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THE GRASP OF LONG ARM JURISDICTION FINALLY EXCEEDS ITS REACH: A COMMENT ON *WORLD-WIDE VOLKSWAGEN CORP. V. WOODSON* AND *RUSH V. SAVCHUK*

MARTIN B. LOUIS†

Two recent United States Supreme Court cases—World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk—have further highlighted those minimum contacts necessary to avoid the due process limitations on state court jurisdiction. Professor Louis asserts that these cases should end prior notions that minimum contacts analysis involved a fluid balancing of the co-equal interests of the plaintiff, the defendant and the forum state. Instead, the Court has now made clear its requirement of voluntary contacts by the defendant with the forum state as a threshold test before considering the interests of the plaintiff and the state. Anticipating an academic assault on the Court's position, Professor Louis examines the specific factors relevant in the minimum contacts analysis applied by the Court in the line of cases beginning with Hanson v. Denckla and continuing through the Court's recent pronouncements in World-Wide Volkswagen Corp. and Rush, and justifies the bright-line approach taken by the Court in these cases as one necessary to end the inexorable growth of state long arm jurisdiction inherent in a balancing test that would allow a state court to weigh local interests in asserting jurisdiction.

I. INTRODUCTION

The period between 1945 and 1977 was one of unparalleled expansion for state judicial jurisdiction. In the first twelve years of that period, the United States Supreme Court announced and then signifi-

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cantly expanded the reach of the minimum contacts test.¹ Thereafter, the states seized the initiative, enacting and extending their long arm statutes under the Court's silent but seemingly approving gaze.² Only once during this period, in *Hanson v. Denckla*,³ did the Court find that a state had gone too far. But that 1958 decision stood alone for almost two decades, and the rigid, old-fashioned, territorially derived view of jurisdiction it espoused⁴ was increasingly regarded as aberrational and of limited precedential value.⁵ Indeed, the dissenting opinion of Mr. Justice Black in *Hanson*,⁶ and the fluid interest analysis it set forth, were regarded by many as a more reliable harbinger of the direction in which both jurisdictional and choice-of-law theory were evolving and would eventually reunite.⁷

By 1975, the evolution was almost complete.⁸ State courts everywhere confidently probed the limits of due process and generally found them to be just a little farther on.⁹ And, in the name of local needs and interests, some courts unhesitatingly assumed jurisdiction over and applied their own law to the foreign acts of nonresident defendants whose contracts with the forum state were at best "minimal" rather than "minimum."¹⁰ Then the Supreme Court suddenly broke its silence of

1. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

2. See generally Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163 (1970); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970).

3. 357 U.S. 235 (1958). For a discussion of this decision, see text accompanying notes 19-33 *infra*.

4. See text accompanying notes 19-33 *infra*.

5. See D. LOUISELL & G. HAZARD, *PLEADING AND PROCEDURE, STATE AND FEDERAL, CASES AND MATERIALS* 241 (4th ed. 1979).

6. 357 U.S. at 259-60 (dissenting opinion).

7. Jurisdiction and choice-of-law were once both dominated by considerations of territorial location and power. Thus jurisdiction could be asserted only over persons or property found within the state, *Pennoyer v. Neff*, 95 U.S. 714 (1877), and the law of the state where the transaction or occurrence took place usually was applied. See generally *RESTATEMENT OF CONFLICT OF LAWS* §§ 377-397 (1934). Both managed to slip this tight leash and seemed destined to reunite under the new balancing approach.

8. In *St. Clair v. Righter*, 250 F. Supp. 148, 155 (W.D. Va. 1966), the court said:

It is possible that the law is moving more and more toward the idea that choice of law is jurisdictional and that the fact that the law of the place is applicable provides the minimum contact necessary to permit the state to exercise *in personam* jurisdiction under the Due Process Clause of the Fourteenth Amendment.

9. For a review of some of these case developments, see Comment, *The Long-Arm Reach of the Courts Under the Effects Test After Kulko v. Superior Court*, 65 VA. L. REV. 175 (1979), and the articles cited note 2 *supra*.

10. E.g., *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 436 U.S.

almost twenty years and in four consecutive cases held that a state court had exceeded the limits of due process.¹¹ More importantly, it rejected the more expansive interpretation of the minimum contacts test, separated jurisdictional from choice-of-law theory and reestablished the former upon the rock of *Hanson v. Denckla* and its simple verities.

These decisions and the fundamentalistic approach to the minimum contacts test they embrace run counter to much of the current scholarly thinking in this area¹² and will undoubtedly draw much critical fire. The decisions are not without their justifications, however, which I would like to explore before the inevitable assault upon them begins. By 1975, state long arm jurisdiction and choice-of-law doctrine had enjoyed three decades of unimpeded growth towards, and arguably sometimes beyond, the limits of due process.¹³ Furthermore, this inexorable growth process was one the states inherently favored and were, therefore, unlikely to stunt voluntarily.¹⁴ Consequently, that task inevitably fell to the Supreme Court, which chose to redefine, or perhaps merely further explicate, the meaning of the minimum contacts test. In doing so the Court sought to reconcile two often conflicting goals. The new approach obviously had to achieve results that were generally fair, just and reasonable. In addition, however, it had to be sufficiently clear and workable such that the states, despite their contrary self-interest, would effectively be bound by it or could easily be held to it. Otherwise the Court could be overwhelmed by a multitude of factually diverse cases asserting jurisdiction, most of which it could not find the time to review.

In my opinion the Court's new approach is a fair and workable one that strikes an appropriate balance between these two goals. To demonstrate this proposition, I shall first briefly review the decisions in *Hanson v. Denckla*, *Shaffer v. Heitner*,¹⁵ *Kulko v. Superior Court*,¹⁶

1034 (1978); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), cert. denied, 414 U.S. 856 (1973). See generally Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 79-90, 97-98 (1978).

11. *Rush v. Savchuk*, 100 S. Ct. 571 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

12. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971).

13. See text accompanying notes 9 & 10 *supra*.

14. See text accompanying notes 164-67 *infra*.

15. 433 U.S. 186 (1977).

16. 436 U.S. 84 (1978).

*World-Wide Volkswagen Corp. v. Woodson*¹⁷ and *Rush v. Savchuk*.¹⁸ Thereafter, I shall offer some tentative explanations and justifications for them.

II. THE CASES

A. *Hanson v. Denckla*¹⁹

In 1935, Mrs. Donner, while living in Pennsylvania, created a Delaware inter vivos trust. Years later, while living in Florida, she executed a power of appointment over the trust assets and a last will and testament containing a residuary clause covering any property subject to a power of appointment that she had not effectively exercised before her death.²⁰ Upon her death a Florida probate court found that the power of appointment was invalid²¹ and that the trust assets, therefore, would pass under the residuary clause. The court had jurisdiction over the principal beneficial appointees under the terms of the invalidated power and over the residuary legatees under the will.²² The question presented to the Supreme Court was whether the Florida probate court had jurisdiction over the Delaware corporate trustee, which was found to be an indispensable party under Florida law.²³

A majority of the justices answered in the negative. Florida lacked jurisdiction in rem over the trust assets because they were located in Delaware, where the trust had been established by the settlor and administered by the trustee.²⁴ More importantly, Florida also lacked ju-

17. 100 S. Ct. 559 (1980).

18. 100 S. Ct. 571 (1980).

19. For extensive discussions of this case, see Kurland, *The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 610-623 1958 and Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1969).

20. 357 U.S. at 238-39.

21. Since the appointment executed by the decedent lacked testamentary formalities, its validity depended upon the validity of the inter vivos trust, which was itself subject to question because of the almost unlimited control the decedent had reserved over it. 357 U.S. at 253; Kurland, *supra* note 19, at 620 n.273; Scott, *supra* note 19, at 697-698.

22. Under the power of appointment, the bulk of the trust's assets were to pass to two other Delaware trusts for the benefit of two of the decedent's grandchildren, both of whom resided with their mother, the executrix of the decedent's will, in Florida. The rival residuary legatees, who had petitioned the probate court to resolve the question, were daughters of the decedent and aunts of the rival grandchildren. 357 U.S. at 239-40.

23. *Id.* at 254-255. The Florida Supreme Court had left this question open. *Hanson v. Denckla*, 100 So. 2d 378, 385 (Fla. 1956). Arguably, it was improper for the United States Supreme Court to decide this question of state law. Kurland, *supra* note 19, at 616; Scott, *supra* note 19, at 705.

24. 357 U.S. at 247-49. The Court went on to say:

[A] State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated

risdiction in personam over the trust company, which neither solicited nor transacted business there other than to correspond with and remit trust income to the settlor.²⁵

In dissent, Mr. Justice Black emphasized the substantial relationship with Florida of the rival claimants, the decedent, her estate and the locally executed power of appointment. Florida was, therefore, "a reasonably convenient forum for all"²⁶ and one whose law could appropriately be applied to the controversy.²⁷ The majority opinion, in reply, rejected all these considerations as unpersuasive, if not irrelevant, because they were based upon relationships with the forum of persons other than the defendant trust company.²⁸ Consequently, even though these relationships arguably made Florida the most convenient location for litigation and the "center of gravity" for choice-of-law purposes, they could not support an assertion of in personam jurisdiction over the trust company, absent its own minimum contacts with the forum.²⁹

The Delaware courts, which possessed in rem jurisdiction over the trust assets, had in fact exercised it in parallel proceedings.³⁰ Thus, Florida's assertion of jurisdiction was not based upon necessity.³¹ Furthermore, the Supreme Court may have regarded probate courts as less desirable forums to resolve the validity of foreign trusts and other analogous transactions because of their possible interest in increasing the size of the estate for local death tax purposes.³²

in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation.

Id.

25. *Id.* at 251-54.

26. *Id.* at 258-60 (dissenting opinion).

27. *Id.* at 258 (dissenting opinion).

28. Thus the majority concluded:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 253-54.

29. *Id.* at 254.

30. *Hanson v. Wilmington Trust Co.*, 119 A.2d 901 (Del. Ch. 1955), *aff'd sub nom.* *Lewis v. Hanson*, 357 U.S. 235 (1958).

31. *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (state of a trust's creation and administration has jurisdiction to terminate potential in personam claims by numerous beneficiaries against the trustee for mismanagement when no other state has jurisdiction over all the parties).

32. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1174-75 (1966); see E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS:

In sum, *Hanson* laid down a traditionally oriented, straightforward test for jurisdiction that one commentator has described as "a workable and not unduly confining expression of the limitations of the Due Process Clause."³³ Nevertheless, between *Hanson's* announcement in 1958 and the Court's next decision in 1977, the case's authority was increasingly regarded as suspect, and most of its principles had either been discounted or ignored, as the lower court decisions in some of the cases to follow will illustrate.

*B. Shaffer v. Heitner*³⁴

Plaintiff, a shareholder in a Delaware-chartered corporation, brought a derivative suit there against a number of the corporation's officers and directors, none of whom had any personal or business contacts with the state.³⁵ Consequently, jurisdiction was asserted over most of them by sequestering their stock in the corporation.³⁶ They appeared specially to make a due process challenge to this assertion of jurisdiction and eventually prevailed in the United States Supreme Court, which held, in an historic opinion effectively overruling *Pennoyer v. Neff*³⁷ and *Harris v. Balk*,³⁸ that assertions of in rem, as well as in personam, jurisdiction were governed by the minimum contacts test.³⁹

If the Court had then simply remanded the case to the Delaware courts to determine whether such minimum contacts were present,⁴⁰ the decision would not be very significant for this discussion. The Court, however, went on to examine the contacts itself and found them lack-

WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS AND FUTURE INTERESTS, CASES AND MATERIALS, 657 n.3 (2d ed. 1977).

33. Kurland, *supra* note 19, at 621.

34. 433 U.S. 186 (1977).

35. *Id.* at 189-90, 213.

36. *Id.* at 190-92, 196. Delaware, unlike other states, provides by statute that the situs of shares in a locally chartered corporation is in the state, regardless of where the certificates are located. See 8 DEL. CODE ANN. tit. 8, § 169 (1974). As Justice Stevens intimated in his concurring opinion, this statute itself might have been declared unconstitutional. 433 U.S. at 217-19 (concurring opinion).

37. 95 U.S. 714 (1877) (holding that judicial seizure of property within the state supports jurisdiction over its owner on any cause of action, however unrelated to the property).

38. 198 U.S. 215 (1905) (upholding jurisdiction over a person on any cause of action in any state in which a debtor of that person is found and the debt is garnished).

39. 433 U.S. at 212. The literature reviewing this historic aspect of *Shaffer* is vast. See generally Silberman, *supra* note 10; Smit, *The Importance of Shaffer v. Heitner: Seminal or Minimal?*, 45 BROOKLYN L. REV. 519 (1979).

40. In dissent, Justice Brennan argued that a remand was appropriate because Delaware had not addressed this question. 433 U.S. at 220-222 (dissenting opinion).

ing in terms harking back to *Hanson v. Denckla*. Delaware, it conceded, had a strong interest in supervising the management of a domestic corporation.⁴¹ That interest, however, while sufficient for choice-of-law purposes, "does not demonstrate that appellants have 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum State' . . . in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware."⁴²

Justice Brennan purported to agree with the majority in principle,⁴³ but dissented on the determination that Delaware lacked minimum contacts. He reviewed Delaware's strong interest in the governance of a corporation it had chartered and concluded that "when a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction."⁴⁴ Thus, he concluded, such "practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries."⁴⁵

C. *Kulko v. Superior Court of California*⁴⁶

Mr. and Mrs. Kulko lived in New York with their two children. In

41. *Id.* at 214-15.

42. *Id.* at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The opinion also suggested that Delaware, which unlike other states lacked a long arm provision specifically asserting jurisdiction over the officers and directors of domestic corporations, had failed to assert clearly its alleged interest in their activities and, therefore, to warn them of their attendant assent to its jurisdiction. *Id.* at 214-16. Justice Brennan in dissent, *id.* at 226-27 (dissenting opinion), and numerous commentators, e.g., Silberman, *supra* note 10, at 65-67, have questioned the wisdom of introducing this formal factor into the due process equation. Nevertheless, the idea was reiterated in the Court's next jurisdictional decision in *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978).

43. 433 U.S. at 219-20 (dissenting opinion). Interestingly, he misstated the position of the majority in purporting to agree with it in principle, asserting that a state may assert extra-territorial jurisdiction "on the basis of minimum contacts among the *parties*, the contested transaction and the forum State." *Id.* at 220 (dissenting opinion) (emphasis added). The majority, by contrast, had referred to the "relationship among the *defendant*, the forum and the litigation" as "the central concern of the inquiry into personal jurisdiction." *Id.* at 204 (emphasis added). This seemingly subtle difference is in fact the nub of their disagreement because a consideration of the interests of persons other than the defendant opens the way to the balancing of interests approach that Justices Black and Brennan advocated in *Hanson*. See text accompanying notes 26 & 27 *supra*.

44. *Id.* at 225-26.

45. *Id.* at 225.

46. 436 U.S. 84 (1978).

1972 they separated, and she moved to California. Later that year, she returned to New York to sign a separation agreement providing for divided custody and partial support of the children.⁴⁷ She then obtained a Haitian divorce and returned to California, where she subsequently remarried. In December 1973, just before a school vacation during which the children were to visit their mother, the younger child told her father that she wished to live with her mother. He acquiesced and accordingly bought her a one-way airplane ticket to California. In 1976, the older child, without his father's knowledge or consent, also arranged to join his mother in California.⁴⁸

A month later, the mother brought an action in California seeking to obtain permanent custody of the children and to increase the amount of child-support she received.⁴⁹ The father appeared specially and challenged California's jurisdiction solely with respect to the support claim. The California courts, however, held that in sending the younger child to that state the father had caused an economic effect in the state and had "purposely availed himself of the benefits and protections of the laws of California."⁵⁰

The Supreme Court reversed. While conceding that "the interests of the forum state and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered," it averred that "an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State."⁵¹ It agreed with the California Supreme Court that jurisdiction could not be based on defendant's participation in the original visitation arrangements. Otherwise parents would eschew such agreements lest they be subject to jurisdiction in the state of visitation.⁵² In addition, said the Court, such a rule would violate *Hanson's* admonition that the unilateral activity of persons having a relationship with the defendant does not satisfy the requirement that the defendant himself make contact with the

47. The children were to reside with their father in New York during the school year and with their mother in California during school vacations. The mother was to receive \$3000 a year per child as support. *Id.* at 87.

48. *Id.* at 87-88.

49. Defendant apparently had not increased the support payment for his daughter after she had moved to California. *Id.* at 88.

50. *Id.* at 88-89. The California courts further held that, because they had jurisdiction over this support claim, they could then reasonably also resolve the related claim with respect to the older child.

51. *Id.* at 92.

52. *Id.* at 93.

forum state.⁵³

The Court, however, rejected the finding that defendant's acquiescence and participation in his younger child's permanent move to California was a sufficient affiliating circumstance. Otherwise jurisdiction would depend, to the detriment of harmonious family relationships,⁵⁴ upon whether defendant "bought his daughter a ticket or instead unsuccessfully sought to prevent her departure."⁵⁵ Furthermore, the daughter's ability then to avail herself of various California public services was a benefit to her, not defendant, and not one he had purposely sought.⁵⁶ Finally, the Court held that the application of the so-called "effects" test⁵⁷ to this situation was unreasonable and unfair because the child, unlike a projectile or commercial papers,⁵⁸ had not been purposefully or beneficially sent to California by defendant, who had himself remained in the state of the marital domicile.⁵⁹

In closing, the Court stated that California's obvious interests in the children's welfare, though sufficient for choice-of-law purposes, did not make it a "fair forum . . . in which to require appellant, who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default."⁶⁰ In any event these interests were protected in other ways.⁶¹

Kulko's mildly worded opinion seemed to break no new doctrinal ground and provoked no real controversy,⁶² even though three justices dissented briefly on the merits. It did, however, call into question many

53. *Id.* at 93-94.

54. *Id.* at 94.

55. *Id.* at 98.

56. *Id.* at 100-01.

57. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971) provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

58. Firing a bullet or mailing contracts or insurance policies across state lines are, the Court indicated, classic examples of the application of the "effects" test. 436 U.S. at 96.

59. *Id.* at 96-97. For citation to and discussion of many of the cases employing this test, see Comment, *supra* note 9.

60. 436 U.S. at 100-01.

61. Most states, including California and New York, have enacted some form of uniform act that facilitates the interstate procurement and enforcement of child-support decrees in such situations. *Id.* at 98-99. Indeed, the Court may have feared that this comprehensive legislative solution could be undermined by a contrary decision creating as precedent for the inevitable cases to follow a colorable jurisdictional claim against any supporting parent who responds more humanely than prudently to such a custody situation.

62. Only a few casenotes of the decision were published. See, e.g., Comment, *supra* note 9.

lower court decisions holding that foreign acts having local effects would confer jurisdiction even though, as many long arm statutes require, the defendants had no other regular, continuous or ordinary contact with the forum.⁶³ Although in hindsight the decision is totally consistent with the doctrine that was emerging, it gave only a hint of the storm that was to follow.⁶⁴

*D. World-Wide Volkswagen Corp. v. Woodson*⁶⁵

While moving from New York to Arizona, plaintiffs were injured in Oklahoma when their automobile, which had been purchased in New York, was struck in the rear and caught fire. They brought a products liability action in Oklahoma against the car's manufacturer, its importer, its regional distributor and its local dealer, asserting jurisdiction under a typical "foreign act-local injury" long arm provision.⁶⁶ The Atlantic regional distributor and the New York dealer, neither of which had any other connection with Oklahoma, unsuccessfully challenged this assertion of jurisdiction over them in the state courts.

The Supreme Court granted certiorari and reversed. The concept of minimum contacts, began the Court, is intended primarily to protect a defendant from the unfairness of litigating in a distant forum and to prevent states from improperly asserting their sovereignty beyond their boundaries, which retain jurisdictional significance in the context of our federal system of government.⁶⁷ Thus, it asserted:

[T]he Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum state has a strong interest in apply-

63. 436 U.S. at 98-99. Some courts, however, distinguished *Kulko* and continued to employ the "effects" test to acquire jurisdiction in questionable circumstances. *E.g.*, *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western Corp.*, 99 S. Ct. 2710 (1979).

64. One law review caught the hint and correctly anticipated the decision in *World-Wide Volkswagen Corp. v. Woodson* denying jurisdiction in the "portable tort" type case. Comment, *supra* note 9, at 187.

65. 100 S. Ct. 559 (1980).

66. *Id.* at 563 n.7. These statutes normally require that a defendant regularly engage in or solicit business within the forum state, including the distribution of goods there. *E.g.*, N.C. GEN. STAT. § 1-75.4(4) (1969); 12 OKLA. STAT. tit. 12, § 1701.3(a)(4) (1961). The Oklahoma version, however, was also satisfied if a defendant "derives substantial revenue from goods used or consumed . . . in this state," and on this basis the Oklahoma courts held that the two appealing defendants could be subjected to Oklahoma's jurisdiction. 585 P.2d 351, 354-55 (Okla. 1978).

67. 100 S. Ct. at 564.

ing its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.⁶⁸

The state courts had grounded their claim of jurisdiction principally upon the assumption that a car sold anywhere in America might foreseeably be used in Oklahoma.⁶⁹ The Court, however, rejected the claim that "foreseeability alone" was a sufficient jurisdictional basis, noting that it was equally foreseeable that the settlor in *Hanson* and the wife and children in *Kulko* would move to another state.⁷⁰ Furthermore, under such a test products liability jurisdiction would automatically follow the chattel wherever it was taken, just as garnishment jurisdiction had automatically followed the debtor in the days before *Shaffer v. Heitner*.⁷¹ Thus, the Court concluded, the foreseeability that a product will find its way into the forum State is not critical. "Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."⁷²

This twist on the "foreseeability" test is not particularly illuminating. Its purport, however, was made quite clear. A manufacturer or distributor is subject to jurisdiction in any state in which it makes efforts, directly or indirectly, to market its products, including their delivery "into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁷³ In other words, every person in the chain of distribution is presumptively amenable to jurisdiction on a products liability claim wherever the goods passing through his hands are eventually sold to consumers in the ordinary course of business.⁷⁴ Since the Atlantic regional distributor and the New York dealer sold no cars in or near Oklahoma, they could not be sued there.

68. *Id.* at 565-66 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); citing *Hanson v. Denckla*, 357 U.S. at 254).

69. *Id.* at 563.

70. *Id.* at 566.

71. *Id.* at 566-67.

72. *Id.* at 567 (citations omitted).

73. *Id.* at 567 (suggesting comparison with *Gray v. American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961)).

74. *Id.* at 569 (Marshall, J., dissenting). If these requirements are met, it should not matter that a defendant did not in fact know that the goods had been sold in the forum state or that they were not promoted or serviced therein, *but see* *Hutson v. Fehr Bros.*, 584 F.2d 833 (8th Cir.) (en banc) (4-3 decision), *cert. denied*, 99 S. Ct. 573 (1978), or that the defective product had actually arrived in the forum state outside the normal distribution process, *see* *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

In dissent, Justice Brennan characterized the majority's formulation as a mechanical test focusing too narrowly upon the quantum of contacts between the forum state and the defendant and giving insufficient weight to the interests of the other parties and the forum state and the amount of inconvenience the defendant might suffer in litigating away from home.⁷⁵ In addition, he thought that the mobility of the automobile made its use in Oklahoma especially foreseeable and, therefore, the case for jurisdiction particularly appealing.⁷⁶ Finally, he could find no clear constitutional distinction "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there."⁷⁷

*E. Rush v. Savchuk*⁷⁸

In this case, a companion to *World-Wide Volkswagen Corp.*, the Supreme Court finally considered the validity of the much discussed doctrine of *Seider v. Roth*,⁷⁹ under which a liability insurance policy was regarded as a debt owed to the insured and subject to garnishment by anyone asserting a claim against him covered by the policy. In theory, such quasi-in-rem jurisdiction could have been asserted wherever the insurance company did business. In practice, however, it was allowed only in the state in which the plaintiff resided.⁸⁰ In addition, a resulting judgment could be satisfied only out of the proceeds of the policy⁸¹ and had no res judicata or collateral estoppel effects even if a

75. 100 S. Ct. at 581 (dissenting opinion). This position is, of course, essentially identical to the one taken by Justice Brennan in *Shaffer* and *Hanson*.

76. *Id.* at 584. This argument, which was also made by Justices Marshall, *id.* at 569 (dissenting opinion), and Blackmun, *id.* at 571 (dissenting opinion), in their separate dissenting opinions, is forensically appealing, but is basically a makeweight. The automobile has long been a likely protagonist in cases extending state jurisdiction, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927), but it is invariably the beginning of, rather than the occasion for, the extension. Thus, if the Court was not prepared to allow portable tort jurisdiction in nonvehicular cases, it was correct in denying jurisdiction in vehicular cases as well.

77. 100 S. Ct. 584-85 (dissenting opinion). Justice Blackmun also made this point in his dissenting opinion. *Id.* at 571 (dissenting opinion). This is certainly a valid point that the majority did not answer directly. One possible answer is to be found in the discussion in section III. C. *infra*.

78. 100 S. Ct. 571 (1980).

79. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

80. See, e.g., *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977).

81. *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669 (1967), *reh'g denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968) (assuming the unconstitutionality of the *Seider* attachment if a defense on the merits by defendant amounted to a general appearance).

full defense on the merits was made.⁸²

The *Seider* doctrine effectively permitted a plaintiff to litigate in his home state and under its substantive law⁸³ against a nonresident defendant with respect to a foreign accident.⁸⁴ Having successfully survived all initial constitutional challenges,⁸⁵ it was clearly placed in new jeopardy when *Harris v. Balk*,⁸⁶ on which it relied, was overruled by *Shaffer v. Heitner*.⁸⁷ Nevertheless, its validity was still proclaimed by many commentators,⁸⁸ by the United States Court of Appeals for the Second Circuit,⁸⁹ and by the highest courts of New York⁹⁰ and Minnesota,⁹¹ principally because an insurance obligation, unlike the debt garnished in *Harris v. Balk*, was related to a plaintiff's underlying claim against a defendant and, therefore, together with a plaintiff's residence in the forum state, provided the minimum contacts required to sustain a judgment limited to the proceeds of the policy.⁹²

After denying certiorari in many of the New York and Second Circuit cases,⁹³ the Supreme Court finally agreed to review the decision of the Supreme Court of Minnesota in *Savchuk v. Rush*.⁹⁴ It reversed,

82. *Minichiello v. Rosenberg*, 410 F.2d 106, 112 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

83. See cases cited note 10 *supra*.

84. In situations in which both parties potentially had claims against each other, such as in vehicular collisions, the prospective *Seider* defendant could bar a *Seider* action by suing first in the state in which the accident occurred because the *Seider*-based claim would be a compulsory counterclaim in that action. By contrast, the prospective *Seider* defendant's claim would not be a compulsory counterclaim in a prior *Seider* action. See FED. R. CIV. P. 13(a)(2). Thus, it could still be separately brought and, if litigated to judgment first, could be used for collateral estoppel purposes in the *Seider* action. A prior *Seider* judgment, however, could not be so employed. See text accompanying note 82 *supra*. Thus, the *Seider* doctrine encouraged a race to the courthouse door and to judgment and made multiple lawsuits and inconsistent judgments a strong possibility. Although these undesirable results do not go to the question of jurisdiction *vel non*, they offer additional reasons to applaud *Seider's* demise.

85. *E.g.*, *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

86. 198 U.S. 215 (1905).

87. See text accompanying note 39 *supra*.

88. See *e.g.*, Dooling, *Seider v. Roth After Shaffer v. Heitner*, 45 BROOKLYN L. REV. 505 (1979); Silberman, *supra* note 10, at 90-99.

89. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

90. *Baden v. Staples*, 45 N.Y.2d 889, 383 N.E.2d 110 (1978).

91. *Savchuk v. Rush*, 245 N.W.2d 624 (Minn. 1976), *vacated and remanded*, 433 U.S. 902 (1977), *aff'd on remand*, 272 N.W.2d 888 (Minn. 1978), *rev'd*, 100 S. Ct. 571 (1980).

92. *Rush v. Savchuk*, 100 S. Ct. 571, 575-76 (1980). See generally Silberman, *supra* note 10, at 92-97.

93. *E.g.*, *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969); *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

94. 245 N.W.2d 624 (Minn. 1976), *vacated and remanded*, 433 U.S. 902 (1977), *aff'd on remand*, 272 N.W.2d 888 (Minn. 1978), *rev'd*, 100 S. Ct. 571 (1980). It is ironic that the Supreme

holding that the *Seider* attachment, which in that case was typical in all respects but one,⁹⁵ did not satisfy the minimum contacts requirement. Neither defendant nor the accident had any connection with Minnesota. Therefore, the only affiliating circumstance was provided by defendant's insurance company, which did business there. But the company's "decision to do business in Minnesota was completely adventitious as far as [defendant] was concerned."⁹⁶ He had no control over the decision and had no expectation that by buying insurance in one state he would be subject to jurisdiction in any state in which a claimant resided and his insurance company did business.⁹⁷ Furthermore, defendant's insurance company did business all over America. Consequently, "[u]nder appellee's theory the 'debt' owed to [defendant] would be 'present' in each of those jurisdictions simultaneously. It is apparent that such a 'contact' can have no jurisdictional significance."⁹⁸ Finally, the Court stated, neither the insurance policy nor the company's preeminent role in the litigation could supply the necessary contacts. The policy was not the subject of the action or related in any way to its operative facts, as is the case in true in rem cases, and the contractual relationship it created between insurer and insured pertained "only to the conduct, not the substance of the litigation."⁹⁹

The Court also rejected the alternative argument that a *Seider* action could be regarded as the equivalent of a common-law direct action against the insurer alone because the insured "nominal defendant" has

Court heard the Minnesota case after refusing to hear so many cases from New York and the Second Circuit in which the *Seider* attachment had also been challenged. Perhaps it had been hoping that the contagion would not spread, 100 S. Ct. at 576, since, prior to *Savchuk*, only one state other than New York had adopted the doctrine, and only in a limited retaliatory way, see *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973) (adopting the *Seider* doctrine only when defendant resides in a *Seider* jurisdiction).

95. Plaintiff Rush had moved to Minnesota after the accident occurred. 100 S. Ct. at 574. With one narrow exception, *id.* at 577, the Court made no mention of this fact, which it presumably considered inconsequential. Whether this minor deviation will be clutched at by diehards remains to be seen.

96. *Id.*

97. *Id.* This language fails to resolve the question whether an attachment of non-transient property, such as realty or a bank account, with respect to an unrelated cause of action meets *Shaffer's* requirements. See Silberman, *supra* note 10, at 67-77. In such cases, the defendant has personally made the contact with the forum and retains control with respect to that contact. See, e.g., *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977). But since the plaintiff's residence is irrelevant, the property's presence would then provide minimum contacts for anyone in the world to sue the defendant on any cause of action. That result seems offensive to *Rush's* general tone. Of course, it would still be possible to find that the contacts are sufficient but reject jurisdiction as unfair or inconvenient because the plaintiff is not a resident of the forum state. See text accompanying notes 104-06 *infra*.

98. 100 S. Ct. at 578.

99. *Id.*

no real stake in its outcome.¹⁰⁰ The direct action statutes previously upheld required that the accident have occurred or that the defendant be domiciled in the forum state, which therefore, had jurisdiction over the defendant anyway.¹⁰¹ Such contact, the Court concluded, is an analytical prerequisite of a direct action and is clearly lacking in typical *Seider* actions.¹⁰² Minnesota had improperly sought to remedy this deficiency by attributing the unilateral actions of the insurer to the insured, who lacked his own necessary contacts with the forum.¹⁰³

In closing, the Court noted that the justifications offered in support of the *Seider* doctrine share a common characteristic: they shift the focus of the jurisdictional inquiry away from the contacts of the defendant with the forum to the contacts and interests of the plaintiff, the insurer and the forum.¹⁰⁴ Such an approach, said the Court, is forbidden under the minimum contacts analysis. Defendant must first be shown to have certain judicially cognizable ties with the forum. Only thereafter do these other considerations come into play, and then only to determine "whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" ¹⁰⁵ In other words, these other factors may confirm or defeat jurisdiction, but they may not create it.

These closing remarks assert premises totally at odds with the modern balancing approach used to justify *Seider*.¹⁰⁶ They also restate the essence of the Court's now familiar theory of jurisdiction, which originated with *Hanson v. Denckla* but which, until now at least, has not been taken seriously by everyone. Why that was so is not alto-

100. In a footnote the Court questioned the assumption that the insured has no real stake in the outcome of the *Seider* litigation. *Id.* at 579 n.20.

101. *Id.* at 578-79 (citing *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954)).

102. *Id.*

103. *Id.* at 579.

104. *Id.* This shift is illustrated by those cases suggesting that it would be unconstitutional to permit a nonresident plaintiff to bring a *Seider* action, *see, e.g.*, *Donawitz v. Danek*, 42 N.Y.2d 138, 366 N.E.2d 253, 397 N.Y.S.2d 592 (1977), and thereby implying that "plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated." *Id.*

105. *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S.310, 316 (1945)).

106. *See* text accompanying note 92 *supra*. This may also explain the Court's conclusory rejection of some of the pro-*Seider* contentions. Thus, it dismissed the direct action justification simply on the authority of *Watson v. Employer's Liab. Assurance Corp.*, 348 U.S. 66 (1954), *see* text accompanying note 101 *supra*, without making an effort to deal with the arguments that have been made to bridge the difference between that case and *Seider*, *e.g.*, *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969), *cited with approval* in 100 S. Ct. at 580 (Stevens, J., dissenting). These arguments are founded, however, on the now rejected assumption that the interests of the plaintiff and the forum state are initially relevant to the question of jurisdiction *vel non*.

gether clear. Perhaps only in hindsight is the Court's message so unequivocal. In any event, there is no mistaking the Court's present resolve or any mystery about why it heard and decided *Rush* and *World-Wide Volkswagen Corp.* together.

III. COMMENTARY

The line of cases beginning with *Hanson v. Denckla* and continuing through the Court's recent pronouncements in *World-Wide Volkswagen Corp.* and *Rush* mandates a bifurcated jurisdictional inquiry, beginning with a straightforward examination of defendant's contacts with the forum state.¹⁰⁷ This threshold examination is surely the cutting edge of the Court's approach and the likely source of whatever, if any, additional jurisdictional pruning that takes place. Where that will or may be is not altogether clear, however,¹⁰⁸ or amenable to careful examination in this brief comment. Therefore, I shall leave that question to others and turn directly to my principal concern—the possible explanations of and justifications for the Supreme Court's strict jurisdictional approach.

To begin with, the approach is consistent with the Burger Court's generally conservative bent and its concern for property¹⁰⁹ and business rights¹¹⁰ and state sovereignty.¹¹¹ Such broad generalizations are, however, of limited analytic utility. Therefore, let me narrow the focus to three distinct inquiries: (1) why an initiative by the Court in the jurisdictional area was inevitable and necessary; (2) what specific factors were most influential in the actual decisions; and (3) what additional justifications there may be for the Court's adherence to such a rigid, mechanical view of jurisdiction.

107. If the minimum contacts requirement is satisfied, then all other considerations become relevant to the question of whether it is fair and reasonable to assert jurisdiction in the case. See text accompanying note 105 *supra*.

108. None of the more familiar long-arm provisions appear to be in jeopardy. Some of the cases employing the so-called "effects" test, however, especially those involving economic effects, would now appear to be questionable. See generally Comment, *supra* note 9, and cases cited note 63 *supra*.

109. See, e.g., *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551 (1972).

110. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

111. See, e.g., *National League of Cities v. Usury*, 426 U.S. 833 (1976); *Goldstein v. California*, 412 U.S. 546 (1973). These cases and others like them hold that the states are, as partially sovereign entities, either immune from certain federal powers or not automatically preempted by them. The jurisdiction cases represent, in effect, the other side of the coin. Thus, the states as sovereign entities are correspondingly saddled with jurisdictional limitations inherent in their territorial boundaries. See *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. at 565.

A. Reasons for the Court's Initiative

Under the Constitution the Supreme Court is the neutral enforcer of the due process and full faith and credit clauses, which are direct limitations on state judicial authority.¹¹² From 1945 to 1957, however, with the announcement and expansion of the minimum contacts test, the Court acted more as a pathfinder than as a policeman.¹¹³ As the new jurisdictional boundaries were generally marked out, however, and state courts began to test their specific limits, the Court was bound to revert back gradually to its traditional role. It did so briefly with the decision in *Hanson v. Denckla*, but then it inexplicably left the field for almost twenty years to the lower courts and the scholars, many of whom were not exactly taken with *Hanson*.¹¹⁴ Indeed that decision was so thoroughly discredited and the opposite viewpoint so firmly entrenched by the seventies¹¹⁵ that the Court's initial efforts in *Shaffer* and *Kulko* to reverse the trend were largely ineffectual. Consequently, the Court had to do something dramatic to reassert its doctrinal hegemony and traditional enforcement role in this area. It very effectively chose as its vehicle the companion decisions in *World-Wide Volkswagen Corp.* and *Rush*.

In addition, the Court's long period of inaction may have been interpreted by the state courts as a signal that the due process clause had become merely a ritualistic limitation on their jurisdiction. In *Shaffer*, for example, the Court unanimously agreed that in rem jurisdiction was governed by the minimum contacts approach, and in *World-Wide Volkswagen Corp.* even the dissenters conceded that the case approached the limits of due process.¹¹⁶ The respective state supreme courts, however, had either ignored or summarily dismissed these due process contentions.¹¹⁷ Such total insensitivity to constitutional questions is perhaps atypical of state appellate courts, at least in the jurisdictional area. On the other hand, it may have been symptomatic of a feeling that almost any colorable assertion of jurisdiction would pass muster in the permissive climate that then prevailed. If that

112. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

113. See cases cited note 1 *supra*.

114. See, e.g., Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 243-44 (P. Kurland ed.).

115. See generally von Mehren & Trautman, *supra* note 32, at 1164-79.

116. 100 S. Ct. at 568, 585.

117. E.g., *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976) (rejecting the due process minimum contacts contention summarily); *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1978) (totally ignoring the due process contention).

was so, it was in large part the fault of the Supreme Court, which has now properly reminded the states that the limits of due process are real.

The Court's resurgence is also attributable to certain specific jurisdictional developments. One obvious example is provided by *Shaffer* and *Rush*. The theoretical basis of quasi-in-rem attachment jurisdiction, which had become increasingly unnecessary and unfair as long-arm jurisdiction expanded,¹¹⁸ had been directly undercut by the concept of minimum contacts.¹¹⁹ Nevertheless, despite frequent suggestions to this effect in the legal literature,¹²⁰ not a single state court had so held, and those to which the contention was advanced generally rejected it summarily.¹²¹ Furthermore, some states were not content to leave well enough alone, but actually expanded attachment jurisdiction by combining it with other questionable doctrines.¹²² Perhaps that is why the Court did not simply weed out these mutant strains but chose to extirpate the genus almost entirely.

A second example is provided by *Hanson* and *Rush* and the now abortive marriage of jurisdiction and choice-of-law. Some states, most notably New York under *Seider*, have found "minimal" contacts to be a sufficient basis both for asserting jurisdiction and applying their own substantive law to the foreign transaction or occurrence.¹²³ Although the choice-of-law decisions were also subject to constitutional review and offered an alternative solution to the perceived problem, their validity was usually assumed and then effectively undercut by the finding that jurisdiction was lacking.¹²⁴ Whichever way was better¹²⁵—and the choice has, of course, now been made—it required the Court's intervention because the state courts were not totally disinterested parties to

118. Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

119. Silberman, *supra* note 10, at 34-35, 64-65.

120. See, e.g., *id.* at 65 n.174.

121. *Id.* at 35 n.4. The state courts have similarly failed to question transient in personam or so-called "tag" jurisdiction, despite the widespread feeling that its days are also numbered. See Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS CONST. L.Q. 15, 24 (1978).

122. The *Seider* doctrine is one obvious example. Another is the Delaware stock situs statute utilized in *Shaffer*, see note 36 *supra*, which permits suit in Delaware against a shareholder in a Delaware corporation on a cause of action totally unrelated to the ownership of the stock. See *Hughes Tool Co. v. Fawcett Publications, Inc.*, 290 A.2d 693 (Del. Ch. 1972).

123. See cases cited note 10 *supra*.

124. See, e.g., Silberman, *supra* note 10.

125. Arguably it is simpler to control the problem by focusing on the single jurisdictional question, however factually variegated it may be, than on the "multitudinous phases of the conflict of laws." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945); see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24, Comment c (1971).

the problem and their union of these two concepts was arguably straining the limits of due process.

The last example is provided by *World-Wide Volkswagen Corp. and Kulko*. The lower court decisions in these cases were illustrative of a new kind of jurisdictional approach. Prior to these cases, it had long been settled that a defendant was generally subject to long arm jurisdiction in any forum in which he conducted or permitted the conduct of his affairs on causes of action arising out of them.¹²⁶ *World-Wide Volkswagen Corp. and Kulko*, however, were representative of a class of cases in which it was asserted that, under the so-called "effects" or "forseeability" test, a defendant was also subject to jurisdiction in additional forums in which his affairs had not been conducted but in which their impact was foreseeably felt.¹²⁷ It was this assertion that was rejected by the Court's decisions in *Kulko* and *World-Wide Volkswagen Corp.* in terms that call into question the usefulness of the "effects" test itself. The merits of this result will be considered below. For the moment it is sufficient to note that these cases as a class clearly implicated the outer limits of due process and, therefore, provided a compelling justification for the Court's belated reentry into the jurisdictional fray.

B. *Specific Factors Affecting the Results*

In *Hanson* and the Court's four most recent jurisdiction cases, the forum state asserted jurisdiction with respect to a transaction or occurrence that took place, at least initially, outside its borders. In rejecting each assertion and the justifications offered in support of it, the Supreme Court relied upon a number of common arguments that offer important insights into its current jurisdictional state of mind.

In the typical *Seider* action, and in *Shaffer*, plaintiff currently resided or was incorporated in the forum state. In *Hanson*, *Kulko* and *Rush* plaintiff, or plaintiff's decedent, subsequently established residence there. The Court, however, held that the plaintiff's residence is not a contact of the defendant and is irrelevant unless minimum contacts on the part of the defendant are first found to exist.¹²⁸

In *Shaffer* and *Rush*, defendant also had an interest in property

126. See generally von Mehren & Trautman, *supra* note 32, at 1148-53. The one notable exception was the case involving the non-resident mail order buyer. *E.g.*, Fourth N.W. Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, 117 N.W.2d 732 (1962); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959).

127. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAW § 37, Reporters Note (1971); Comment, *supra* note 9; authorities cited notes 59-63 *supra*.

128. *Rush v. Savchuk*, 100 S. Ct. at 579.

allegedly situated in the forum state. In neither, however, did the claim asserted against him arise directly out of that interest, although in *Rush* the two were related.¹²⁹ The absence of such a linkage may eventually be found fatal to any assertion of in rem jurisdiction.¹³⁰ For the moment, however, it is at least clear that, if the interest was acquired outside the forum state and the property is not uniquely situated therein,¹³¹ the interest will not provide the necessary contacts to sustain jurisdiction over an unrelated cause of action. Otherwise a promisee or debtor could unilaterally create jurisdiction anywhere or everywhere he goes or does business.¹³² Such "contacts," the Court has concluded, "can have no jurisdictional significance."¹³³ Like a plaintiff's choice of residence, they are, from the defendant's perspective, "adventitious,"¹³⁴ totally beyond his control,¹³⁵ and, though often foreseeable, not for his direct or immediate benefit.¹³⁶

These considerations are also applicable to the portable tort, products liability cases exemplified by *World-Wide Volkswagen Corp.* To the defendant, the movements of the product after it has been sold at retail, though often foreseeable, are again adventitious, uncontrollable and not beneficial¹³⁷, and, if used as the basis for asserting jurisdiction, of potential jurisdictional significance throughout the nation. By contrast, if the defendant has been involved in the distribution of goods to the forum state, his contacts with it are volitional and financially beneficial. Furthermore, he can presumably ascertain where the goods are

129. In *Rush*, the Court said: "The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. [It] pertain[s] only to the conduct, not the substance of the litigation . . ." 100 S. Ct. at 578.

130. See note 97 *supra*.

131. This describes the situations in *Shaffer* and *Rush*, in which shares of stock and an insurance policy, respectively, were purchased outside the forum state and, unlike a local bank account or realty, were not uniquely situated therein.

132. *Rush v. Savchuk*, 100 S. Ct. at 578.

133. *Id.*

134. *Id.* at 577.

135. *Id.*

136. In his dissenting opinion to both *Rush* and *World-Wide Volkswagen Corp.*, Justice Brennan noted that an interstate insurance company benefits its policy holders, who may more easily make claims or conduct business with it away from home. *Id.* at 583 (dissenting opinion). Such a collateral benefit is hardly direct or immediate, however, and is one over which the defendant has little or no control. Cf. *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 568 ("[W]hatever marginal revenues [defendants] may receive because their products are capable of use in [a state] is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.")

137. In *World-Wide Volkswagen Corp.*, the dissenters noted that each dealer or distributor of a nationally sold, serviced and advertised product benefits from that fact. 100 S. Ct. 559, 585 (dissenting opinion). The majority, however, found these collateral benefits "too attenuated a contact." *Id.* at 568.

bound and object or make other arrangements if the resulting multistate jurisdictional exposure is unacceptable.¹³⁸ Thus, he is hardly at the mercy of "[t]he unilateral activity of those who claim some relationship with [him]."¹³⁹

The decisions in *Hanson* and *Kulko* also reflect these considerations. In *Hanson*, the principal affiliating circumstance was the settlor's execution of the power of appointment in Florida after she had moved there.¹⁴⁰ That act was not done by, for or under the control of defendant, however, and could just as well have been done elsewhere. In *Kulko*, the affiliating circumstance was defendant's acquiescence in his daughter's decision to live in California with her mother, who had moved there.¹⁴¹ Defendant, however, did not seek, desire or directly benefit from that decision.¹⁴² And, although he might have resisted it, ultimately he had little control over it. Consequently, his acquiescence and participation in the decision was not a sufficiently beneficial or volitional act to give California jurisdiction over him. Again jurisdiction was improperly based upon the "unilateral activity of those who claim some relationship with a non-resident defendant."¹⁴³

In one sense, however, *Hanson* and *Kulko* were different from the others. The relationship between the parties in both was continuing and, therefore, defendant had some limited contact with the forum state after plaintiff moved there.¹⁴⁴ The claim asserted did not arise directly out of this continuing relationship, however,¹⁴⁵ but out of the original underlying transaction.¹⁴⁶ Consequently, defendant's contacts

138. *Id.* at 567.

139. *Id.*

140. 357 U.S. at 253.

141. 436 U.S. at 94.

142. *Id.* at 94-95. The Court noted that defendant's continuing obligation to support his child was not at issue, only California's jurisdiction to determine that support obligation. *Id.* at 94-96. Thus, defendant's temporary freedom from the expense of supporting his daughter while she resided in California did not benefit him sufficiently for jurisdictional purposes. Finally, the child's right to use California public services was a benefit to her, not to him. *Id.* at 94 n.7.

143. *Id.* at 93-94 (quoting *Hanson v. Denckla*, 357 U.S. at 253).

144. In *Hanson*, the trustee had remitted trust income to the settlor in Florida and had corresponded with her concerning the administration of the trust. 357 U.S. at 252. In *Kulko*, the father had each summer sent the children and the agreed upon support payment to the mother in California. 436 U.S. at 93.

145. A claim by the settlor against the trustee for trust income not remitted or a claim by the mother against the father for failure to send the agreed upon support payments would have arisen directly out of these limited activities. As to whether the state court would have had jurisdiction in these cases, see note 149 *infra*.

146. In *Hanson*, the litigation concerned the validity of the trust itself and the disposition of the assets after the settlor's death, 357 U.S. at 238; in *Kulko*, plaintiff sought to alter, not enforce, the support agreement, 436 U.S. at 88.

were deemed insufficient to support jurisdiction over the claim asserted.¹⁴⁷ Otherwise the simple act of sending children or money into the forum state would potentially create jurisdiction over the sender with respect to almost any aspect of the underlying relationship.¹⁴⁸ That possibility, however, had such undesirable policy consequences that jurisdiction could not be permitted.¹⁴⁹

In effect, what the Court has done in these cases is to turn the clock back to an earlier time when jurisdiction, like substantive tort law, was concerned more with the defendant's conduct and less with notions of social welfare and convenient risk allocation.¹⁵⁰ A defendant must now act with respect to the forum state or have some control over and derive some benefit from the acts of those for which he is to be jurisdictionally charged. If the affiliating acts are limited in scope or territory, the jurisdictional risk will be correspondingly limited to claims arising specifically from them¹⁵¹ and to forums directly involved or affected.¹⁵² Acts that supposedly amount to a consent to jurisdiction anywhere or everywhere the plaintiff or some third person resides, goes or transacts busi-

147. In *Kulko*, the Supreme Court of California also agreed that this was not a sufficient basis for jurisdiction. 19 Cal. 3d 514, 519, 138 Cal. Rptr. 586, 590, 564 P.2d 353, 357 (1977).

148. *Kulko v. Superior Ct.*, 436 U.S. at 93; see *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. at 566.

149. In *Kulko*, the Court feared that the supporting spouse might otherwise eschew voluntary support or visitation arrangements, lest his assent subject him to jurisdiction wherever his spouse resided, to the greater detriment of harmonious family arrangements. 436 U.S. at 93. *Hanson* did not discuss the obvious problem of subjecting a trustee to lawsuits questioning the administration or validity of a trust in every state where beneficiaries reside, perhaps because even the possibility presents such a procedural nightmare. These factors help to distinguish *Hanson* and *Kulko* from *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), in which the Supreme Court held that an insurance company, or one that succeeded to its obligations, was subject to jurisdiction in an action on a policy in any state in which the insured resided when the policy was issued, even though the company transacted and solicited no other business in the state and had no office or agents there. In that situation, the claim arose directly out of the limited business done within the state, and the assertion of jurisdiction over defendant had no socially onerous side effects. Whether *McGee* is authority for the assertion of jurisdiction in the hypothetical cases set forth in note 145 *supra*, is a nice question that need not be answered here. In any event, *McGee* is not necessarily inconsistent with *Hanson* or *Kulko*.

150. Needless to say the clock has been turned back, or perhaps merely stopped, only with respect to jurisdiction and not with respect to substantive tort law, which is a separate question even though some of the underlying policy considerations are similar. Thus, even if the Court had constitutional authority to curtail the parallel developments in state products liability law, it has not even hinted that it would be so inclined. Indeed, unless it were prepared to hold, contrary to the unequivocal language in *World-Wide Volkswagen Corp.*, see notes 59 & 60 *supra*, that manufacturers and distributors generally could not be sued even in states where their goods were actually sold, it could not logically even contemplate the equivalent substantive result. Therefore, although some of the justifications presented here for the jurisdictional result logically could be used to assail the substantive one, they are not so intended and should not be so interpreted.

151. See note 149 *supra*.

152. *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. at 564-65.

ness are generally regarded as jurisdictionally irrelevant.¹⁵³

Under such a conduct-oriented approach to minimum contacts, a defendant who travels from his home or place of business to that of the plaintiff is clearly required to return again to answer for his conduct there.¹⁵⁴ Similarly, a defendant who solicits or initiates interstate sales transactions by carrier, mail or telephone must ordinarily litigate wherever his customers live.¹⁵⁵ Thus, the question of who went to whom and who was the aggressor has traditionally been a relevant question in jurisdictional inquiries.¹⁵⁶ In these recent cases, however, the peripatetic party is a plaintiff who deals with a defendant at the latter's home or place of business, moves away and then expects the defendant to come to him or her.¹⁵⁷ That this expectation proved to be erroneous is in retrospect not surprising. On the other hand, it is also not surprising that the state courts and many commentators thought otherwise. Their position was that litigation away from home is less costly and inconvenient today. Furthermore, the defendants and insurance companies of today are usually financially better prepared to undertake such litigation and can normally budget for the extra cost in their prices or rates.¹⁵⁸ These assertions are obviously true. Their significance, however, is another matter. The decreasing inconvenience of litigation away from home also applies to plaintiffs. In addition, plaintiffs as a group are no longer as helpless as they perhaps once were.¹⁵⁹ Today,

153. *Id.* at 566; *Rush v. Savchuk*, 100 S. Ct. at 578.

154. *See generally* von Mehren & Trautman, *supra* note 32, at 1148.

155. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). As a general rule, a consumer who in response to advertisements initiates a mail order transaction is not regarded as an aggressor. *See* cases cited at note 138 *infra*. Furthermore, in the absence of advertisements or other solicitation, a consumer who in fact initiates a mail order transaction may still not have sufficient contacts with the seller's state.

156. *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959); von Mehren & Trautman, *supra* note 32, at 1167-69. This distinction also helps to explain the much maligned decision in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956), in which the defendant, at plaintiff's request, shipped a single order of goods, which were later found to be defective, into the forum state.

157. Thus, in *Kulko*, the Court noted that plaintiff "seeks modification of a contract that was negotiated in New York and that she flew to New York to sign," and that defendant "has remained in the State of the marital domicile, whereas [plaintiff] has moved across the continent." 436 U.S. at 97.

158. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. at 570 (dissenting opinion).

159. Many injured plaintiffs once were forced either to settle claims prematurely in order to pay their bills or to seek advances for living expenses from their attorneys, a practice that raised serious professional responsibility questions. *See* M. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS* 580-88 (1979). Today, however, the problem apparently arises far less frequently.

many are protected by public and private health, disability, income maintenance and legal service schemes, including the contingent fee arrangement, and are better able to seek and obtain effective legal redress. That does not mean, of course, that all plaintiffs can comfortably litigate away from home today or that defendants as a class are still not better able to do so. It does suggest, however, that a strong jurisdictional bias in plaintiff's favor is perhaps no longer truly essential and that the more neutral position to which the Court has moved will not deprive many of them of a remedy.¹⁶⁰

C. *Other Justifications for the Court's Approach*

The real difference between the Supreme Court's jurisdictional approach and the alternative balancing approach of Justice Black and other advocates is in the importance assigned to factors and interests other than the defendant's contacts with the forum state. Under the balancing approach, these other factors and interests enjoy relatively co-equal status with those of the defendant.¹⁶¹ Under the Court's approach, however, they are of secondary importance and can only confirm or defeat, but never themselves create, jurisdiction.¹⁶² The reason for the difference is not altogether clear. Neither the federal system,¹⁶³ constitutional text, prior precedent or ineluctable logic mandated this difference. Nor was it essential to the specific results reached in the cases. The Court could just as well have restruck the balance itself and found it lacking. Moreover, the balancing test is hardly inherently in-

160. Perhaps some very small or marginal claims will not survive the trip to the place of the occurrence or to the defendant's residence or place of business. That, however, is arguably one of the hazards of traveling or doing business away from home. Furthermore, these claims are the kind that unscrupulous plaintiffs, if allowed to sue at home, could use to hold up even insurance companies, which, despite their large resources, often find it more economical to settle unreasonably than to litigate expensively, especially in a distant forum.

161. In his dissenting opinion in *World-Wide Volkswagen Corp.*, Justice Brennan said:

In answering the question whether or not it is fair and reasonable to allow a particular forum to hold a trial binding on a particular defendant, the interests of the forum State and other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant.

100 S. Ct. at 586 (dissenting opinion).

162. *Rush v. Savchuk*, 100 S. Ct. at 579; see text accompanying notes 104-106 *supra*.

163. The very existence of long arm jurisdiction makes it clear that state boundaries have less than paramount jurisdictional significance. The reason, as Professor Kurland reminds us, is that for states in a federal system bound together by the full faith and credit clause, "[t]he real question becomes not whether a state could itself enforce a judgment, but rather under what circumstances the national power should be used to assist the extraterritorial enforcement of a state's judicial decrees." Kurland, *supra* note 19, at 585. Obviously the national power should be withheld when a defendant has no contacts with the forum state, which asserts what amounts to nationwide service of process. Beyond that, however, it is for the Court to decide what circumstances are relevant to the existence of jurisdiction.

imical to the achievement of proper case results. Indeed, by definition it seeks the "just" result in every case, whereas the Court's more mechanical approach obviously does not and cannot.

The explanation is, in my opinion, a more practical one. The Court must set the limits of due process somewhere and no doubt believes that its mechanical approach will usually produce the right result, or will at least produce few very wrong and unfair ones. Thus, justice would only rarely be served if the state courts were permitted to search under a balancing approach for the random exception, which they, in their obvious self-interest, would perhaps too often erroneously purport to find. The potential sources of that self-interest are certainly numerous. For example, an affirmative jurisdictional finding may (1) allow the creation or augmentation of an estate or fund for tax or local creditor purposes,¹⁶⁴ (2) allow the assertion of state regulatory or taxing authority,¹⁶⁵ (3) provide a local forum for state residents, (4) allow more sympathetic, and possibly more liberal, local juries and judges to decide issues and assess damages,¹⁶⁶ (5) allow the choice of local substantive law,¹⁶⁷ and (6) obviate the need for local attorneys to seek out, rely upon and divide their fees with out-of-state counsel. Aligned against this formidable array are several countervailing forces; namely, (1) the felt obligation of state judges to apply the Constitution correctly and their desire to avoid embarrassing reversals by the Supreme Court, (2) the conservatism of many state judges, (3) the fear of retaliatory jurisdictional decisions by other states,¹⁶⁸ and (4) the fear that an aggressive local jurisdictional posture might drive some marginal business away from the state. Only the first two of these considerations appear to be significant, and, although they probably exert some countervailing force, they cannot in my opinion totally neutralize the powerful local interest bias. In close cases, state courts will naturally tend to resolve jurisdictional doubts in their own favor. And sooner or later one will announce a significant advance that the others will soon be

164. See text accompanying note 32 *supra*.

165. Cf. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (state has jurisdiction over nonresident mail-order health insurance company to enforce state permit requirements); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (state has jurisdiction over nonresident corporation to recover payments due to the state unemployment compensation fund.)

166. Cf. *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947) (plaintiff sued in New York on a Virginia tort because he feared a local jury would be staggered by the amount in controversy).

167. See cases cited note 10 *supra*.

168. E.g., *Forbes v. Boynton*, 113 N.H. 617, 313 A.2d 129 (1973) (adopting the *Seider* doctrine if defendant resides in a *Seider* jurisdiction).

pressed to follow.¹⁶⁹ Thus, under the relentless prod of local interest, the state's long arm will inevitably reach farther and farther.

For years this inexorable growth was benignly ignored by the Supreme Court. When, however, it reached, and then arguably breached, the limits of due process, as the four recent cases illustrate, it had to be arrested. The problem was how. At best the Court can review only a handful of the many jurisdictional cases that otherwise remediless defendants seek to bring before it each year. In addition, these cases, once decided, often have only limited precedential value because of the ease with which they can be distinguished from new jurisdictional questions, which arise in an endless variety of factual contexts. The problem is a difficult one under any circumstances. It would be greatly exacerbated, however, if the state courts were permitted to use a broader balancing approach, which invites them to consider and weigh local interests, asserts that such interests are at least a partial substitute for minimum contacts, complicates the review of any decision reached because of the multitude of relevant factors to be weighed, and thereby makes each decision reached potentially distinguishable from any other.

By contrast, the Court's approach spurns the lure of perfect justice in favor of a bright line test that the states can more easily follow and the Court can more easily police. Although it is not a litmus paper test, its initial focus on a single objective variable—the defendant's contacts with the forum state—must simplify both its application and any subsequent appellate review. Such simplicity is always desirable if the attendant social welfare loss can be minimized. Arguably it has been.¹⁷⁰ In any event, the Court thinks so, and it obviously does not wish to add to its many tasks a continuing campaign to contain the jurisdictional avarice of the states.

IV. CONCLUSION

The Supreme Court no doubt felt that state long arm jurisdiction, after thirty-five years of generally unrestricted growth, was finally threatening to overreach the limits of due process and acted decisively to contain it. By limiting the source of minimum contacts solely to the

169. For example, the seminal decision in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), gave rise to a host of similar products liability cases around the country, culminating in *World-Wide Volkswagen Corp.*, and to the adoption of new long arm provisions incorporating the result. See note 66 *supra*.

170. See note 160 *supra*.

activities of defendants, it promulgated a strict jurisdictional approach that tends to hold the state courts to the mark and more easily identifies the occasions when they depart from it. In the process, it has probably stunted the growth of long arm jurisdiction, ended the era that began with the decision in *International Shoe* and the announcement of the minimum contacts test, and ushered in a new period of comparative jurisdictional quiescence.

