that require a nonparty to give a deposition in person.[36] Courts may refuse discovery requests aimed at nonparties in cases where the same testimony or documents could instead be obtained from a party to the action.[37] Under some circumstances, nonparties may file an immediate appeal of a discovery order on the theory that "the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance."[38] A few courts even impose a heightened relevancy requirement for nonparty discovery requests.[39]

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33. This Note focuses on the subpoena power of courts in civil actions. It does not address the scope of the subpoena power in criminal cases, where a range of factors, including the constitutional right to confront witnesses, may alter the constitutional standard.

34. Welling, *supra* note 23, at 132 n.117. *But see* Wolfe v. Mass. Port Auth., 319 N.E.2d 423, 424 (Mass. 1974) (stating that revised civil discovery rules do not supplant, but merely supplement, equitable bills of discovery under Massachusetts law).

35. Jaffee v. Redmond, 518 U.S. 1, 9–10 & n.8 (1996) (acknowledging public's right to "every man's evidence" but upholding psychotherapist's testimonial privilege); *see also* Anker v. G.D. Searle & Co., 126 F.R.D. 515, 519 (M.D.N.C. 1989) (acknowledging that the public's right to evidence cannot infringe on "constitutional, statutory or common law privileges").

36. FED. R. CIV. P. 45(c)(3)(A)(ii). This 100-mile limit, by its own terms, extends only to "travel," and thus has no effect on requests for documents or tangible things under Rule 34. *See id.*

37. *See, e.g.*, Haworth, Inc. v. Herman Miller, Inc., 998 F.2d 975, 978 (Fed. Cir. 1993) (requiring the plaintiff to "seek discovery from its party opponent before burdening the nonparty" with requests for settlement documents).

38. Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992).

39. *E.g.* Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D.

Most importantly, federal and state discovery rules protect nonparties by almost universally requiring the court to balance the need for requested discovery against the expense of compliance,[40] and empowering courts to modify or quash subpoenas that impose an undue burden.[41] Courts usually give special solicitude to nonparties in this calculation,[42] recognizing that nonparty witnesses have "no dog in that fight."[43] Quite apart from questions of personal jurisdiction, then, nonparties enjoy considerable protection from excessive discovery.

B. TOP DOG: THE EMERGENCE OF MINIMUM CONTACTS

The United States Supreme Court inaugurated the modern formula for evaluating personal jurisdiction in *International Shoe Co. v. Washington*,[44] holding that due process requires a defendant to "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[45] Subsequent cases have refined and shaped the minimum contacts analysis.[46] The Supreme Court curtailed the scope of the personal jurisdiction requirement by rejecting its extension to absent class-action plaintiffs in *Phillips Petroleum Co. v. Shutts*.[47]

463, 467 (W.D. Tenn. 1999). *But see* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459, at 46 (3d ed. 1995) (noting that "there is no basis for this distinction in the rule's language").

40. *See* FED. R. CIV. P. 26(b)(2).

41. *See* FED. R. CIV. P. 45(c)(B)(iv).

42. *See* Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) (stating that the rules "afford nonparties special protection against the time and expense of complying with subpoenas"); Monarch Healthcare v. Superior Court, 93 Cal. Rptr. 2d 619, 625 (Cal. Ct. App. 2000) (describing California discovery procedures as "generally less onerous for strangers to the litigation"); Allstate Ins. v. Boecher, 705 So. 2d 106, 107 (Fla. Dist. Ct. App. 1998) ("[T]he nature of protection for a *party* from relevant discovery requests is qualitatively different from that afforded to someone who is merely a witness.").

43. Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) (noting that while parties must expect invasive discovery in modern litigation, "[n]onparties have a different set of expectations" and "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs").

44. 326 U.S. 310 (1945).

45. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

46. *See* Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory Is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 515–17 (2003).

47. 472 U.S. 797, 812 (1985).

Four other developments have particular relevance to nonparty discovery: (1) the widespread recognition of general and specific jurisdiction;[48] (2) the rejection of jurisdiction based on the unilateral activity of third parties;[49] (3) the approval of transient jurisdiction based on physical presence in the forum state;[50] and (4) the emergence of a multifactor reasonableness inquiry separate from the aggregation of contacts.[51]

1. *Phillips Petroleum* and the Scope of the Personal Jurisdiction Requirement

In the nearly sixty years since *International Shoe*, the Supreme Court has never applied the minimum contacts analysis to a nonparty.[53] Only once, in *Phillips Petroleum*, has it considered applying the test to a nondefendant.[55] The case involved a defendant's challenge to the Kansas court's personal jurisdiction over certain non-named class-action plaintiffs, joined automatically through a class "opt out" notice,[56] who lacked any pre-litigation contacts with the state.[57] Despite the fact that the minimum contacts analysis was designed to protect defendants from litigation in a distant forum,[58] the Court acknowledged that "[t]he Fourteenth Amendment does protect 'persons,' not

48. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 nn.8–9 (1984).

49. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

50. *See* Burnham v. Superior Court, 495 U.S. 604, 628 (1990).

51. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 113–15 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–94 (1980).

52. 326 U.S. 310 (1945).

53. The Court has hinted, however, that due process requires a court to have personal jurisdiction over the party before issuing discovery orders. *See* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) (holding that "the subpoena power of a court cannot be more extensive than its jurisdiction," but passing only on a challenge to subject matter jurisdiction); Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) (affirming jurisdiction over a defendant based on constructive consent, where the court deemed personal jurisdiction admitted as a sanction for discovery abuses, and noting that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties").

54. 472 U.S. 797 (1985).

55. 472 U.S. 797, 803–06 (1985).

56. *Cf.* FED. R. CIV. P. 23(c)(2)(B) (requiring federal courts, in a class-action, to "exclude from the class any member who requests exclusion").

57. *Phillips Petroleum*, 472 U.S. at 806.

58. *Id.* at 807.

'defendants,'" meaning that absent plaintiffs deserve due process protection when a distant state attempts to adjudicate their claims.[59] The Court upheld Kansas's jurisdiction, however, reasoning that "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order of magnitude as those it places upon an absent defendant."[60] Emphasizing that a range of class-action devices protects the rights of absent plaintiff class members,[61] the Court held that Kansas could properly exercise jurisdiction even though the same contacts would not support jurisdiction over a defendant.[62] It adopted instead a requirement for simple procedural due process, requiring only notice, an opportunity to be heard, and the right to opt out of inclusion in the class.[63]

Phillips Petroleum makes two valuable contributions to a discussion of personal jurisdiction in nonparty discovery. First, it confirms the obvious: the Fifth and Fourteenth Amendments guarantee due process to persons, not parties.[64] This language suggests some constitutional limit on courts' jurisdiction over nonparties, despite the Court's longstanding focus on defendants. Second, *Phillips Petroleum* reveals the Court's approach when determining whether personal jurisdiction protections apply to classes of persons other than defendants.[65] If the burdens imposed by the court are "of the same order or magni-

59. *Id.* at 811.

60. *Id.* at 808. The Court cited a number of burdens facing out-of-state defendants not applicable to class-action plaintiffs: the "full powers of the forum State to render judgment *against* it," the need to "hire counsel and travel to the forum to defend itself," the risk of default judgment, the prospect of "extended and often costly discovery," and the cost of a judgment on the merits of the suit. *Id.* Broadly, the Court noted that "[u]nlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything," but "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* at 810.

61. *Id.* at 810–11.

62. *Id.* at 811.

63. *Id.* at 811–12.

64. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

65. *See Phillips Petroleum*, 472 U.S. at 811–12. The Supreme Court has since confirmed that absent class-action plaintiffs "could not invoke the same due process limits on personal jurisdiction that out-of-state defendants had under *International Shoe*" but could raise procedural due process concerns. Ortiz v. Fibreboard Corp., 527 U.S. 815, 847–48 (1999).

tude"[66] as those imposed on out-of-state defendants, due process imposes a corresponding level of protection.

2. Specific and General Jurisdiction

Professors Arthur von Mehren and Donald Trautman first proposed the terms "general jurisdiction" and "specific jurisdiction" to categorize courts' treatment of personal jurisdiction over out-of-state defendants.[67] The Supreme Court adopted their formulation in *Helicopteros Nacionales de Columbia, S.A. v. Hall*,[68] noting that a state exercises specific jurisdiction in suits "arising out of or related to the defendant's contacts with the forum," and exercises general jurisdiction in suits "not arising out of or related to the defendant's contacts with the forum."[69] Specific jurisdiction makes possible the exercise of personal jurisdiction based on a limited set of contacts, even a defendant's single act, if sufficiently related to the underlying lawsuit.[70] General jurisdiction, in contrast, requires such "continuous and systematic" contacts that the forum could assert jurisdiction over the defendant in any action.[71]

Notably, the Supreme Court has endorsed specific jurisdiction only over defendants;[72] it has never invoked specific jurisdiction in evaluating plaintiff personal jurisdiction[73] or while evaluating a subpoena or other discovery motion distinct from the underlying suit.

3. Unilateral Activity

In one of its earliest elaborations on the minimum contacts analysis, the Court in *Hanson v. Denkla*[74] held that "[t]he unilateral activity of those who claim some relationship with a

66. *Phillips Petroleum*, 472 U.S. at 808.

67. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

68. 466 U.S. 408 (1984).

69. *Id.* at 414 nn.8–9. These concepts subsequently "have become the touchstones of contemporary personal jurisdiction analysis." Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611 (1988).

70. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 n.18 (1985).

71. *See Helicopteros*, 466 U.S. at 415–16.

72. *See* Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001).

73. The Court had an opportunity in *Phillips Petroleum*, but declined to apply a minimum contacts analysis for absent class-action plaintiffs. *See supra* notes 55–63 and accompanying text.

74. 357 U.S. 235 (1958).

nonresident defendant cannot satisfy the requirement of contact with the forum State."[75] Subsequent decisions have reinforced that the Court will not look to the unilateral conduct of nondefendants in evaluating personal jurisdiction over defendants.[76] This principle reflects two concerns. First, unilateral acts by plaintiffs or third parties do not fit the Court's quid pro quo rationale: "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[77] Second, unilateral acts by plaintiffs or third parties do not provide adequate notice to a defendant that it may face a lawsuit in the forum. This matters because an important function of the Due Process Clause is to "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary contact with some minimum assurance as to where that conduct will and will not render them liable to suit."[78] In *Kulko v. Superior Court*,[79] for example, the Supreme Court held that California lacked personal jurisdiction over a nonresident father in an action for child support, where the defendant's only relevant contact with the state was "consenting" to the children living with their mother after she moved there from New York.[80]

4. Transient Jurisdiction Based on Physical Presence

In another personal jurisdiction milestone, the Court in *Burnham v. Superior Court*[81] reached the deceptively straightforward[82] holding that a state may assert personal jurisdiction,

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75. *Id.* at 253.

76. *See, e.g.*, *Helicopteros*, 466 U.S. at 416–17 (finding that the plaintiff's payments, drawn from a nonparty bank in Texas, did not support Texas's jurisdiction over the defendant Columbian corporation); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (finding that the plaintiff's unilateral act of driving a car to Oklahoma after its sale in New York did not support Oklahoma's jurisdiction over the regional auto distributor and dealership); Kulko v. Superior Court, 436 U.S. 84, 93–96 (1978) (finding that a husband's consent to his estranged wife's move to California to raise their children did not support California's jurisdiction over the husband in a child support action).

77. *See Hanson*, 357 U.S. at 253.

78. *See World-Wide Volkswagen*, 444 U.S. at 297.

79. 436 U.S. 84 (1978).

80. *Id.* at 87–88, 94.

81. 495 U.S. 604 (1990).

82. *See* Robert Taylor-Manning, Note, *An Easy Case Makes Bad Law—*

consistent with due process, over any defendant physically present and personally served within its borders ("transient" or "tag" jurisdiction).[83] While all nine Justices concurred in the result, the various *Burnham* opinions announce a tangle of competing rationales.[84] Writing for the four-vote plurality, Justice Scalia proposed that personal service within state boundaries single-handedly satisfied due process because the practice stood "[a]mong the most firmly established principles of personal jurisdiction in American tradition."[85] Writing a four-vote concurrence, Justice Brennan rejected the suggestion that "all traditional rules of jurisdiction are, *ipso facto*, forever constitutional."[86] He agreed that physical presence necessarily satisfied due process, but for different reasons. First, Justice Brennan found the pedigree of the rule, while not dispositive, relevant to the analysis in that a time-honored rule provides visitors to a forum state with ample notice that they may be subject to suit.[87] Second, he reasoned that physical presence necessarily implies some degree of purposeful availment of various benefits of the forum state.[88] Third, he noted that physical presence in the forum suggests that defending the suit would involve only slight inconvenience, because the defendant had already visited at least once.[89] Separately, Justice White expressed concern that without a bright-line rule, courts would face "endless, fact-specific litigation" in personal service cases.[90] Justice Stevens, writing for himself and staying above the fray, vaguely endorsed all three opinions,[91] leaving the precise ra-

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Burnham v. Superior Court of California, 66 WASH. L. REV. 623, 629–30 (1991) (criticizing *Burnham* for "fail[ing] to resolve the underlying historical, legal, and equitable issues involved").

83. *Burnham*, 495 U.S. at 628 (Scalia, J., plurality opinion).

84. *See id.* at 628 (Scalia, J., plurality opinion); *id* (White, J., concurring); *id.* at 640 (Brennan, J., concurring); *id.* (Stevens, J., concurring).

85. *Id.* at 610 (Scalia, J. plurality opinion). For Justice Scalia, a long and continuing tradition of personal jurisdiction based on physical presence settled the matter, and "the crucial time" was "1868, when the Fourteenth Amendment was adopted." *Id.* at 611 (Scalia, J. plurality opinion).

86. *Id.* at 629 (Brennan, J., concurring).

87. *Id.* at 637–39 (Brennan, J., concurring).

88. *Id.* at 637–38 (Brennan, J., concurring) (citing police, fire, and emergency services, along with the reciprocal promise of acces to the forum state's courts as guaranteed by the Privileges and Immunities Clause, as "contacts" that justify jurisdiction over defendants physically present in the forum state).

89. *Id.* at 638 (Brennan, J., concurring).

90. *Id.* at 628 (White, J., concurring).

91. *Id.* at 640 (Stevens, J., concurring).

tionale of *Burnham* hopelessly unclear.

5. Fair Play and Substantial Justice for Defendants

A final relevant development in the minimum contacts framework came in *World-Wide Volkswagen Corp. v. Woodson*,[92] where the Court articulated a multifactor reasonableness inquiry to evaluate the "fair play and substantial justice" prong of the test:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute . . . the plaintiff's interest in obtaining convenient and effective relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies . . . and the shared interest of the several States in furthering fundamental substantive social policies.[93]

This balancing test may reduce the degree of contact otherwise required between a defendant and the forum,[94] and turns in large part on the facts of each case.[95]

The forum's interest in resolving the dispute goes to a state's desire to provide an "effective means of redress for its residents,"[96] and may strongly support the reasonableness of jurisdiction when a resident plaintiff seeks relief for injury caused within the state's borders.[97] On the other hand, where a nonresident brings the suit or where the injury occurred out-of-state, the forum's lack of interest cuts against the reasonableness of jurisdiction.[98] Among the few points of agreement for the Court in *Asahi Metal Industry Co. v. Superior Court*[99] was that California's assertion of jurisdiction over a Japanese component manufacturer offended traditional notions of fair play and substantial justice under the multifactor reasonableness test.[100] The Court held that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of

92. 444 U.S. 286, 292 (1980).
93. *Id.* at 292.
94. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).
95. *Id.* at 486 n.29.
96. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).
97. *See Burger King*, 471 U.S. at 482–83.
98. *See World-Wide Volkswagen*, 444 U.S. at 298.
99. 480 U.S. 102 (1987).
100. *Id.* at 114 (O'Connor, J., writing for eight Justices).

stretching the long arm of personal jurisdiction over national borders."[101] The Court's use of "foreign" to describe the American legal system is something of a double entendre, as the Court emphasized that the burden on the defendant stemmed "not only [from] travers[ing] the distance"[102] between Japan and California, but more qualitatively from being forced to "submit its dispute . . . to a foreign nation's judicial system."[103]

These and other developments in the minimum contacts framework have resulted in a workable jurisprudence of personal jurisdiction over defendants in American courts.[104] As the next section indicates, however, courts have struggled to apply the same principles of personal jurisdiction to nonparty discovery.

C. DOG AND PONY SHOW: COMPETING APPROACHES TO PERSONAL JURISDICTION FOR NONPARTY WITNESSES

A survey of federal and state case law evaluating personal jurisdiction for nonparty discovery reveals haphazard, often competing approaches. Courts and authorities disagree, from the outset, about whether due process imposes a limit on personal jurisdiction over nonparty witnesses at all. When they do recognize such a requirement, they disagree about the proper method of analysis, typically adopting some opaque version of a minimum contacts test. They have produced particularly uneven results when attempting to import concepts designed for defendants, including specific jurisdiction, unilateral activity, transient jurisdiction, and the "fair play and substantial justice" reasonableness test.

1. Minimum Contacts with Minimum Explanation

The majority of federal courts to consider the question acknowledge some elementary, if imprecise, constitutional limit on personal jurisdiction over nonparty witnesses.[105] Where they

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101. *Id.* at 114.

102. *Id.* at 113.

103. *Id. But see* Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573–74 (2d Cir. 1996) (considering only inconvenience based on distance in assessing the "[b]urden on the [d]efendant").

104. *See* Burnham v. Superior Court, 495 U.S. 604, 633 n.7 (1990) (Brennan, J., concurring) ("Our experience with this approach demonstrates that it is well within our competence to employ.").

105. A number of cases have held that due process imposes a limit on personal jurisdiction over nonparty witnesses. *See, e.g.*, First Am. Corp. v. Price

have reached the question, federal courts usually apply some species of minimum contacts test.[106] Their decisions, however, typically forego any serious discussion of the applicable personal jurisdiction standard for nonparty witnesses.

Many state courts, on the other hand, hold that limits on personal jurisdiction do not extend to nonparty witnesses. The

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Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998) (holding that service of a subpoena on a nonparty witness physically present in the district satisfies due process); *In re* Application to Enforce Admin. Subpoenas Duces Tecum of SEC v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996) (requiring that the Bahamian nonparty subject to an administrative agency subpoena possess minimum contacts with the United States); Innomed Techs., Inc. v. Worldwide Med. Techs., Inc., 267 F. Supp. 2d 1171, 1173 (M.D. Fla. 2003) (denying motion "to compel immediate and significant discovery from non-parties over whom this Court has determined that it has no personal jurisdiction"); *In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8-85, 2002 WL 1870084, at *2–3 (S.D.N.Y. Aug. 14, 2002) (finding due process satisfied based on personal service of the subpoena within the district); *In re* Jee, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989) (acknowledging the need for personal jurisdiction over nonparty witnesses, and finding both general and specific jurisdiction available); Ghandi v. Police Dep't, 74 F.R.D. 115, 121 (E.D. Mich. 1977) (upholding nonparty document subpoena of an FBI field office based on minimum contacts); Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (quashing document subpoena based on complete lack of contacts with the forum); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.125 (3d ed. 2003) (stating that "[a] nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court," but citing no authority for this proposition).

Other cases appear to recognize such a limit in dicta. *See, e.g.*, *In re* Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998) (recognizing that in Rule 45 discovery transfer motions "a transferee court . . . would often lack personal jurisdiction over the nonparty"); *In re* United States Catholic Conference, 824 F.2d 156, 161 (2d Cir. 1987), *rev'd on other grounds sub nom.*, United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (holding that nonparty witnesses have standing to appeal civil contempt sanctions for any reason that "concerns the witness personally," including "the district court's personal jurisdiction over the witness"); Ariel v. Jones, 693 F.2d 1058, 1061 (11th Cir. 1982) (quashing a subpoena based in part on the nonparty witness's "minimal contacts . . . with the southern district of Florida"); FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1321 n.119 (D.C. Cir. 1980) (assuming that "just as a court may not validly exert its adjudicative authority over a defendant lacking 'minimum contacts' with the forum . . . the FTC is subject to some limitations on its personal jurisdiction—set by the Due Process Clause of the Constitution"); Ion Beam Applications, S.A. v. Titan Corp., 156 F. Supp. 2d 552, 561–62 (E.D. Va. 2000) (noting on a motion to transfer venue that "[t]his Court has no greater subpoena power over out-of-state witnesses than does the Southern District of California").

106. *See, e.g.*, *Knowles*, 87 F.3d at 418; *Ariel*, 693 F.2d at 1060–61; *Jee*, 104 B.R. at 293; *Ghandi*, 74 F.R.D. at 121; *Elder-Beerman Stores*, 45 F.R.D. at 516; WRIGHT & MILLER, *supra* note 39, § 2454.

Oklahoma Court of Appeals, for example, has expressly confined the minimum contacts analysis to parties, rendering *International Shoe* and its progeny "inapplicable" to discovery.[107] Other states have reached the same result, reasoning that "[t]he underlying concepts of personal jurisdiction and subpoena power are entirely different."[108]

That federal courts would turn to minimum contacts, even for nonparties, comes as no great surprise. When a federal court invokes diversity jurisdiction, it necessarily hears cross-border disputes that may implicate witnesses and documents outside the state where it resides.[109] Many federal question cases involve federal statutes with nationwide service-of-process or venue provisions that make possible far-flung sources of discoverable information.[110] Importing the minimum contacts analysis to nonparty discovery extends the reach of the subpoena beyond that provided by a traditional territorial approach,[111] making it useful to facilitate the breadth of nonparty discovery required in federal cases. Moreover, since *International Shoe*, the minimum contacts test has become the most widely known (and widely litigated) method for evaluating due process limits on personal jurisdiction.[112]

Remarkably, despite declining to require minimum contacts for nonparty witnesses, most state courts provide out-of-

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107. Craft v. Chopra, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995).

108. *In re* Nat'l Contract Poultry Growers' Ass'n, 771 So. 2d 466, 469 (Ala. 2000). The Alabama Supreme Court's reasoning is illustrative:

> Personal jurisdiction is based on conduct that subjects the nonresident to the power of the Alabama courts to adjudicate its rights and obligations in a legal dispute. . . . By contrast, the subpoena power of an Alabama court over an individual or a corporation that is not a party to a lawsuit is based on the power and authority of the court to compel the attendance of a person at a deposition or the production of documents by a person or entity.

Id.; *see also* Phillips Petroleum Co. v. OKC L.P., 634 So. 2d 1186, 1187–88 (La. 1994) (same).

109. *See* 28 U.S.C. § 1332(a)(1) (2000) (granting federal courts jurisdiction over controversies between "citizens of different States").

110. *See, e.g.*, 29 U.S.C. § 1132(e)(2) (2000) (authorizing national service of process for actions brought under Employee Retirement Income Security Act); 15 U.S.C. § 22 (2000) (making venue proper in private enforcement antitrust actions in any district in the United States where the defendant "may be found or transacts business").

111. *See* Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37, 67 (1989).

112. *See* Twitchell, *supra* note 69, at 611.

state nonparties greater insulation from discovery than do federal courts.[113] This reflects the traditional concept of states as sovereign powers, exercising plenary jurisdiction within their territories but largely powerless beyond state lines.[114] Most states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found outside the state.[115]

Courts at the federal and state level disagree, then, over fundamental questions about the applicability of the personal jurisdiction requirement to nonparty witnesses and the proper framework for analysis. Even where courts have agreed on some species of minimum contacts test, however, the following sections reveal that the uncritical adoption of case law designed for defendants has produced mixed results.

2. Specific Jurisdiction, Applied Generally

A few federal courts have invoked specific jurisdiction in enforcing subpoenas against an out-of-state nonparty. The most influential decision, from the Tenth Circuit, upheld document subpoenas issued by the Securities and Exchange Commission against the former president of two Bahamian corporations suspected of bribing American brokers.[116] The court noted that the witness's contacts with the United States related directly to his activity as president of the corporations under investiga-

113. *See* Welling, *supra* note 23, at 146–47 (citing Texas and New York provisions demanding higher standards of proof for nonparty discovery requests, under provisions analogous to Rule 34 of the Federal Rules of Civil Procedure).

114. *Cf.* FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980) (analyzing subpoena power of federal administrative agency under principles of international law).

115. *See, e.g.*, *In re* Nat'l Contract Poultry Growers' Ass'n, 771 So. 2d 466, 469 (Ala. 2000); Armstrong v. Hooker, 661 P.2d 208 (Ariz. Ct. App. 1982); *In re* Special Investigation No. 219, 445 A.2d 1081 (Md. Ct. Spec. App. 1982); Estate of Mirsky, 546 N.Y.S.2d 951, 953 (N.Y. Sur. 1989); MOORE ET AL., *supra* note 105, § 108.125. For a thorough review of the territorial reach of state courts' subpoena power, see Wasserman, *supra* note 111, at 67–75, concluding that while "*every* state has adopted a long-arm statute authorizing assertions of personal jurisdiction over nonresident defendants, . . . *not a single state* has adopted a statute authorizing assertions of extraterritorial subpoena power over nonparty witnesses." States are slowly relaxing those restrictions, however, as state courts and administrative agencies increasingly adjudicate national and international disputes. *See* Silverman v. Berkson, 661 A.2d 1266, 1275 (N.J. 1995).

116. *In re* Application to Enforce Admin. Supboenas Duces Tecum of SEC v. Knowles, 87 F.3d 413, 414–15 (10th Cir. 1996).

tion, and thus gave rise to specific jurisdiction.[117] Other federal courts have taken a more aggressive approach, suggesting that any relationship between a discovery request and the underlying litigation provides specific jurisdiction over a nonparty.[118]

3. Unilateral Activity, Still Active

Several courts have borrowed portions of the unilateral activity rule to evaluate personal jurisdiction over nonparty witnesses. In *Silverman v. Berkson*,[119] the New Jersey Supreme Court heard a challenge to personal jurisdiction by a nonparty named in a state administrative agency subpoena.[120] Despite holding that *International Shoe* did not "inevitably" control the territorial reach of the subpoena power,[121] the court adopted a "purposeful availment" rule as its due process standard[122] and held that the nonparty had purposefully availed itself of the benefits and protections of doing business in New Jersey by "entering regulated securities markets in the forum state."[123] Similar concerns about unilateral activity have influenced other courts.[124]

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117. *Id.* at 418. As the target of a formal SEC investigation, Knowles may not be typical of the nonparties discussed in this Note. *Cf. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d at 1310–11 (describing the recipient of a subpoena, "one of several targets of an FTC investigation which remains in a preliminary phase," as neither "an accused in a criminal trial nor . . . a defendant in a civil trial" but as "merely a third-party witness on notice"). Still, the Tenth Circuit's reliance on specific jurisdiction to support personal jurisdiction in a discovery request, based on the contents of the anticipated testimony and documents, has obvious implications for all nonparties holding "books, documents or tangible things" relevant to distant litigation. *See* FED. R. CIV. P. 45(a)(1)(C).

118. *See, e.g.*, *In re* Jee, 104 B.R. 289, 293–94 (Bankr. C.D. Cal. 1989) (acknowledging that "[t]he initial query is whether this court has jurisdiction over [nonparty] KEB" and finding specific jurisdiction because "the documents requested . . . arise out of and are related to the litigation"); *cf.* FTC v. Productive Mktg., Inc., 136 F. Supp. 2d 1096, 1102–03 (C.D. Cal. 2001) (upholding jurisdiction over nonparty subject to receivership because "the instant matter clearly relates to [the nonparty's] forum-related activities"; absent the nonparty's relationship with the defendants, it would not have held any of the defendant's assets).

119. 661 A.2d 1266 (N.J. 1995).

120. *Id.* at 1267.

121. *Id.* at 1272.

122. *Id.* at 1273 ("We agree that absent 'purposeful availment,' the jurisdiction to proscribe conduct in another forum would not suffice to confer jurisdiction to enforce a civil investigative demand in the territory of another state.").

123. *Id.*

124. *See, e.g.*, Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.,

4. Transient Jurisdiction, Here to Stay

A striking line of Second Circuit cases has imported transient jurisdiction per *Burnham v. Superior Court*[125] as the controlling standard for nonparty witnesses. In *First American Corp. v. Price Waterhouse LLP*,[126] the court enforced a document subpoena against a partnership from the United Kingdom, served on one of the partners while physically present in New York on a business trip.[127] The court brushed aside protests that the partnership was a foreign entity and a nonparty to the suit,[128] and declined a lengthy analysis of the *Burnham* decision, reasoning simply that "a person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony."[129] While the court in *First American* may have stopped short of articulating a per se rule that personal service of a subpoena within state lines comports with due process,[130] the courts that ruled on the Taittinger and Sasaki subpoenas unquestionably interpreted the decision that way.[131] The line of cases now stands for the proposition that because the subpoena power is "simply a discovery mechanism" and cannot impose liability, nonparty witnesses deserve some lesser degree of protection from the personal jurisdiction of distant courts than defendants receive.[132]

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45 F.R.D. 515, 518 (S.D.N.Y. 1968) (quashing a subpoena for lack of personal jurisdiction where the parties selected the forum themselves, solely because it would "suit the convenience of counsel," without regard for the burden on the nonparty witness); Ramirez v. Lagunes, 794 S.W.2d 501, 504 (Tex. App. 1990) (holding that the court lacked personal jurisdiction for a bill of discovery based "merely [on] locating monies in a Texas bank account").

125. *See supra* notes 81–91 and accompanying text.

126. 154 F.3d 16 (2d Cir. 1998).

127. *Id.* at 20.

128. *See id.* (seeing "no reason for . . . per se distinctions" between parties and nonparties).

129. *Id.*

130. *See id.* at 20–21 (commenting only briefly on the question of personal jurisdiction over a nonparty foreign entity, and relying on the fact that the partner served "was in New York working on a prolonged assignment for an affiliated partnership, having been seconded to do so" by his partnership).

131. *See supra* notes 9–12 and accompanying text (summarizing the courts' holdings that personal jurisdiction was proper, despite the fact that the witnesses' transient visit to New York had virtually no relationship to the requested discovery or the underlying lawsuit).

132. *In re* Edelman, 295 F.3d 171, 179 (2d Cir. 2002). These decisions mark something of a departure for the Second Circuit. The late Judge Mansfield,

5. Fair Play Free-for-All

No court has expressly applied the multifactor reasonableness test that makes up the "fair play and substantial justice" prong of the minimum contacts test when evaluating a personal jurisdiction challenge by a nonparty witness. Yet a few widely scattered courts have, informally and perhaps unknowingly, borrowed and modified elements from the test to fit the context of nonparty discovery.

First, in a close parallel to the "fair play and substantial justice" test's inquiry into the burden on the defendant,[133] several courts have considered the burden on the nonparty witness. Where the facts suggest an unusually slight burden on an out-of-state nonparty, courts have shown greater willingness to extend the territorial reach of the subpoena power.[134] Conversely, where the facts suggest an unusually heavy burden, courts have shown greater restraint.[135] Courts disagree, however, over whether nonparty status, standing alone, matters to the reasonableness of personal jurisdiction as a component of the burden on the witness.[136]

Second, in a rough approximation of the inquiry into the interests of the plaintiff, the forum state, and the interstate judicial system,[137] several courts have considered the interests of the parties, the forum state, and the system of justice as a whole when evaluating personal jurisdiction for a nonparty witness. For example, at least one court has refused personal

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then a district judge in the Southern District of New York, had proposed decades earlier that "a different (and presumably stricter) [personal jurisdiction] standard might apply to *non*-party subpoenas." Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515, 516 (S.D.N.Y. 1968).

133. *See supra* note 93 and accompanying text.

134. *See* Ghandi v. Police Dep't, 74 F.R.D. 115, 121–22 (E.D. Mich. 1977) (noting that the FBI, named as a nonparty witness, had a large field office in the forum with adequate personnel engaged in a "wide scope of . . . activity"); Silverman v. Berkson, 661 A.2d 1266, 1275 (N.J. 1995) (noting the many low-cost methods of transportation a New York firm could use to respond to a subpoena issued across the bay in New Jersey).

135. *See, e.g.*, *Elder-Beerman Stores*, 45 F.R.D. at 518 (taking into account the fact that the nonparty had limited resources available in the forum, and noting that compliance with the subpoena would require "bring[ing] voluminous documents and key personnel from Georgia to New York").

136. *Compare id.* at 516 (presuming that a stricter personal jurisdiction standard exists for nonparty witnesses than for defendants) *with* First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998) (seeing "no reason for such per se distinctions").

137. *See supra* note 93 and accompanying text.

jurisdiction where the forum state, chosen for the convenience of the parties, needlessly increased the cost of compliance.[138] Another has considered both the importance and uniqueness of the requested information[139] and any duty owed by the witness to assist in the truth-seeking function of discovery.[140] While not consistently applied, and certainly not couched in terms of the multifactor test proposed by the Supreme Court in *World-Wide Volkswagen*,[141] consideration of these factors suggests that courts can weigh various equitable factors when deciding on the reasonableness of personal jurisdiction in nonparty discovery as well.

II. OLD DOG, NEW TRICKS

Against this backdrop, Part II poses two questions: first, whether due process shields nonparties from discovery where a court lacks personal jurisdiction; and second, if so, whether courts should apply the same minimum contacts analysis to nonparties that they apply to defendants. This section considers alternatives to the minimum contacts test, as well as modifications that might make the analysis more workable in resolving personal jurisdiction challenges by nonparty witnesses. Part II concludes that due process indeed imposes a personal jurisdiction limit on nonparty discovery, that the minimum contacts framework should apply when testing that limit, and that courts should alter their minimum contacts analysis for nonparty witnesses by revisiting four concepts designed for defendants: specific jurisdiction, unilateral activity, transient jurisdiction, and the "fair play and substantial justice" prong.

A. ALL BARK, ALL BITE: WHY DUE PROCESS IMPOSES A LIMIT ON PERSONAL JURISDICTION OVER NONPARTY WITNESSES

The first and most basic question is whether due process

138. *See Elder-Beerman Stores*, 45 F.R.D. at 518 (quashing a subpoena for lack of personal jurisdiction where "the principal reason for the attempted service of the subpoena here rather than in Georgia is that it would suit the convenience of counsel for the parties, who would suffer no legally recognizable prejudice by being compelled to conduct their examination . . . in Georgia").

139. *See First Am.*, 154 F.3d at 20 (noting that the nonparty witness had "unique access to documents that may be critical in unraveling a bank fraud of unprecedented scale").

140. *See id.* (suggesting that, as an auditor, the nonparty witness ought to "feel a professional commitment" to clear up the dispute, given its "unique responsibility" to safeguard the integrity of financial data).

141. *See supra* notes 92–93 and accompanying text.

subjects nonparty discovery to a personal jurisdiction limit at all. The Fifth and Fourteenth Amendments protect "persons," not "defendants,"[142] and nonparties certainly fit that description. Still, any interference with nonparty discovery based on personal jurisdiction could be assailed on various grounds: (1) as unnecessary, given that discovery rules and statutes already insulate nonparties from unreasonable discovery; (2) as ill-advised, in light of modern policy to promote liberal discovery; (3) as antiquated, based on advances in technology that reduce the inconvenience and cost of testifying for nonparties; and (4) as conceptually problematic, given the sharp differences in judicial treatment of nonparty discovery and defendant liability. Of these objections, only the last can survive any serious analysis, and even it cannot overcome the strong countervailing grounds for finding a constitutional personal jurisdiction limit to nonparty discovery.

1. Objections to a Due Process Limit

a. Why Bother?

Initially, bringing due process to bear on requests as mundane as nonparty document requests and depositions may seem unnecessary, given the statutory and procedural protections already in place for nonparties.[143] Undoubtedly many subpoenas that would face a personal jurisdiction challenge fail for other reasons, like the 100-mile limit on deposition subpoenas,[144] before such concerns arise. The potential that courts can guard against burdensome discovery by using other tools, however, does not obviate the need for, and certainly does not disprove the existence of, concurrent constitutional protection.[145] Federal and state courts today routinely treat the personal jurisdiction inquiry for defendants in two steps. First, they determine whether the state long-arm statute confers personal jurisdic-

142. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

143. *See supra* notes 36–43 and accompanying text.

144. *See* FED. R. CIV. P. 45(c)(3)(A)(ii). Recall, however, that the 100-mile limit applies only to forms of discovery requiring "travel," and thus provides no protection against production of documents or tangible things. *See id.*

145. *But see Phillips Petroleum*, 472 U.S. at 809–10 (upholding jurisdiction in part because of the protection typically afforded to the interests of absent class-action plaintiffs by state class certification and related rules); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483–84 (1985) (upholding jurisdiction in part because of the availability of a transfer of venue to protect defendant's interest in securing the testimony of key witnesses).

tion over the defendant. Second, they determine whether personal jurisdiction would comport with due process under the minimum contacts test.[146] This approach predominates despite the fact that some state long-arm statutes already offer protection coextensive with, or greater than, the due process minimum.[147] Thus, so long as state or federal nonparty discovery rules run the risk of overreaching their territorial limits,[148] a constitutional standard would operate as a crucial "backstop" to existing procedural rules and statutes.[149]

b. The Liberal Discovery Imperative

Widely recognized judicial policy in support of liberal discovery may counsel against a due process limit on personal jurisdiction for nonparties. The Supreme Court has repeatedly recognized the existence[150] and value[151] of liberal civil discovery rules. Indeed, several of the Court's decisions rely on parties' freedom to obtain broad discovery in determining substantive requirements.[152] The Federal Rules of Civil Procedure encourage a "broad search for facts."[153] Trial courts could therefore

146. *E.g.*, Stripling v. Jordan Prod. Co., 234 F.3d 863, 869 (5th Cir. 2000); 36 AM. JUR. 2D *Foreign Corporations* § 441 (2002).

147. *See* 4 WRIGHT & MILLER, *supra* note 39, § 1068.

148. The many cases in which nonparties have raised a personal jurisdiction defense to discovery make it difficult to imagine that courts perfectly police the territorial reach of the subpoena power relying on procedural rules alone. *See supra* Part I.C.

149. If state long-arm statutes offer any guide, the formal recognition by the Court of a due process personal jurisdictional limit for nonparty discovery might prompt states to adopt discovery rules "coextensive" with the constitutional standard.

150. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002) (noting that federal courts follow "liberal discovery rules"); Societé Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 540–41 (1987) (stating that procedural rules such as the Hague Evidence Convention may be used by district courts to facilitate gathering evidence).

151. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

152. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (holding that a specific causation requirement is essential to a prima facie case alleging disparate impact and is not unreasonable, since "liberal discovery rules give plaintiffs broad access to employers' records"); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) (affirming that the plaintiff bears the burden to prove that a proffered explanation for an adverse employment action is pretextual, based in part on the availability of expansive discovery).

153. FED. R. CIV. P. 26(b) advisory committee's note (1946 amendment).

rightly complain about any constitutional doctrine that impinges on the truth-seeking function of discovery,[154] particularly one that could generate new satellite litigation in an already inefficient stage of American legal process.[155]

Yet liberal pretrial discovery has well-recognized limits. The Supreme Court has instructed the judiciary to minimize the cost and inconvenience of discovery,[156] and federal and state courts have developed a host of protections aimed specifically at nonparties.[157] These statutory and judge-made exceptions have emerged despite the fact that they cut against the truth-seeking function of discovery.[158] In the end, while policy arguments in favor of liberal discovery may encourage narrow and careful limits on the subpoena power, they do not propose unlimited discovery.[159]

c. Discovery Without Borders

Personal jurisdiction limits for nonparty discovery might seem quaint in light of technological developments that dramatically reduce the burdens of nonparty testimony and document production. Some observers contend that advances in technology have rendered strict territorial limitations on the

154. *See* Patterson v. Avery Dennison Corp., 281 F.3d 676, 681 (7th Cir. 2002) (noting a strong public policy in favor of liberal discovery rules); Burke v. New York City Police Dep't, 115 F.R.D. 220, 225 (S.D.N.Y. 1987) (noting that "ordinarily the overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth").

155. *Cf.* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 22 (2001) (noting the potential for new satellite litigation stemming from changes to Rule 26(b)(1)).

156. Societé Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 546 (1987).

157. *See supra* notes 36–43 and accompanying text.

158. *Cf.* Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996) (upholding testimonial privilege despite the fact that it would impair truth seeking); Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 787 (9th Cir. 2002) ("Adequate discovery, however, does not mean unfettered discovery.").

159. Indeed, all limits on personal jurisdiction over defendants inevitably undermine the justice-seeking function of the forum state, and cut against the interest of the plaintiff. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Rather than disposing of a constitutional standard for personal jurisdiction, these functions and interests have informed the constitutional standard. *See supra* notes 93–103 and accompanying text. The same principle should apply to personal jurisdiction over nonparty witnesses. See *infra* notes 280–97 and accompanying text for proposals modifying the "fair play and substantial justice" prong of the minimum contacts analysis.

subpoena power of courts obsolete.[160] Calling such limits "a triumph of form over substance,"[161] they argue that the availability of live satellite testimony at trial, Internet communications, live videoconferencing, and other technological advances[162] have reduced the burden on nonresident witnesses to the point where those burdens can never outweigh the truth-seeking value of discovery.[163]

Whatever the merit of these observations for the drafters of civil procedure rules, advances in technology cannot eliminate constitutional due process protections for nonparty witnesses. Initially, the "burden" of nonparty discovery goes beyond the cost of transportation and photocopying, and includes the time and expense involved in assembling and explaining information,[164] the potential embarrassment of placing private information into the public record,[165] and the business risk associated with surrendering confidential information about internal practices and external negotiations.[166] Further, the Supreme Court

160. *See, e.g.*, Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 90 (1990) (arguing that developments in technology have collided with the Federal Rules of Civil Procedure, leaving them rigid and antiquated).

161. *Id.* at 90.

162. *See* Bayer AG v. Biovail Labs., Inc., 35 F. Supp. 2d 192, 195 (D.P.R. 1999) (denying motion to transfer venue in part because the defendants could "easily make use of all modern means of communication and take advantage of all available technological advances in the discovery process and in preparation for trial regardless of the court's venue"); *In re* San Juan Dupont Plaza Hotel Fire Litig., 129 F.R.D. 424, 425–26 (D.P.R. 1989) (requiring witnesses beyond the district court's 100-mile trial subpoena power to give testimony by live satellite transmission, stating that "the Court favors entering the new age of communications technology").

163. *See* Roach, *supra* note 160, at 84.

164. *See* Buchanan v. Am. Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983) (noting the unreasonable burden involved in calling a nonparty expert witness and "requir[ing] him to spend a large amount of time itemizing and explaining the raw data"); United States v. CBS, Inc., 103 F.R.D. 365, 367 (C.D. Cal. 1984) (noting that the nonparty witness corporation had produced roughly six million documents at a cost of over two million dollars to comply with discovery orders).

165. *See* Miller v. Regents of Univ. of Colo., No. 98-1012, 1999 WL 506520, at *11 (10th Cir. July 19, 1999) (affirming the district court's order limiting discovery against nonparty witnesses in sexual harassment suit against a university, where the plaintiff sought to subpoena the names of women on the former president's list of women who, "based on rumor and innuendo," may also have suffered sexual harassment).

166. *See* Builders Ass'n v. City of Chicago, No. 96 C 1122, 2001 WL 1002480, at *7 (N.D. Ill. Aug. 30, 2001) (quashing some 500 subpoenas seeking

has made clear that defendants have an individual right to avoid the jurisdiction of a forum state with which they lack minimum contacts,[167] even if for practical reasons they would face little or no inconvenience by litigating in the forum.[168] Likewise, a personal jurisdiction limit for nonparty discovery stems from an individual right to avoid invasive discovery even if for practical reasons a witness would face little or no inconvenience by providing testimony or documents in the forum.

d. Liability and Discovery

The strongest argument for the proposition that the Constitution imposes no territorial limit on nonparty discovery goes to the conceptual differences between liability and discovery. Several courts have found that territorial limits for defendants simply do not apply to nonparty witnesses.[169] Plausible distinctions can be drawn. Jurisdiction to adjudicate a defendant's rights evolved far differently from jurisdiction to issue discovery orders.[170] Also, while a defendant's liability depends on some substantive cause of action, discovery requests implicate essentially "procedural" concerns.[171] Thus, unlike final judgments as to liability, discovery orders are rarely appealable, leaving considerable discretion in the hands of trial courts.[172] At

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statistical data from Chicago-area contractors and subcontractors). The court noted that "many of the subpoena recipients are bystanders both to this lawsuit and to the City contracts at issue" and expressed reluctance "to use the judicial power to compel non-parties to provide their sensitive business records to create data for a party's expert witness." *Id.*

167. *See infra* notes 179–83 and accompanying text (summarizing the Supreme Court's recognition in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 465 U.S. 694 (1982), of an individual liberty interest protected by the Due Process Clause).

168. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state . . . the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment.").

169. *See supra* notes 107–08 and accompanying text.

170. *Compare supra* notes 44–51 and accompanying text *with supra* notes 20–33 and accompanying text.

171. *E.g.*, Univ. of Tex. at Austin v. Vratil, 96 F.3d 1337, 1340 n.3 (10th Cir. 1996) (noting that discovery is considered procedural, and thus governed by federal law rather than state law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny).

172. *See* 28 U.S.C. § 1291 (2000) (granting circuit courts appellate jurisdiction only from "final decisions of the district courts of the United States"). Under the federal rules, in a district other than the one where the action is pending a party may immediately appeal the *denial* of a nonparty discovery

bottom, defendant liability and nonparty discovery involve different consequences, even if at times "it is unclear which way that should cut."[173]

The question, however, is not whether real differences exist between defendant liability and nonparty discovery, but whether those differences shift nonparty discovery into an extraconstitutional zone where territorial limits on jurisdiction dissolve. That proposition seems dubious on its face.[174] True, nonparty discovery and defendant liability developed independently, but the two bodies of law also share a number of historical parallels: both began with strict territorial limitations, evolved gradually to accommodate changing commercial and legal practice, and today permit a liberal scope of judicial action.[175] That both might also involve a constitutional outer limit on personal jurisdiction does not run counter to this history.[176] Admittedly, discovery involves procedural rather than substantive concerns, but this difference hardly disqualifies discovery from the realm of due process. If anything, procedural fairness falls closer to the heart of the Due Process Clause than does substantive or policy fairness.[177] Notably, in spite of the intui-

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request, because this is deemed to be a final decision in the ancillary proceeding. *See* Tenkku v. Normandy Bank, 218 F.3d 926, 927 n.2 (8th Cir. 2000). In contrast, a party may not immediately appeal the *granting* of a nonparty discovery request, because such a ruling does not amount to a final judgment. *In re* Flat Glass Antitrust Litig., 288 F.3d 83, 87 (3d Cir. 2002). A nonparty faced with a discovery motion granted by the district court has no option but to refuse discovery, receive an order of contempt, and then file an immediate appeal of the contempt order. *See id.* at 87–88. This strategy, of course, "is a difficult path to appellate review, and one that may carry with it a significant penalty for failure." *Id.* at 89.

173. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998).

174. *Cf.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) (holding that a nonparty witness charged with contempt may challenge the court's subject matter jurisdiction over the underlying suit, because the subpoena power "cannot be more extensive than its jurisdiction"); United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (noting that "[t]he judicial subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those limitations inherent in the body that issues them because of the Judiciary Article of the Constitution").

175. *See* Wasserman, *supra* note 111, at 46–48, 52–55.

176. *See id.* at 49, 91 (noting that at common law "the scope of a court's subpoena power and its jurisdictional authority were coextensive" and that this "historical linkage" suggests a comparable due process standard).

177. *Cf.* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires.").

tive differences between defendant liability and nonparty discovery, the majority of courts to consider the question have held that some personal jurisdiction standard applies to both.[178]

2. The Case for a Constitutional Standard

There are several strong countervailing arguments that the Due Process Clause does impose a personal jurisdiction limit on nonparty discovery. First, defendants and nonparties alike possess an "individual liberty interest" under the Due Process Clause,[179] and defending against a lawsuit in a distant forum and enduring discovery in a distant forum both threaten that interest. The Court casts this liberty interest as "not being subject to the binding judgments of a forum with which [a person] has established no meaningful 'contacts, ties, or relations.'"[180] The animating concerns it addresses include the lack of "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign"[181] and the assurance of "a degree of predictability to the legal system" by allowing people to structure their actions to avoid unexpected litigation.[182] Those concerns seem equally applicable to nonparty witnesses, who face indisputable burdens to their liberty when compelled to testify in someone else's lawsuit.[183]

Second, *Phillips Petroleum Co. v. Shutts* strongly suggests that the personal jurisdiction requirement is not limited to defendants.[184] In that case, the Court declined to adopt a minimum contacts requirement for absent class-action plaintiffs despite finding that they possessed a constitutionally viable liberty interest.[185] Arguably, some of the factors that guided the Court's treatment of absent class-action plaintiffs apply equally

178. *See supra* note 105 and accompanying text.

179. *See* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982) (holding that the Due Process Clause "is the only source of the personal jurisdiction requirement," which must be seen as "ultimately a function of the individual liberty interest").

180. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

181. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

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

183. *Cf.* FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1319 (D.C. Cir. 1980) (applying both minimum contacts and a "[p]rocedural due process" requirement of "adequate notice and an opportunity to be heard" to a nonparty served with an FTC subpoena).

184. 472 U.S. 797, 806–14 (1985) (discussing requirements for personal jurisdiction over class-action plaintiffs).

185. *See supra* notes 58–63 and accompanying text.

to nonparty witnesses: a nonparty witness does not face "the full powers of the State to render judgment *against* it," and does not risk default judgment.[186] All of the other factors enumerated in *Phillips Petroleum*, however, suggest that nonparty witnesses face burdens more comparable to defendants than absent class-action plaintiffs. Unlike absent class-action plaintiffs, nonparties facing discovery may be required to "hire counsel and travel to the forum,"[187] may face "extended and often costly discovery,"[188] and "may also face liability for court costs and attorney's fees."[189] Nonparty witnesses also face the risk of a contempt order,[190] which certainly qualifies as a binding judgment.[191] The *Phillips Petroleum* holding reflected the Court's belief that absent class-action plaintiffs "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for [their] protection."[192] The same cannot be said of nonparty witnesses, who must play an active role in the litigation, potentially at considerable expense, and with no potential reward.[193] Between these personal jurisdiction poles, where defendants receive maximum protection because they face maximum risk, and absent class-action plaintiffs receive zero protection because they face zero risk, nonparty witnesses fall closer to the former than the latter.

Third, the threat of a contempt order for failure to comply with discovery implies a constitutional limit to the territorial

186. *Phillips Petroleum*, 472 U.S. at 808.

187. *Id.* at 808. Even simple discovery requests may require the retention of counsel and sizeable time and production costs.

188. *Id.* Rule 45 allows for nonparty discovery as expansive as adverse party discovery under Rule 26(b). FED. R. CIV. P. 45(d) advisory committee's note (1946 amendment).

189. *Phillips Petroleum*, 472 U.S. at 808. Rule 45(e) authorizes sanctions for "[f]ailure by any person without adequate excuse to obey a subpoena." FED. R. CIV. P. 45(e).

190. *See infra* notes 194–96 and accompanying text.

191. *See* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1311–12 (D.C. Cir. 1980) (noting the potentially severe consequences of failing to comply with an administrative agency's subpoena); Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (speculating that a higher due process standard presumably applies to out-of-state nonparty witnesses than to out-of-state defendants); *In re* Abrams, 166 Cal. Rptr. 749, 753 (Cal. Ct. App. 1980) (noting that the consequences of failing to respond to a subpoena usually exceed those of failing to respond to a summons, which usually results in a default judgment that can later be set aside).

192. *Phillips Petroleum*, 472 U.S. at 810.

193. *See* Wasserman, *supra* note 111, at 108 n.298.

reach of courts. The effectiveness of court-ordered discovery depends on the serious consequences that follow from noncompliance.[194] Every discovery order is a contempt order waiting to happen.[195] Because courts readily acknowledge the need for proper personal jurisdiction over a nonparty before issuing a contempt order,[196] nonparty discovery—or at least nonparty discovery with any teeth—must face comparable personal jurisdiction limitations.[197]

For these reasons, due process must impose some personal jurisdiction limit on nonparty discovery. Despite a number of basic differences between defendants and nonparty witnesses, the nature of the liberty interest protected by the Due Process Clause, as explained in *Phillips Petroleum*, supports a limit on the territorial reach of American courts in both contexts.

B. BEST IN SHOW: WHY THE MINIMUM CONTACTS TEST PROVIDES THE PROPER FRAMEWORK FOR EVALUATING PERSONAL JURISDICTION OVER NONPARTY WITNESSES

Having concluded that due process imposes some personal jurisdiction limit on nonparty discovery, the next question is whether courts should teach the "old dog" of minimum contacts the "new trick" of evaluating personal jurisdiction for nonparty

194. *See* FED. R. CIV. P. 45(e) (authorizing an order of "contempt of the court" for failing to obey a subpoena "without adequate excuse"). Courts rely on the threat of sanctions, even if imposed sparingly, to ensure compliance with their discovery orders. Even the word "subpoena," from the Latin *sub poena*, translates as "under penalty." Wasserman, *supra* note 111, at 44.

195. *See* MOORE ET AL., *supra* note 105, § 45.04[6][b].

196. *See* Elec. Workers Pension Trust Fund of Local Union # 58 v. Gary's Elec. Serv. Co., 340 F.3d 373, 380 (6th Cir. 2003) (contrasting "the minority view suggesting that personal jurisdiction over a non-party for contempt only can be achieved through service of process" with the "majority view allowing personal jurisdiction for contempt over officers or corporate employees if they have notice of the injunction and its contents"); Waffenschmidt v. MacKay, 763 F.2d 711, 721 (5th Cir. 1985) (acknowledging the general need for minimum contacts with the forum before issuing a contempt order against a nonparty, but noting that where "a nonparty has aided a party in knowingly violating an injunction," due process is satisfied); United States v. Int'l Bhd. of Teamsters, 945 F. Supp. 609, 616 (S.D.N.Y. 1996) (calling the personal jurisdiction requirement "a basic principle of first-year civil procedure" and applying it to a nonparty facing a contempt order).

197. *See* Silverman v. Berkson, 661 A.2d 1266, 1275 (N.J. 1995) (noting that even though contempt orders against out-of-state nonparty witnesses are entitled to full faith and credit, other states must guarantee their residents due process and must decide, as a threshold matter, "whether the state rendering the judgment had jurisdiction").

witnesses. Because the most promising alternative standards have significant weaknesses and stray too far from the Supreme Court's conception of personal jurisdiction, this Note concludes that the minimum contacts test provides the most sensible framework for evaluating personal jurisdiction in the context of nonparty discovery.

1. Alternatives to Minimum Contacts

Before determining the changes required, if any, to make the minimum contacts analysis workable for nonparty discovery, two viable alternatives merit consideration: (1) a "meaningful inconvenience" standard;[198] and (2) an "interest in the lawsuit" standard, adapted from the common law rule.[199] Weaknesses in both of these standards make the minimum contacts framework a superior starting point for nonparty witnesses.

a. Meaningful Inconvenience

Professor Rhonda Wasserman has argued that the proper test for evaluating personal jurisdiction over nonparty witnesses should consist of two inquiries: first, whether the nonparty would suffer meaningful inconvenience by testifying in the distant forum; and second, whether despite that inconvenience the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice."[200] Her standard would measure meaningful inconvenience based on the cost differential between discovery in the proposed forum and discovery in the witness's "home" forum.[201] Wasserman rejects minimum contacts with the forum as a factor in this personal jurisdiction formula.[202]

198. Wasserman, *supra* note 111, at 96–97.

199. *See supra* notes 20–33 and accompanying text (describing the common law bill of discovery).

200. Wasserman, *supra* note 111, at 96–97 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

201. *Id.* at 96. Professor Wasserman calls attention to the variety of burdens faced by nonparty witnesses, including "the anxiety of having to testify in public, perhaps against a friend or even a dangerous criminal, and the time required to prepare for trial, including the time required to meet with counsel, travel to and from the courthouse, and testify or wait to testify." *Id.* at 95. Other burdens include forum-specific procedural laws, such as "state laws regarding compensation for time and reimbursement for travel expenses . . . [and] state laws regarding testimonial privilege." *Id.* at 95–96.

202. *Id.* at 96–97 (noting that "[s]tate boundaries . . . provide poor proxies

While defensible on its own terms, Wasserman's model does not square with the Supreme Court's understanding of due process limits on personal jurisdiction. Wasserman's rejection of state boundaries as a meaningful component of the analysis[203] rests on three premises: that the Supreme Court has roundly rejected "horizontal sovereignty" as the animating theory for limits on personal jurisdiction,[204] that geography does not matter to the degree of inconvenience suffered by a defendant or nonparty,[205] and that nonparty discovery deserves a lower level of constitutional protection than does defendant liability.[206] None of these premises withstands a close reading of the Supreme Court's personal jurisdiction cases.

First, the meaningful inconvenience standard is premised on the Supreme Court's rejection of horizontal sovereignty as a basis for the constitutional limit on personal jurisdiction. Horizontal sovereignty, the traditional theory that states lack authority to enforce rules and exert jurisdiction over persons in the territory of another state, has waxed and waned as an underlying theory for a due process limit on personal jurisdiction.[207] The Supreme Court appeared to seal its fate in a footnote in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,*[208] by declaring that the Due Process Clause "is the only source of the personal jurisdiction requirement," which must be seen as "ultimately a function of the individual liberty interest" rather than "federalism concerns."[209] Taking a cue from this apparent downplaying of state lines in the personal jurisdiction formula, Wasserman argues that minimum contacts should no longer matter, and that due process protects both defendants and nonparty witnesses only if they would suffer meaningful inconvenience in a distant forum.[210]

The Court in *Ireland*, however, did not purport to do away

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for convenience").

203. *See id.* at 110.

204. *Id.* at 58–59.

205. *Id.* at 63.

206. *See id.* at 109.

207. *See generally* 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, 709–27 (1983) (describing the Court's shifting account of the role that interstate comity and sovereignty play in the due process requirement of personal jurisdiction).

208. 456 U.S. 694 (1982).

209. *Id.* at 703 n.10.

210. Wasserman, *supra* note 111, at 59–60.

with minimum contacts, even as it rejected the horizontal sovereignty rationale, expressly holding that the requirement of contacts with the forum state retained vitality as "a function of the individual liberty interest" protected by the Due Process Clause.[211] Moreover, however valid the academic criticisms,[212] in the twenty years since *Ireland* the Court has not signaled a retreat from the minimum contacts framework.[213] Thus any standard that eliminates contacts from the personal jurisdiction calculus appears irreconcilable with the widespread judicial understanding of due process.[214]

Second, the meaningful inconvenience test rests on the corollary premise that geography plays virtually no role in the level of inconvenience suffered by a defendant or nonparty witness.[215] Wasserman points to the availability of "[a]ir travel, telephones, fax machines, and other burden-reducing technologies" as evidence that defending or testifying in a distant forum has become less burdensome.[216] Yet even while acknowledging those innovations in *World-Wide Volkswagen*, the Supreme Court rejected the idea that "state lines are irrelevant for jurisdictional purposes."[217] Simply put, geography does play an important role in the degree of inconvenience suffered by a defendant or witness.[218] State and national boundaries act as a valuable, and easily administered, proxy for inconvenience.[219]

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211. *Ireland*, 456 U.S. at 703 n.10.

212. *See* Lewis, *supra* note 207, at 723; Wasserman, *supra* note 111, at 59 n.107 (collecting scholarship critical of the Court's approach).

213. In fact, the Court reaffirmed its commitment to the minimum contacts approach just three years after *Ireland* in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985).

214. Neither *Phillips Petroleum* nor *Ireland* contradicts this conclusion. In *Phillips Petroleum*, the Court determined that no personal jurisdiction limit applied to absent class-action plaintiffs. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 847–48 (1999) (discussing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 606–08 (1985)). In *Ireland*, the trial court properly exercised personal jurisdiction based on consent, not on minimum contacts. *See supra* note 53.

215. Wasserman, *supra* note 111, at 63.

216. *Id.*

217. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

218. *Cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114–15 (1987) (holding unconstitutional the exercise of personal jurisdiction by a California court over a Japanese subcomponent manufacturer forced to defend an indemnification action against a Taiwanese tire manufacturer, citing the "unique burdens" such a distant forum would impose).

219. Professor Wasserman offers an example: "[A] Philadelphia witness compelled to travel 300 miles to Pittsburgh faces greater universal burdens than if compelled to travel fifteen miles to Camden, New Jersey." Wasserman,

Third, and most basically, the meaningful inconvenience standard rests on the assumption that due process imposes a weaker standard for out-of-state nonparty witnesses than it does for out-of-state defendants.[220] The Second Circuit has echoed this proposition, reasoning that the consequences of a direct judgment, as opposed to simply discovery, result in a meaningfully higher level of risk for defendants.[221]

Other courts have disagreed, however, noting that a nonparty witness faces the real risk of contempt sanctions and

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supra note 111, at 97. While this may prove her point that "assertions of extraterritorial subpoena power . . . would not *necessarily* expose a witness to greater universal burdens than an assertion of in-state subpoena power," *id.*, it takes little imagination to name other forums (Seattle, Houston, and Honolulu come to mind) where the burden would be considerably higher, based solely on geography. Further, the example fails to acknowledge the kind of complex international nonparty discovery becoming commonplace in American courts. *See supra* notes 1–12 and accompanying text.

220. Professor Wasserman raises the practical concern that a heightened standard for defendants carries little risk because in the event of a dismissal, the plaintiff is likely to refile in another state where the court has jurisdiction over the defendant. Wasserman, *supra* note 111, at 62 n.118, 96 n.246. In contrast, a plaintiff is "less likely to change the forum to obtain subpoena power over a nonparty witness." *Id.* at 96 n.246. According to Wasserman, a heightened standard for nonparty witnesses would therefore unreasonably discourage discovery of important testimony.

This reasoning, however, gives short shrift to the widespread availability of subpoena service in a nonparty's home forum. Rule 45 authorizes service in any other United States district to obtain testimony relevant to an action pending in federal court. Interstate compensatory statutes make testimony available, with some restrictions, to actions pending in state courts. Wasserman, *supra* note 111, at 78–91; *see also id.* at 120–21 (noting that state compensatory statutes often result in difficult choices between expensive interstate practice and forgoing the testimony altogether). A host of discovery treaties governs the acquisition of testimony from international nonparty witnesses. *See, e.g.*, Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. While these methods may prove less convenient for the parties than would universal nationwide or worldwide subpoena service, they ease fears that limiting the reach of the subpoena power might effectively deter discovery from nonresidents.

Further, Wasserman's suggestion that denying personal jurisdiction over a defendant simply prompts refiling in another forum does not hold up in practice. The same claim may be doomed under the substantive law of a different state or circuit, may be time-barred, or may prove too costly and inconvenient to litigate in a distant forum. Yet the due process standard for defendants does not change when failing to exercise jurisdiction would mean, for practical or legal reasons, that the defendant would escape liability altogether. Likewise, the due process standard for nonparty discovery should not change based on the possibility that the witness may escape discovery altogether.

221. *See supra* notes 125–32 and accompanying text.

other burdens comparable to those faced by a defendant.[222] Ultimately, the meaningful inconvenience standard, like any standard that presumes a lower level of due process protection for nonparty discovery than for defendants, fails not because it misapprehends the relative level of risk faced by nonparty witnesses,[223] but because it misapprehends the relative level of interest, stake, involvement, and expectation a nonparty witness has in someone else's lawsuit.[224] A witness with no dog in the fight deserves as much constitutional protection as a defendant who got himself into the mess.[225]

b. An Interest in the Lawsuit

A second potential due process standard comes from the common law "mere witness" rule that parties could not seek equitable discovery from nonparties who lacked an interest in the underlying dispute.[226] The rule has some intuitive appeal: when a nonparty has a large stake or close involvement in a suit, the forum ought to have greater access to the nonparty's testimony and documents, whereas when a nonparty has no stake and little involvement in a suit, the nonparty ought to enjoy greater protection from territorial overreaching by courts.[227] Also, the common law roots of the interest standard make it an attractive option for those who hold that the scope of due process depends in part on historical pedigree.[228]

Two serious deficiencies make the interest standard inappropriate. First, it examines only a nonparty's contacts with the underlying lawsuit, presumably established by showing connections with the parties or the transactions involved.[229] As will be

222. *See supra* note 191 and accompanying text.

223. *See* Wasserman, *supra* note 111, at 110 (noting, correctly, that "a defendant may well be subpoenaed to testify and then would face the same risks as the nonparty witness").

224. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998).

225. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (adopting a due process standard for absent class-action plaintiffs based not only on the level of risk they faced but on their role, stake, and expectations in the lawsuit).

226. *See supra* notes 27–30 and accompanying text.

227. *See* Welling, *supra* note 23, at 135 n.133 (discussing the rationale underlying the "mere witness" rule).

228. *Cf.* Burnham v. Superior Court, 495 U.S. 604, 610–11 (1990) (plurality opinion) (relying on the long history of in personam jurisdiction in American courts in holding that jurisdiction based on physical presence alone comports with due process).

229. *See* Welling, *supra* note 23, at 134–35 (noting that under the "mere

discussed further, a personal jurisdiction standard must measure contacts with the forum, rather than the suit, to remain consistent with the Supreme Court's understanding of the power of courts to hale persons into a distant state. Second, an interest standard would provide too little guidance to courts attempting to sketch the limits of the subpoena power. The mere witness rule proved so imprecise in equity courts that it devolved into a virtual per se rule against nonparty bills of discovery.[230]

2. Advantages of the Minimum Contacts Framework

In contrast to these alternatives, the minimum contacts framework boasts several advantages. Some fifty years after *International Shoe*, it has become the foremost—indeed, the only—modern standard for evaluating personal jurisdiction under the Due Process Clause.[231] Further, because of its ubiquity, Supreme Court cases developing and applying the minimum contacts framework have become immediately familiar to practitioners.[232] While important questions about the operation of the test inevitably remain unanswered, until the Court changes direction the minimum contacts approach must serve as the incumbent technique in evaluating personal jurisdiction over both defendants and nonparty witnesses.[233]

C. NEW TRICKS: HOW THE MINIMUM CONTACTS FRAMEWORK MUST CHANGE TO EVALUATE PERSONAL JURISDICTION OVER NONPARTY WITNESSES

Despite its advantages, the minimum contacts framework requires a number of modifications in the context of nonparty discovery. The remainder of this Note identifies and offers recommendations relating to four awkward aspects of the minimum contacts analysis as applied to nonparty witnesses: specific jurisdiction, unilateral activity, transient jurisdiction, and the "fair play and substantial justice" prong.

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witness" rule, "the person from whom discovery was sought had to be a party to the main litigation or at least have an interest in the litigation" (citations omitted)).

230. *See supra* notes 27–33 and accompanying text.

231. *See* Twitchell, *supra* note 69, at 611.

232. *Id.*

233. *See* Wasserman, *supra* note 111, at 142 (noting that a minimum contacts approach to personal jurisdiction for nonparty discovery would allow courts to "'piggyback' on existing jurisdictional analysis").

1. Specific Jurisdiction in Nonparty Discovery

One awkward aspect of importing the minimum contacts test to nonparty discovery concerns the treatment of "specific jurisdiction." A court exercises specific jurisdiction when the cause of action "aris[es] out of or relate[s] to" a defendant's contacts with the forum state.[234] Limited contacts, even a single contact, can satisfy the due process minimum under a specific jurisdiction standard.[235] Two plausible interpretations of specific jurisdiction in the nonparty discovery context illustrate the difficulty the concept poses.

Read broadly, specific jurisdiction could require simply that the discovery request "arise out of or relate to" the lawsuit. The court in *In re Jee*[236] took this approach, holding that specific jurisdiction over a nonparty existed because "the documents requested . . . arise out of and are related to the litigation."[237]

This interpretation has serious flaws. First, it treats the possession of any discoverable information, whether in the form of documents or testimony, as a relevant contact.[238] This result ignores the fact that personal jurisdiction reflects territorial limits on the power of the court, and must therefore require contacts with the forum,[239] not with the parties or with the litigation. Second, this interpretation results in a per se rule that the exercise of personal jurisdiction over nonparties for discovery comports with due process. Requested documents will always relate to the litigation. Not only do the discovery rules limit requests to matters "relevant to the claim or defense of any party,"[240] but parties presumably have no use for documents completely unrelated to the lawsuit.

Read narrowly, on the other hand, specific jurisdiction could require that the cause of action "arise out of" the nonparty's contacts with the forum, tracking closely to the current standard for defendants.[241] Again, this approach faces serious

234. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); *see also supra* notes 67–69 and accompanying text.

235. *See supra* notes 70–71 and accompanying text.

236. 104 B.R. 289 (Bankr. C.D. Cal. 1989).

237. *Id.* at 294.

238. *See id.*

239. *Helicopteros*, 466 U.S. at 414 n.8.

240. FED. R. CIV. P. 26(b)(1).

241. *Cf. Helicopteros*, 466 U.S. at 414 n.8 (reasoning that a state exercises specific jurisdiction when the cause of action "arise[s] out of or relate[s] to the defendant's contacts with the forum").

drawbacks. First, although emphasizing the "cause of action" makes sense when discussing defendants, because a cause of action directly targets the defendant, that starting point makes less sense in the context of nonparty discovery. Nonparties face no direct threat from the underlying cause of action.[242] Second, the narrow interpretation makes specific jurisdiction effectively unavailable in nonparty discovery. A nonparty, by definition, does not possess the precise contacts with the forum that gave rise to the cause of action—if anyone, only the defendant does. As a result, this standard, if adopted, would leave only general jurisdiction available for nonparty witnesses,[243] meaning no nonparty could be compelled to testify without "the kind of continuous and systematic" contacts that would support jurisdiction with respect to any action or order.[244]

Thus, a broad interpretation makes personal jurisdiction inevitable and a narrow interpretation makes it impossible. Nevertheless, specific jurisdiction can be salvaged in the context of nonparty discovery. The proper analysis would focus on the relationship between (1) the discovery request and (2) the

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242. On the other hand, the narrow reading might ease the court's burden, because, rather than evaluating personal jurisdiction for each discovery request individually, a court could pass on the question once for all discovery related to the cause of action. This advantage should not be overstated, however, considering the lively debate regarding the merits of "supplemental personal jurisdiction" over defendants, which allows jurisdiction over defendants for multiple claims in a suit based on a single claim that bears a sufficient relationship to the defendant's contacts with the forum. *See generally* Jason A. Yonan, Note, *An End to Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization to Bring Supplemental Personal Jurisdiction Within Federal Courts' Powers*, 2002 U. ILL. L. REV. 557, 562–68 (2002) (providing a judicial and statutory background of supplemental jurisdiction). A comparable doctrine could allow supplemental personal jurisdiction over nonparty witnesses based on a single discovery request that bears a sufficient relationship to the nonparty's contacts with the forum. Regardless, where courts have refused to recognize supplemental personal jurisdiction, they have shown a willingness to evaluate contacts related to each count of a complaint separately. *See* Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1641 (2001) (noting, in her discussion of pendant personal jurisdiction, that courts limit proceedings to counts over which they have jurisdiction and exclude those over which they do not). They would presumably do the same for a series of discovery requests directed at the same nonparty.

243. *Cf.* Ramirez v. Lagunes, 794 S.W.2d 501, 504 (Tex. App. 1990) (dismissing a bill of discovery against a nonparty bank for lack of personal jurisdiction, holding that "merely locating monies in a Texas bank account did not invoke the court's jurisdiction because . . . the cause of action [for divorce did not arise] from the opening of those accounts").

244. *See Helicopteros*, 466 U.S. at 416.

nonparty's contacts with the forum. This interpretive middle ground cures the defects of both the broad and narrow readings by focusing on the discovery request that targets the nonparty, and requiring contacts with the forum to reflect the underlying territorial limitation at issue. Table 1 summarizes this analysis:

Specific jurisdiction exists where . . .	arises out of or relates to . . .	Comments
the cause of action	defendant contacts with the forum.	current standard for defendants
the discovery request	the lawsuit.	broad standard, results in per se specific jurisdiction over nonparty witnesses
the cause of action	nonparty contacts with the forum.	narrow standard, makes specific jurisdiction over nonparty witnesses impossible
the discovery request	nonparty contacts with the forum.	proposed standard for nonparty witnesses

Table 1

For an illustration, suppose that Takao Sasaki, the nonparty witness discussed at the beginning of this Note, had been served a document subpoena demanding his notes and records from negotiations that took place in North Carolina.[245] Under the broad standard, the court would easily find specific jurisdiction because the requested documents plainly relate to the subject matter of the litigation. Under the narrow standard, the court could not possibly find specific jurisdiction, because Sasaki's activities in New York in no way precipitated litigation between the defendant and other insurance companies. The result under the proper standard would depend on whether the document request arises out of or relates to Sasaki's contacts with New York. On these facts, the proposed standard would probably render specific jurisdiction unavailable. The subpoena

245. *See supra* notes 5–12. The court ultimately quashed the subpoena because it demanded that Sasaki give a deposition in New York, but upheld personal jurisdiction for other forms of discovery based on physical presence. *See In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8-85, 2002 WL 1870084, at *2–3 (S.D.N.Y. Aug. 14, 2002). For a discussion of transient jurisdiction in the context of nonparty discovery, see *infra* notes 262–77 and accompanying text.

requested documents stored at Sasaki's office in Japan prepared during contract negotiations held in North Carolina years before any litigation began. The request thus bears no relationship to Sasaki's infrequent, unrelated business trips to New York, including the single negotiation session during which he received service of the subpoena.[246]

2. The Unilateral Activity Rule in Nonparty Discovery

Another awkward aspect of importing the minimum contacts test to nonparty discovery concerns the treatment of the "unilateral activity" rule, which provides that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[247] This rule reflects two underlying concerns: first, that unilateral actions by third parties do not satisfy the quid pro quo rationale by providing evidence of purposeful availment of the benefits and protections of the forum state;[248] and second, that the unilateral actions of third parties fail to give a defendant clear notice that it may face suit in the forum state.[249]

Read expansively, the unilateral activity rule could completely foreclose discovery from out-of-state nonparties. Nonparty witnesses, after all, always face the jurisdiction of the court due to the activity of the parties themselves, who unilaterally engaged in whatever conduct triggered the suit and made the nonparty's information valuable. Such a facile reading, however, interprets the unilateral activity rule too literally.[250]

The real value of the unilateral activity rule for nonparties comes from its implications for subpoenas against the most sympathetic characters in the world of discovery: "innocent bystanders" summoned to testify in someone else's lawsuit before

246. Importantly, however, a North Carolina court issuing the same subpoena could properly exercise specific jurisdiction over Sasaki under this standard; the requested documents were created by Sasaki in North Carolina as a record of activities that took place in North Carolina, thus establishing the requisite relationship between the discovery request and Sasaki's contacts with the forum.

247. Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see also supra* notes 75–76 and accompanying text (describing the unilateral activity rule).

248. *See supra* note 77 and accompanying text.

249. *See supra* note 78 and accompanying text.

250. *See supra* notes 119–23 and accompanying text (describing New Jersey's approach in *Silverman*).

a distant court.[251] For such persons, both of the Supreme Court's concerns about unilateral activity seem particularly applicable. First, the quid pro quo rationale that operates against defendants who purposefully avail themselves of the benefits and protections of the forum state does not make sense against an innocent bystander, forced to bear the costs of discovery merely for knowing something relevant to someone else's case or defense.[252] Second, innocent bystanders by definition lack advance notice that their activities will subject them to the subpoena power, and they are powerless to consciously avoid service of a subpoena by refusing to witness the "unilateral activity" of others. As a result, the unilateral activity rule might provide considerable protection to an innocent bystander subject to a subpoena from a distant court.

That parties might face an uphill battle to satisfy the unilateral activity rule for innocent bystanders is not objectionable. Due process has proven sensitive to differently situated defendants,[253] and should do the same for differently situated nonparty witnesses. Further, as a practical matter, nonparty witnesses in civil cases are seldom innocent bystanders. They typically have inside information regarding the events or transactions underlying the lawsuit,[254] or have come under sus-

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251. *Cf.* Alfadda v. Fenn, 149 F.R.D. 28, 38–39 (S.D.N.Y. 1993) (noting that "some courts have been hesitant to require a non-party witness, who is an innocent source of information and a stranger to the litigation, to be forced to undergo hardship for the sake of discovery").

252. The requirement of purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). A nonparty who obtains information while innocently standing by is always haled before the court based on such contacts.

253. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–15 (1987) (holding that unique burdens on the foreign defendant rendered the exercise of personal jurisdiction inconsistent with traditional notions of fair play and substantial justice).

254. See, for example, *In re First American Corp.*, 184 F.R.D. 234, 242 (S.D.N.Y. 1998), in which the court refused to award expenses to a nonparty witness who "was not the quintessential innocent, disinterested bystander." The court reasoned that because of the role the nonparty played in the matter about which the underlying litigation was concerned, the nonparty "should have reasonably anticipated being drawn into subsequent litigation." *Id.*; *see also* Tutor-Saliba Corp. v. United States, 32 Fed. Cl. 609, 610 n.5 (1995) ("[U]nlike many nonparties, EBI was substantially involved in the underlying transaction and could have anticipated that the contract on which it was a subcontractor might, given its size, reasonably spawn some litigation, and discovery of EBI.").

picion for their own wrongdoing.[255] Also, parties could always secure the testimony of an out-of-state innocent bystander through a subpoena issued by a home forum that can properly exercise general jurisdiction.[256] Retaining a version of the unilateral activity rule for personal jurisdiction over nonparty witnesses thus properly balances the evidentiary needs of litigants with a minimum level of affirmative conduct, purposeful availment, and fair notice.[257]

For example, neither of the nonparty witnesses described in the introduction would find any comfort under this reading of the unilateral activity rule. Even in his personal capacity, Claude Taittinger, the quintessential insider, had a substantial economic stake and a significant role in the transactions that precipitated the underlying French lawsuit,[258] and he had ample advance warning of impending litigation where his testimony and documents might prove valuable.[259] Likewise, Takao Sasaki acquired his discoverable information as an insider, purposefully participating in the kind of profitable international transactions that frequently become the subject of legal disputes.[260] Assuming that the forum state had some basis for specific jurisdiction given the relationship between the discovery request and their contacts with the forum,[261] neither

255. *See, e.g.*, SEC v. McGoff, 647 F.2d 185, 192 (D.C. Cir. 1981) (describing the witness as "not in any sense a disinterested third party called upon to supply evidence" but as "the principal actor in the matters the SEC seeks to investigate"); Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, 190 F.R.D. 463, 467 (W.D. Tenn. 1999) (declining to require a heightened standard of relevance for discovery from a nonparty because "[g]iven [his] level of involvement with the negotiations and subsequent dispute . . . [and] being a potential party, the court is not inclined to view [him] as an innocent bystander needlessly entangled in burdensome discovery"); Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 527 (S.D.N.Y. 1987) (noting that a nonparty witness was "not [an] innocent party caught up in events beyond its control" because its deliberate conduct had "placed itself in the thick of things").

256. *See supra* note 220 (describing the widespread availability of subpoena service in the nonparty and home forum).

257. *See supra* notes 119–24 and accompanying text (citing cases that have incorporated portions of the unilateral activity rule when evaluating personal jurisdiction for nonparty witnesses).

258. *See In re* Edelman, 295 F.3d 171, 174 (2d Cir. 2002) (noting as undisputed the fact that Taittinger possessed knowledge relevant to the litigation).

259. *See* Nigro, *supra* note 2.

260. *See In re* Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8-85, 2002 WL 1870084, at *2 (S.D.N.Y. Aug. 14, 2002).

261. *See supra* notes 245–46 and accompanying text.

Taittinger nor Sasaki could credibly invoke the unilateral activity rule.

3. Transient Jurisdiction for Nonparty Witnesses

Yet another source of difficulty in translating personal jurisdiction concepts to nonparty witnesses is the transient jurisdiction doctrine of *Burnham v. Superior Court*, which held that personal service of summons on a defendant physically present within state lines always satisfies due process.[262] The Second Circuit holds that "tag" jurisdiction applies equally to personal service of a subpoena on a nonparty witness physically present in the forum state, regardless of how fleeting the visit.[263]

Unfortunately, the Second Circuit's analysis of the issue failed to consider the competing rationales for the transient jurisdiction rule, relying mostly on factual comparisons between the defendant in *Burnham* and the nonparty challenging the subpoena.[264] The principal opinions in *Burnham* reached the same result for strikingly different reasons, however, and courts should consider each of them before uncritically adopting *Burnham* as the controlling standard for nonparty witnesses.

Justice Scalia's plurality opinion rested on the premise that personal jurisdiction based on physical presence had an ancient and enduring pedigree in American courts.[265] For nonparty witnesses, however, the historical record leaves considerable room for debate. The equitable bill of discovery, which served as the mainstay of pretrial civil discovery in American courts until at least the 1930s, could not reach a mere witness regardless of the circumstances of service.[266] While civil discovery rules have, for decades, authorized subpoenas against nonparties using in-state service of a subpoena, these systems might not enjoy a history ancient enough to compare with analogous service rules for defendants[267]—particularly if courts

262. *See supra* notes 81–91 and accompanying text.

263. *See supra* notes 125–32 and accompanying text.

264. *See supra* notes 128–29 and accompanying text.

265. *See supra* note 85 and accompanying text.

266. *See supra* notes 27–33 and accompanying text (discussing the historical inability of parties to obtain discovery against a "mere witness").

267. *Compare supra* notes 27–33 and accompanying text (documenting common law limitations on the bill of discovery with respect to nonparty witnesses) *with* Burnham v. Superior Court, 495 U.S. 604, 607–16 (1990) (Scalia, J., plurality opinion) (documenting the ancient roots of transient jurisdiction over defendants).

take Justice Scalia at his word that "the crucial time . . . [is] 1868, when the Fourteenth Amendment was adopted."[268] In the nineteenth century, modern nonparty discovery would have been altogether alien to American courts.[269] Strictly speaking, however, these limits on the bill of discovery did not relate to personal jurisdiction, but developed as substantive limitations on the device itself.[270] Thus, it could be argued that the long history of transient jurisdiction always conferred jurisdiction on nonparties physically present within state boundaries, but that the equity courts simply declined to enforce discovery against nonparties despite that jurisdiction.

Justice Brennan's concurrence, on the other hand, stuck closer to the standard minimum contacts analysis. He noted that the history of the transient jurisdiction rule gave visiting defendants adequate notice, that physical presence necessarily implies certain contacts that constitute purposeful availment, and that even a single visit by the defendant suggests that the burden of defending a suit in the forum state would be minimal.[271] This reasoning seems readily applicable to nonparty witnesses. In-state subpoena service for nonparties, while perhaps not "ancient," has persisted long enough to provide reasonable notice to prospective witnesses when traveling to other jurisdictions.[272] Likewise, if physical presence in the state amounts to constructive consent to jurisdiction as a defendant, it probably amounts to constructive consent to submit to discovery in the state as well.[273] The theory that physical presence implies a minimal burden in defending against a suit probably

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268. *Burnham*, 495 U.S. at 611.

269. *See supra* notes 27–33 and accompanying text.

270. *See supra* notes 27–33 and accompanying text.

271. *See supra* notes 86–89 and accompanying text (explaining Justice Brennan's rationale in *Burnham*).

272. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20–21 (2d Cir. 1998). As Taittinger's and Sasaki's experiences show, however, fair notice of a surprise subpoena in a distant forum exists in legal fiction, not in fact. Courts readily acknowledge that nonparties have different expectations regarding the burden and invasiveness of discovery than defendants. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998).

273. Professor Wasserman agrees that "[b]y entering the trial state voluntarily, the witness impliedly consent[s] to testify there," but adds the qualifier, "on matters relating to her visit." Wasserman, *supra* note 111, at 143. The transient jurisdiction rule for defendants goes further, of course, granting personal jurisdiction based on fleeting physical presence even if the cause of action bears no relationship to the visit, or even to the forum state. *See Burnham*, 495 U.S. at 610–11.

holds up for nonparty witnesses as well, although their relative stake in the outcome of the underlying action may affect that assessment of burden.[274]

While a close reading of the *Burnham* opinions leaves room for doubt, the principle of transient jurisdiction should extend to nonparty witnesses served a subpoena while physically present in the forum state. Despite its potential for disconcerting results,[275] the rule provides an easily administered, bright-line standard for courts, and allows potential witnesses to pattern their behavior with a high degree of certainty.[276] Rather than recognize a constitutional exception to the well-entrenched belief that states enjoy broad personal jurisdiction over all persons found within their borders, courts should adopt a transient jurisdiction rule, corollary to that in *Burnham*, for nonparty discovery.[277]

4. Fair Play for Nonparty Witnesses

A final challenge in adapting the minimum contacts framework to personal jurisdiction over nonparty witnesses involves the multifactor reasonableness test that makes up its "fair play and substantial justice" prong. For defendants, this

274. *See infra* notes 284–89 and accompanying text (discussing the role that nonparty witnesses' stake and expectations should play).

275. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (holding service of process valid where the defendant was served within the "territorial limits of the State of Arkansas" while on board a passenger airplane flying from Memphis to Dallas).

276. *See supra* note 90 and accompanying text (noting Justice White's concerns with "endless, fact-specific litigation" in his concurrence in *Burnham*).

277. If adopted, this proposal would unquestionably limit the instances in which nonparty witnesses could successfully challenge a court's personal jurisdiction, because most states require personal service of every subpoena somewhere within state boundaries. *See supra* notes 113–15 and accompanying text. All federal courts, however, allow limited service of process outside the boundaries of the district. FED. R. CIV. P. 45(b)(2). Some federal and state administrative agencies have statutory authorization to serve subpoenas nationwide. *See, e.g.*, 15 U.S.C. § 23 (2000) (permitting the same for antitrust actions under the Clayton Act); 18 U.S.C. § 1965(c) (2000) (authorizing nationwide service of subpoenas for civil and criminal actions under RICO); FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1308–09 (D.C. Cir. 1980) (construing 15 U.S.C. § 49 (1976) (Federal Trade Commission Act)). Furthermore, the *Burnham* rule applies only to individuals, not to corporations or other entities that may serve as nonparty witnesses. Wenche Siemer v. Learget Acquisition Corp., 966 F.2d 179, 182–83 (5th Cir. 1992). Thus, while transient jurisdiction would effectively eliminate one category of challenges, it would leave considerable room for disputes over the scope of due process protection in nonparty discovery.

analysis weighs the burden on the nonresident defendant against the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in efficient resolution of controversies, and substantive social policies.[278] These factors require only slight revision when applied to nonparty discovery.[279]

a. Burden on the Nonparty Witness

The initial factor courts should take into account in a reasonableness test for nonparty witnesses is the burden imposed on the nonparty witness.[280] This factor should consider the incremental costs faced by a nonparty subject to discovery in a distant forum rather than a home forum:[281] incremental out-of-pocket costs associated with production, transportation, and delivery of information; incremental time and opportunity costs incurred in responding to requests in a distant forum; and incremental legal costs, such as the retention of local counsel and additional state-specific legal demands, associated with the forum.[282] These costs can cut both ways, of course, depending on the anticipated costs for the out-of-state nonparty.[283]

Further, this factor should take into account the witness's nonparty status, standing alone, by considering the full range of burdens under the circumstances, regardless of the distance of the forum.[284] Such costs include the size, complexity, and invasiveness of the discovery requested; the nonincremental monetary, time, and legal costs of responding; the embarrassment or hardship caused to the nonparty through compelled testimony; and the strategic costs imposed on a nonparty forced to disclose nonpublic information about its business.[285] While a few authorities have proposed ignoring these costs in establish-

278. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).

279. *See supra* notes 133–41 and accompanying text.

280. *Cf. Asahi*, 480 U.S. at 114 (treating the burden on the nonresident defendant as the decisive factor in the reasonableness analysis).

281. *See supra* notes 134–35 and accompanying text (citing cases that have considered the degree of burden on a nonparty witness when determining the level of due process protection for nonparty witnesses).

282. *See* Wasserman, *supra* note 111, at 99–100.

283. *See supra* notes 134–35 and accompanying text.

284. *See supra* note 136 and accompanying text (noting that courts disagree over the wisdom of taking nonparty status into account in determining the reasonableness of personal jurisdiction).

285. *See supra* notes 164–66 and accompanying text (summarizing the burdens of nonparty discovery).

ing a due process standard,[286] a proper "fair play and substantial justice" test would consider all burdens the requested discovery imposes on nonparties, as nonparties.[287] This approach not only comports with the Supreme Court's understanding of the burden on a defendant in *Asahi*, which appears to blend the burdens posed by distance with more qualitative concerns,[288] but properly reflects the lower stake a nonparty witness has in the lawsuit.[289]

b. The Interest of the Parties, the Forum State, and the Interstate Judicial System

Against the burden on a nonparty witness, courts should weigh the interests of the parties, the forum state, and the interstate judicial system.[290] These factors should include several considerations unique to the discovery process: the expected value of the requested information to the pending lawsuit, the lack of alternative sources of the same information, any efficiency to be gained through discovery in the forum state, and any special responsibility the nonparty witness may owe to the system of justice.[291] Again, these considerations could cut in favor of or against jurisdiction, depending on the circumstances.[292]

Admittedly, these factors do not translate neatly from the present reasonableness test for defendants. With regard to

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286. *See supra* note 136 and accompanying text (discussing the competing approaches by courts on the subject); *see also* Wasserman, *supra* note 111, at 96 (proposing that the assertion of subpoena power should rest on an analysis of whether the incremental burdens suffered render the power unreasonable).

287. *Cf. supra* notes 222–25 and accompanying text (arguing that nonparty witnesses should not receive a weaker standard of due process protection than defendants).

288. *See supra* notes 100–103 and accompanying text (describing the Court's concern in *Asahi* not only with the cost of traversing the distance between Japan and California, but also with the burdens inherent in submitting a legal dispute to the jurisdiction of a foreign tribunal).

289. *See supra* notes 222–25 and accompanying text. Insofar as a central component of the due process standard demands "clear notice that [a defendant] is subject to suit" to enable it to consciously "alleviate the risk of burdensome litigation," World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980), nonparties' relative lack of notice and relative inability to avoid becoming entangled in other people's lawsuits should affect the constitutionality of jurisdiction.

290. *See supra* notes 138–40 and accompanying text.

291. *See* First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998).

292. *See supra* notes 138–40 and accompanying text.

defendants, for example, the forum state's interest turns in large part on whether the plaintiff resides in the forum.[293] A forum state's interest in the testimony or documents of a nonparty, on the other hand, relates to the truth-seeking function of discovery, and does not depend on the residence of the witness.[294] Also, in cases where one forum obtains discovery on behalf of litigation pending in another jurisdiction, the forum issuing the subpoena has no interest of its own, save perhaps interstate comity.[295]

Still, given that the "fair play and substantial justice" prong has, from the outset, considered case-specific equitable factors, courts should have little trouble adapting their analysis to reflect the interest of parties and courts in discovery from nonparties. The test for defendants already considers the shared interest of the interstate judicial system, along with substantive policy concerns,[296] and as a result provides considerable latitude.[297] The proposed shift in emphasis would make the minimum contacts framework more workable when considering challenges by nonparty witnesses.

CONCLUSION

Whatever the precise contours of the constitutional standard, the Due Process Clause imposes a personal jurisdiction limit on nonparty discovery. The minimum contacts test provides the proper framework for evaluating personal jurisdiction challenges brought by nonparty witnesses. Courts should, however, rethink the operation of four aspects of the minimum contacts analysis in the context of nonparty discovery: specific jurisdiction, unilateral activity, transient jurisdiction, and the "fair play and substantial justice" prong. By seriously wrestling with the correct due process limits on the territorial scope of the subpoena power, federal and state courts can introduce clarity and consistency to the haphazard range of approaches that has dogged the intersection of personal jurisdiction and nonparty discovery for decades.

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293. *See supra* notes 96–98 and accompanying text.

294. *See supra* notes 150–55 and accompanying text.

295. *See* Wasserman, *supra* note 111, at 81.

296. *See supra* note 93 and accompanying text.

297. *See* Wasserman, *supra* note 111, at 94 (noting that "it is axiomatic that citizens have a duty to testify in both civil and criminal trials," and that "[c]itizens owe this duty not to the individual litigants, but to the system of justice").

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