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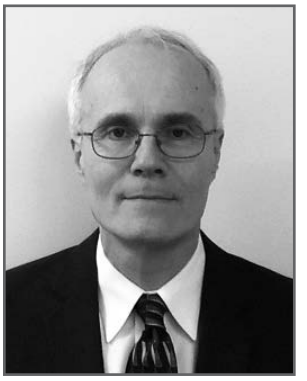
Rethinking the Long-arm Statute

By James P. Rooney

Personal jurisdiction is notoriously complex. It need not be. The long-arm statute adopted by the Massachusetts legislature in 1968 not only sought to take advantage of the possibility of broader jurisdiction over out-of-state residents offered by the "minimum contacts" approach described in the Supreme Court's *International Shoe*[1] decision, it also attempted to establish a regime in which jurisdiction would be clear under both the statute and due process principles.[2] The legislature had reason to believe that the six specific types of contacts described in the long-arm statute would suffice to establish the minimum contacts necessary for due process purposes because they did so under existing precedent.[3] This should have simplified the determination of personal jurisdiction because, once jurisdiction was established under one of the relatively straightforward statutory categories, the potentially more complex due process analysis could be resolved easily. That is because the finding of jurisdiction under the statute could be presumed to establish that jurisdiction comported with due process.

It has not quite worked out that way. While there is no question that personal jurisdiction has expanded under the long-arm statute, in many ways, it has not gone quite as far as the statutory language would seem to suggest, and determining whether jurisdiction exists can still be a confusing matter. In part, this is because, as Appeals Court Justice Joseph P. Warner put it, "the statutory standard has not always been clearly and separately defined."[4] This lack of a clear understanding of the statute and its purposes has obscured how it was meant to make minimum contacts analysis more straightforward. Two problems predominate in the decisions addressing personal jurisdiction. What would seem like a generous interpretation of the statute — a holding that it was meant to extend to the limits of due process[5] — has ironically hindered, not helped, an understanding of the long-arm statute by diminishing its importance. It has given free rein to the courts to adopt their own restrictive conceptions of when jurisdiction is appropriate, ignoring the legislature's deliberate choice of a more expansive jurisdiction. Moreover, the judiciary has never quite accepted the long-arm statute's fundamental premise that a single act by an out-of-state defendant can be a legitimate basis for jurisdiction in Massachusetts. It has long since been time to refocus on what the legislature meant to achieve by enacting the long-arm statute.



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Background

The need to clarify personal jurisdiction began when the Supreme Court held in *Pennoyer v. Neff*[6] that due process was implicated if a state court sought to establish personal jurisdiction over an out-of-state defendant. On the surface, this decision established a simple rule that "no state can exercise direct jurisdiction and authority over persons or property without its territory."[7] But there is more to its holding, for this suit over title to property in Oregon put personal jurisdiction on a path towards excess complexity. Justice Stephen J. Field, who wrote the decision, was not unsympathetic to Oregon's interest in protecting the Oregon lawyer who was owed money by California resident Neff. He observed that "every state owes protection to its own citizens."[8] The problem, in Field's view, was that Mitchell, the lawyer, had sued Neff personally, but had not attached Neff's property at the outset of the lawsuit. Had he done so, then the suit would have been against property within the jurisdiction and it would not have mattered whether service by publication actually reached Neff because of the legal fiction under which "[t]he law assumes that property is always in the possession of its owner . . . and it proceeds upon the theory that its seizure will inform him."[9]

And so for the next three quarters of a century, personal jurisdiction over out-of-state residents was based on various legal fictions and work-arounds. As one commentator put it, the era was marked by "stretching the concepts of consent and presence to authorize jurisdiction where consent in fact did not, and presence could not, exist."[10] Massachusetts's approach was typical. It enacted statutes

1. Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310 (1945).
2. Mass. Gen. Laws c. 223A (2018).
3. Mass. Gen. Laws c. 223A, § 3 (2018), as appearing in St. 1968, c. 760; *see infra* at 57-60 (discussion of the statute's legislative history).
4. Heins v. Wilhelm Loh Wetzlar Optical Mach. GmbH & Co. KG., 26 Mass. App. Ct. 14, 18 n.3 (1988).
5. *See* Automatic Sprinkler Corp. of Am. v. Seneca Foods Corp., 361 Mass. 441, 443 (1972).
6. 95 U.S. 714 (1877).
7. *Id.* at 722.
8. *Id.* at 723.
9. *Id.* at 727.
10. Philip B. Kurland, "The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from *Pennoyer* to *Denckla*: A Review," 25 U. Chi. L. Rev. 569, 573 (1958).

allowing for jurisdiction over foreign corporations "engaged in or soliciting business in the commonwealth,"[11] and providing that such companies must appoint the secretary of state as their agent for service of process — and implied that they did even when they didn't.[12] Not only was jurisdiction in this era limited, it was confusing. Judge Learned Hand, examining the state of jurisdiction over corporations "doing business" in a state, commented that "[i]t is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[13]

The Supreme Court sought in *International Shoe* to end the era of legal fictions and confusion and focus directly on whether jurisdiction over an out-of-state defendant could be obtained consistent with the Constitution. The International Shoe Company was trying to avoid jurisdiction in the state of Washington by employing standard dodges under existing case law holdings that solicitation of business in a state standing by itself was not enough to permit jurisdiction over an out-of-state company — an approach that Massachusetts accepted.[14] Although the company employed full-time resident salesmen in Washington, they were authorized to solicit sales, but not to close them. Instead, they transmitted orders to the company's principal place of business in St. Louis, Missouri. If the main office filled the order, it shipped the shoes "f.o.b." at their point of origin, so that ownership of the shoes passed to the merchant client before the shoes arrived in Washington.[15]

Chief Justice Harlan Fiske Stone brushed all this aside and took personal jurisdiction law in a new direction. Jurisdiction over an out-of-state defendant would turn on whether it had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[16] In explaining how to determine whether jurisdiction was appropriate under this new standard, he stated that "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[17]

But what did this mean? Justice Hugo Black, in a separate opinion, acknowledged the "strong emotional appeal in the words 'fair play,' 'justice' and 'reasonableness,'" but worried that the Court's announcement of "vague Constitutional criteria . . . introduced uncertain elements."[18] The *Harvard Law Review* also noted uncertainties of the Court's application of its new doctrine, commenting that Justice Stone "failed . . . to articulate why the facts specified made the assumption of jurisdiction [over International Shoe] reasonable or just."[19] There was even some question as to whether *International Shoe* articulated a new, broader doctrine of personal jurisdiction because "it did not purport to overrule the multitude of cases which rested on earlier doctrinal errors," but instead "was substituting an appropriate rationale to demonstrate their consistency."[20]

A. The Development of a Long-arm Statute

With this level of uncertainty as to what *International Shoe* meant, it should come as no surprise that the states did not immediately move to assert jurisdiction robustly over out-of-state actors. Not until 10 years after the decision was issued did Illinois become the first state to enact a comprehensive long-arm statute to take advantage of the potential *International Shoe* offered. The 1955 Illinois long-arm statute took an overall approach that became the model for later efforts. It granted jurisdiction so long as the cause of action against the out-of-state defendant arose from one of the single acts listed in the statute.[21] The Illinois long-arm statute's basic approach of focusing on single acts that could provide a valid basis for personal jurisdiction over out-of-state defendants was one followed by the National Conference of Commissioners on Uniform State Laws, which adopted a uniform model long-arm statute in 1962 that itself became a model for Massachusetts.[22] On Aug. 24, 1968, Massachusetts adopted its long-arm statute, General Laws chapter 223A, section 3, which provided that:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (a) transacting any business in this commonwealth;
>
> (b) contracting to supply services or things in this commonwealth;
>
> (c) causing tortious injury by an act or omission in this commonwealth;
>
> (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

11. Mass. Gen. Laws c. 223, § 38.

12. Mass. Gen. Laws c. 181, §§ 3, 3A (repealed 2004).

13. Hutchinson v. Chase & Gilbert Inc., 45 F.2d 139, 141-42 (2d. Cir. 1930).

14. Thurman v. Chi., M. & St. P. Ry. Co., 254 Mass. 569 (1926).

15. Int'l Shoe Co. v. Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 313-14 (1945).

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

17. *Id.* at 319.

18. *Id.* at 323, 325 (Black, J.).

19. "Developments in the Law: State-Court Jurisdiction," 73 Harv. Law Rev. 909, 924 (1959-1960).

20. Kurland, *supra* note 10, at 586, 589.

21. The Illinois long-arm statute provided for jurisdiction over "any cause of action arising from the doing of any" of four types of acts:

> (a) the transaction of business within this State;
>
> (b) the commission of a tortious act within this State;
>
> (c) the ownership, use, or possession of any real estate situated in this State; or
>
> (d) contracting to insure any person, property or risk located within this State at the time of contracting.

Civil Practice Act, 1955 Ill. Laws 2238, 2245-46, Ill Rev. Stat c. 110, § 17 (1956) (codified, as amended, at 735 Ill. Comp. Stat. Ann. 5/2-209 (West 2003)).

22. Uniform Interstate and International Procedure Act, 71 *Handbook Nat'l Conf. Commissioners on Uniform St. Laws and Proc. Ann. Conf. Meeting* 219, 221 (1962) (hereinafter *1962 Handbook*).

(e) having an interest in, using or possessing real property in this commonwealth; or

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting.[23]

These six provisions came directly from the text of the model act almost verbatim, but with "state" changed to "commonwealth."[24]

The approach Illinois, and later Massachusetts, took was both bold and safe at the same time. It was bold in its focus on single acts of out-of-state actors as the basis for jurisdiction. That this was bold may not seem obvious since the Supreme Court in *Hess v. Pawloski*[24] had upheld a Massachusetts statute providing for jurisdiction over an out-of-state driver who had, on one occasion, caused an accident in the state. But the *Hess* court had emphasized that the statute authorizing such jurisdiction was limited to "proceedings growing out of accidents or collisions on a highway," and that, while such jurisdiction might be acceptable in tort cases when a dangerous instrumentality like an automobile was involved, it was not to be extended to contract disputes, for the "mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts."[25] Judge Hand, as well, had expressed doubt about the idea that single corporate acts could suffice as doing business in a state. He observed that "[i]t might indeed be argued that [a corporation] must stand suit upon any controversy arising out of a legal transaction entered into where the suit was brought, but that would impose upon it too severe a burden."[26]

Not everyone thought this way, however. A 1919 law review by Harvard Law Professor Austin Wakeman Scott had argued that "a state might constitutionally provide that the doing of business within the state by a nonresident should subject him to the jurisdiction of the courts of the state as to causes of action arising out of such business."[27] It was this view that the Court seemed to accept in *International Shoe* when Justice Stone wrote:

> to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[28]

If by this language *International Shoe* had given the green light to assert personal jurisdiction over out-of-state actors, so long as that jurisdiction was limited to matters arising from the nonresident's activities in the state, how then to translate that into a law that would withstand challenge? It was at this juncture that Illinois, and later Massachusetts, played it safe. In enacting its long-arm statute, Illinois chose to "extend jurisdiction only to carefully-selected activities within the state . . . that previous judicial decisions had already determined to be within the limits of due process."[29] And so while Illinois extended its jurisdiction over nonresidents beyond what might have been allowed before *International Shoe*, it remained within already-charted jurisdictional waters, and did not press further to whatever the limits of minimum contacts might be.[30]

23. Mass. Gen. Laws c. 223A, § 3, as appearing in St. 1968, c. 760. The statute was later amended to add two clauses related to domestic relations disputes. *See* Mass. Gen. Laws c. 223A, §§ 3(g), 3(h). Other statutes have also been read as providing a basis for personal jurisdiction. *See* Bulldog Inv'rs Gen. P'ship v. Sec'y of the Commonwealth, 457 Mass. 210, 216 (2010) (power of the Secretary of the Commonwealth to enforce the Massachusetts Uniform Securities Act includes the power "to exercise personal jurisdiction over nonresidents in an administrative proceeding"); *see also* Roch v. Mollica, 481 Mass. 164, 167 n.7 (2019) ("G.L. c. 104, § 9 (personal jurisdiction over nonresident wholesalers); G.L. c. 110A, § 414 (h) (personal jurisdiction over those who violate Uniform Securities Act); G.L. c. 159C, § 12 (personal jurisdiction over nonresidents who violate telemarketing solicitation laws); G.L. c. 201A, § 2 (b) (personal jurisdiction over custodians under Uniform Transfers to Minors Act); G.L. c. 203B, § 4 (c) (personal jurisdiction over custodial trustees under Uniform Custodial Trust Act); G.L. c. 209D, § 2-201 (a) (personal jurisdiction over nonresidents in support order and parentage proceedings).").

24. 274 U.S. 352 (1927).

25. *Id.* at 355-56.

26. Hutchinson v. Chase & Gilbert Inc., 45 F.2d 139, 141 (2d. Cir. 1930).

27. Austin Wakeman Scott, "Jurisdiction over Nonresident Motorists," 39 Harv. L. Rev. 563, 563 (1926).

28. Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement, 326 U.S. 310, 319 (1945).

29. Douglas McFarland, "Dictum Run Wild: How Long-arm Statutes Extended to the Limits of Due Process," 84 B.U. L. Rev. 491, 504 (2004). In the Historical and Practice Notes discussing the adoption of the long-arm statute, the drafters of the Illinois statute noted five other states that had enacted statutes granting jurisdiction over corporate activities that did not amount to doing business, as previously understood, and court decisions upholding those statutes. As for torts, the Illinois drafters looked to *Hess* and other instances of single-act tort statutes that had already withstood constitutional challenges. *Id.* at 504-05.

30. The merit of playing it safe can be seen by examining developments related to jurisdiction based on a defendant's transient presence in the forum state. After *International Shoe*, this widely derided jurisdictional basis was thought by some to be on the way out. University of Chicago Law Professor David Currie declared in 1963 that "it has no place in a system where jurisdiction is based upon fairness to the defendant in the context of his acts and the interests of the forum State." David P. Currie, "The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois," 1963 U. Ill. L. F. 533, 583-84 (1963). A few years later, Attorney Albert Zabin predicted that the passage of the long-arm statute in Massachusetts would mean that an out-of-state resident served with process while changing planes at Logan Airport could not by that service alone be subject to the jurisdiction of the Massachusetts courts because the long-arm statute did not make "mere physical presence" within the state a basis for jurisdiction and that, for due process purposes, "fortuitous physical presence in the state is, at best, a minor consideration and may well have become a totally irrelevant fact." Albert P. Zabin, "The Long Arm Statute: *International Shoe* Comes to Massachusetts," 54 Mass. Law Q. 101, 113-14 (1969).

But these predictions of the demise of transient jurisdiction proved premature. The Supreme Court has unanimously reaffirmed this basis of jurisdiction. Justice Antonin Scalia, writing for the Court, held that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" Burnham v. Superior Court of Cal., Cty. of Marin, 495 U.S. 604, 619 (1990). Justice William Brennnan, concurring, stated that transient jurisdiction comported with due process because, "[b]y visiting the forum state, a transient defendant actually 'avail[s]' himself of significant benefits provided by the state." *Id.* at 637. The Supreme Judicial Court, while admitting that there was no statutory basis for transient jurisdiction in Massachusetts law, nonetheless recently upheld its continuing validity, saying, "We . . . decline to repeal our common-law rule as it applies to defendants who are intentionally, knowingly, and voluntarily in the commonwealth." Roch v. Mollica, 481 Mass. 164, 169 (2019).

The Illinois long-arm statute's basic approach of focusing on single acts that could provide a valid basis for personal jurisdiction over out-of-state defendants was one followed by the National Conference of Commissioners on Uniform State Laws when it adopted a uniform model long-arm statute. The model act, and thus the Massachusetts long-arm statute derived from it, took the same careful approach as Illinois had taken, relying heavily on existing statutes and court cases affirming the validity of particular bases for jurisdiction. While Illinois had only a comment from the Supreme Court on which to base its single-act approach, the drafters of the model had reason to feel more confident in taking the same approach because they now had a full-scale Supreme Court decision, *McGee v. International Life Insurance Co.*,[31] upholding jurisdiction over an insurance company based on the one and only contract it had in the forum state. As for the specific provisions of the model act, the "transacting business" provision was adopted straight from the Illinois statute, and was meant to be interpreted just as broadly as it had been interpreted in Illinois.[32] The comment to this section cited an Illinois case in which a single transaction by a defendant with an Illinois company was sufficient to establish jurisdiction.[33] The most significant change in the model act from the Illinois statute came in the tort provisions, which took a more conservative approach by adding a requirement that if the tortious act occurred out-of-state, other facts beyond an injury in the state must be shown to demonstrate that the defendant has some continuing business relationship to the state, an approach that Massachusetts adopted.[34]

The net result is that the drafters of the model statute and the Massachusetts long-arm statute, buoyed by a Supreme Court case that had upheld jurisdiction over a defendant who had only one contact with a state, thought they could safely say that the single acts they identified were valid bases under the Constitution to establish jurisdiction, with the sole exception of tortious acts committed outside the state where the injury occurred. Whether the legislature's intent to enact valid single-act bases of jurisdiction would be followed depended on whether the courts saw it this way. Some trepidation might have been warranted on this score because, prior to 1968, the Massachusetts Supreme Judicial Court (SJC) had shown a decided reluctance to expand jurisdiction based on the opportunity offered by *International Shoe*, and this reluctance was one of the reasons why members of the legal community had advocated for passage of a long-arm statute.[35] Once the SJC considered the matter, it took three attempts before the court acknowledged that the long-arm statute deserved an evaluation separate from due process, but even then it did not acknowledge the statute's goal of creating jurisdictional bases that would survive due process analysis or fully accept the fundamental premise that a single act could be a valid basis for jurisdiction. Along the way, the court inserted its own policy judgments about what jurisdiction was appropriate, although no such opportunity is genuinely presented under analysis of either due process or the long-arm statute. Due process looks only to whether minimum contacts are present without deciding whether the state ought to assert any allowable jurisdiction. That policy decision is exclusively the state's, and is implemented by the legislature when it decides which contacts the state will use as the basis of jurisdiction under a long-arm statute. The court's role is to determine whether a particular assertion of jurisdiction complies with the terms of the long-arm statute, not whether the legislature should have adopted a different policy.

B. Judicial Interpretations of the Long-arm Statute

1. Initial Attempts — The One-step Approach

The SJC had its first opportunity to address the meaning and breadth of the state's long-arm statute in 1972. *Automatic Sprinkler Corp. of America v. Seneca Foods Corp.*[36] has aspects that look like a law school exam fact pattern gone awry. While the plaintiff manufacturer was based in Massachusetts and the defendant purchaser was a New York company, the case featured phone calls to New Jersey, a Canadian salesman, and the manufacturer of a machine in Ohio. At bottom, however, it involved a straightforward purchase and sale. The New York buyer sought out the plaintiff to purchase a machine from it, signed a purchase-and-sale agreement and mailed that to the plaintiff's Worcester, Massachusetts, office, received the machine and made one payment to Worcester, but then stopped paying.[37]

31. 355 U.S. 220 (1957). This was the only Supreme Court case mentioned by the drafters in their explanation of the model statute's provisions. *See 1962 Handbook*, *supra* note 22, at 222, 223.

32. 1962 Handbook, *supra* note 22, at 222.

33. *Id.* (*citing* Berlman v. Superior Distrib. Co., 17 Ill. App., 2d 522 (1958) (shipment of vending machines into Illinois furnished sufficient grounds for exercise of in personam jurisdiction by Illinois court)).

34. *Id.* at 221, 223; *see* Mass. Gen. Laws c. 223A, § 3(d).

35. The SJC's first comment on *International Shoe* was dismissive. In Wyshak v. Anaconda Copper Mining Co., the court noted that its earlier opinion in Thurman v. Chi., M. & St. P. Ry. Co., 254 Mass. 569 (1926), that the Constitution precluded jurisdiction over an out-of-state company whose only action in Massachusetts was soliciting business, had "not been wholly borne out" by *International Shoe*, but nonetheless discounted the relevance of that decision to the question of jurisdiction in a lawsuit between private parties before it because *International Shoe* dealt with the "quite different question of liability to contribute to a State unemployment compensation fund." 328 Mass. 219, 223 (1952). Subsequently, in Jet Mfg. Co. Inc. v. Sanford Ink Co., 330 Mass. 173 (1953), the SJC acknowledged that jurisdiction based on solicitation of business alone had been confirmed as legitimate by *International Shoe*, but the court did not stop after it determined that the defendant had solicited business here. Rather, it went on to observe that the company also had a permanent representative in the state, thus appearing to rest its decision on the *Thurman* approach that required something more than solicitation to justify jurisdiction. *Jet Mfg.,* 330 Mass. at 175-76.

The situation had not changed 10 years later when Francis Larkin, then the associate dean of Boston College Law School, pointed out that the SJC was continuing to take an "overly restrictive view" of personal jurisdiction. Francis Larkin, 11 *Annual Survey of Massachusetts Law* 259, 273 (1963-64). In 1965, the Judicial Council recommended the adoption of the Uniform Act. John J. Curtin, Jr., 13 *Annual Survey of Massachusetts Law* 333, 336 (1965-66). Representative Andre R. Sigourney, the vice-chairman of the Judiciary Committee, urged support for the bill because it would be good public policy for Massachusetts as it would finally "allow Massachusetts citizens having claims against . . . out of state Insurance companies . . . , mail order houses, and manufacturers, to have their cases heard here." Andre R. Sigourney, 11 Boston Bar Journal 17, 18 (1967).

36. 361 Mass. 441 (1972).

37. *Id.* at 442-43.

Jurisdiction without offending due process should have been found readily under the long-arm statute. This was a textbook example of a business transaction with a Massachusetts company and a suit for breach of contract arising out of that transaction, thus making jurisdiction appropriate under Mass. Gen. Laws chapter 223A, section 3(a), the "transacting business" clause of the statute. The defendant also had "purposefully availed" itself of the privilege of conducting business in Massachusetts (as was required by *Hanson v. Denckla*[38]) by seeking out a Massachusetts company from which to purchase a machine, and sending a purchase-and-sale agreement and a contract payment into Massachusetts.

But the SJC did not see it this way. It did not analyze what the legislature meant by transacting business at all. Instead, it began by asserting that "we see the function of the long arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States."[39] From there, ignoring the model statute drafters' reliance on a case from Illinois that had determined that a single transaction was sufficient to establish jurisdiction, it noted two federal court cases that rejected this fundamental premise.[40] The court also concluded that the defendant's "impact upon commerce in Massachusetts was slight,"[41] without citing any basis for the implicit proposition that a defendant must have a significant impact on commerce in Massachusetts for it to have transacted business in the commonwealth.[42]

The SJC's second opportunity to address the transacting business clause of the statute proceeded along the same vein. *Droukas v. Divers Training Academy Inc.*[43] dealt with the sale and shipment of two marine engines by a Florida company to a Massachusetts purchaser. The purchaser discovered that the engines were defective due to salt water damage and brought suit in Massachusetts.[44] The analysis under the Massachusetts long-arm statute also should have been straightforward. The defendant had most certainly transacted business in the state; it had advertised the engines for sale in a nautical publication available in Massachusetts, had sent a letter to the buyer in Massachusetts confirming the sale, and had shipped the engines into the state. But again, the court saw it differently based on factors unmentioned in the statute. It analyzed the question of whether the defendant had transacted business in Massachusetts "in light of the constitutional limit[s]" of *International Shoe* and *Denckla*, which were paramount because of its previous holding that the statute extended to the limits allowed by the Constitution.[45] In rejecting jurisdiction under the "transacting business" clause, the court noted that the defendant had not previously done business in the state and emphasized that the "sale of the engines . . . [was] an isolated transaction, with slight effect on the commerce of the commonwealth."[46] Had the court looked at the language of the long-arm statute itself, it would have seen that none of this was relevant. Doing business was the old jurisdictional standard that the long-arm statute replaced. Single transactions suffice for jurisdiction under the long-arm statute, and nowhere does the statute require that a transaction have a substantial effect on the state's commerce. It is the statute, not prior case law, that sets Massachusetts policy concerning the type of cases over which the state may assert jurisdiction.[47]

Because the court had found jurisdiction lacking under chapter

38. 357 U.S. 235 (1958). The impact of *Denckla* on personal jurisdiction is discussed below.

39. *Automatic Sprinkler,* 361 Mass. at 443.

40. *Id.* at 445-46. The cases on which the SJC relied are unpersuasive. Morgan v. Heckle, 171 F. Supp. 482 (E.D. Ill. 1959), rejected jurisdiction virtually without explanation in a one-sentence holding that the defendant lacked minimum contacts with Illinois. Agrashell Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965), held that a single sale of goods and subsequent shipment into the forum state, without more, could be a valid basis for jurisdiction only if the risk of loss remained with the defendant as the goods traversed the forum state. This is wholly inconsistent with the intent of the model statute. *See* discussion *infra*. There were warnings the court could have heeded against relying on such cases. Professor Currie had dryly observed that the "Seventh Circuit [of which the then-existing Eastern District of Illinois was a part] . . . has not been noted for any tendency toward an expansive reading of the [Illinois long-arm] statute." Currie, *supra* note 30, at 567. Attorney Zabin cautioned Massachusetts lawyers against an overreliance on New York and Illinois law because decisions in those jurisdictions "have limited and constricted the application of their Long-arm statutes, [while the Massachusetts] act has been drawn to avoid these results." Zabin, *supra* note 30, at 112.

41. *Automatic Sprinkler*, 361 Mass. at 446.

42. The "transacting business" provision makes no mention of such a condition. *See* Mass. Gen. Laws c. 223A, § 3(a). Only subsection "d," the clause pertaining to tortious acts originating outside the state, requires any showing of additional economic activity by the defendant. One way to prove this is to show that the defendant "derives substantial revenue from goods used or consumed or services rendered" in Massachusetts. Mass. Gen. Laws ch. 223A, §3(d). But even when this subsection applies, this is a far cry from proof that the defendant had some considerable impact on Massachusetts commerce. *See,* e.g., Mark v. Obear & Sons Inc., 313 F. Supp. 373, 375-76 (D. Mass. 1970) (California saw manufacturer subject to Massachusetts jurisdiction based on injury one of its saws caused in Massachusetts because the $5,000 it made annually from sales in the state amounted to "substantial revenue").

43. 375 Mass. 149 (1978).

44. *Id.* at 150-52.

45. *Id.* at 152-53.

46. *Id.* at 153-54.

47. *Droukas* cited a First Circuit case decided before the Massachusetts long-arm statute was enacted as its source for the proposition that jurisdiction over an out-of-state corporation required that the corporation's activities have some substantial effect on the state's commerce. 375 Mass. at 154 n.5 (*citing* Caso v. Lafayette Radio Elecs. Corp., 370 F.2d 707 (1st Cir. 1966)). However, in that case, the First Circuit acknowledged that jurisdiction could theoretically be had in a case with less evident connection to Massachusetts than that presented in *Droukas*. It recognized that (in 1966) one way a plaintiff could obtain jurisdiction over an out-of-state corporation was if the company was doing business in the state, and to prove that, the plaintiff would have to show that the company's activities had a substantial impact on state commerce. *Caso*, 370 F.2d at 712. But, it also noted that the state could, if it wanted, adopt a minimum contacts approach that would have allowed it to assert jurisdiction over the particular controversy at hand, which involved a Massachusetts resident who claimed that a New York company with a retail outlet in Massachusetts had reneged on a deal to have him operate a retail store in Italy. *Id.* at 708, 710.

223A, section 3(a), the "transacting business" clause, it also considered whether jurisdiction was warranted under subsection 3(b), the clause allowing jurisdiction if an out-of-state company was "contracting to supply services or things in the commonwealth." Again, it found jurisdiction wanting, this time because title to the engines passed when the defendant delivered the marine engines to the carrier for shipment to Massachusetts.[48] In doing so, the court once again substituted its policy judgment for the judgment of the legislature, which had relied on the model statute. The drafters of the model statute, like the Supreme Court in *International Shoe,* did not think this shipping detail would defeat long-arm jurisdiction. Indeed, the Uniform Act's comments cited a case in which jurisdiction under a long-arm statute had been allowed when title to goods transferred before reaching the forum state.[49]

2. Good Hope — The Two-step Approach

The third time the SJC considered a transacting business case, in 1979, it changed its approach. It acknowledged that whether jurisdiction is established under the long-arm statute and whether it satisfies due process are separate issues. In *Good Hope Industries Inc. v. Ryder Scott Co.*, the court declared that "a claim of personal jurisdiction over a nonresident defendant presents a two-fold inquiry: (1) is the assertion of jurisdiction authorized by statute, and (2) if authorized, is the exercise of jurisdiction under state law consistent with basic due process requirements mandated by the United States Constitution?"[50] This is the correct approach, because whether jurisdiction satisfies due process requirements does not matter unless the suit meets the standards set forth in the long-arm statute. It was also an implicit rejection of the overall approach to the long-arm statute taken in *Automatic Sprinkler* and *Droukas*. As such, it raises the question of what the result would have been if the court applied its new two-step approach to the facts in *Automatic Sprinkler* and *Droukas*. The court reluctantly conceded that in "both these cases . . . the defendants might be viewed literally as having 'transact[ed] . . . business' in Massachusetts."[51] But this concession was relegated to a footnote, and in the text the court reaffirmed the notion it first adopted in *Automatic Sprinkler* that the long-arm statute is meant to extend jurisdiction to the limits allowed by the Constitution. According to the court, this means that "the two questions tend to converge," in part, because the long-arm statute "cannot authorize jurisdiction which is constitutionally unacceptable, even though the fact pattern asserted in support of jurisdiction apparently satisfies the statute's literal requirements."[52] In this convergence, the analysis of the long-arm statute was reduced to an arid exercise, devoid of any effort to determine the legislature's purpose in making single transactions a sufficient basis for jurisdiction, while the constitutional analysis remained at the forefront, with the court continuing to hold that *Droukas* and *Automatic Sprinkler* were correctly decided because, even if the defendants in those cases had "literally" transacted business sufficient for the long-arm statute's purposes, "their contacts with the commonwealth were constitutionally insufficient to support jurisdiction."[53]

The net result of the court's approach was to make the statutory analysis of secondary importance, limited to a quick determination of whether the jurisdiction exercised comports with the literal terms of the long-arm statute. There was no good reason to treat the statute in such an offhand way, as if its meaning was obvious. Attorney Albert Zabin had already published a lengthy article demonstrating otherwise, by highlighting the differing ways that states with similar long-arm statutes had interpreted their statutes.[54] Yet that was just what the court did when it analyzed the facts in *Good Hope*. It spent one paragraph on statutory long-arm jurisdiction, and six pages on due process.[55]

This approach to the analysis affected not only the relative lengths of the discussions of the statute and due process, but also their substance. *Good Hope* involved a Massachusetts corporation and four subsidiary Texas corporations, all of which were headquartered in Springfield, Massachusetts. One of the subsidiaries, Good Hope Refineries, leased property in Texas on which it intended to drill for natural gas. To get a bank loan in Louisiana to finance the development of this land, it contacted Ryder Scott, a Texas company that appraised natural gas reserves, to arrange for an appraisal. Ryder was told where the subsidiary was located and agreed to send its appraisal reports to Massachusetts. Thereafter, Ryder sent multiple appraisals to Springfield and was paid from there. The initial appraisal reports were positive, and allowed Good Hope to obtain a loan and start building the infrastructure necessary to drill for gas on the land. But later revised reports showed much less value, causing the financing to be withdrawn and Good Hope to lose money.[56] Good Hope sued, and Ryder moved to dismiss.

With regard to the long-arm statute, the court held that:

> the defendant's sending periodic appraisal reports to [Good Hope] Refineries in Massachusetts over the course of one year, its frequent initiation of telephone communications with Refineries in Massachusetts, its mailing monthly invoices to Refineries in Massachusetts over a period of seventeen months and regularly accepting payment by checks drawn from Refineries' Massachusetts bank account points to the conclusion that the defendant "transact(ed) . . . business" in Massachusetts, within the literal meaning of those words.[57]

48. *Droukas*, 375 Mass. at 157-59.
49. *1962 Handbook, supra* note 22, at 222 (*citing* Shepard v. Rheem Mfg. Co., 249 N.C. 454 (1959)).
50. 378 Mass. 1, 5-6 (1979).
51. *Id*. at 8 n.13.
52. *Id.* at 6.
53. *Id.* at 8 n.13.
54. *See* Zabin, *supra* note 30.
55. *Good Hope*, 378 Mass at 6-12.
56. Good Hope Industries Inc. v. Ryder Scott Co., 378 Mass. 1, 3-5 (1979).
57. *Id.* at 6.

This brief gloss suggests that what makes this a business transaction in Massachusetts is that significant activity occurred with some connection to the state. But is that really what the legislature intended? The more obvious answer is that the jurisdictionally significant business transaction was the plaintiff's purchase of appraisal services from the out-of-state defendant and the mailing of the appraisal reports to the company's headquarters in Springfield, with the payment for them originating there. Had there been only one appraisal and one payment, it would have been just as much a business transaction, because the long-arm statute requires only a single transaction with a connection to the state to establish jurisdiction. All of the other back-and-forth may be relevant in some way to the lawsuit, but it does not turn this into an instance of multiple transactions, let alone really provide added proof that this was a "business transaction" at all.

What the court could have pondered was whether this transaction had sufficient connection to Massachusetts to say that it involved "transacting any business in this commonwealth."[58] The plaintiff had arranged the contract in Louisiana and Texas, for use in developing land in Texas. The court made a point of noting that the defendant knew early on that it was about to contract with a company headquartered in Massachusetts.[59] Is it then enough that the defendant knowingly contracted with a Massachusetts resident, even if the meat of the contract was to be performed out-of-state? The court evidently did not think so. Later in the decision, it treated favorably an Appeals Court decision holding that Massachusetts lacked jurisdiction over a suit brought by a Massachusetts surveying company hired to do work in Connecticut because all the important work occurred in that state.[60] Was the sending of appraisal reports and payment for them enough connection? That is what the court focused on, but this is hard to square with *Droukas*, in which payment was made from Massachusetts and the actual product, not just a report, was shipped to the state, and yet no jurisdiction was found. As noted earlier, the *Good Hope* court conceded that *Droukas* involved a transaction, but still held to the belief that the connection was insufficient to meet due process standards.[61] However, it offered no explanation as to why one transaction was sufficient to establish jurisdiction and the other was not. If, as the court declared, the long-arm statute was drafted to extend state jurisdiction to the limit allowed by the Constitution, then any instance in which the defendant had been transacting business in Massachusetts should have sufficed to meet due process requirements.

Indeed, the point of the Uniform Act, and thus of the long-arm statute, was to establish concrete bases for jurisdiction over out-of-state defendants that were acceptable for due process purposes. Given this, the *Good Hope* court should at least have used its determination that Ryder had transacted business in Massachusetts as the starting point of its due process analysis. It did not, and apparently no subsequent SJC or Appeals Court case has explicitly relied on a finding of jurisdiction under the long-arm statute as part of its due process analysis. The absence of such an analysis has consequences. In *Good Hope*, the court's due process analysis has its positive points — for example, its determination that it does not matter for purposes of determining whether the defendant purposefully availed itself of the privilege of conducting activities in Massachusetts whether the plaintiff or the defendant initiated the business transaction. However, the court also emphasized the point it made in *Droukas* that the defendant must be shown to have been engaged in more than an "isolated transaction."[62] This is a leftover from the earlier "doing business" approach that allowed jurisdiction only over a defendant that had systematic, multiple contacts with the state. The court determined that Ryder's contacts were not isolated because it "had engaged in an enterprise of substantial dimension," had 52 phone conversations with the plaintiffs in Massachusetts over the course of one year, and had billed and received payment multiple times.[63] None of this changes the underlying fact that *Good Hope* involved one business deal, and the sole question before the court was whether the fallout from that transaction could be heard in the Massachusetts court system. But instead of facing that directly, the court's analysis suggested that jurisdiction over a single transaction can be obtained only if the single transaction is protracted. If that was so, how many phone calls or billings would be needed to prove the transaction was not isolated?

58. Mass. Gen. Laws c. 223A, §3(a).

59. *Good Hope*, 378 Mass. at 4.

60. *Id.* at 8-9 (discussing Nichols Assocs. v. Starr, 4 Mass. App. Ct. 91 (1976)). In commenting favorably on *Nichols*, the SJC included the following footnote:

> It is significant in Nichols Assocs. v. Starr [citation omitted], that the plaintiff had performed services for the nonresident defendant. The attachment of jurisdiction over the defendant might well have implied that under § 3(a) all Purchasers could be rendered subject to long arm jurisdiction. So broad an interpretation would have promoted the unwanted result of discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts. *See* Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1085 (1st Cir. 1973).

Id. at 9 n.14 (emphasis in original). This analysis, however, did not consider the evident purpose of the long-arm statute to protect Massachusetts citizens and businesses, including Massachusetts businesses that sell goods or services to buyers in other states.

Whittaker involved a Massachusetts corporation that made a metal ash that could potentially be used in the manufacture of airline turbines. The company sued United Airlines and two other companies. The First Circuit acknowledged that the contacts of all three defendants were more extensive than those involved in *Automatic Sprinkler* (which in footnote 13 of *Good Hope* the SJC had just suggested might have been sufficient to establish that they transacted business in Massachusetts), but concluded that jurisdiction was appropriate only as to United, which had extensive involvement in approving the metal ash specifications. 482 F.2d at 1083-84. The other two companies, which had entered into contracts to purchase the metal ash, the court referred to as "passive purchasers." *Id.* at 1084. It acknowledged that some courts had held that "entering into a manufacturing agreement with the resident of a forum has been held to be sufficient to support long arm jurisdiction," but decided to take the contrary approach because "the interest of the forum in not discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts undercuts such an expansive interpretation." *Id.* at 1085. Whatever the merits of this policy argument, it is not one the legislature has adopted. Instead, the legislature has chosen to provide a Massachusetts forum for the Massachusetts party dealing with an out-of-state party to a transaction, whether either party is a seller, a buyer, a manufacturer, or a consumer.

61. *Good Hope,* 378 Mass. at 8 n.13.

62. Good Hope Industries Inc. v. Ryder Scott Co., 378 Mass. 1, 9 (1979).

63. *Id.*

3. Subsequent Developments

Good Hope remains the leading case in Massachusetts on personal jurisdiction over out-of-state defendants. By separating the analysis of personal jurisdiction under the long-arm statute from the due process analysis, the decision has led to the development of law on what the long-arm statute means. Few subsequent Massachusetts state court decisions did much more than *Good Hope* in discerning the statute's meaning in depth, but they have, by and large, confirmed that the long-arm statute's provisions are meant to be read broadly.

Most notably, transacting business has been read to encompass far more than contract actions. The phrase "transacting any business" is, in the SJC's view, "general and applies to any purposeful acts by an individual, whether personal, private, or commercial."[64] Furthermore, a business transaction may be the jurisdictional basis not only for contract actions, but for tort actions as well, if the injury was sufficiently connected to the transaction.[65] And the transaction in Massachusetts in which the defendant engaged need not have been with the plaintiff so long as the plaintiff was impacted directly by the defendant's transaction of business in the state.[66]

a. Single Transactions Should be Enough to Establish Jurisdiction

But the SJC's decision that jurisdiction was proper in *Good Hope* because the dealings between plaintiff and defendant were not a "single isolated transaction" has tended to lead to a more restrictive interpretation of the long-arm statute than was intended. That interpretation, coupled with the court's effort to recraft the way its earlier decisions in *Automatic Sprinkler* and *Droukas* should be viewed, has not been well understood, and, as a result, these earlier cases have continued to have an outsized — and erroneous — influence on the development of the law.

The result in some cases was not affected because the out-of-state defendant who had business dealings with one person in Massachusetts proved to have had other significant contacts with the state as well. Thus, a Massachusetts woman who slipped and fell at a hotel in California was able to gain jurisdiction over the hotel in Massachusetts because "the defendant's acceptance of the plaintiff's room reservation formed part of the defendant's overall purposeful solicitation of hotel business from residents of Massachusetts" — with the SJC making a particular point that this "broader range of activities" was different than the isolated sale of marine engines in *Droukas*.[67] Similarly, the Appeals Court found that a Massachusetts resident who purchased a car from a dealer a short distance across the border in Rhode Island could bring suit in Massachusetts, not because the advertisements the dealer placed in a Massachusetts newspaper and radio station led the plaintiff to the dealership and they then entered into a business transaction, but instead because this was part of a persistent marketing campaign meant to cultivate a market in Massachusetts, unlike the advertisement in a general trade magazine that happened to make its way to Massachusetts in *Droukas*.[68] And, the former vice president of a New York corporation's Massachusetts subsidiary was allowed to sue the parent company in Massachusetts for breach of contract because "[t]he activities in Massachusetts of . . . the parent corporation went well beyond isolated incidents [as in *Droukas*]. . . . It established and directed a division whose operational activities were entirely in Massachusetts."[69]

Of course, none of this effort to distinguish the cases from *Droukas* need have been made as a matter of statutory analysis because the *Good Hope* footnote had already begrudgingly acknowledged that the single sale in *Droukas* "might" amount to transacting business. It would seem, then, that this footnote has been forgotten.

This forgetfulness has had its greatest impact when the defendant had just one contact with Massachusetts. Under the long-arm statute, if the particular dealings between the parties amounted to a business transaction in Massachusetts, this should suffice for jurisdiction. But that has not always been the case. Consider the situation of Telco Communications, a Rhode Island corporation that,

64. *See,* e.g., Ross v. Ross, 371 Mass. 439, 441 (1976) (divorced husband could bring suit in the Massachusetts Superior Court against his ex-wife who was living in New Jersey to enforce a separation agreement because his ex-wife had "transacted business" in Massachusetts by petitioning the Probate Court for an increase in alimony and child support).

65. Tatro v. Manor Care Inc., 416 Mass. 763 (1994) (a woman who slipped and fell in a hotel bathtub in California was permitted to sue the hotel in Massachusetts because "but for" the "business transaction" she made in Massachusetts to rent the hotel room, the accident would never have occurred). This interpretation of the long-arm statute was advocated by Attorney Zabin, who wrote approvingly of a New York decision under its long-arm statute allowing jurisdiction in New York over an injury that occurred in Connecticut caused by a geologist's hammer sold in New York. Zabin, *supra* note 30, at 117, discussing Singer v. Walker, 15 N.Y.2d 443 (1965) (according to Westlaw, the actual case name is Longines-Wittnauer Watch Co. v. Barnes & Reinecke Inc., although both Singer v. Walker and Feathers v. McLucas are used by subsequent courts to identify the case since it involved three actions consolidated in a single opinion).

66. Balloon Bouquets Inc. v. Balloon Telegram Delivery Inc., 18 Mass. App. Ct. 935 (1984) (a Louisiana company that compiled a national directory of balloon delivery companies and had four balloon delivery clients in Massachusetts was subject to suit in Massachusetts by a local balloon company, because the defendant had questioned the plaintiff's trademark in a newsletter that it distributed to its clients). Similarly, the First Circuit held that a business transaction can sometimes occur when a defendant takes action against the plaintiff. Thus, a Massachusetts company was permitted to bring a patent infringement suit against a Swiss citizen who had "transacted business" by sending two letters to the company threatening a patent infringement suit and also had an arrangement licensing his product to another Massachusetts company. Nova Biomedical Corp. v. Moller, 629 F.2d 190, 195 (1980).

67. *Tatro*, 416 Mass. at 768-69.

68. Gunner v. Elmwood Dodge Inc., 24 Mass. App. Ct. 96, 97-99 (1987).

69. Kleinerman v. Morse, 26 Mass. App. Ct. 819, 822-23 (1989).

from its principal place of business in Massachusetts, helped civic organizations nationwide with fundraising.[70] It entered into a contract with the New Jersey State Firemen's Mutual Benevolent Association to create and circulate a booklet in New Jersey celebrating the state's firefighters with the money to finance this project generated by advertising that Telco would solicit.[71] The deal fell apart and Telco brought suit in Massachusetts.[72] While many of the dealings between the parties occurred in New Jersey, there were sufficient Massachusetts dealings to amount to a Massachusetts business transaction.[73] Numerous phone calls were made between the two states concerning advertising and copy for the publication, which was supposed to have been printed in Massachusetts.[74] But the Appeals Court did not see it that way. Citing *Automatic Sprinkler,* it held that the mere fact that the defendant had a contract with a company located in Massachusetts was not enough for jurisdiction, and the other contacts were insufficient because "it can fairly be said not merely that the center of gravity of the transaction was in New Jersey, but that the great heft of it was there, leaving little by way of a connection of the defendant . . . with Massachusetts that could qualify as a transaction of business in Massachusetts."[75] This is inconsistent with the *Good Hope* footnote's treatment, as a business transaction, of the purchase-and-sale agreement in *Automatic Sprinkler*, which involved a Massachusetts seller providing to a New York buyer a good made elsewhere. It also misses the essence of the minimum contacts approach, which allows for the possibility that minimum contacts might be satisfied in a number of states, not just the state where most of the business activity occurred.[76]

The SJC also has denied jurisdiction in single transaction cases simply because they involved single transactions. In 2005, it once again considered a case remarkably like *Droukas*. This time, a Massachusetts company bought two boats, one based on an advertisement in *Boats and Harbors* magazine, which is distributed in Massachusetts, and the second based on its relationship with the Louisiana seller of the first boat. The SJC held that jurisdiction over a breach of contract action was lacking. It noted that, in the similar situation *Droukas* presented, the defendant's contacts were found insufficient to show under the long-arm statute that it had transacted business in Massachusetts. It followed this original understanding of *Droukas* without mentioning that the *Good Hope* court had subsequently acknowledged that the boat sale and shipment in *Droukas* might have been a business transaction.[77]

b. The Long-arm Statute Does Not Extend to the Limit of Due Process

Not only should cases involving a single transaction be recognized as potentially sufficient under the long-arm statute, as the legislature intended, but the relationship between the long-arm statute and due process considerations should be re-examined as well. *Good Hope's* stance that the long-arm statute is meant to extend to the limits of due process is both incorrect and unhelpful. *Good Hope* relied for this proposition on the holding to this effect in *Automatic Sprinkler*. That earlier decision itself relied not on an analysis of the meaning of the statute or an investigation of its legislative history, but on two federal district court cases and Attorney Zabin's article. The two cases do not make any such claim. Rather, in the first one, a federal district court judge, when discussing the Massachusetts long-arm statute, noted that "[a]s long as constitutional limits are not crossed, a court should interpret the statute to effectuate a state's legitimate desire to protect its citizens."[78] This statement does not offer an opinion one way or the other on whether the long-arm statute extends jurisdiction to constitutional limits. Nothing else in the decision does either. The second district court case merely quotes the first one.[79] That leaves the Zabin article as the only source for the "limits of due process" thesis. The introduction to Attorney Zabin's article begins with the bold statement that "[t]he thesis of this article is that this [long-arm] statute is intended to permit the Courts of the Commonwealth to exercise jurisdiction to the fullest limits permitted by the Constitution."[80] In support of this proposition, Attorney Zabin offered only that the courts of Illinois and New York have interpreted the "transacting business" clause of their long-arm statutes to extend to the limits the Constitution allows.[81] The New York case Zabin cited does not make such a claim at all. It states merely that New York, "[t]aking advantage of the Supreme Court's broadening of the bases for the exercise of personal jurisdiction over nondomiciliaries," adopted a long-arm statute modeled on Illinois's, which, by itself, does not stand for the proposition that New York's long-arm statute extends to the limits of due process.[82] Professor Douglas McFarland, who has assembled a comprehensive list of 27 states that, for one reason or another, have interpreted their long-arm statutes to extend to constitutional limits, does not include New York among those states.[83] McFarland demonstrated this by citing a New York Court of Appeals decision holding that the tort provisions in

70. Telco Commc'ns Inc. v. N.J. State Firemen's Mut. Benevolent Ass'n., 41 Mass. App. Ct. 225, 230-31 (1996).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. To the extent the *Telco* court thought the controversy had more connections with New Jersey, this was not a reason to deny jurisdiction in Massachusetts. Rather, consideration should have been given to transferring the case to the New Jersey courts by way of a forum non conveniens motion.

77. Intech Inc. v. Triple "C" Marine Salvage Inc., 444 Mass. 122, 126-27 (2005). The following year, the SJC once again denied jurisdiction over a claim by a disappointed Massachusetts boat purchaser against a nonresident boat seller. This time, the plaintiff added that the boat seller had misrepresented the boat's condition and thereby committed a tort in Massachusetts. Despite precedent holding that that sending a false statement into Massachusetts is a tort in the state that can be the basis for jurisdiction under Mass. Gen. Laws c. 223A, § 3(c) ("causing tortious injury by an act or omission in the commonwealth") (*see* Murphy v. Erwin-Wasey Inc., 460 F.2d 661, 664 (1st Cir. 1972)), the court held that the "damages sought are grounded in breach of contract and do not constitute 'tortious injury' as contemplated under § 3[c]." Roberts v. Legendary Marine Sales, 447 Mass. 860, 864 (2006).

78. DeLeo v. Childs, 304 F. Supp. 593, 595 (D. Mass. 1969).

79. Mark v. Obear & Sons Inc., 313 F. Supp. 373, 376 (D. Mass. 1970).

80. Zabin, *supra* note 30, at 101.

81. *Id.* at 108.

82. Longines-Wittnaeur Watch Co. v. Barnes & Reinecke Inc., 15 N.Y.2d 443, 452 (1965).

the long-arm statute were "not designed to go to the full limits of permissible jurisdiction . . . [but instead] were deliberately inserted to keep the provision 'well within constitutional bounds.'"[84]

The situation in Illinois is a bit more complicated. Ignoring the Illinois legislature's deliberate effort to limit long-arm jurisdiction to matters previously established as well within the limits of due process, the Illinois Supreme Court in *Nelson v. Miller* declared in dictum that the long-arm statute "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause."[85] That court cited two law review articles as its source, neither of which made any such claim, but rather made the more limited assertions that the long-arm statute extends jurisdiction "far more fully"[86] than before, and that this jurisdiction extends "virtually to the full limits permitted by the due process clause as presently interpreted."[87]

Even though the sources cited for the proposition that the long-arm statute extends to the limits of the Constitution do not actually say so, could the proposition still be true? That is highly unlikely. The long-arm statute requires that only two questions be answered before jurisdiction is determined: do the defendant's actions fit into one of the mostly concrete categories listed in the statute (such as a "tortious injury by an act or omission in the commonwealth" or "having an interest in, using or possessing real property in this commonwealth") and, if so, does the suit arise from these types of actions? Due process requires a more extensive inquiry. Aside from the inquiry previously mentioned — that the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state — other factors must be considered, including: (1) whether the relationship between the defendant and the forum state is sufficient to make it reasonable for the defendant to be required to defend a suit there, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in "obtaining convenient and effective relief," (4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies."[88] Undoubtedly, in some instances, the answer as to whether there is jurisdiction will be the same under the long-arm statute and due process analysis. But it would also seem inevitable, given the straightforward questions the statute asks and the vaguer, multi-factored approach needed to perform a due process analysis, that there will be at times some divergence between the two analyses.

A close look at the long-arm statute itself also reveals that it does not extend to constitutional limits. The statute does not include jurisdictional provisions that are found in some other long-arm statutes. Michigan, for example, grants jurisdiction over an individual "[a]cting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state."[89] Wisconsin, which has the most detailed long-arm statute, has sections specifying particular types of transactions that warrant jurisdiction, such as an action that "[a]rises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff."[90] Whether, in every instance, the Massachusetts long-arm statute would provide for jurisdiction over such promises is not absolutely clear.

What is clear, however, is that the tort section of the statute does not go as far as Illinois's long-arm statute, as interpreted by the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp*.[91] As a consequence of that decision, Illinois allows suit to be brought over a design defect created out of state that led to an injury in Illinois; no additional showing need be made.[92] But Massachusetts, in line with the Uniform Act drafters' decision not to go as far as *Gray*, requires some additional showing of the defendant's involvement with the state.[93] Since *Gray* has been cited favorably by the Supreme Court,[94] the Massachusetts approach to jurisdiction over such tort suits cannot possibly extend to constitutional limits.

If there was any doubt that the long-arm statute did not extend to constitutional limits, that should have been eliminated in 1977. In that year, the Uniform Act was withdrawn because so many states had passed more liberal long-arm statutes.[95] These more liberal long-arm statutes tend to simply state that personal jurisdiction extends to the limits of due process. The SJC recently recognized that, when compared to such statutes, the Massachusetts long-arm statute cannot be said to permit jurisdiction in every instance that due process would allow.[96] But this has not deterred it from continuing to hold that, insofar as the long-arm statute enumerates grounds for jurisdiction, it extends to constitutionally allowable limits.[97]

83. *McFarland, supra* note 29, at 511-24.

84. Ingraham v. Carroll, 90 N.Y.2d 592, 597 (1997).

85. 11 Ill. 2d 378, 389 (1957).

86. Edward Cleary and Arthur Seder Jr., "Extended Jurisdictional Bases for the Illinois Courts," 50 N.W. U. L. Rev. 599, 599 (1955).

87. John O'Connor and James Goff, "Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Practice Act," 31 Notre Dame L. Rev. 223, 223 (1956). For a complete discussion of the Illinois legislature's intent and the *Nelson* court's interpretation of that intent, *see McFarland, supra* note 29, at 502-08.

88. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

89. Mich. Comp. Laws Ann. § 600.705(6) (West 2018). The drafters of the Uniform Act chose not to include such a provision. *1962 Handbook*, *supra* note 22, at 224.

90. Wisc. Stat. Ann. § 801.05(5)(a) (West 2018).

91. 22 Ill.2d 432 (1961).

92. *Id.* at 435-36.

93. *See* Mass. Gen. Laws c. 223A, § 3(d).

94. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).

95. "Minutes of the Executive Committee of the National Conference of Commissioners on Uniform State Laws," 86 *Handbook Nat'l Conf. Commissioners on Uniform St. Laws and Proc. Ann. Conf. Meeting* 114, 118 (1977).

96. "In contrast to the long-arm statutes of some states, the Massachusetts statute does not purport to extend jurisdiction as far as due process would allow. Compare Cal. Civ. Proc. Code § 410.10 (West 2004) ('A court of this [S]tate may exercise jurisdiction on any basis not inconsistent with the Constitution of this [S]tate or of the United States')." SCVNGR v. Punchh Inc., 478 Mass. 324, 328 (2017).

97. *Id.* at 329.

c. Negative Consequences of Interpreting the Long-arm Statute as Extending to the Limit of Due Process

The consequences of the continued belief that the long-arm statute extends to the limits allowed by the Constitution can be seen most strikingly in a line of First Circuit decisions that do not analyze at all whether jurisdiction is consistent with the long-arm statute. This is because of the circuit court's determination that it "may sidestep the statutory inquiry and proceed directly to the constitutional analysis . . . because the Supreme Judicial Court of Massachusetts has interpreted the state's long-arm statute 'as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States.'"[98] This approach can lead to results that are wholly inconsistent with what ought to have been the result had the long-arm statute itself been analyzed separately.

Two illustrations of cases in which the federal courts found jurisdiction lacking under this approach will suffice. *Micro Estimating Systems Inc. v. Laurentec LLC*[99] involved a suit by a Wisconsin software developer against its former customer, a South Carolina corporation, for defamation over a critical letter the defendant sent to a Massachusetts competitor of the plaintiff, which that company then republished to its clients. Defamation occurs wherever the defamatory statement is published.[100] Publishing the contested letter in Massachusetts was a tortious act in Massachusetts. If the district court had applied the long-arm statute's plain language correctly,[101] it would have found that jurisdiction was appropriate under the long-arm provision allowing jurisdiction if a defendant causes "tortious injury by an act or omission in the commonwealth."[102]

Katz v. Spinello Companies[103] was also a tort suit, this time for wrongful death that occurred when a Gulfstream airplane crashed while taking off from Hanscom Airport in Bedford, Massachusetts. Plaintiffs alleged a design defect in one of the plane's parts, and thus needed to establish jurisdiction, under subsection "d" of the long-arm statute, based upon any tortious act involved in designing the part that occurred out of state. Under Mass. Gen. Laws chapter 223A, section 3(d), they needed to show that the injury occurred in Massachusetts and that the defendant had some other business connection with the state. The accident occurred in Massachusetts, and though this particular plane had not been sold to a Massachusetts buyer, Gulfstream had sold at least 10 other planes in the state.[104] Thus, it appeared to have been regularly doing business in Massachusetts or deriving substantial revenue from the state, thereby meeting all the statutory requirements to establish jurisdiction based upon an out-of-state tortious act, which the court should have recognized.

d. Impact on Long-arm Statute Interpretation of Supreme Court Retrenchment on Minimum Contacts

In cases like these, had the courts first determined that jurisdiction was justified under the long-arm statute, that might — and should have — impacted their due process analyses because the statute was meant to provide for jurisdiction safely within the bounds of what was thought to be the jurisdiction allowed based upon minimum contacts. Or at least so was the opinion in 1962 when the Uniform Act was approved as a model long-arm statute. At that time, the Supreme Court appeared inclined to adopt ever-expanding notions of personal jurisdiction "on . . . the road toward nationwide in personam jurisdiction."[105] That has not proved to be the case. Restrictive and confusing decisions have followed, one after another, to the point that one commentator has suggested abandoning the minimum contacts approach, saying "[t]he minimum contacts test is in its twilight because it has become almost completely separated from the fairness rationale that underlay the test as it was originally conceived."[106] Indeed, "[a]s it is now functioning, the minimum contacts test is little or no improvement over the 'patchwork of legal and factual fictions' from which it supposedly liberated civil actions."[107] Locally, Judge William Young expressed his frustration with having to decline jurisdiction in a situation when he thought

98. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002) (quoting Automatic Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 443 (1972)).

99. 2013 WL 1330996 (D. Mass. 2013).

100. The First Circuit had held early on that when "a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state," and therefore jurisdiction is established under the long-arm statute because a "tortious act within this state" has been shown. Murphy v. Erwin-Wasey Inc., 460 F.2d 661, 663-64 (1st Cir. 1972). The district court included this quote in its decision in *Micro Estimating Systems*, but did not indicate that it referred to the long-arm statute. 2013 WL 1330996 at 5.

101. The district court did consider the long-arm statute in a footnote, but erroneously concluded that because the letter originated in South Carolina it was not a tortious act in Massachusetts. 2013 WL 1330996 at 3 n.2. The court's main reasoning, however, was that the defendant did not purposefully avail itself of the privilege of conducting activities in Massachusetts, because it was unlikely to have foreseen that it was making itself subject to suit by the Wisconsin company that was the subject of the letter. Id. at 4. The court also thought Massachusetts had an insufficient interest in the matter because the injured party was an out-of-state company. *Id.* at 5. However, that should not have presented a due process problem because the Supreme Court had already concluded in Keeton v. Hustler Magazine Inc., 465 U.S. 770 (1984) that, consistent with due process, an out-of-state plaintiff could sue a defendant in a state in which defamatory material had been published.

102. Mass. Gen. Laws c. 223, § 3(c) (2018).

103. 244 F. Supp.3d 237 (D. Mass. 2017).

104. *Id.* at 255. While at one time these circumstances might have justified general jurisdiction over *Gulfstream*, the Supreme Court has limited such jurisdiction to states "in which the corporation is fairly regarded as at home," such as states in which it is domiciled, its place of incorporation, and its principal place of business. Goodyear Dunlop Tires Operation S.A. v. Brown, 564 U.S. 915, 924 (2011).

105. *Kurland, supra* note 10, at 622.

106. Patrick J. Borchers, "The Twilight of the Minimum Contacts Test," 11 Seton Hall Cir. Rev. 1, 4 (2014).

107. *Id*. at 33.

to do so was unfair, saying:

> It is perhaps unfortunate that recent jurisprudence appears to "turn the clock back to the days before modern long-arm statutes when a [business], to avoid being hailed into court where a user is injured, need only Pilate-like wash its hands of a product by having [agents] market it," Russell J. Weintraub, "A Map Out of the Personal Jurisdiction Labyrinth," 28 U.C. Davis L. Rev. 531, 555 (1995), and that, in many circumstances, American consumers "may now have to litigate in distant fora — or abandon their claims altogether," Arthur R. Miller, Inaugural University Professorship Lecture: "Are They Closing the Courthouse Doors?" 13 (March 19, 2012) (criticizing the plurality opinion in *J. McIntyre Mach. v. Nicastr*o), but this court must follow the law as authoritatively declared.[108]

How much should any of the more restrictive readings of personal jurisdiction from the Supreme Court affect the analysis under the long-arm statute? In some sense, not at all. The long-arm statute is meant to establish concrete, readily determinable bases of jurisdiction, rather than designed to simply follow the vagaries of Supreme Court jurisprudence on personal jurisdiction's due process limitations. Moreover, per *Good Hope,* the statutory and due process aspects of personal jurisdiction are to be evaluated separately.

The Massachusetts long-arm statute was designed with the idea that it was safely within the bounds permitted by due process, and thus determination of jurisdiction under the statute should lead to a determination that due process standards had been met as well. The reality now may be that sometimes the statute would allow jurisdiction, but Supreme Court precedent would not. How frequently will this happen? Maybe not as frequently as some fear. The most obvious way in which the Supreme Court has taken a more limited view of personal jurisdiction is its focus on the standard developed in *Denckla*, that the defendant must have purposefully availed itself of the forum state's benefits.[109] In *Denckla*, the Supreme Court had held that Florida did not have jurisdiction over a Delaware trustee because the maker of the trust had moved there after the trust was formed.[110] As a consequence, movement by the plaintiff, or plaintiff's movement of a purchased good to the forum state, has been held to defeat jurisdiction because it is not something the defendant sought. In *World-Wide Volkswagen Corp. v. Woodson,* for example, the Court held that plaintiffs, who bought a car in New York and were later injured in a car crash in Oklahoma, could not obtain jurisdiction in that state over the New York auto dealer who sold them the car or over the car's regional distributor, because neither defendant intended to serve Oklahoma directly or indirectly.[111] And in *Kulko v. Superior Court of California*, the Court held that California lacked jurisdiction over an ex-husband in his ex-wife's action to obtain full custody of their children because the marital home had been in New York and the ex-wife had later moved to California.[112]

When it is not the plaintiff who has caused the movement, but, instead, the "stream of commerce," the Court has not been able to reach a consensus on how to approach jurisdiction. At first it appeared to adopt a broad view, stating in *World-Wide Volkswagen* that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[113] The Court later split with Justice William Brennan, who commanded four votes for the view that jurisdiction was appropriate over the "regular and anticipated flow of products from manufacture to distribution to retail sale."[114] Justice Sandra Day O'Connor also commanded four votes for a more restrictive view that would require the defendant to have taken additional steps showing an interest in serving a particular market, such as using a distributor who agreed to sell in that market.[115] Subsequent decisions have not clarified the

108. Weinberg v. Grand Circle Travel LLC, 891 F.Supp.2d 228, 252 (2012).

109. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

110. *Id.* at 252. For a five-to-four decision, *Denckla* has had an outsized influence. There was reason to believe when it was issued that it was a one-off, a case in which the result meant nothing more than that the majority was sympathetic to one side in a family dispute over an inheritance and decided it in that light. But the decision revealed a fundamental division about how to determine minimum contacts, with the majority focusing exclusively on the defendant's contacts with the forum and the dissent looking at a broader array of factors. *Id.* at 253, 258-59. When *Denckla* was issued, its long-term implications for personal jurisdiction law were unclear. Professor Kurland thought at the time that the case "forebodes some change in the Court's approach" to personal jurisdiction, but that it was most likely "a stopping place — whether permanent or temporary — on what had been the road toward nationwide in personam jurisdiction." Kurland, *supra* note 10, at 610, 622.

111. 444 U.S. 286, 297 (1980).

112. 436 U.S. 84 (1978). Massachusetts has followed the same approach in domestic relations cases. *See* Morrill v. Tong, 390 Mass. 120 (1983).

113. 444 U.S. at 297-98.

114. Asahi Metal Indus. Co. Ltd. v. Superior Court of Cal., 480 U.S. 102, 117 (1987) (Brennan, J., dissenting).

115. Justice O'Connor's examples of additional steps were "designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." *Id.* at 112.

Court's position. In 2011, four justices in *J. McIntyre Machinery, Ltd. v. Nicastro* accepted the restrictive view and held that a person injured in New Jersey by a machine manufactured by the defendant in England could not sue in New Jersey because the defendant sold its machines to an independent distributor and did not control where the machines were resold.[116] Two additional justices concurred in the judgment, but declined to adopt the plurality's rationale, and would have held only that this one sale in New Jersey was insufficient to establish jurisdiction.[117] Thus, there remains no majority in the Court agreeing on the extent of personal jurisdiction in a stream of commerce case.

What is clear about the analysis of due process issues and their interplay with long-arm statutes is that the Supreme Court has paid more heed when a state has specified the grounds for jurisdiction it intends to provide for its citizens, as it did in *McGee* when California provided for jurisdiction over insurance contracts made with its residents, but did not do in *McIntyre* when New Jersey's long-arm statute explicitly stated that it extended to the limits of due process — and thereby, ironically, failed to assert a particular state interest in the matter.[118]

Wherever the Court ultimately ends up on stream of commerce as a basis for personal jurisdiction, these decisions on the movement of goods by the plaintiff or by commerce suggest a potentially far more limited view of jurisdiction than the one embodied in the Massachusetts long-arm statute. For example, it does not matter under the statute how a product ended up in Massachusetts. If it caused injury in Massachusetts, jurisdiction is potentially available.

Still, in many instances, the difference in approach between the statute and the Supreme Court's due process jurisdiction should not make any difference in determining whether personal jurisdiction exists. Take the case of the Gulfstream airplane that crashed in Massachusetts, a case that involved the movement of a product by someone other than the defendant. The plane was not sold in Massachusetts, although others made by the same manufacturer were. The district court held that jurisdiction over the plane's manufacturer was inappropriate without a showing of a connection between the Massachusetts sales and the claims arising out of the plane crash.[119] That would be relevant under the business transaction clause in the long-arm statute, but not under the clause addressing torts committed out-of-state. Under the latter clause, all that is required is that the out-of-state tortious act (in *Katz*, a design flaw in a plane part) caused an injury in Massachusetts (it allegedly did), and that the defendant engaged in other business-related activity in the state. This it also did, by selling other planes to Massachusetts customers. Thus, the statute was satisfied. Due process likely was as well. The Supreme Court has never addressed the type of jurisdiction allowed by the out-of-state tort provision of the Massachusetts long-arm statute. In *World-Wide Volkswagen*, for example, while it ruled that jurisdiction over a New York car dealer was inappropriate in Oklahoma, the site of the car crash, it was not asked to rule on whether jurisdiction over Volkswagen itself, which surely sold its cars in Oklahoma, was appropriate. Jurisdiction based upon the long-arm statute's "tortious acts committed out-of-state" provision, which requires some additional business activity by the defendant in-state, would seem to satisfy even those Supreme Court justices who demand particular evidence that the defendant has targeted the forum state.

As for stream of commerce cases, the Massachusetts Appeals Court has shown that this can be deftly handled. *Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co. KG*.[120] involved a tort suit by a Massachusetts resident who was injured by an optical lens grinding machine manufactured by a German company. The defendant sold its machines to a Swiss company that marketed them in the United States through an Illinois corporation. The court held that jurisdiction was present under the long-arm statute because the injury occurred in Massachusetts and the German company had other business contacts with the state.[121] Turning to whether jurisdiction met due process standards, the court noted the split on the Supreme Court over how to approach stream of commerce as a jurisdictional basis and then declared that, "[w]hichever view is assumed to be controlling, we think that Massachusetts may constitutionally assert jurisdiction over the defendant in this case."[122] It then explained:

> There is no question on the facts presented that the defendant was aware that its products had been purchased by Massachusetts customers for use here. The sale of the machine in question was not an isolated occurrence. There were "dozens" of the defendant's machines in one Massachusetts plant and three or four in the plaintiff's employer's place of business prior to the purchase of the machine in question. While the sales of the defendant's products may have been accomplished indirectly, the defendant also acted directly to serve the Massachusetts market. The defendant sent its employees to Massachusetts to visit existing or prospective customers at three different companies to provide advice on delivered machines and to cultivate a market for the defendant's products. The defendant derived substantial revenue from its products used in Massachusetts. When considered cumulatively, we think these facts support a finding of sufficient minimum contacts brought about by the purposeful acts of the defendant directed toward Massachusetts, so that the assertion of specific personal jurisdiction over the defendant by the Superior Court is consonant with due process.[123]

116. 564 U.S. 873, 886 (2011).

117. *Id.* at 887-88 (Breyer, J., concurring).

118. *Compare* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957), and *McIntyre*, 564 U.S. at 902.

119. Katz v. Spinello Cos., 244 F. Supp.3d 237, 255 (D. Mass. 2017).

120. 26 Mass. App. Ct. 14 (1988).

121. *Id.* at 19-21.

122. *Id.* at 25.

123. *Id.* (citations omitted).

As for cases in which a transaction is the basis for jurisdiction, the situation is potentially more confused because of a description by Justice Brennan of the circumstances in which jurisdiction over a contract dispute would be upheld. In *Burger King Corp. v. Rudzewicz,* he declared for the Court:

> If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. . . . Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." [*Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316-317 (1943).] It is these factors — prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing — that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.[124]

Justice Brennan's comments at first blush seem odd. What would Wigmore or Corbin think of the apparent diminution of the contract's significance? They also seem disconnected from the case before him, in which Burger King brought suit in Florida, the state of its corporate headquarters, to stop a former Michigan franchisee from continuing to use the Burger King name.[125] Prior negotiations were irrelevant to the suit, as was the brief time that the franchisee operated, and, from Burger King's perspective, there were no future consequences because it had terminated the franchise. But Justice Brennan's statements can be understood as a response to the dissent, which thought that, because the contract negotiations had mainly been between the prospective Michigan franchisee and Burger King's Michigan office, jurisdiction would be appropriate only in Michigan.[126] Justice Brennan thought not. He quoted *Hoopeston* to show that the place where a contract was entered into was not the exclusive place where jurisdiction can lie. In *Hoopeston*, the court upheld the power of New York State to regulate an insurer that provided fire insurance to New York businesses, but had all of its contracts signed in Illinois. It was this that led Justice Black to contrast the place where a contract was made with the real object of the business transaction, which he saw as justifying New York's assertion of regulatory jurisdiction, for "[s]urely the object of all this activity is not the signing of a contract or a check, but the protection of property and payment of indemnity in case of loss by fire."[127]

Seen in this light, Justice Brennan's comments in *Burger King* reflect an expansive, rather than a restrictive, view of personal jurisdiction. Although several subsequent decisions have read *Burger King* as requiring more than a single contract,[128] the decision hardly stands for this proposition. The franchisee's only contact with Florida was the single contract with Burger King. Nonetheless, the majority thought this sufficient because the defendants had deliberately entered into the franchise agreement, and damages to Burger King in Florida were foreseeable from their continued unauthorized use of the Burger King name.[129] And if that were not enough, the Court reaffirmed that *McGee* was still valid, and that a single contract can be the basis for jurisdiction if a "substantial connection" to the forum is present.[130]

Conclusion

The net result is that while the Supreme Court's present-day view of personal jurisdiction is more restrictive than it would have appeared when *International Shoe* was issued, in most cases that should not conflict with the jurisdictional grounds set forth in the Massachusetts long-arm statute. Indeed, it is worth noting that the Supreme Court has never held a long-arm statute unconstitutional, and thus Massachusetts courts can be comfortable enforcing the long-arm statute to its intended breadth. It was meant to provide jurisdiction safely within the bounds allowable under the Constitution's due process clause.

The statute also was intended to provide concrete, and constitutional, bases for jurisdiction over out-of-state defendants. It deserves to be given the full effect of its emphasis on single transactions and torts as adequate bases for jurisdiction, so long as the cause of action actually arises from either type of conduct. This will require reconsidering some of the prior interpretations of the long-arm statute, and starting afresh to re-emphasize what the drafters of the Uniform Act and the long-arm statute intended.

124. 471 U.S. 462, 478-79 (1985).

125. *Id*. at 468-69.

126. *Id.* at 487-90.

127. Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 318 (1943).

128. *See, e.g.,* Bond Leather Co. Inc. v. Q.T. Shoe Mfg. Co. Inc., 764 F.2d 928, 932 & 935 n.4 (1985) (Ohio corporation's guarantee of payment to Massachusetts company was sufficient to show it transacted business within the meaning of the long-arm statute, but this single action was not the substantial connection to the forum required by *Burger King*).

129. *Burger King,* 471 U.S. at 479-80.

130. *Id*. at 475 n.18.

Case Comment

Estate Administration in the Era of Digital Assets

Ajemian v. Yahoo! Inc., 478 Mass. 169 (2017)

I. Introduction

For years, personal representatives (formerly known in Massachusetts, as "executors") have been granted authority to access a decedent's assets, pay bills and debts on behalf of the decedent, file tax returns on behalf of the decedent, and otherwise manage the decedent's affairs. In the digital age, where bills are often paid online, correspondence is often done electronically, and sensitive information is often stored virtually, personal representatives are faced with new obstacles when it comes to accessing a decedent's information, and the law is not always keeping up with these changes. A recent Massachusetts case addresses these obstacles; the case analyzes a personal representative's authority to obtain access to the contents of a decedent's email without express instructions from the decedent.

II. The *Ajemian* Case

On Aug. 10, 2006, John Ajemian (Decedent) died in a bicycle accident and left no will.[1] John's two siblings were appointed as co-personal representatives (Personal Representatives) of the Decedent's estate.[2] The Decedent had a Yahoo! Inc. (Yahoo) email account that he and his brother had opened four years prior, in August 2002.[3] The Decedent used this email account as his primary email account until his death.[4] The Personal Representatives sought access to the contents of the email account so they could identify the assets of the estate.[5] Yahoo denied access to the email account, stating that it was prohibited from doing so by the federal Stored Communications Act[6] (SCA).[7, 8] Yahoo also argued that even if it was not prohibited from disclosing the contents of the email account by the SCA, it was prohibited by the Yahoo terms of service, which, in its opinion, gave it discretion to deny access to, and even delete the contents of, the account in its sole discretion.[9]

a. The Procedural Background of the Case

i. Norfolk Probate and Family Court (2009)

In September 2009, the Personal Representatives filed a complaint in the Norfolk Probate and Family Court (Probate Court) seeking a judgment: (i) declaring that they were entitled to unfettered access to the messages in the Decedent's email account; and (ii) directing Yahoo to provide the requested access.[10] The complaint also sought an injunction requiring Yahoo to grant the Personal Representatives access to the account. The Personal Representatives argued that the contents of the Decedent's email account were the property of the estate, and, therefore, they were entitled to access.[11]

Yahoo filed a motion to dismiss on four bases: (i) the forum selection clause in Yahoo's terms of services required that the action be brought in California; (ii) a one-year statute of limitations contained in the terms of service barred the Personal Representatives' action; (iii) res judicata, due to a prior complaint seeking subscriber information from the Decedent's Yahoo account; and (iv) the emails in question were not property of the estate.[12] Yahoo argued that: (i) the SCA prohibited the requested disclosure; and, (ii) even if it did not, any common-law property right that the Decedent otherwise might have had in the contents of the email account had been contractually limited by the Yahoo terms of service.[13] Yahoo argued that the terms of service provided it with the right to deny access to, and even delete the contents of, the account at its sole discretion, and that it was thereby permitted to refuse the Personal Representatives' request.[14] The Probate Court dismissed the complaint on procedural grounds, stating that: (i) the forum selection clause in Yahoo's terms of service required that the action be brought in California; and (ii) res judicata precluded the Personal Representatives from filing their

1. Ajemian v. Yahoo! Inc., 478 Mass. 169, 170 (2017).
2. *Id.*
3. *Id.*
4. *Id.* at 171.
5. *Id.* at 170.
6. 18 U.S.C. §§ 2701-2713.
7. Ajemian v. Yahoo! Inc., 478 Mass. 169,170 (2017).
8. Note that Yahoo initially stated that it would furnish subscriber information (i.e., name of sender, addresses and time stamps) if presented with a court order mandating disclosure to the Personal Representatives. The Personal Representatives obtained such an order and were granted access to subscriber information. *Id.* at 172.
9. *Id.* at 173.
10. *Id.*
11. *Id.*
12. Ajemian v. Yahoo! Inc., 83 Mass. App. Ct. 565 (2013).
13. Ajemian v. Yahoo! Inc., 478 Mass. 169, 172 (2017).
14. *Id.* at 173.

claim because the parties had agreed that, in exchange for the Personal Representatives' agreement not to litigate the estate's entitlement to the contents of the messages, Yahoo agreed not to oppose the Personal Representatives' request for an order requiring production of subscriber information.[15]

ii. Massachusetts Appeals Court (October 2012–May 2013)

The Appeals Court reversed the Probate Court's dismissal, concluding that there was no res judicata because the estate's claim for the contents of the emails was never at issue in the first action and instead was explicitly carved out from the complaint, as the suit was brought for the limited purpose of obtaining the order Yahoo stated it required before producing the header information.[16] It stated that it would make no sense to apply the doctrine of claim preclusion in these circumstances because a conclusion to the contrary would undermine the many benefits and advantages of encouraging parties to narrow their disputes on their own before submitting others to the court for resolution.[17] The Appeals Court also concluded that Yahoo did not carry its burden to show that the terms of service were reasonably communicated, nor that the terms were accepted, and therefore concluded that it was not reasonable to enforce the forum selection clause against the Personal Representatives.[18] The Appeals Court did not opine on whether email was considered property of the estate.

iii. Norfolk Probate and Family Court, On Remand

On remand, the Probate Court found that the contents of Decedent's emails were the property of his estate, and, accordingly, the Personal Representatives could have taken possession of the emails if permitted by the SCA.[19] The Probate Court concluded, however, that the SCA prevented Yahoo from disclosing the contents of Decedent's emails.[20] The Probate Court reasoned that the agency exception and the lawful consent exception under the SCA (both discussed later in this case comment) did not apply, and the Probate Court allowed Yahoo's motion for summary judgment.[21]

iv. Massachusetts Supreme Judicial Court (2017)

The Personal Representatives appealed the Probate Court's decision, and the Massachusetts Supreme Judicial Court (SJC) transferred the case to itself, on its own motion.[22] The SJC analyzed whether the SCA does in fact prohibit Yahoo from voluntarily disclosing the contents of the email account to the Personal Representatives.[23] The SJC explicitly did not address whether the Yahoo terms of service gave Yahoo the discretion to deny the Personal Representatives access to the account because material issues of fact pertinent to the enforceability of the contract remained in dispute (such as whether there was an offer and acceptance).[24]

b. Stored Communications Act

The SJC looked at whether the SCA prohibited Yahoo from disclosing the contents of the email account.[25] The SCA was enacted in 1986 "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[26] Its purpose is to "protect the privacy of users of electronic communications by criminalizing the unauthorized access of the contents and transactional records of stored wire and electronic communications, while providing an avenue for law enforcement entities to compel a provider of electronic communication services to disclose the contents and records of electronic communications."[27]

With the intention of preventing unauthorized persons from deliberately gaining access to, and/or tampering with, electronic or wire communications, the SCA first prohibits unauthorized third parties from accessing communications stored by service providers, subject to certain exceptions.[28] Second, the SCA regulates when service providers voluntarily may disclose stored electronic communications.[29] Third, the SCA prescribes when and how a government entity may compel a service provider to release stored communications to it.[30] The SCA prohibits entities that provide "services to the public" from voluntarily disclosing the "contents" of stored communications unless certain statutory exceptions apply.[31] The Personal Representatives argue that they fall within two exceptions: (1) the "agency exception," and (2) the "lawful consent exception."[32]

i. Agency Exception

The agency exception allows service providers to disclose the contents of stored communications "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient."[33] The Personal Representatives argued that they were the Decedent's agents for purposes of the agency exception of

15. *Ajemian*, 83 Mass. App. Ct. at 571.
16. *Id.* at 572.
17. *Id.* at 573.
18. *Id.*
19. Ajemian v. Yahoo! Inc., 478 Mass. 169, 173 (2017)
20. *Id.*
21. *Id.*
22. *Id.* at 169.
23. *Id.* at 171
24. *Id.*
25. Ajemian v. Yahoo! Inc., 478 Mass. 169, 171 (2017).
26. S. Rep. No. 99-541, (1986), reprinted in 1986 U.S. Code Cong. & Ad. News 3555.
27. Commonwealth v. Augustine, 467 Mass. 230, 235 (2014).
28. 18 U.S.C. § 2701(c).
29. 18 U.S. C. § 2702(b)-(c).
30. 18 U.S.C. § 2703.
31. *See* 18 U.S.C. § 2702(b)(1)-(8).
32. Ajemian v. Yahoo! Inc., 478 Mass. 169, 175 (2017).
33. 18 U.S.C. § 2702(b)(1).

the SCA. The SJC, having noted that "agent" is a common-law term and the SCA does not provide an alternate definition, looked to the common law to determine the meaning of an "agent."[34] Under the common law, an "agent" "[a]cts on the principal's behalf and is subject to the principal's control."[35] "An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal and subject to the principal's control."[36] The SJC concluded that the Personal Representatives did not fall within the definition of "agent" because they were appointed by, and are subject to the control of, the Probate and Family Court, not the Decedent.[37]

ii. Lawful Consent Exception

The lawful consent exception to the SCA allows providers to disclose the contents of stored communications "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."[38] The Personal Representatives argued that they lawfully could "consent to the release of the contents of the [D]ecedent's email account in order to take possession of it as property of the estate."[39] Yahoo argued that "the personal representatives of the estate [could] not lawfully consent on behalf of the decedent, regardless of the estate's property interest in the email messages," because lawful consent requires "express consent from a living user."[40] The court addressed whether lawful consent for purposes of access to stored communications "property is limited to actual consent, such that it would exclude a personal representative from consenting on the Decedent's behalf."[41] In doing so, the court analyzed the: (i) laws of preemption; (ii) statutory language; and (iii) legislative history of the lawful consent exception in the SCA:

> **Presumption against preemption.** Precluding personal representatives from accessing a decedent's stored communication would result in the preemption of state probate and common law, which allows a personal representative to consent on a decedent's behalf.[42] Absent clear congressional intent to preempt such law, there is a presumption against interpreting a federal law in such a way that would result in preemption of state laws.[43] "Congress enacted the SCA against a backdrop of State probate and common law allowing personal representatives to take possession of the property of the estate."[44] "To construe lawful consent as being limited to actual consent, thereby preventing personal representatives from gaining access to a decedent's stored communications, would significantly curtail the ability of personal representatives to perform their duties under State probate and common law."[45] "[T]his interpretation would also result in the creation of a class of digital assets — stored communications — that could not be marshalled."[46] The SJC concluded that "[n]othing in the statutory language or the legislative history of the SCA evinces a clear congressional intent to intrude upon State prerogatives with respect to personal representatives of a decedent's estate."[47]
>
> **Statutory Language.** "The SCA does not define the term "lawful consent," and … there is no similar state common-law backdrop with respect to the phrase "lawful consent."[48] The SJC therefore looked to Black's Law Dictionary when defining "consent," as "a voluntary yielding to what another proposes or directs" and "lawful" as "not contrary to law; permitted or otherwise recognized by law."[49] The SJC concluded that the plain meaning of the term "lawful consent" is consent permitted by law and noted that "[n]othing in this definition would suggest that lawful consent precludes consent by a personal representative on a decedent's behalf."[50] Instead, "personal representatives provide consent lawfully on a decedent's behalf in a variety of circumstances under both Federal and common law."[51] In addition, the SJC pointed out that "[h]ad Congress intended lawful consent to mean only actual consent, it could have included language such as 'actual consent' or 'express consent' rather than lawful consent."[52] Therefore, lawful consent may be given by a personal representative on behalf of a decedent.[53]
>
> **Legislative History.** "To the extent there was any ambiguity in the statutory language, [the SJC] turn[ed]

34. *Ajemian*, 478 Mass. at 175.
35. *Id.* at 176 (*citing* Restatement (Third) of Agency § 1.01 (2006)).
36. *Id.*
37. *Id.*
38. 18 U.S.C. § 2702(b)(3).
39. *Ajemian*, 478 Mass. at 176-77 (*citing* Mass. Gen. Laws c. 190B, § 3-709(a) (2019))
40. *Id.*
41. *Id.*
42. *Id.* at 178.
43. *Id.*
44. *Id.* at 179.
45. Ajemian v. Yahoo! Inc., 478 Mass. 169, 180 (2017).
46. *Id.*
47. *Id.*
48. *Id.*
49 *Id.* at 181 (*citing Black's Law Dictionar*y (10th ed. 2014)).
50. *Id.*
51. Ajemian v. Yahoo! Inc., 478 Mass. 169, 181 (2017).
52. *Id.* at 182.
53. *Id.*

to the legislative history of the SCA.[54] "[T]he purpose of the Electronic Communications Privacy Act (ECPA), the broader federal statute that includes the SCA, is to 'protect against the unauthorized interception of electronic communications' and to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[55] "This stated purpose demonstrates congressional concern with the protection of stored communications against 'unauthorized interception' by overzealous law enforcement agencies, industrial spies and private parties."[56] "It does not suggest congressional concern over personal representatives accessing stored communications in conjunction with their duty to manage estate assets."[57] The SJC, in reasoning that "Congress … intended lawful consent to encompass certain forms of implicit consent," concluded that the Personal Representatives may provide lawful consent on Decedent's behalf to release of the contents of the Yahoo email account.[58]

Therefore, the SJC concluded that the SCA did not prohibit Yahoo from disclosing the contents of Decedent's email because the Personal Representatives' request fell under the lawful consent exception of the SCA.[59] The SJC, however, did not "require Yahoo to divulge the contents of the decedent's communications to the personal representatives" because the question as to whether Yahoo's terms of service gave Yahoo the discretion to deny access remained outstanding.[60]

c. Terms of Service

Yahoo's terms of service provide for a "termination provision," which essentially states "that Yahoo, in its sole discretion, may terminate [the user's] password, account (or any part thereof) or use of the Service and remove and discard any Content within the Service, for any reason."[61] They also provide that "Yahoo may also in its sole discretion and at any time discontinue providing the service … with or without notice."[62] The judge was unable to address whether the terms of services indeed gave Yahoo the overarching authority to deny the Personal Representatives access to the Decedent's email content because the record was not adequate to establish essential details of a valid contract formation.[63] "Yahoo had not established that a 'meeting of the minds' had occurred with respect to the terms of the service, including whether they had been communicated to, and accepted by, the [D]ecedent."[64]

d. Conclusion

Although the SJC concluded that the SCA did not prohibit Yahoo from disclosing the contents of the Decedent's email account to the Personal Representatives, the SJC remanded the decision to the Probate Court for further proceedings.[65] Specifically, the Probate Court still needed to determine whether a valid contract was created between the Decedent and Yahoo through Yahoo's terms of service, and whether, through such terms, Yahoo has unfettered discretion to deny the Personal Representatives access to the contents of the email account.[66]

III. Discussion

a. United States Supreme Court

In January 2018, Yahoo[67] filed a petition for writ of certiorari with the United States Supreme Court requesting that it grant Yahoo's petition to correct the SJC's "expansive, flawed, and dangerous interpretation of a federal statute."[68] It emphasized that the SCA's fundamental purpose is to place prohibitions on communication providers sharing personal information with third parties.[69] Yahoo stated that the SJC's analysis on preemption was flawed and that the "lawful consent" exception under the SCA cannot be expanded to reach consent by a court-appointed personal representative.[70] The Personal Representatives responded, requesting that the petition for certiorari be denied because: (i) the decision of the SJC did not conflict with the decision of a United States court of appeals or the decision of another state court of last resort; and (ii) the SJC did not decide any important questions of federal law that should be resolved by the Supreme Court.[71] In March 2018, the Supreme Court declined to weigh in on the SJC's decision and denied Yahoo's certiorari petition.[72]

54. *Id.*
55. *Id.*
56. *Id.* at 183.
57. Ajemian v. Yahoo! Inc., 478 Mass. 169, 183 (2017).
58. *Id.* at 184.
59. *Id.*
60. *Id.*
61. *Id.* at 185.
62. *Id.*
63. Ajemian v. Yahoo! Inc. 478 Mass. 169, 185 (2017)
64. *Id.*
65. *Id.* at 186.
66. *Id.*
67. Verizon and Yahoo creating Oath subsidiary, Oath (June 13, 2017), https://www.oath.com/2017/06/13/verizon-completes-yahoo-acquisition-creating-a-diverse-house-of/.
68. Petition for Writ of Certiorari at 1, Oath Holdings Inc. v. Ajemian, 200 L. Ed.2d 526 (2018), 2018 U.S. S. Ct. Briefs LEXIS 173 at *7.
69. Id. at 2.
70. Id. at 15.
71. Brief in Opposition at 1, Oath Holdings Inc. v. Ajemian, 200 L. Ed.2d 526 (2018), No. 17-1005.
72. Oath Holdings Inc. v. Ajemian, 200 L. Ed.2d 526 (2018).

b. Property of the Estate

The Personal Representatives argued in their various complaints that the email messages were considered property of the estate.[73] The Probate Court concluded in dicta that the contents of emails are in fact considered part of the estate.[74] Yahoo essentially left this matter unchallenged and did not appeal this issue to the SJC, instead contending that the point was moot because the terms-of-service agreement that gave Yahoo the authority in its discretion to deny access superseded any common-law property right asserted by the estate.[75] The SJC therefore did not address whether the estate had a common-law property right in the contents of the account, but did note that "numerous commentators have concluded that users possess a property interest in the contents of their email accounts."[76]

c. Significance in the Community

Scholars and trusts and estate practitioners have vocalized their support of granting a personal representative access to a decedent's email account as consistent with longstanding estate law principles. They argue that since a personal representative has access to, indeed an obligation to marshal, all hard copy bills, bank account statements, and other similar records, this right and duty should extend to the equivalent electronic form. In contrast, commercial service providers have argued against disclosing personal information to personal representatives based upon the expectation of privacy of the user's account information during life and after death.

The Cyberlaw Clinic of Harvard Law School filed an amicus brief (Harvard Amicus Brief) with the SJC in support of the Personal Representatives, arguing that suppressing "data of all those who die without expressing their post-mortem preferences runs against the important public policy of preserving the property and value of a deceased's estate for the benefit of the living."[77] The Harvard Amicus Brief stated that the SCA is silent when it comes to whether or not a personal representative can access digital assets because the original framers could not "imagine a world where quantities of valuable data are stored in the cloud."[78] In addition, it pointed out that the SCA should be read "in line with estate law" in that "the power to "lawfully consent" … is entrusted to a decedent's fiduciary."[79] Personal representatives have significant powers that enable them to stand in the shoes of a decedent (i.e., personal representatives can sue and be sued just as the decedent could have sued and been sued immediately prior to death).[80] Personal representatives can lawfully open someone's hard mail, so should also be lawfully entitled to consent to disclosure of email.[81] The Harvard Amicus Brief argued: (i) digital assets are valuable and should be preserved just like any other assets of an estate; (ii) personal representatives have to go through sensitive material in discharging their duties, such as financial records, and email is no different; and (iii) a deceased person has diminished privacy interests.[82]

Facebook Inc., Google LLC, Dropbox Inc., Everynote Corp., Glassdoor Inc., the Internet Association, and Netchoice collectively filed an amicus brief with both the SJC and the Supreme Court in support of Yahoo.[83] In their amicus brief in support of Yahoo's petition for a writ of certiorari, they argued that the SJC's interpretation that the lawful consent exception means that implied-in-law or constructive consent falls within the lawful consent exception under the SCA conflicts with extensive authority and therefore subjects service providers to conflicting legal obligations (and potential liability).[84] The brief stated that only actual consent should satisfy the lawful consent exception under the SCA.[85] It argued that the deceased should indicate before death who, if anyone, should have access to content.[86]

How does this decision, which addresses a personal representative's authority to access a decedent's email account, extend to access to a decedent's social media account? In a California decision, surviving family members of a decedent, as executors of the decedent's estate, sought access to the decedent's Facebook account after the decedent allegedly committed suicide.[87] The surviving family members did not believe the decedent committed suicide and believed her Facebook account could help them ascertain the decedent's cause of death and state of mind.[88] Facebook argued that it was prohibited by the SCA to give parents access to her Facebook account.[89] The court ruled that it could not lawfully compel production of records from providers like Facebook and it did not have jurisdiction to address whether or not a personal representative could lawfully consent on behalf of a decedent and qualify under the exception to the SCA.[90]

73. Ajemian v. Yahoo! Inc., 478 Mass. 169, 172 (2017).
74. *Id.* at 177 n.16.
75. *Id.* at 173.
76. *Id.* at 177 n.16.
77. Brief of Amici Curiae Naomi Cahn, James D. Lamm, Michael Overing, and Suzanne Vrown Walsh in Support of Plaintiffs-Appellants at 2, Ajemian v. Yahoo! Inc., 468 Mass. 169 (2017) No. SJC-11917.
78. *Id.*
79. *Id.* at 2.
80. *Id.* at 6.
81. *See id.* at 9.
82. *See id.*
83. Motion for Leave to File Brief of Amici Curiae and Brief of Facebook Inc., Google LLC, Dropbox Inc., Evernote Corp., Glassdoor Inc., The Internet Ass'n and Netchoice as Amici Curiae in Support of Petitioner, Oath Holdings Inc. v. Ajemian, 200 L. Ed. 2d 526 (2018), No. 17-1005.
84. *Id.*
85. *Id.* at 4.
86. *Id.* at 14.
87. *In re:* Request for Order Requiring Facebook Inc. to Produce Documents and Things, case no.: C 12-80171 LHK (PSG) in the U.S. District Court for the Northern District of California (2012), http://www.digitalpassing.com/wordpress/wp-content/uploads/2012/10/Daftary-Facebook-Order-9-20-2012.pdf.
88. *Id.*
89. *Id.*
90. *Id.*

d. RUFADAA

In 2014, the Uniform Fiduciary Access to Digital Assets Act (UFADAA) was enacted and, almost immediately, 26 states introduced legislation modeled after UFADAA.[91] UFADAA outlined fiduciaries' authority to access and manage a decedent's digital property.[92] Internet service providers argued that, under UFADAA, a fiduciary's access to digital assets was too broad, privacy rights after death were not properly protected and that it improperly overrode terms-of-service agreements.[93] In 2015, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was enacted, and currently 42 states have enacted it.[94] Massachusetts introduced RUFADAA in the 2015–16 and 2017–18 legislative sessions, without success.[95] Efforts are currently underway to reintroduce it, but Massachusetts currently is one of only three states that does not have a RUFADAA statute or an active bill in process.[96]

The lawful consent exception does not require the service provider to share the contents of a decedent's communications; it simply does not bar a service provider from doing so.[97] State laws such as RUFADAA are designed to provide a clear procedure for determining a personal representative's access to online account content.[98] RUFADAA specifically incorporates common statutory fiduciary duties such as management of digital assets, duty of care, duty of loyalty and duty of confidentiality, and addresses the delicate balance between a personal representative's needs and heirs' desires versus a decedent's privacy.[99] RUFADAA requires a decedent's explicit consent for a personal representative to access the decedent's electronic messages.[100] It states that an account holder can grant a fiduciary access to its digital property through (1) the service's online tool, or (2) the account holder's estate plan.[101] If a service's online tool and estate planning documents are silent as to a fiduciary's access to digital assets, the terms of service of the service provider will then apply.[102] RUFADAA, however, has not been tested directly against the SCA.

e. Where do Massachusetts Estate Planners and Fiduciaries Stand Now?

For years, personal representatives have had unfettered access to decedent's paper bills, bank accounts, debt information, and retirement accounts, as well as personal letters and journals. Personal representatives needed access to this information in order to carry out their fiduciary duties. As the SJC pointed out in its decision, personal representatives can consent to the disclosure of a decedent's health information pursuant to the Health Insurance Portability and Accountability Act of 1996, can consent to a government search of a decedent's property, and can waive rights on behalf of a decedent (such as the attorney-client, physician-patient, psychotherapist-patient privileges).[103] In addition, personal representatives may sell a decedent's property, bring claims on the decedent's behalf, and vote the decedent's stock.[104] Now that financial information is often stored online instead of on paper, laws must catch up to these social changes so as not to interfere with the personal representatives' management of a decedent's estate.

Massachusetts's enactment of RUFADAA would clarify fiduciaries' rights when it comes to access to digital assets and prevent years of litigation such as the Ajemian family endured. As Massachusetts law stands now after the *Ajemian v. Yahoo! Inc.* decision, the SCA does not prevent a provider from giving a personal representative access to the contents of an email account because of the lawful consent exception to the SCA.[105] The *Ajemian* decision, however, does not require a service provider to grant a personal representative access to a decedent's digital assets.[106] The lack of statutory law addressing a fiduciary's right to access and/or manage a decedent's digital property creates a lot of ambiguity for estate planners, fiduciaries, and service companies when it comes to a fiduciary's access to digital assets.

While Massachusetts estate planners await clarification from state legislators, they should advise their clients to complete all online tools granting certain individuals (presumably their nominated personal representative) access to their online digital information. In addition, estate planners should discuss with their clients the importance of granting (or not granting) a personal representative the authority to access and manage a decedent's or an attorney-in-fact's digital assets and should update their estate planning documents accordingly.

— Rebecca Tunney

91. Alberto B. Lopez, "Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets," 25 Geo. Mason L. Rev. 183, 189 (2016).

92. Fiduciary Access to Dig. Assets, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68530 (Unif. Law Comm'n 2014) (rev'd 2015).

93. Sharon L. Klein, "What Passed, What Didn't, What's Next," *Trusts & Estates*, Vol. 256, No. 41 (2016).

94. *2015 | Fiduciary Access to Digital Assets Act, Revised, Unif. Law Comm'n,* https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 (last visited May 9, 2019).

95. H.B. 4365, 189th Gen. Ct. (Mass. 2016); H.B. 3083, 119th Gen. Ct. (Mass. 2017).

96. H.B. 3368 191st Gen. Ct. (Mass. 2019).

97. Ajemian v. Yahoo! Inc., 478 Mass. 169, 184 (2017).

98. *See Revised Fiduciary Access to Dig. Assets* (Unif. Law Comm'n 2015).

99. *Revised Fiduciary Access to Dig. Assets* § 15 (Unif. Law Comm'n 2015).

100. *Revised Fiduciary Access to Dig. Assets* § 4 (Unif. Law Comm'n 2015).

101. *Id.*

102. *Id.*

103. Ajemian v. Yahoo! Inc., 478 Mass. 169, 181 (2017).

104. *Id.* at 182.

105. *Id.*

106. *Id.*

Book Review

How Wall Street Helped Richard Nixon Win the White House
By Victor Li (Fairleigh Dickinson University Press) 2018, 350 pages

On the morning of Nov. 7, 1962, angry, hungover and aching for a fight, Richard Milhous Nixon decided to address members of the media who were waiting for a post-mortem on his failed California gubernatorial campaign. Nixon went on a diatribe that can still be seen on YouTube, and signed off with one of the most iconic and repeated lines in political history: "you won't have Nixon to kick around anymore, because, gentlemen, this is my last press conference …"[1] The compelling story of how Nixon recovered from his "final" press conference and used his time in private practice in New York City to lay the groundwork to become president of the United States six years later is the subject of Victor Li's book, *How Wall Street Helped Richard Nixon Win the White House.*

Nixon's time in the "wilderness" was spent in New York City as a high-profile public partner of the Wall Street law firm of Mudge, Stern, Baldwin, & Todd that, upon Nixon's arrival, became Nixon, Mudge, Rose, Guthrie, & Alexander. He used his tenure at Nixon Mudge as a time to reflect on his past missteps, put his finances in order, rebuild his political machine, and resurrect and realize his dream of occupying the White House. In addition to acting as the firm's rainmaker, he did some first-rate legal work, including on a twice-argued, high-profile First Amendment case before the Supreme Court of the United States. The book is replete with people who would become household names during the Nixon presidency and, more significantly, during the Watergate years. Len Garment, John Mitchell, Rosemary Woods, Patrick Buchanan and William Safire, to name a few, are major figures throughout the story. The book is a compelling narrative of one of the most dominant political figures of the 20th century intertwined with a look at life in a Wall Street law firm in the 1960s.

In November 1962, Nixon had not just lost the race for the California gubernatorial election, he had been humiliated. Two years after coming within a whisker of being the president of United States, he was decisively beaten by incumbent Gov. Edmund "Pat" Brown. That defeat would lead many to believe that Nixon's public life was over. Four months after the "last" press conference, Nixon played a round of golf with the senior partners of Mudge Stern. Nixon had come to the conclusion that working for a big law firm in New York would be the perfect way for him to generate some badly needed income and engage in politics while traveling the world to bolster his foreign policy credentials. He also rightly concluded that he would prove beneficial at whichever firm he landed: besides his obvious name recognition, he would bring with him Pepsi-Cola (for whom he had served as a lawyer) as a client with annual legal billings in excess of $300,000.[2] For its part, Mudge Stern lacked a "big name" public partner to bring in business and to help recruit the best and brightest law students in America.

Nixon settled in comfortably as one of the four leaders of the newly named firm. He got a corner office that became part museum, part workspace, and part monument to his political life. In the reception area for his office were three desks: his longtime secretary Rosemary Woods (who would later come to infamy in the Watergate scandal, explaining how she "accidentally" erased tapes) occupied the main desk and served as secretary/gatekeeper; Patrick Buchanan took the second desk when he joined the firm to work solely as Nixon's speechwriter and researcher; and the third desk was reserved for "Ms. Ryan" (also known as Pat Nixon), who would come in periodically to answer phones or perform clerical duties.

The central theme of Li's book is the relationship between Nixon, the Wall Street lawyer, and Nixon, the man with a laser focus on the White House. While there was never any question about his ambitions, Nixon, by all accounts, loved his new role at the firm and threw himself into it. He would arrive at the office before 7 a.m. and stay late. He was cognizant of his social responsibilities to the firm and their clients. Notably, he was successful in recruiting the best and brightest law students to the firm and took a genuine interest in their careers that lasted a lifetime. Nixon's rainmaking abilities were also proven out almost immediately. Li exhaustively researched and details the firm's income. Mudge Stern collected $2.6 million in fees in 1963 (Nixon joined the firm in August of that year); during 1964 (Nixon became a partner in January of 1964), that amount rose to nearly $3.5 million, and creeped further to $3.8 million in 1965.[3]

While a partner at Nixon Mudge, Nixon twice argued for the appellee in the case of *Time Inc. v. Hill*[4] before the United States Supreme Court. *Time Inc.* was a First Amendment case pitting an individual's right to privacy against the right of the press to cover newsworthy stories.[5] The case stemmed from a daring escape staged by three prisoners from a federal prison in 1952.[6] Once outside of the prison, they broke into the homes of the Hill family and held them, including five children, hostage for 19 hours before leaving the family unharmed.[7] *Time* magazine did a story on the Hill

1. Victor Li, *How Wall Street Helped Richard Nixon Win the White House,* 7 (2018).
2. *Id.* at 77.
3. *Id.* at 75.
4. 385 U.S. 374 (1967).
5. *Id.*
6. *Id.* at 378.
7. *Id.*

family without its permission, which spawned a movie titled "The Desperate Hours" that was loosely based on the event.[8] The Hills sued *Time* magazine for breach of privacy and won a judgment in a New York state court.[9] In an incredible act of friendship, loyalty and savvy political calculation, Len Garment, who had brought the case to Nixon Mudge and had been lead counsel, asked Nixon to argue the case before the Supreme Court. Ultimately, Nixon failed to convince the Court, which ruled in *Time's* favor.[10] In perhaps the finest chapter in the book, Li gives full treatment to the Court's ruling, Nixon's relationship with the various justices, the political backstory and the privacy rights of individuals versus those of the press. Even better, though, is the "inside baseball" that Li brings to the narrative, including how painstakingly Nixon prepared for his two oral arguments, and how various players, including the justices, are threaded into the story.

As contextualized by Li, however, for all that Nixon offered as an able partner and rainmaker, he used his time at the firm as a means to further his political goals. Before moving to New York to begin work, the Nixon family went on a six-week trip to Europe and the Middle East with the full approbation of the firm. Tellingly, while essentially a working vacation, it was really a trip to confirm his credentials as the United States' foremost foreign policy expert.

Once at Nixon Mudge, Nixon utilized the firm as recruitment ground for his future presidential campaign. Part of Nixon's own post-mortem of his failed 1960 presidential run was his dissatisfaction with his campaign staffers. A chapter of the book is devoted to Nixon's recruitment of a cadre of young, accomplished, hard-working intellectuals to the law firm and his political team, many of whom were at the firm and some of whom were recruited by him out of law school. Chief among them was Garment, who had joined the firm in 1949, became a partner and, eventually, Nixon's closest ally and friend. He would join the Nixon White House as counsellor to the president, and later as special counsel to the president during Watergate. Patrick Buchanan, who had been an editorial writer for the S*t. Louis Globe Democrat*, would later become special assistant to the president and Nixon's principal speechwriter. Still another recruit, William Safire, was employed at the firm solely as support for Nixon and his future political plans. Nixon's ability to recruit law students to the firm who would later work in his 1968 presidential campaign and remain lifelong friends is also discussed in detail and provides insight not only as to how Nixon gained supporters for his campaign, but also into law firm recruitment practices more than 50 years ago.

The best example of the marriage between Nixon's quest for the White House and Nixon Mudge's role, however, is John Mitchell. Mitchell, who would become Nixon's attorney general, was a wildly successful Wall Street bond lawyer who figured a way to have the government "back" low-income housing bonds by "pledging its intention" to repay the bonds in the event of default (even though it had no legal obligation to do so).[11] In 1967, Mitchell's firm merged with Nixon Mudge to become one of the early megafirms.[12] By that point, Nixon and Garment were increasingly frustrated that they could not find a satisfactory campaign manager for Nixon's upcoming presidential campaign. Garment recounts how he and Nixon were in Nixon's office at Nixon Mudge trying to figure out who the campaign chairman should be when he had a "eureka" moment and told Nixon, "the answer to our problem is sitting 20 feet away from us in the next office."[13] Mitchell's ruthless running of Nixon's 1968 campaign was a tour de force and Li's detail of it is worth the read.

Li's story also delves into Nixon's personal relationships with political rivals. He devotes an entire chapter to Nixon's relationship with John F. Kennedy, beginning in January of 1947, when both were newly elected members of the United States House of Representatives and viewed as rising stars within their parties. They were not the type of friends "who vacationed together or had dinner at each other's houses every weekend or so."[14] Instead, their friendship was forged from their early days in Washington when each man represented the brightest hopes of not only their political parties, but their entire generations. Li deftly traces this complicated relationship through two decades with anecdotes and insight.

As he does with President Kennedy, Li also writes in detail of Nixon's relationship with President Lyndon B. Johnson, dating back to when Johnson suffered a serious heart attack in 1955. Nixon visited him in the hospital to pay a cursory visit and the two ended up in a long conversation about their lives and futures. When Johnson recovered to make it back to the Senate in time for the beginning of the 1956 congressional session, Johnson rose from his seat in order to be recognized by the chair as majority leader. Vice President Nixon, in his role as president of the Senate, declined to recognize Johnson immediately and instead rendered an impromptu, eloquent statement expressing joy at seeing the leader back in his rightful place in the Senate.[15] This was an act of kindness that Johnson never forgot, and offers a counterpoint to the picture painted of the calculating lawyer planning his ascension to the presidency.

For those of us who came of age in the 1960s reviling Richard Nixon, this book is a treat. Li's unvarnished look at the man is painstakingly researched and well-crafted. It is also a balanced and sympathetic appraisal of one of the central figures of the 20th century as he worked from an ignominious defeat to the most powerful position in the world. In addition to the political perspective, the inside look at the world of the Wall Street law firm in the 1960s is particularly compelling. Today, in the age of the megafirm, while political discourse is at an all-time low, Li's story is a solid look at an equally divisive time and an undeniably polarizing figure. There are lessons to be learned.

— Hon. Timothy S. Hillman

8. *Id.* at 377.
9. *Id.* at 378-79.
10. *Id.* at 397-98.
11. Victor Li, *How Wall Street Helped Richard Nixon Win the White House,* 7 (2018), *supra* note 1, at 263.
12. *Id.*
13. *Id.*
14. *Id.* at 105.
15. *Id.* at 171.

Book Review

Without Precedent: Chief Justice John Marshall and His Times

By Joel Richard Paul (Riverhead Books, an imprint of Penguin Random House LLC) 2018, 512 pages (including endnotes and index)

When President John Adams nominated the former secretary of state, John Marshall, to be the nation's fourth chief justice, the United States Supreme Court was a constitutional afterthought. The concept of federal judicial review was unheard of. Since there were so few federal laws, there was little to decide: the average docket comprised six cases each term, almost exclusively maritime cases. In the absence of courts of appeal, the justices themselves heard intermediate appeals, literally "riding circuit" on horseback several months per year.

The designers of the new capital district had not even planned a building to house the court. In its early years, it met in a basement conference room of the U.S. Capitol. After the British burned the city in the War of 1812, the Court relocated temporarily to the home of the court clerk — lawyers argued their cases in a parlor while the clerk's young children played around them. For the few weeks each year that they resided in Washington, the justices bunked together in a rooming house, often sharing meals and beds.

Into this ignominious state of affairs stepped John Marshall, one of 15 siblings born in a log cabin in the Virginia wilderness and whose only formal education consisted of a year of grammar school and six weeks of law school. It is not hyperbole to argue that Marshall's term on the Court gave birth to the modern nation we know today. Between 1801 and 1835 — the longest tenure of any chief justice — he singlehandedly transformed the Supreme Court into a co-equal branch of the federal government. During his term, the court issued 1,129 opinions (half of which Marshall wrote himself), all but 87 of which were unanimous. He established the principle of judicial review, separated the powers of the federal branches, asserted the supremacy of the federal government over the states, and was even an early champion of international law and human rights. Contrary to some modern jurists who adhere to a strict construction of the U.S. Constitution's "original intent," Marshall read the text broadly as a living document, which had to adapt to the needs of a rapidly changing nation. In words that are still quoted today, he wrote, "we must never forget that it is a constitution we are expounding."[1]

In *Without Precedent: Chief Justice John Marshall and His Times*, Joel Richard Paul, a professor at Hastings Law School, connects Marshall's eventful personal life to his accomplishments as chief justice.[2] He plants Marshall within the political controversies of his era, often contrasting him with his better-known contemporary and second cousin, Thomas Jefferson. If the biography suffers at times from an excess of hagiography (and anti-Jeffersonian resentment), the author can be excused for aspiring to shine a favorable light on a founding father whose vital contributions to the early republic we take for granted. The book's title, *Without Precedent*, is its motif: writing on a blank slate and as a matter of first impression, Chief Justice Marshall created the legal principles that form the foundation of modern constitutional law. He did so, the author suggests, by the force of his affable personality and his political instincts, which allowed him to assert his belief in a strong national government.

To a remarkable degree, Thomas Jefferson and John Marshall circled each other like a pair of dueling rams. And, they serve as metaphors for the two opposing visions of the early federal government. Their connection actually began decades before they were born. Their mothers were first cousins, both descended from the Randolph family, whom Paul colorfully anoints as the "Adam and Eve of colonial Virginia society."[3] When Marshall's maternal grandmother was caught up in a scandal with a poor Irish workman and later a Scottish minister who was 17 years her senior, the family was banished and cut off from the Randolph inheritance. Hence, John Marshall's humble origins on the frontier. Meanwhile, Jefferson's family received some of the land that originally had been destined for Marshall's family. While Marshall grew up in an isolated log cabin, the future third president came of age on a plantation with 500 slaves.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and His Times* (2018).

3. Paul, *supra* note 2, at 12.

As a young frontiersman, Marshall learned the conservative values of self-reliance and property ownership that shaped his jurisprudence. Through his father's connections, Marshall served with George Washington in the colonial army, wintering at Valley Forge. His experience left a lasting impression and introduced him to the wider world. According to Paul, Marshall's views on a strong central government were born during his military service, having seen firsthand the weakness of a mere confederation of states. Paul portrays Marshall as a gregarious and affable young man of optimistic humor, which survived even the hardships of Valley Forge. His personality served him well in life as a politician and jurist.

After his military service, Marshall returned to Virginia, where he met Jacquelin Ambler, a prominent citizen who later served as state treasurer. After falling in love with one of Ambler's daughters, Polly, Marshall dropped out of William & Mary after six weeks and followed the Amblers to Richmond, which had recently become the state capital. There, the future chief justice passed the bar examination and received his law license, signed by none other than his cousin, Gov. Thomas Jefferson, who — the author points out in one of many unfavorable contrasts — spent the Revolutionary War at home, designing Monticello and abandoning the city when the British attacked.

Marshall married Polly Ambler and took over a law practice that at one time had been owned by Jefferson, yet another confluence of their lives. The practice consisted of the bread and butter issues of the day, focusing on claims by British creditors against Virginia debtors. The son-in-law of the state treasurer, Marshall suddenly found himself in the upper reaches of Virginia society. As a wedding present, the young couple received a small house, three horses and a slave, Robin Spurlock, who served Marshall his entire life.

Spurlock was one of approximately a dozen slaves who served the Marshall household at any time. Paul describes Marshall's attitude toward African-Americans as "paternalistic."[4] He viewed his slaves as family members who needed his guidance. Unlike Jefferson, there is no evidence that Marshall mistreated or whipped his slaves; on the other hand, like Jefferson, he favored gradual emancipation and removal to Africa. He did not free his slaves until his death and, even then, only on condition that they leave for Africa. Rejecting this offer, the valet Spurlock chose to remain indentured to Marshall's daughter until he died.

Marshall's domestic life, which receives limited attention in Paul's book, was not happy. Polly suffered from severe depression throughout her life. She rarely left the house. As the author suggests, her personality must have been challenging for the gregarious Marshall, but he remained devoted to her, writing her often even though his correspondence was rarely returned. Marshall's children were also a source of pain: five out of 10 children died in infancy or childbirth. None of the remaining children were able to establish themselves as adults, continuously relying on their father for support.

Marshall's career took off in the early years of the new nation. He was a rare breed: a southern Federalist who favored federal rights over those of the states and who viewed the nascent French Revolution with skepticism rather than naïve enthusiasm, siding with President Washington's Proclamation of Neutrality in the war between France and England. In 1795, Washington asked him to serve as attorney general. Marshall declined, opting instead to remain in Richmond to practice law.

A pivotal event in young Marshall's life came when President Adams appointed him as one of three commissioners to represent the United States in Paris to negotiate a peace treaty with France. The effort resulted in the infamous XYZ Affair in which the French foreign minister, Charles Maurice de Talleyrand-Perigord, tried to extort a bribe from the Americans. Marshall's refusal to acquiesce, even at the risk of war, made him a hero to the American public. As Paul points out, his experience in France strengthened the future chief justice's conservative views on law and politics. He witnessed the breakdown of a revolutionary society where extreme ideology led to the erosion of civil rights.[5] It also convinced him of the fragility of civilized society and the need to diffuse power among the

4. Paul, *supra* note 2, at 47.

5. Paul, *supra* note 2, at 168.

branches of government.[6]

Popular acclaim led to Marshall's election to the Sixth Congress in 1798, representing Richmond. His congressional career was capped by a momentous speech in which he argued that a treaty was the supreme law of the land and the president, as the sole representative with foreign nations, had a duty to carry out the nation's international relations. His statement that the president is the "sole organ"[7] of foreign affairs has become a pillar of constitutional law. Adams then appointed him as secretary of state (unlike Washington's offer of attorney general, Marshall did not decline this offer), the cabinet position previously held by his cousins, Thomas Jefferson and Edmund Randolph. At the time, the State Department's portfolio extended beyond foreign relations. As secretary of state, Marshall was responsible for patents, the census, the mint, supervision of territories and even the judicial system (the attorney general served only as a legal advisor to the president). All this he did on an annual budget of $15,000, which covered salaries for its nine employees, stationery and firewood. In addition to these myriad quotidian duties, secretary of state oversaw the completion of the new capital city.

After his defeat in the election of 1800, Adams nominated Marshall to fill the vacant position of Supreme Court chief justice, reasoning that elevating a sitting associate justice would create jealousy. Marshall accepted, and agreed to serve out his term as secretary of state at the same time, thereby serving simultaneously in the executive and judicial branches for the final month of the Adams administration.

One of Marshall's first duties as chief justice was to administer the oath of office to the newly elected president, his cousin Thomas. Observers recorded that Jefferson coldly stared past Marshall during the oath, after which the chief justice turned his back on the president in what many saw as a slight. Throughout his first eight years on the court, Marshall saw his primary responsibility as "defending the constitution against the onslaught of the Jeffersonians."[8]

Paul effectively shows how Marshall's personality and political talents brought together a diverse group of judges to a single view of constitutional law. He took an interest in his colleagues' personal lives. Since there was no life in Washington for families, the justices lived and socialized together, an arrangement that the author characterizes as "an elite — albeit ascetic — fraternity."[9] They discussed cases late into the night over drinks and cards.

One of Marshall's innovations was the majority decision. Until his tenure, each justice issued his own opinion. Believing that the court's authority would be enhanced if it spoke with one voice, Marshall encouraged his colleagues to sign a single opinion, most of which he wrote. The number of unanimous opinions (511 of the 547 written by the chief) is even more remarkable when one considers that the court was almost evenly divided between members of the two political parties during most of Marshall's tenure. Paul attributes this unanimity to several factors, including Marshall's personality and his ability to forge consensus. Perhaps more importantly, as the book's title suggests, the justices were writing their own precedent, undoubtedly conscious that future generations would look to their decisions as guidance.

Early in his tenure, Marshall guided the Court to a unanimous decision in *Marbury v. Madison*.[10] The case is famous for establishing the principle of judicial review, but as Paul correctly points out, this was not entirely a revolutionary idea. Many state courts routinely reviewed their own statutes. After *Marbury*, the Court did not declare another act of congress unconstitutional until *Dred Scott v. Sandford*[11] in 1857. More controversial was the holding that courts had jurisdiction over executive officials in the exercise of their official duties. In holding that the plaintiff *Marbury*, a justice of the peace, was entitled to his commission and that the new secretary of state, James Madison, had violated his duties by refusing to deliver it, Marshall in effect established that the Supreme Court had the authority to enforce orders against the executive branch. With the *Marbury* decision, the Constitution was not simply a statement

6. Paul, *supra* note 2, at 168.
7. Paul, *supra* note 2, at 192.
8. Paul, *supra* note 2, at 224.
9. Paul, *supra* note 2, at 235.
10. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

of principles; it was judicially enforceable. And, the decision recognized, private citizens had the right to go to court to seek a remedy. Deriving the Court's authority directly from the Constitution, Marshall memorably declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[12]

As other commentators have pointed out, *Marbury* demonstrated the chief justice's deft political talents. Indeed, in order to establish its jurisdiction, the Court had to "rule against itself."[13] After recognizing the right of judicial review, announcing that the Constitution was the supreme law of the land, and excoriating the executive officers (namely Jefferson and Madison) for violating their duties, Marshall held that the Court could not issue a writ of mandamus to the petitioner, Marbury. He arrived at this conclusion by holding that the Judiciary Act of 1789, the statute under which Marbury brought his case, violated Article III of the Constitution. The point was a seemingly technical one: because the Constitution limited the Court's jurisdiction to appellate review, with limited, specific exceptions, Marbury, who had filed an original suit in the Supreme Court, had sued in the wrong court. So, after announcing its broad jurisdiction to say what the law is, the Supreme Court declined to issue a writ in favor of the petitioner. The Court had exercised its authority in a manner that actually limited its authority. As Cliff Sloan and David McKean point out in their study of the case, Marshall may have been motivated by a reluctance to directly challenge the new president.[14] Again, Marshall's political talents were on display.

Following the opening shot in *Marbury*, Marshall led the Court in a series of cases establishing principles still in force today. While generally accepted as uncontroversial, settled law in the 21st century, the decisions inflamed political arguments, most of which took place against the backdrop of slavery, the removal of Native Americans, and states' rights. Thus, in *McCulloch v. Maryland*,[15] when Marshall wrote that states could not tax a federally chartered bank, a newspaper in the south condemned the decision as a "deadly blow" to state sovereignty.[16] In *Martin v. Hunter's Lessee*,[17]one of the few decisions not written by Marshall, the Court established its authority to invalidate state laws that conflicted with the federal Constitution. In *Gibbons v. Ogden*, (the Great Steamboat Case)[18] Marshall displayed his expansive views of congressional authority, holding that the Article I power to regulate commerce among the states included the power to regulate navigation within the states. Marshall observed that nothing in the Constitution's text countenanced a narrow interpretation. As Paul notes, *Gibbons* made possible the expansion of the American economy in the 19th century, thereby forming the foundation of the federal government's regulatory authority.[19] A narrow, "strict constructionist" interpretation of congress's powers would have stifled nascent progress. Lest the nation believe that Marshall unleashed an unfettered and intrusive governmental authority, in *Dartmouth College v. Woodward*, he protected corporate charters against state interference, holding that the state of New Hampshire could not control the college's board of directors.[20] The decision also gave rise to modern corporate law by recognizing that corporations were not instruments of the state, but rather private persons with many of the same rights as natural persons.[21]

The intellectual foundation of these decisions was Marshall's view that the Constitution, while ratified by the states, was not a compact among them; rather, its authority derived from the will of the people, as expressed in the document's opening phrase. As he wrote in *McCulloch*, "The government of the Union [sic], then … is emphatically, and truly, a government of the people. In form and in substance it emanates from them."[22]

As Paul's book concludes, the reader senses the passing of a golden age. Marshall was the last of the revolutionary generation. Both Adams, the president who appointed him, and Jefferson, the president who juxtaposed him at every stage of their lives, died before him. After the administrations of Madison and Monroe, Marshall concluded his service under the presidency of Andrew Jackson. One cannot think of a president and chief justice more dissimilar in temperament and politics. Jackson nominated to the court Henry Baldwin of Connecticut, a strident supporter of states' rights and a firm believer in a literal reading of the Constitution who was immune to the chief justice's charm and persuasion. His presence ended the Court's long run of collegiality and frequent unanimity.

12. *Marbury*, 5 U.S. at 177.
13. Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (2009).
14. Sloan and McKean, *supra* note 13, at 165.
15. 17 U.S. (4 Wheat.) 316 (1819).
16. Paul, *supra* note 2, at 343.
17. 14 U.S. (1 Wheat.) 304 (1816).
18. 22 U.S. (9 Wheat.) 1 (1824).
19. Paul, *supra* note 2, at 372.
20. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
21. Paul, *supra* note 2, at 379.
22. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

The final years of Marshall's term were noted by frequent battles with Jackson, particularly over Indian removal. These disputes took place against the backdrop of states' rights and slavery. Initially, Marshall deferred to congress's authority to set policy, this time with respect to the power to acquire land for the government. In *Cherokee Nation v. Georgia*,[23] he held that the plaintiff could not sue a state in federal court, because it was not a foreign nation. Thus, the Native Americans, who were challenging the taking of their land by the state, were relegated to state court, where their request for an injunction against their forced removal was an inevitable loser. Mindful of the brewing controversies over states' rights and slavery, Marshall tread carefully. He avoided a direct confrontation with the president by denying the court's jurisdiction, punting the states' rights question to another day.[24] Since the plaintiffs were not considered United States citizens and were not a foreign nation, the chief justice invented a new status: "domestic dependent nations."[25] In an adroit political maneuver, he voted with the majority in order to write the court's opinion, which was relatively narrow, preventing a racist and bombastic concurrence by Justice William Johnson from becoming the court's governing opinion.

Marshall moved away from this position in one of his last important cases, *Worcester v. Georgia*.[26] The issue in the case was whether the state of Georgia had the right to enforce its law that made it a crime for any white person to reside on Indian land absent state permission. When a group of northern missionaries was arrested for preaching to the Cherokees, the missionaries challenged their arrest in federal court. In a decision based not on the Constitution but on international law and treaties, Marshall wrote that the federal government had sole jurisdiction over the Indians: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."[27] At the risk of inflaming states' rights supporters, the Court held that the Georgia law was "repugnant to the Constitution ...."[28] Long a champion of compromise, Marshall held nothing back in *Worcester*, voicing his moral outrage at the injustice of Jackson's policy of Indian removal.[29]

Coming at the end of Marshall's career, *Worcester* stands as a valedictory. He died on July 6, 1835, as the nation left the "era of good feelings" and entered its long slide toward civil war. Jackson nominated Marshall's successor as chief justice, Roger Taney, the author of *Dred Scott,* the next case after *Marbury v. Madison* to strike down an act of congress (the Missouri Compromise). Paul argues that *Dred Scott* not only tore apart the union that Marshall had fought to preserve, the decision also damaged the court's legitimacy for a generation.[30]

Although not expressly stated, Paul's thesis is the connection between law and politics. The unanimity of the Marshall court's many landmark opinions masks the controversies of the time, controversies that were as far-reaching as the unity of the young nation. Consensus was not inevitable. Paul argues convincingly that it was Marshall's political skill, as much as his legal acumen, that enabled him to forge consensus. As with the current chief justice, John Roberts, Marshall's abiding objective was preserving the court's legitimacy as an equal branch of the federal government.[31] This required skill. To place the court above the political issues of the nation, Marshall had to navigate the politics of the court. The enduring authority of the Supreme Court is a testament to his legacy. In *Without Precedent,* Paul has written an engaging biography of an eventful life, showing how his subject's life story, personality, and character shaped his jurisprudence and, ultimately, the institution that we recognize today as the Supreme Court.

— Joseph Berman

Any views expressed herein are those of the author himself and are not the views of any organization with which he works or is affiliated.

23. 30 U.S. (5 Pet.) 1 (1831).
24. Paul, *supra* note 2, at 415.
25. Paul, *supra* note 2, at 415.
26. 31 U.S. (6 Pet.) 515 (1831).
27. *Id.* at 519.
28. *Id.* at 521.
29. Paul, *supra* note 2, at 423.
30. Paul, *supra* note 2, at 435.
31. John Roberts, "Leader of the Supreme Court's Conservative Majority, Fights Perception That It Is Partisan," New York Times, Dec. 23, 2018.