Minimum Contacts As a Unified Theory of Personal Jurisdiction: A Reappraisal

Stewart Jay
“MINIMUM CONTACTS” AS A UNIFIED THEORY OF PERSONAL JURISDICTION: A REAPPRAISAL

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Recent decisions by the United States Supreme Court involving due process limitations on state court jurisdiction have emphasized that the threshold inquiry must be directed toward determining whether there are “minimum contacts” between the defendant and the forum state. In this Article, Professor Jay denounces this defendant-oriented approach and argues for a more balanced analysis with no a priori weight given to one forum. Professor Jay analyzes the major jurisdictional cases and finds them inherently flawed by a pursuit of antagonistic theories of decision. He also criticizes the minimum contacts test itself, finding that it is being used as a substitute for, and barrier to, in-depth analysis and explanation. Professor Jay concludes by contending that the old jurisdictional standard, Pennoyer v. Neff, continues to impede the quest for an acceptable theory of jurisdiction.

Law professors long anticipated the official demise of Pennoyer v. Neff.1 After all, International Shoe v. Washington,2 decided in 1945, seemed to rest on an entirely different conceptual foundation, and so it was assumed by many that the end was only a matter of time and opportunity. Shaffer v. Heitner3 hardly came as a surprise to anyone; for some the outcome was so obvious that the case itself could be characterized as insignificant.4 This is not to say that commentators viewed Shaffer as answering all questions concerning personal jurisdiction, particularly those involving property.5 Yet the consensus was that Pennoyer’s regime had come to an end. The literature appearing after Shaffer often invoked metaphors reserved for the most significant of cases, namely allusions to death, destruction, and rebirth. Thus we have been treated to visions of fallen citadels,6 nailed coffins,7 departed friends,8 the

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1. 95 U.S. 714 (1877).
2. 326 U.S. 310 (1945).
6. Id. at 34.
7. Id.
passing of the aged,\textsuperscript{9} collapse,\textsuperscript{10} and abandonment,\textsuperscript{11} as well as to the usual references to seminality.\textsuperscript{12}

Perhaps in some of this we see reflected the observation of Roberto Unger on the attraction that death exercises over life.\textsuperscript{13} At the very least, the labels applied to \textit{Shaffer} indicate the limited ways in which the English language can express the thought that something important has happened. Given the enormous literature following the case,\textsuperscript{14} one pictures scores of writers searching for some way of making their point without using the word "landmark."\textsuperscript{15}

It was Professor Hazard who, some sixteen years ago, stressed the need for a general theory of jurisdiction, one which would use the "minimum contacts" approach of \textit{International Shoe} as a basis for resolving all jurisdictional issues.\textsuperscript{16} His point was not merely that some cases were hard to reconcile. A greater concern was the extent to which \textit{Pennoyer} had survived in the absence of an "acceptable alternative":\textsuperscript{17}

\textit{Pennoyer v. Neff} is, to borrow a phrase from Mr. Justice Frankfurter, not merely a venerable case. It represents a particular way of looking at the law of jurisdiction. Its rules of jurisdiction have been gradually abandoned in detail, though in certain respects they still represent accepted law. But the conceptual structure established by \textit{Pennoyer} remains substantially intact. The questions of state-court jurisdiction continue to be formulated much as Justice Field formulated them: may the state exercise "power" or "authority" (as if these were indistinguishable notions) over the particular person, thing, or intangible in question (as if these were separable notions)?\textsuperscript{18}

Hazard's comment was made long before \textit{Shaffer}, a case which certainly seemed to endorse the view that jurisdictional questions should be decided according to a unified theory: "We therefore conclude that all assertions of

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\item[12.] Smit, \textit{supra} note 4, at 519 (denying "seminal" significance).
\item[13.] R. UNGER, \textit{KNOWLEDGE AND POLITICS} (1975).
\item[14.] For a listing of articles and comments on \textit{Shaffer}, see J. COUND, J. FRIEDENTHAL, & A. MILLER, \textit{CIVIL PROCEDURE CASES AND MATERIALS} 133 (3d ed. 1980); Silberman, \textit{supra} note 5; Smit, \textit{supra} note 4.
\item[16.] \textit{See} Hazard, \textit{A General Theory of State-Court Jurisdiction}, 1965 SUP. CT. REV. 241 (Kurland ed.).
\item[17.] \textit{Id.} at 242.
\item[18.] \textit{Id.} at 241 (footnotes omitted). The \textit{Shaffer} opinion explicitly cited this page of the Hazard article. \textit{See} 433 U.S. at 199.
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state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."19 In turn, the Supreme Court gave a sketch of the proper course by summarizing the treatment afforded in personam cases during the previous thirty-odd years: "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."20

This method, roughly characterized by the Court as directed toward the "fairness" of the forum's exertion of jurisdiction over the defendant, was confidently seen as being "easily applied in the vast majority of cases."21 That this statement was made suggests that a hiatus of more than twenty years from the subject had weakened the Court's grasp of the complexities involved in applying the minimum contacts standard. Sobriety was not long in coming. The next Term produced *Kulko v. Superior Court*,22 authored by Justice Marshall, who had written for the majority in *Shaffer*. In discussing the ease by which the *International Shoe* test could be applied, the *Kulko* Court was far more restrained:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla* . . . . We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."23

Perhaps this change of heart may be dismissed as a reflection on what happens to opinions written during the hectic last month of the Court's year.24 And, to be sure, there is little gained by perusing the Court's pronouncements on the clarity of its own work. What may be suggested by the quoted remarks, and proven by more careful analysis, is that the Court has fallen short of articulating an acceptable theory of personal jurisdiction. One can even find, in light of the cases decided by the Court after *Shaffer*, the vestiges of an old scourge, *Pennoyer v. Neff*.

I

At the outset a serious question arises about the meaning of the term "unified theory," particularly when its invocation presumes some inherent superiority. It can fairly be asked: superiority over what? Presumably the reference is to "something" characterized by greater discord than the supposedly

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19. 433 U.S. at 212.
20. Id. at 204.
21. Id. at 211.
22. Id.
24. Id. at 92.
25. *Shaffer* was decided June 24, 1977; *Kulko* on May 15, 1978.
"unified" theory. But "discord," like similar words expressing a sense of irreconcilable diversity, is a relative term; one thing is not in harmony with another. However, the question still remains: just what is it that makes them disharmonious? Certainly it is nothing in either of the two entities under consideration—when they stand alone the notion of disunity vanishes. It is the relation—imposed on the elements—that creates the contrast.

To illustrate this point, take some of the traditional doctrines flowing from Pennoyer. One of the most highly criticized was the rule that service of process could not operate beyond the borders of a state. This result seemed to spring naturally from Pennoyer's premise that a state's judicial command had absolutely no authority outside of its territorial limits:

> [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. Story Conf. Laws, c. 2 . . . . The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. . . . [T]he laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

As a justification for limitations on process, the Court's invocation of the principle of exclusive sovereignty neatly fit the bill. The total tab was too much, for implicit in this conception of sovereignty was the idea that states had complete control over the disposition of property situated within their respective borders. This led to the question of how absentee owners of property would be notified of in rem proceedings when process could not transgress state lines. Resolving the issue required a sleight of hand on the part of the Pennoyer Court:

> The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

Accordingly, the use of constructive notice—via newspaper announcement, posting, or seizure—became the only sanctioned means of informing the absentee, even when the person's address was known. It is difficult to believe that the Court really considered it likely that such constructive notice actually would inform the interested absentees in any more than a handful of cases. At best, this view of the notice requirement operated to coerce the out-of-stater into appointing an agent to receive process. From the vantage point of over

26. "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them." 95 U.S. at 727.

27. *Id.* at 722 (citations partially omitted).

28. *Id.* at 723.

29. *Id.* at 727.
one hundred years, such a roundabout method of notice, with its obvious shortcomings for the impecunious or legally unastute, appears bizarre. Nevertheless, so powerful is the force of theory that the essential rationale of constructive notice for the in rem case was repeated as late as 1950, in Mullane v. Central Hanover Trust Co.:30 “A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized.”31

Mullane reached a happy conclusion by requiring mail notice to the principal beneficiaries of a common trust fund, including nonresidents. Notwithstanding the result, the opinion contained a serious internal inconsistency. The actual notice to these beneficiaries was justified by “the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties,”32 a rationale which surely applied to the owners of “tangible” property. Eventually, the Court recognized in Schroeder v. City of New York33 and Walker v. City of Hutchinson34 that personal notice was required whenever the name and address of the owner of real property was readily obtainable.

By finding that nonresident beneficiaries were entitled to at least mail notice, Mullane contradicted the reasoning of Pennoyer. The confines of state boundaries had long been breached, however, by Wuchter v. Pizzutti,35 in which the Court invalidated a nonresident motorist statute on the ground that it did not require service “by mail or otherwise”36 on the out-of-state defendant. The justification in Wuchter presaged International Shoe; without once mentioning Pennoyer, the Court reasoned that a failure to so notify “would not be fair or due process” as it provided “a clear opportunity for the commission of fraud.”37

After tracing a part of the Pennoyer legacy, we are in a position to clarify what is intended by reference to a “unified theory” of jurisdiction. In one sense, cases like Pennoyer, Mullane, and Wuchter may stand in isolation: there is a general rule that process does not extend beyond state borders, with exceptions for cases involving common trusts and nonresident motorist statutes. Probably all of us are familiar with this kind of judicial reasoning, namely the elaboration of a principle covering most cases, and thereafter the development of provisions for particular fact patterns that do not fit comfortably into the main scheme. Eventually someone realizes that the exceptions overshadow the primary rule; the lattice collapses and reconstruction com-

31. Id. at 316.
32. Id. at 318.
33. 371 U.S. 208 (1962) (riparian owner entitled to notice of action affecting water rights when name and address were readily ascertainable from public records).
34. 352 U.S. 112, 116 (1956) (property owner should receive personal notice of condemnation action, “even a letter,” because his name was known to the city).
35. 276 U.S. 13 (1928).
36. Id. at 20.
37. Id. at 19.
mences. Quite frequently the judicial side of this rebuilding starts with a grand foundation, stated in broad language, with a few hints on how future cases should develop. *International Shoe* and *Shaffer v. Heitner* were precisely those kinds of decisions.

So stated, the elaboration of a "unified theory" becomes identical with the ordinary process of common-law development. The decisions in *Mullane* and *Wuchter*, not to mention *International Shoe*, are now seen as something other than mere exceptions to *Pennoyer*; rather, they strike us as being representative of a different basis for approaching jurisdiction. Put simply, if process can extend beyond state lines, and if the courts of one state can inquire into the affairs of nonresidents, the doctrine of mutually exclusive sovereignties has been directly challenged.

This is not to say that what emerges in the place of an old theory will necessarily be "unified." Indeed the very notion of unification becomes difficult to grasp. We have a sense, particularly when under the spell of the new consciousness which emerges from a sharp break with the past, that our theory is more powerful than the discarded form. We say so because the theory accommodates already decided cases within a workable whole, and provides a basis for deciding those appearing on the horizon. What enables us to conclude that the new system is unified?

Every theory is stated in propositional form, using highly abstract words. This is not by accident. It reflects the very nature of the language being employed. In producing a theory we necessarily engage in abstraction, the isolation of particular aspects of a complex entity for purposes of generalization. Similarly, language of any complexity depends on abstraction—the ability to produce words that meaningfully represent more than isolated entities. Language in turn leads to theory, not as the implication of a causal relation, but rather as a reflection of the sense of what it means to conceptualize. Language relates events in the world; relationship is the essence of theory.

Now, to restate the question: what entitles us to say that a propositional statement of theory is "unified?" Isn't the very assertion that a theory is "unified" or "general" itself an exercise in theorizing? We mean to argue by such theorizing that the unifying concept is a superior abstraction: it provides a better way of relating the elements than rival theories. For example, the proponents of the doctrine emerging from *Shaffer* (including the Court) would contend that the deciding of all jurisdictional issues under the minimum contacts test provides a better means for resolving the myriad of jurisdictional cases than the older theories, which had sharply distinguished in rem and in personam cases.

But what is it that makes decisions under *Shaffer* more satisfactory than the alternatives? Is it because cases like *Harris v. Balk*38 will be overruled? Why should that result be desirable? We cannot say it is because Balk lacked minimum contacts with the forum! That assertion would be nothing more

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38. 198 U.S. 215 (1905); see *Shaffer*, 433 U.S. at 208-09.
than a repetition of the theory, which supposedly is justified by overturning Harris. Don’t we then generate a theory to explain why Harris should have come out differently? One argument might be that under Harris a creditor could be sued wherever the debtor might roam. Why is that result so terrible? Don’t we have to come up with a reason for this assertion—a theory? What justifies this latter theory—another theory? And, in all of this, what has become of the “unifying” minimum contacts test?

If there is anything “unifying” about a theory, it is this: the words of the proposition push us in certain directions. Invoking the analysis suggested by International Shoe supposedly leads us toward solutions—and further theory—that are quite unlike those obtainable under Pennoyer.39 Why does the proposition push us in these ways? How do we know, when purporting to decide a case under the minimum contacts test, that our result is faithful to the original principle? Recall here that Shaffer speaks of evaluating jurisdictional situations “according to the standards set forth in International Shoe and its progeny.”40 What tells us that we are being faithful to the standard? Here we may not respond that the Supreme Court informs us through its decisions. Putting the answer that way tells us nothing about fidelity to the standard; rather, it informs us that what the Court says is law. How do we know when the Court is being faithful to the standard? At some point we seem prepared to contend that the Court is no longer following the standard, for instance, when decisions like Wuchter and Mullane come along. What allows us to maintain that the force of the standard has weakened? Evidently when the cases no longer fit the mold. And how can we prove the mold has been broken or ignored? We must be able somehow to point to a way in which the newer cases diverge; in the process of “pointing,” don’t we need a means for arguing that the result is not what was intended by the standard? Can standards have intentions? No, people have intentions.

By this account, the degree to which the use of a particular propositional statement (for example, the minimum contacts test) tends to produce a certain result is a reflection of how in fact the statement is employed. The lawyer or judge who argues in favor of a decision by invoking such a statement is on the surface contending that the facts of the case appear to be covered by the proposition. At a deeper level, his expression is indicative of much more, such as the education that is shared by the advocates and the expectations of the larger society. The use of an expression like “minimum contacts” by a speaker is an invitation to analyze the problem according to a particular tradition.41

In some situations this “tradition” represents an elaboration so ingrained in a single rule that the mere statement of it effectively resolves the question. Suppose all jurisdictional issues were determined by the following rule: “Jurisdiction to adjudicate lies with any court in which the plaintiff initiates the

40. 433 U.S. at 212 (emphasis added).
action.” Certainly that is unified in the sense that it leaves little room for discussion, provided the conversationalists comprehend the words. To evaluate the fairness of the standard, much more is required. While American lawyers in the late 20th century would be horrified at many of the results obtained, a different era might find the approach perfectly acceptable. We could imagine some future society that had made two accomplishments: (a) transportation systems capable of moving people and objects great distances in negligible periods of time had been developed and were accessible for modest sums; (b) the laws of the various jurisdictions within the nation had become uniform in all respects, at least for multi-jurisdictional conflicts. Under these conditions, consideration of personal jurisdiction issues would be radically different. Critics of the rule might concentrate on the plaintiff’s ability to shop for a particular adjudicator. This may or may not be a real issue; it would depend on other factors in the society.

When we refer to the generality of a theory, then, caution is immediately in order, for several different matters may be disguised by the expression. On the one hand we may mean to say something about the scope of cases covered by the theory. In itself the range of the theory implies nothing about its desirability. We may instead take generality as a way of recommending particular decisions. Used in this manner, the theory is a shorthand expression, a way of explaining how the result fits against the entire background of the culture in which it operates.

A theory is, to repeat, merely an abstraction, a relationship among elements. If by such abstractions we master our world, so too do we become enslaved. Advances in theory are made possible by the use of language, but language itself is a creature of the very abstractions involved in theorizing. For theory to evolve we must step beyond current language, a seemingly impossible feat since the developing language depends on the same abstractions being created by the theory. We may wonder how criticism is ever accomplished.

In some respects very little is accomplished. The very nature of the common law, dependent as it is on continual references to the language of past cases, discourages theoretical innovation. An aspect of this is the inclination of the legal system toward formalism, the mechanical repetition of prior procedures solely because the practices have become firmly established. Formalism is only one feature of the common law phenomenon. Professor Hazard’s point about the hold Pennoyer has had on generations of lawyers is indicative of something larger: the very formulation of issues (for example, “may the state exercise ‘power’ or ‘authority’?”) suggests the manner in which we will go about deciding the case. It provides the conceptual orientation for approaching the issues. The words push us in certain directions. Herein also lies the device for chaotic thinking. If the words are invitations to walk theoretical

paths, what occurs when we receive more than one invitation? What occurs is an era of judicial decision-making like that which followed *International Shoe*.

II

In *World-Wide Volkswagen Corp. v. Woodson* plaintiffs had been residents of New York, where they purchased a new automobile from a retail dealer. While driving the car through Oklahoma in route to a new residency in Arizona, they were struck from behind by another vehicle, producing a fire that seriously injured the plaintiffs. A products liability suit was filed in Oklahoma state court; named as defendants were the dealer, its regional distributor, the importer, and the foreign manufacturer. Both the dealer and the regional distributor contested jurisdiction on due process grounds, but the state courts refused to dismiss. The United States Supreme Court reversed, holding that the exercise of jurisdiction offended the minimum contacts test.

While the result in *World-Wide* is perfectly clear, the explanation provided by the Court is, with all charity, difficult to comprehend, much less defend. The problem begins with the Court's formulation of the issue. Early in the opinion the question posed is whether "an Oklahoma court may exercise *in personam* jurisdiction" under these circumstances; at another point the Court speaks of the fourteenth amendment as limiting "the power of a state court to render a valid personal judgment against a nonresident defendant;" later there are references to a state court's "asserting jurisdiction over the defendant." Implicit in these usages is the assumption that jurisdictional issues are resolved by testing the state's power or authority over the defendant, as opposed to deciding whether the forum is a fair place to conduct the litigation. Of course, it may be contended that this interpretation reads too much into a few words—the use of these expressions can be discounted as linguistic habits which, in context, bear little resemblance to their employment in *Pennoyer*. The *World-Wide* Court explicitly says it is applying the minimum contacts test. This rebuttal assumes, however, that the Court clearly understands its analytical method. The thesis here is that the patterns of language used to present the issues are indicative of fundamental conflict, caused in large part by the simultaneous pursuit of antagonistic theories of decision.

This basic disharmony is most evident in the Court's interpretation of the purposes served by the minimum contacts approach:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum.

43. 444 U.S. 286 (1980).
44. Justices Brennan, Marshall, and Blackmun dissented, each filing an opinion; Justice Blackmun also joined Justice Marshall.
45. 444 U.S. at 287.
46. *Id.* at 291.
47. *Id.* at 293.
48. *Id.* at 291.
And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.\textsuperscript{49} By presenting these “two related, but distinguishable functions”\textsuperscript{50} in such an offhand manner, we are given the impression that the conceptual marriage is entirely obvious from past decisions. In fact, the resulting union is more akin to an arranged wedding between the offspring of warring kingdoms.

Matters go well enough as the Court proceeds to address what is meant by the reference to protecting defendants from inconvenient litigation. It turns out that this branch of minimum contacts is directed toward ascertaining the “reasonableness” or “fairness” of the forum:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute, see \textit{McGee v. International Life Ins. Co.} . . . ; the plaintiff’s interest in obtaining convenient and effective relief, see \textit{Kulko v. Superior Court} . . . , at least when that interest is not adequately protected by the plaintiff’s power to choose the forum, cf. \textit{Shaffer v. Heitner} . . . ; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see \textit{Kulko v. Superior Court} . . . .\textsuperscript{51}

The process described is similar to the type of multifactor analysis mentioned in \textit{Shaffer}.\textsuperscript{52} Actually, the Court’s articulation of these various considerations is more elaborate than \textit{Shaffer}, and indeed more expansive, since that opinion made no explicit reference to the interest of plaintiffs. The \textit{World-Wide} Court also acknowledges the decreasing persuasiveness of a defendant’s claim of inconvenience; quoting familiar language from \textit{McGee}, the Court points to “modern transportation and communication”\textsuperscript{53} as having relieved much of the former burden stemming from litigation in distant forums.

All of this discussion concerning “reasonableness” consumes two paragraphs of the report. The remainder of the opinion is devoted, in one way or another, to the second function which the Court announced as being served by the minimum contacts test: ensuring that states respect the prerogatives of other sovereigns. \textit{World-Wide} plainly indicates that the limitations imposed by notions of sovereignty are of threshold importance, that is, these considerations prevail over such matters as the convenience of the forum and the interest of the forum in trying the case. Referring to the due process clause as an “instrument of interstate federalism,”\textsuperscript{54} the Court stresses that jurisdiction to

\textsuperscript{49} Id. at 291-92.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 292.
\textsuperscript{52} See text accompanying note 20 \textit{supra}.
\textsuperscript{53} 444 U.S. at 293.
\textsuperscript{54} Id. at 294.
adjudicate may be defeated
[e]ven 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 applying its law to the controversy; even if the forum State is the most convenient location for litigation.\textsuperscript{55}

As authority for this position, the Court cites Hanson v. Denckla,\textsuperscript{56} in which the statement was made that "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him."\textsuperscript{57}

The Hanson Court justified this restriction on jurisdiction by way of Delphic pronouncement, saying only that it was "a consequence of territorial limitations on the power of the respective States."\textsuperscript{58} Some commentators regarded this reference to territoriality as a bit of judicial amnesia—Chief Justice Warren presumably had forgotten that International Shoe was supposed to have dashed such thoughts. So Hanson came to be regarded by many as a curiosity, a view surely reinforced by the Court's subsequent twenty year retreat from the subject.\textsuperscript{59}

While more will be said about Hanson later in this Article,\textsuperscript{60} it should be noted here that the Chief Justice at least indicated that he was following International Shoe, for he cited the case in the course of making the above declarations.\textsuperscript{61} On the page referred to in International Shoe the following is found: "[The 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. Cf. Pennoyer v. Neff . . . ."\textsuperscript{62}

No further explanation was given in International Shoe for this reliance on Pennoyer. Nor did the Court explain that "contacts, ties or relations" meant something very different in Pennoyer's day. At that time the defendant's pres-

\begin{footnotesize}
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\item Id.
\item 357 U.S. 235 (1958).
\item Id. at 251. In World-Wide we see a departure from the way in which the terms "minimum" or "minimal" contacts were used by Hanson. Hanson identified the "minimal contacts" standard as the threshold barrier enacted as a consequence of territorial sovereignty; issues of "convenience" seemed to represent a set of issues not falling under this rubric. World-Wide, on the other hand, states that the questions of "convenience" and "sovereignty" are both aspects of "minimum contacts," see text accompanying note 49 supra, although the latter is to be given priority. By comparison, International Shoe is closer to World-Wide in its use of the expression: [The demands . . . of due process . . . may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. 326 U.S. at 317.
\item 357 U.S. at 251.
\item See text accompanying notes 184-207 infra.
\item 357 U.S. at 251.
\item 326 U.S. at 319.
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ence in the forum (either real or fictional) was the key determinant of jurisdiction, which naturally followed from *Pennoyer*’s emphasis on the independence of sovereigns. Furthermore, *International Shoe* made no attempt to reconcile *Pennoyer* with its explicit disavowal of territorial presence as a requirement for jurisdiction.\(^{63}\)

*World-Wide*’s approval of *Hanson* may thus be seen as something more than a reinstatement of a discredited outcast. Through its explicit approval of *Hanson*’s remarks about territoriality, the Court seems to have linked itself to the *Pennoyer* tradition. Surely it could be argued, however, that the suggested connection is nothing more than the result of an academic’s game; the *World-Wide* Court specifically cited *Pennoyer* only for the uncontroversial point that a state need not give full faith and credit to a judgment rendered in violation of due process.\(^{64}\) It is also true that *World-Wide* claimed to abandon “the shibboleth that ‘[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,’ *Pennoyer v. Neff*.”\(^{65}\) Furthermore, if we look back to *Shaffer*, the Court there dismissed *Hanson*’s focus on territoriality in an almost flippant footnote:

> The *Hanson* Court’s statement that restrictions on state jurisdiction “are a consequence of territorial limitations on the power of the respective states” . . . simply makes the point that the States are defined by their geographical territory. After making this point, the Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.\(^{66}\)

Did Chief Justice Warren really intend merely to provide his readers with an elementary lesson in civics? Moreover, if *Hanson* actually was applying something called the *International Shoe* “standard,” why did the Court cite the very page of the latter opinion where *Pennoyer* is expressly sanctioned? Rather than pursue such speculations, it is probably more useful to examine *World-Wide*’s explanation for the priority assigned to the so-called sovereignty function. Reading this section of the opinion is much like rummaging through the contents of a time capsule left from another century:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution . . . . [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of

\(^{63}\) *Id.* at 316.

\(^{64}\) 444 U.S. at 291.

\(^{65}\) *Id.* at 293.

\(^{66}\) 433 U.S. at 204 n.20. Part of the tension between *Shaffer* and *World-Wide* is undoubtedly a reflection that the author of the former, Justice Marshall, dissented in the latter.
the Constitution and the Fourteenth Amendment.67

The Court provided no authority for this constitutional theory, but it might very well have employed Pennoyer v. Neff—the language of the last two sentences is nothing more than a paraphrase of the portion of Mr. Justice Field's opinion that articulated the Pennoyer view of sovereignty.68

Shortly after making these sweeping pronouncements on the importance of state sovereignty, the World-Wide Court quoted the familiar line from International Shoe: "Thus, the 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'."69 This language is the same as that offered by Hanson in its explanation of the "consequence of territorial limitations on . . . power."70 As in Hanson, the World-Wide Court neglected to mention that the line from International Shoe concludes with a citation of Pennoyer v. Neff.71

These discussions of the role played by "minimum contacts" appear in Section II of the World-Wide opinion. The final portion, Section III, begins by telling the reader it will apply "these principles to the case at hand."72 One might think that this means the Court will analyze both "functions" served by "minimum contacts" as they relate to Oklahoma's assertion of jurisdiction. In examining the remainder of the decision, however, it is apparent that the analysis is directed entirely toward the "sovereignty" limitation. There is not a single reference to the kinds of issues that might come under the previously-described heading of "fairness" or "reasonableness." The opinion even concludes by pinpointing the defendant's lack of "contacts, ties, or relations" with the forum as the reason for denying jurisdiction to adjudicate.73 Consequently, the importance of World-Wide lies in its determination to make the "essential attributes of sovereignty"74 a very real barrier to state long arm jurisdiction. At a minimum this represents a sharp break with Shaffer's revisionist historical summary of personal jurisdiction, which had made "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States" the "central concern" in resolving jurisdictional disputes.75 By exploring how the Court proceeds in Section III of the opinion, we may obtain important insights into the analytical paralysis engendered by its fixation with the past.

The Court starts by listing all of the contacts that defendants did not have with Oklahoma: no sales, solicitations, advertising, or similar activities in the

67. 444 U.S. at 293.
68. See text accompanying note 27 supra. Particularly pertinent is this line from Pennoyer: "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." 95 U.S. at 722.
69. 444 U.S. at 294 (quoting International Shoe, 326 U.S. at 319).
70. 357 U.S. at 251.
71. See text accompanying note 62 supra.
72. 444 U.S. at 295.
73. Id. at 299 (quoting International Shoe, 326 U.S. at 319).
74. Id. at 293.
75. 433 U.S. at 204. See text accompanying note 20 supra.
state; in short, "[t]hey avail themselves of none of the privileges and benefits of Oklahoma law." 76 The Court was willing to concede a sort of contact with the forum, namely the foreseeability "that the purchasers of automobiles sold" by defendants "may take them to Oklahoma." 77 But this kind of foreseeability, "the mere likelihood that a product will find its way into the forum State," 78 was not considered sufficient to supply the threshold relationship. To sanction jurisdiction on this ground would, in the Court's estimation, open the door for all kinds of horrible consequences. Here the Court was bothered by the "portable tort" cases, in which items like tires, automobile jacks, or soft drinks might cause injury in states distant from the place of sale. 79 Jurisdiction based on the fortuity of the product's location at the time the defect became manifest would make the choice of forum depend entirely on "the mere 'unilateral activity'" 80 of the plaintiff, a type of contact condemned as irrelevant by both Kulko and Hanson. 81

The Court did indicate that a certain kind of foreseeability would count. This would occur when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there," 82 which is an expression derived from Kulko 83 and Shaffer. 84 In other words, there must be "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 85 Such "clear notice" is provided when a defendant "'purposefully avails itself of the privilege of conducting activities within the forum State';" 86 a defendant so acting can avoid the burdens of distant litigation through appropriate countermeasures: obtaining insurance, passing anticipated costs to customers, or severing connection with the forum. 87

Apparently the Court means that this kind of predictability and risk avoidance cannot be achieved when the location of a product is completely in the control of the consumer, notwithstanding the likelihood that items like automobiles will eventually be removed from the state where sale occurred. The Court is careful at this point not to doom all products liability cases to

76. 444 U.S. at 295.
77. Id. at 298.
78. Id. at 297.
79. Id. at 296.
80. Id. at 298 (quoting Hanson, 357 U.S. at 253).
81. World-Wide analogizes the "portable tort" cases to Harris v. Balk. See id. at 296. While Harris did involve a situation in which jurisdiction depended on factors beyond the defendant's control, the comparison ends there. The debt owed in Harris, which was the basis for the quasi-in-rem jurisdiction, could not visit injury on others in the way a defective product can; nor did the debt have any relation to the claim or the defendant's use of interstate commerce (whereas in World-Wide the argument could be made that defendants participated in a nationwide system of marketing. See text accompanying 100-03 infra).
82. 444 U.S. at 297.
83. 436 U.S. at 97-98.
84. 433 U.S. at 216.
85. 444 U.S. at 297.
86. Id. (quoting Hanson, 357 U.S. at 253).
87. Id.
dismissal from forums other than the place of manufacture or initial sale. Explicit sanction is bestowed on *Gray v. American Radiator & Standard Sanitary Corp.*88 There the Illinois Supreme Court upheld jurisdiction over an out-of-state manufacturer whose defective product (a valve) had reached the state as a component in a water heater assembled by an unrelated intermediary. Cases of the *Gray* vein are distinguished because it was not the plaintiff-consumer who had brought the product to the forum; instead, the manufacturer had “deliver[ed] its products into the stream of commerce with the expectation that they [would] be purchased by consumers in the forum State.”89 Presumably the Court was aware that in *Gray* the record failed to reveal the existence of any other of defendant’s products in the forum;90 the Illinois court inferred from the nature of the business that there was a reasonable likelihood of “substantial use and consumption” in the state.91

On one level, the reasoning is *World-Wide* is positively circular. If the deciding factor is whether the defendant can “anticipate being haled into court” in a particular state, then a contrary result in this very case would have informed manufacturers, distributors, and retail sellers of their vulnerability. Armed with such knowledge, they could take all of the prophylactic measures suggested by the opinion, such as procuring insurance, adding the expense to the price of the goods, or withdrawing from the market. Surely the “predictability” of suit mentioned by the Court accounts for judicial precedents, and undoubtedly the business community (or at least automobile dealers) would have discerned quickly the meaning of a decision allowing Oklahoma to proceed. It may be objected that this would have been small comfort for the defendants in *World-Wide*, who could not have divined the content of the Justices’ minds. Arguments along this line only demonstrate the futility of the “haled into court” test. Since judicial decisions supply the measure of predictability, a reviewing court following this approach should deny jurisdiction whenever the prior cases do not point precisely toward liability to suit in the forum. This might prevent the use of a perfectly fair forum on the sole ground that there was no precedent for jurisdiction. In short, jurisdiction would be frozen in a perpetual status quo.

Of course, it is equally possible to view the “predictability” issue from a plaintiff’s perspective, and accordingly reach exactly the opposite conclusion. Under this view, the knowledge charged to prospective defendants would include an awareness of the total judicial climate with respect to jurisdiction. Therefore, since it was well known prior to *World-Wide* (and certainly more so before *Shaffer* and *Kulko*) that state courts were expanding the permissible reaches of their long arm statutes, defendants should have been aware of the stacked odds.

Given that the “haled into court” line of analysis lends itself to exploita-

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88. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
89. 444 U.S. at 298.
90. 22 Ill. 2d at 438, 442, 176 N.E.2d at 764, 766.
91. *Id.* at 442, 176 N.E.2d at 766.
tion by both defendants and plaintiffs, its utility for actual decision making appears suspect. In practice the Court seems inclined to translate the expression into a more practical approach. Applied to World-Wide, for example, the test of foreseeability centered on defendants’ inability to control the movements of their product. It did not matter that defendants could predict such unilateral movement, and accordingly anticipate suit anywhere. Defendants must have “some minimum assurance as to where that conduct will and will not render them liable to suit”92—in short, an ability to avoid a forum by structuring their primary activities.

There are at least two problems with this version of the “predictability” formula. First, it appears to make an arbitrary distinction between products borne to forums by consumers and those (as in Gray) which travel via intermediaries. In the latter cases, the distributor has “deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State,”93 thereby directly or indirectly serving the market for its product in other states. But doesn’t this place the defendant (and the choice of forum) at the mercy of those who are beyond its control? Can the typical manufacturer really affect the actions of intermediaries who purchase the product for resale—particularly when the defendant’s product is a minor component in a more complex device? Implicitly the Court seems to accept the assumption that manufacturers and distributors have this capacity, otherwise its stress on providing defendants the option to “sever...connection with the State”94 makes no sense.

In the first article to comment extensively on World-Wide, Professor Louis agrees with the Court’s apparent view: “[I]f 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 bound and object or make other arrangements if the resulting multistate jurisdictional exposure is unacceptable.”95 Neither the Court nor Professor Louis cites any authority for this presumption. Undoubtedly there are times when a manufacturer does exercise such control over its product. The more usual situation might well be along the lines of what happened in Gray and Buckeye Boiler Co. v. Superior Court.96 In those cases it was reasonably evident that the defendants were neither certain of the volume of their products in the forum, nor able to influence the distribution process.97

92. 444 U.S. at 297 (emphasis added).
93. Id. at 298.
94. Id.
95. Louis, supra note 59, at 426-27.
96. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).
97. See Gray, 22 Ill. 2d at 442-43, 176 N.E.2d at 766; Buckeye, 71 Cal. 2d at 896-98, 904-05, 458 P.2d at 60-61, 65-66, 80 Cal. Rptr. at 116-17, 121-22. The inference mentioned in the text is drawn from these cases because in neither was it certain how many products other than the one involved in the litigation had entered the forum. Presumably a defendant with control over intermediaries could at least estimate the volume; of course there is the possibility that defendants had such data, but withheld it for strategic purposes, although this would be based on the unlikely assumption that plaintiffs would not request the information through discovery.
Even if this assumption is inaccurate, most manufacturer-defendants probably applaud the widest distribution pattern for their goods,\(^9\) regardless of where they may wander; controls of the sort mentioned in *World-Wide* and by Professor Louis would seldom have any business justification.\(^9\)

One could grant the Court its empirical presupposition and still disagree with the conclusion drawn, for there is a second and more basic objection. Why should it matter for jurisdictional purposes that the defendant might not be able to control the ultimate destination of its product? Here we must bear in mind that nothing in *Gray* or *Buckeye* turned on the degree of control exercised by the defendant over its product. Those courts made a realistic appraisal of 20th-century American economic life, and coupled it with an investigation into whether the forum was a convenient place for the parties to litigate:

As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted . . . .

The principles of due process relevant to the issue in this case support jurisdiction in the court where both parties can most conveniently settle their dispute . . . . [P]laintiff, an Illinois resident, was injured in Illinois. The law of Illinois will govern the substantive questions, and witnesses on the issues of injury, damages and other elements relating to the occurrence are most likely to be found

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98. By contrast, it often does make economic sense for a manufacturer to control the number of its distributors through territorial limitations. See R. Posner, *Antitrust Law - An Economic Perspective* 147-67 (1976). But *World-Wide* is speaking of controls that essentially eliminate a product from a territory. On occasion these restrictions will be justified, such as when a manufacturer is testing a new product in a geographically controlled area, or when a producer of perishable goods desires to restrict the area of distribution in order to insure fresh products.

99. Naturally, this rebuttal is somewhat weak. It could be countered by saying that at least the manufacturer could, if it wanted, control product distribution. Still, the point remains that the nature of the business enterprise demands wide distribution; if the firm intends to maximize profits (and, in some instances, stay in business) it will probably not find these controls attractive. Both the businesses in *World-Wide* and *Gray* were in similar circumstances—they depended heavily on product mobility. Perhaps if it could be shown that a manufacturer had taken strong measures to keep its product from an area, this might count as a factor in determining the fairness of using a forum in that territory. Given the extraordinary difficulty of policing such arrangements, it is hard to see why this should be any more than a factor. Again, the issue is that market structures are such that a manufacturer knows the inherent peripatetic nature of many products.
here.  

The point made above by Gray is that the modern large-scale commercial enterprise hardly considers state lines relevant. Profits are made because products cross boundaries to reach a large number of consumers; regardless of whether the dealer makes direct contact with a distant state, the business benefits from the broad dispersal which occurs. It makes little difference to the business that the consumer is the one carrying the goods to other places; if anything, the company gains from wider exposure of its product. Furthermore, certain enterprises, of which the automobile industry is one, absolutely depend on their products being mobile in the hands of consumers. Not only are customers attracted to vehicles by the very promise of long-distance transportation, but few cars would be sold unless the buyer was assured of servicing and spare parts in most areas of the country. 

The rebuttal offered here leaves little room for defendants like those in World-Wide to avoid the possibility of some distant litigation, short of ceasing their dealerships. Quite apart from the fact that the same thing could be said in Gray, this line of reasoning overlooks what lies behind the growth of long arm jurisdiction in areas like products liability. The great gains made by consumers through the expansion of substantive liability over the makers and sellers of defective goods would be effaced if the injured buyer could not afford the burden of suit. Given the physical distance between modern manufacturers/distributors and their ultimate buyers—a setup encouraged by business for economic advantage—the danger of uncompensated loss to the consumer is very real unless plaintiffs can compel the attendance of defendants in a reasonable forum. As Mr. Justice Black wrote for the majority in Travelers Health Association v. Virginia, 103 "[t]he Due Process Clause does not forbid a state to protect its citizens from such injustice." 103 Defendants should not be able to 

100. Gray, 22 Ill.2d at 442-43, 176 N.E.2d at 766-67 (emphasis added); see Buckeye, 71 Cal.2d at 903-04, 458 P.2d at 64-65, 80 Cal. Rptr. at 120-21.

101. See 444 U.S. at 315 (Marshall, J., dissenting) ("[Defendants] intentionally became part of an interstate economic network, which included dealerships in Oklahoma, for pecuniary gain."). Justice Marshall also observes that "local dealers normally derive a substantial portion of their revenues from their service operations and thereby obtain a further economic benefit from the opportunity to service cars which were sold in other States." Id. at 314.


103. Id. at 649. Professor Kalo has remarked on "the social welfare philosophy that permeates the minimum contacts test":

The social welfare philosophy demands a bias in favor of the plaintiff, who more often than not will be an individual who has suffered some form of physical or economic injury. The minimum contacts test imposes upon the defendant the costs of going to one forum or another, thus making it economically more feasible for a plaintiff to initiate litigation.

Kalo, Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles, 1978 DUKE L.J. 1147, 1186. Professor Kalo also argues that the bias in favor of the plaintiff extends beyond the question of who should bear the cost of going to one forum or another. To the extent that a local bias in favor of or against one party is reflected in a jury verdict, the nonresident plaintiff would be at a disadvantage. Picture litigating a claim that a product is defective in the community in which the defendant is a major employer. If the plaintiff is a resident of the forum he will be further advantaged. In this setting the idea of distributing the plaintiff's loss
hide within their state boundaries when they have used the entire country as a
free trade zone and in the process have visited injury on those who do not
enjoy the economic fortunes derived from substantial interstate business op-
erations.

Admittedly, this portrait of the consumer is painted in overly dramatic
tones. Taken as a class, the group includes quite a few who could afford li-
itation away from home. And some have argued that these days prospective
plaintiffs are better able to finance litigation as a consequence of “public and
private health, disability, income maintenance and legal service schemes, in-
cluding the contingent fee arrangement.”104 To assess this kind of contention,
we must bear in mind that the issue relates to the extra burdens of litigation
away from home. These undeniably are significant. Someone must pay travel
expenses for lawyers, parties, and witnesses (including hotel bills and meals),
the cost of transporting evidence and documents, long distance phone calls, in
addition to hiring local counsel. Working against the plaintiff is the generally
prevailing ethical consideration that attorneys hired on a contingent fee basis
may not agree to assume liability for all expenses of the litigation, should the
case prove to be a loser.105 These burdens become acute when added to the
financial pressures placed on an individual who may have substantial medical
bills and employment disability resulting from the incident giving rise to the
claim. While it is true that advances have been made in providing compensa-
tion for these disruptions, there are still enormous gaps in the quantity and
quality of health and disability insurance, as well as income maintenance pro-
grams.106 At the very least, a careful study of the real effects of financing long

among society as a whole can be viewed in a more abstract manner than in the defend-
ant’s community.

Id. at 1187 (footnotes omitted).

104. Louis, supra note 59, at 430. Professor Louis provides no authority for this argument,
other than his opinion that injured plaintiffs are “far less frequently” forced to settle claims pre-
aturally in order to pay their bills. Id. at 429 n.159.

105. See S. SPEISER, I ATTORNEYS’ FEES § 2:17 (1973); ABA CODE OF PROFESSIONAL RE-
SPONSIBILITY DR 5-103(B):

While representing a client in connection with contemplated or pending litigation, a law-
year shall not advance or guarantee financial assistance to his client, except that a lawyer
may advance or guarantee the expenses of litigation, including court costs, expenses of in-
vestigation, expenses of medical examination, and costs of obtaining and presenting
evidence, provided the client remains ultimately liable for such expenses. See also id., EC 5-8.

There is authority to support the lawyer’s treatment of relatively indirect litigation expenses,
such as the attorney’s hotel bills, telephone bills, etc., as overhead not billable to the client; see V.
1976); the extent of this practice is not certain, particularly when practice manuals advise lawyers
to include expenses in retainer agreements. S. SPEISER, supra, §§ 1:48, 2:22. It has also become a
“common practice” to require clients to make interim payments for expenses; some lawyers re-
quire a deposit on account of expenses. Id. at 2:22.

106. For example, in 1976 some 22.8 million Americans under age 65 had no public or private
health coverage of any kind. See 1 HEALTH CARE FINANCING REV. 7 (1979). As to those covered
by some form of insurance, “coverage can mean a narrow or a comprehensive range of benefits, a
large deductible and co-payment, or 100 percent reimbursement by the insurer for health care
costs.” Id. at 6. A gross indication of the problem is that in 1977 private health insurance met
only 45.5% of consumers’ total health care bills. Id. at 14. With respect to disability income
insurance, in 1977 only 64.6 million persons (about 30% of the population) had short-term poli-
distance litigation should be forthcoming before indulging in the assumption that any significant number of plaintiffs will find the burdens minimal.

World-Wide’s impact on the injured consumer will be realized in only a relatively small number of products liability cases; while this is a rough estimate, it seems likely that the “portable tort” is responsible for far fewer claims than those arising from a Gray scenario. Nonetheless, we should recognize the disparity of treatment afforded to these two kinds of cases, each of which is identical as far as the damaged plaintiff is concerned. Those who are hurt by products purchased in the forum clear the initial barriers to litigating at home and can rely on the “reasonableness” side of the minimum contacts standard. They may point to such considerations as: the regulatory interest of the forum in adjudicating the matter; the desirability of having the forum apply its own law; the location of witnesses and other evidence; the relative burdens imposed on the parties; the availability of alternate forums; the advantage of avoiding multiple suits with possibly conflicting results; and the impact of forum choice on matters outside of the lawsuit. Persons in the Woodsons’ position must simply remain silent, despite the existence of any number of arguments that might establish their forum choice as an entirely fair one. On the facts of World-Wide there are several such possibilities: all witnesses to the accident, as well as the physical evidence (which is not easily transportable), are most likely in the forum; Oklahoma has a definite interest in controlling the quality of automobiles on its highways; plaintiffs were severely injured, potentially making travel physically difficult; and defendants are most likely in a superior financial position, especially when, as here, their litigation is conducted by an insurance company.107

Undeniably there are points favoring defendants, the most important being that the Woodsons still can pursue the manufacturer and importer in Oklahoma courts.108 The difficulty is that this response comes with a double edge. Plaintiffs may very well continue in Oklahoma and lose to a defense (accepted by the factfinder) asserting that the explosion was due to some fault introduced after import (for example, the negligence of the defendants who prevailed before the Supreme Court) or was the complete responsibility of the driver who struck them. Assuming they would not be bound by collateral estoppel, plaintiffs might then pursue the other corporate defendants in New York, only to be met by a potentially successful defense placing blame on those previously exonerated. Inconsistent adjudication and judicial discon-

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107. See 444 U.S. at 305 n.9 (Brennan, J., dissenting).
108. Neither petitioned the Supreme Court for review, nor does it appear they entered special appearances at the trial court. See 444 U.S. at 288 & n.3. Even if they had done so, presumably their business contacts in all parts of the United States would have defeated any defense, or they would have been swept under the Gray basis for jurisdiction.
omy are the twin evils of this arrangement.\textsuperscript{109} Realizing the possibility of multiple defendants pointing the finger at each other, plaintiffs in the Woodsons’ situation may be forced to a distant forum, thereby accepting the financial consequences. Compounding the dilemma is the figure of the other driver, who might very well have been at fault;\textsuperscript{110} it would be purely fortuitous if he could be joined in the New York action.

Products liability cases are classic situations in which frequently the plaintiff knows that someone else is liable, although the responsible party cannot be identified without at least going through discovery, and then the controversy often must be resolved by trial. The substantive doctrine in this area allows the plaintiff to sue up the line until the culpable defendant is found. Common sense dictates that this be accomplished in the course of one proceeding, since to do otherwise only adds to plaintiff's burdens, while promoting systemic inefficiency. Despite the appropriateness of allowing the Woodsons to sue some of the defendants in Oklahoma, the Court refuses to consider arguments for bringing the others in, even though all of the corporate defendants are linked together in a cooperative scheme utilizing interstate commerce.

A contrary result in \textit{World-Wide} would not necessarily have committed the Court to endorsing the jurisdiction of any forum in which a “portable tort” might happen to produce damage. Not every business using the avenues of national commerce can afford to defend suits in distant forums; some number, probably substantial, are in marginal positions, with little ability to pass extra expenses along to consumers.\textsuperscript{111} There is also the problem of delineating which businesses should have to answer complaints in places where their products happen to produce damage.\textsuperscript{112} Many might recoil at the thought of a local druggist being caught in the clutches of a distant long arm statute when the cigarette lighter he sold happens to explode on the other side of the continent. Bearing in mind that a sizable number of these local businesses would be represented by national insurance companies, it is still possible to argue for some bias in favor of defendants. The point of this Article is not to define precisely which “portable torts” should be subject to plaintiff’s forum choice; for one thing there is an existent literature on the subject.\textsuperscript{113} Rather, the issue is why the Court lays down a blanket rule that effectively smoothes the case-

\textsuperscript{109} See, e.g., Buckeye Boiler Co. v. Superior Ct., 71 Cal. 2d 893, 906, 458 P.2d 57, 67, 80 Cal. Rptr. 113, 123 (1969) (“[P]laintiff alleged in his amended complaint that he is in doubt whether his present incapacitating hemiplegic condition was caused by the explosion or by the negligence of the medical defendants or both. He fears that if he is required to sue defendant Buckeye in Ohio and the medical defendants in California, the defendant(s) in each case may be able to avoid liability for this condition by pointing the finger at the absent defendant(s).”).

\textsuperscript{110} It is not clear from the record in \textit{World-Wide} whether the other driver potentially is responsible.

\textsuperscript{111} The same could be said, however, about firms that fall within the \textit{Gray} category.

\textsuperscript{112} For an example of a state court carefully considering the nature of a defendant's interstate business, and deciding against jurisdiction, see Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 235 N.W.2d 446 (1975).

by-case development of a jurisprudence in this area. What prevents the Court from hearing arguments that are taken to be relevant in closely analogous situations? Why are defendants ever entitled to a conclusive veto power over forum choices? Addressing this aspect of World-Wide takes us far beyond the unfortunate victims involved. We may find, contrary to the rumors, that Pennoyer v. Neff is still with us.

III

World-Wide will undoubtedly attract a following; many will simply agree that, even accounting for the interests of the plaintiffs and the forum, the balance of fairness lay on the side of defendants. The focus of criticism here will not be on those who merely favor the result; the inquiry will center on partisans of the defendant-oriented approach adopted by the majority of the Court. Already the Court has found one such friend in Professor Louis, who terms the methodology “a fair and workable one.”

After examining the recent decisions from the Supreme Court on personal jurisdiction, Louis concludes that “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.” Louis fixes the destination of this reverse time travel at Hanson v. Denckla, a decision he describes as espousing “the rigid, old-fashioned, territorially derived view of jurisdiction.” Despite this characterization of the Court’s theoretical foundation, which might be taken as disparaging, Louis applauds the “bright line test” emerging from Kulko, Shaffer, World-Wide, and Rush v. Savchuk. One reason for this appraisal—the supposedly decreasing burdens facing plaintiffs who must litigate away from home—has already been investigated. The other justifications advanced relate to what he perceives to be the motivating force behind the majority Justices’ votes, namely the desire to “more easily police” the tendency of state courts to broaden the reach of their long arm statutes.

Louis notes the “unparalleled expansion” that occurred in the scope of

114. Two of the World-Wide dissenters conceded the closeness of the decision. See 444 U.S. at 313 (Marshall, J., joined by Blackman, J.): “This is a difficult case, and reasonable minds may differ as to whether . . . the requirements of International Shoe [are met].” Justice Brennan in dissent likewise acknowledged that the case “approach[ed] the outer limits of International Shoe’s jurisdictional principle,” id. at 307-08, but contended that the minimum contacts approach “may be outdated.” Id. at 308.

115. Louis, supra note 59, at 409.

116. Id. at 428.

117. Id. at 409.

118. Id. at 408.

119. Id. at 432.


121. See text accompanying notes 104-06 supra.

122. Louis, supra note 59, at 432.

123. Id. at 407.
state court jurisdiction during the period from *International Shoe* to *Shaffer*. Only once during this time, in *Hanson*, did the Court limit a state court's jurisdiction to adjudicate; for nearly two decades after *Hanson* the Court said nothing directly on the subject. Increasingly, Louis maintains, state courts tended to weigh the interests of resident plaintiffs heavily in the balance, and accordingly the limits of the due process clause became stretched to the point of being essentially meaningless. Nor were the state courts likely to limit their jurisdiction; their own self-interest inclined them "to resolve jurisdictional doubts in their own favor." Indicative of this attitude, Louis argues, is the poor quality of many of the lower court decisions—particularly those in *Shaffer* and *World-Wide*—in which difficult jurisdictional questions had been resolved in a cavalier fashion. At times the state courts completely ignored the constitutional issue.

Against this background, Louis surmises that the Court refused to sanction any balancing test that allowed a state court to weigh the defendant's interest against those of the forum and the plaintiff, since in practice this would almost inevitably favor the plaintiff. Consequently, in its four most recent cases the Court reversed the trend by setting a series of categorical rules that mandated protection for defendants. This step was necessary, he believes, because the Court could not effectively review "a multitude of factually diverse cases asserting jurisdiction," especially given its already crowded docket. Louis candidly acknowledges the limitations inherent in this technique; by looking primarily at defendants' interests, the "just" result is not always achieved because important countervailing factors are left unconsidered. Irrespective of this drawback, Louis believes that, on the whole, the Court has outlined an acceptable doctrine:

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 . . . . 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 pressed to follow. Thus, under the relentless prod

124. 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, (2) allow the assertion of state regulatory or taxing authority, (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, (5) allow the choice of local substantive law, and (6) obviate the need for local attorneys to seek out, rely upon and divide their fees with out-of-state counsel.

125. *Id.* at 431 (footnotes omitted).
126. *Id.*
127. *Id.* at 423 & n.117.
128. *Id.* at 430-31.
of local interest, the state's long arm will inevitably reach farther and farther.  

Louis will receive no quarrel here in his assessment that the Court essentially has retreated to a defendant-oriented, territorially-based theory of jurisdiction. While such a diagnosis would be disturbing enough, a far more serious concern is presented if he is right in his evaluation of what motivated the Court to reach the solutions it did. In effect the argument casts serious doubts on the efficacy of a main portion of the federalist structure of our government: the utilization of the full faith and credit clause to create a unified national court system.

To appreciate the point being made here, we need to return for a moment to the foundations of *Pennoyer v. Neff*. Justice Field viewed the states as competing sovereigns, meaning that the exercise of jurisdiction by one inevitably deprives another of ability to adjudicate. Obviously this is correct. But the result is troubling only to those who view the states as rivals, rather than cooperating members in a common effort to promote the welfare of a single population. Evidently Justice Field embraced the former notion, for his explanation of the *Pennoyer* doctrine equated the states with sovereign nations. This aspect of the *Pennoyer* story has been recounted before, so what follows will be a brief summary.

*Pennoyer* owes a great debt to Joseph Story, whose celebrated treatise on conflicts of laws provided “the basic organization, the intellectual structure, and much of the language” for the opinion. From Story, Justice Field obtained his theory of sovereignty, which, although originally intended for resolving conflicts questions, was translated by *Pennoyer* into constitutional doctrine.

Story borrowed heavily from continental jurists, Boulenois and Huber in particular, the former of whom he quoted for the proposition that “all the laws made by a sovereign have no force or authority except within the limits of his domains.” Taking this expression to represent a “natural principle flowing from the equality and independence of nations,” Story elaborated: “It is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty.” With this premise laid, Story stated the maxim that later became the first point in Field’s system: “[E]very nation possesses an

129. *Id.* at 431-32.
134. Story, *supra* note 132, at 8.
135. *Id.*
exclusive sovereignty and jurisdiction within its own territory." 136 From this he deduced another principle, one that became the second and third in Pennoyer's constellation: "[N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein... for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories." 137 Whatever effect a nation's laws would have in another country would depend, according to Story, solely "upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." 138 Story had derived this concept of comity from Huber; 139 it became the fourth of Pennoyer's maxims. 140 Finally, in a separate part of the treatise devoted to jurisdiction and remedies, Story added: "[N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." 141 In this section Story also propounded the "international point of view [of] jurisdiction," which he again borrowed from Boulleinois: "[J]urisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory; for, otherwise, there can be no sovereignty exerted... ." 142 These ideas concerning limits on process were eventually the capstones of the Pennoyer regime. 143

Professor Kurland has stated succinctly the objection to Justice Field's employment of the Story system: "[T]he doctrines were borrowed from laws relating to wholly independent sovereignties which were not relevant to jurisdictions joined in a federation." 144 Considered in an international sense, Story's ideas are at least intelligible in that they define barriers inherent to a setting in which a sovereign's ability to enforce a judgment appears as the most important issue. Without the power to enforce a judgment, an attempt to adjudicate is a futile act, unless other nations recognize the judgment by comity. When transplanted to a federal union whose states are bound to honor each others' judgments under the full faith and credit clause, these limitations are simply beside the point. "The real question becomes not whether a state could itself enforce a judgment, but rather under what circumstances the na-

136. *Id.* at 19; *See also* Pennoyer, 95 U.S. at 722: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory... ."
137. *Story, supra* note 132, at 21. *See also* Pennoyer, 95 U.S. at 722: "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory... . The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others... ."
139. *Id.* at 24 n.1, 30.
140. 95 U.S. at 722: "[T]he laws of one state have no operation outside of its territory, except so far as allowed by comity... ."
141. *Story, supra* note 132, at 450.
142. *Id.*
143. *See 95 U.S. at 722: "[N]o tribunal established by it [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions."
tional power should be used to assist the extraterritorial enforcement of a state’s judicial decrees.”

Certainly the issue arises whether the judgment to be enforced was rendered under fair circumstances; unlike the international arena, this country has a neutral court for making such determinations.

When providing this neutrality, the Supreme Court need not be bound by Pennoyer’s definition of the constitutional due process guarantee. Justice Field had explained that under the fourteenth amendment “the validity of . . . judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.” By equating due process analysis with the determination of jurisdiction to adjudicate, Pennoyer made the former an empty shell to be filled with Story’s maxims, thereby establishing traditional jurisdictional bias toward the defendant as a constitutional doctrine. Freed from this doctrinal prison, the court is at liberty to ask why there should be any automatic weight given to either party. The due process guarantee then serves to require “that a state court refrain from hearing a case in which it could not render as complete or convenient justice as some other court.” Naturally, this represents a sharp departure from the World-Wide Court’s point of view. The fourteenth amendment would protect not merely the defendant from an unfair forum, but also would stand as a source for plaintiffs’ rights, recognizing their entitlement to a reasonable site for the lawsuit.

Returning now to Professor Louis, the disturbing aspect of his argument is the extent to which it doubts the ability of the various states to engage in the kind of cooperative venture necessary to realize a truly federal court system. He may be right in asserting that the Court’s latest rules were spawned by a reaction to perceived immoderation on the part of state courts. One simply never knows for certain about those sorts of things. What may be said is that the Court responded improperly if it did.

Probably it is accurate that the Justices were less than thrilled by the quality of jurisdictional opinions from the state courts, especially in Shaffer and World-Wide. Yet anyone who reads a representative sample of petitions

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145. Kurland, supra note 130, at 585.
146. See von Mehren & Trautman, supra note 113, at 1122-23.
147. 95 U.S. at 733.
149. See Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 439 (1929), quoted in Kurland, supra note 130, at 591: “It may be argued that a plaintiff has as much right as a defendant to claim that the legal battle ought to be fought at his home.”
151. The Shaffer Court’s decision to resolve the “minimum contacts” issue (as opposed to remanding with directions to dispose of the case under the standards of International Shoe) might have been influenced by the “cursory treatment,” 433 U.S. at 195, given the jurisdictional questions by the Delaware courts. Interestingly, in the next Term, the Court heard another case from Delaware, Franks v. Delaware, 438 U.S. 154 (1978), which decided that a criminal defendant
for certiorari realizes the generally low level of many opinions under review, regardless of the subject. In partial defense of the state courts, it should be considered that these usually overworked bodies have relatively little time to engage in protracted discussions, particularly when the issues are well settled, as they were in *Shaffer*. While this hardly excuses the opinions rendered, it does counsel caution when attributing motives to the Court.

But this is really an aside. The main question is whether alleged self-interest on the part of state courts demands rules that frustrate a more in-depth approach to jurisdiction. Granted, the state courts generally have interpreted their long arm statutes in favor of jurisdiction, just as they have been liberal in construing *International Shoe* and its descendants. In the abstract there is nothing particularly improper about such a trend. A great deal of this can be attributed to cases like *Gray*, which if anything have received good press from the Court and commentators alike. Considering the declining burdens imposed by interstate travel, coupled with the corporate use of national marketing, it was virtually inevitable that a responsive system of jurisdiction would have undergone expansion in recent years.

It is possible to find examples of excesses on the part of state courts, although we must keep in mind that what is excessive to one may seem progressive to another. For example, Louis abuses the doctrine of *Seider v. Roth*, which he terms a “questionable” refusal to recognize the unfairness of quasi-in-rem jurisdiction. Apparently the unfairness should have been obvious to the state courts since there had been “frequent suggestions to this effect in the legal literature.” Placing matters in perspective, it should be pointed out that *Seider* was received very poorly in other state courts. Only three states adopted the practice, including New Hampshire, which authorized it solely against defendants who lived in a *Seider* jurisdiction. A large number of other states rejected *Seider*, either could challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. The state courts had flatly rejected this proposition, refusing to hear evidence from the defendant concerning the veracity of various assertions made in the affidavits used to obtain the warrant in his case. After upholding the defendant's right to make such a challenge, the Supreme Court ordered a remand: “Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer.” Id. at 172. Dissenting in *Shafer*, Justice Brennan objected to disposing of the minimum contacts issue in part on the ground that plaintiff had not yet had an opportunity to develop “a proper factual foundation.” 433 U.S. at 221-22 (Brennan, J., dissenting).

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153. Professor Louis, in fact, uses the reaction to *Gray* as an example of the kind of “relentless” expansion that has supposedly taken place. See Louis, supra note 59, at 432 n.169.
154. See 4 C. WRIGHT & A. MILLER, supra note 144, at § 1068, at 243 & n.30.
156. Louis, supra note 59, at 424 & n.122.
157. Id.
on statutory or constitutional grounds, which is not the result to be predicted if Louis' premise about the states' self-interests is accurate. And any generalizations about the flimsiness of the case's basic rationale have to contend with its approval by Judge Friendly and an en banc majority of the Second Circuit, not to mention endorsement by some commentators.

The persistence of the Harris v. Balk variety of quasi-in-rem jurisdiction up until Shaffer is another matter; it is correct that state courts had not heeded the advice of virtually every academic who had written on the subject. Closely connected with this issue is that of so-called "tag jurisdiction," in which the state court acquires jurisdiction only as a consequence of process being served within the forum. Each is a product of Pennoyer's holding that presence within the forum (either of the person or of property) would support jurisdiction. Both Harris and tag jurisdiction contain the same essential flaw: cases potentially are directed to courts whose connection with the plaintiff, the defendant, and the claim may be nonexistent; the vice is aggravated when such a forum insists on applying its own substantive law. There is now nothing to recommend these types of decisions, but we should nevertheless be wary of inferring that their longevity was (or has been) due to a species of state parochialism. On the question of tag jurisdiction, our impatience with its continuing survival should be tempered by realizing how infrequently these cases arise. Although commentators have continued to pummel Grace v. MacArthur, they generally provide no more recent examples of the plague's havoc. Many potentially abusive exercises on this basis have been curbed by the state courts' development of various defenses for the tagged party, including the doctrine of fraudulent inducement into the jurisdiction and the privilege afforded to parties, witnesses, and lawyers attend-

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160. See Rush v. Savchuk, 444 U.S. at 327 n.13 (collecting cases); Silberman, supra note 5, at 50 n.79.
162. See, e.g., Diamond, Seider v. Roth - Alive and Well, 45 BROOKLYN L. REV. 545, 563-64 (1979). Silberman, supra note 5, at 97-98 (approving on condition that restraints be placed on forum's choice of law); Williams, supra note 15.
163. See Silberman, supra note 5, at 35 n.4.
165. See Lowenfeld, In Search of the Intangible: A Comment on Shaffer v. Heitner, 53 N.Y.U. L. REV. 102, 109-10 (1978) ("[I]ntangible property is the reciprocal of the transitory action: intangible property is an interest that can be sued on, and suit can be brought [prior to Shaffer] wherever the obligor can be found.").
166. Fortunately, forums exercising transient jurisdiction do not inevitably insist on the application of their own law. See Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185, 202 (1976).
167. Quasi-in-rem jurisdiction made much more sense in the era before long arm statutes, when it was difficult to pursue absconding debtors; its existence probably facilitated credit arrangements that otherwise might have been jeopardized. See Kalo, supra note 103, at 1150-62.
168. See Lowenfeld, supra note 165, at 109 n.32.
169. 170 F. Supp. 442 (E.D. Ark. 1959) (jurisdiction upheld when defendant was served with process while flying over the forum in commercial aircraft).
170. See F. JAMES & G. HAZARD, supra note 150, § 12.26, at 654-55. This defense applies as
ing proceedings in the forum. Another mollifying element has been the increasing application by states of forum non conveniens as a means of dismissing suits with only a tenuous relationship to the jurisdiction. These mitigating features probably account for the Second Restatement of Conflict of Laws' acceptance of presence-based jurisdiction.

With respect to the states' reluctance to discard the quasi-in-rem jurisdictional basis rejected by Shaffer, it is surely relevant that the practice was supported by overwhelming authority, both state and federal. Moreover, despite plenty of opportunities, the Supreme Court had not definitively intervened to stop the states from employing a justification for jurisdiction older than the Republic. Quite the contrary, for in Hanson the Chief Justice bifurcated his discussion into in rem and in personam issues, thereby giving the imprimitur for that mode of analysis. Speaking of in rem actions, Hanson recited that such jurisdiction was "founded on physical power . . . . The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." How were the lower courts to interpret this expression? While Hanson went on to limit in rem jurisdiction over certain intangibles, it did not cast doubt on the continuing validity of this general head of jurisdiction. Old habits die hard, especially when encouraged. At very least it can be said that property owners should have been well aware of the danger of suit—of being "haled into court"—and in many instances could have planned accordingly.

This brings us to the larger issue underlying Louis' argument. If it is correct that the Supreme Court perceived the state courts to be getting out of hand, who should it have blamed? After all, the states did not force the Supreme Court out of the jurisdiction business for virtually a generation. Now, after such neglect, we are told that the Court devised "mechanical" rules in order to better "police" the process, the implication being that any balancing test would inevitably be diluted by the states in favor of their own residents. Any mere invitation to "balance" has that danger, which is the reason why a body of case law needs to be developed to provide useful analogies—to explain, in other words, how the various factors should be stacked. No such guidance came from the Supreme Court. A dozen or so cases over the last twenty years would have offered a chance to see if the states really were bent on intransigence.

In fact, there is a good deal of evidence to suggest that the state courts have been more constrained than Louis has suggested. During the first fifteen

171. Id. § 12.25, at 651.
172. See id. at § 12.29; Werner, supra note 15, at 589-90. Admittedly, state courts have been reluctant to dismiss on this basis when the plaintiff is a state resident. See id. at 590.
174. See, e.g., id. at § 66 & Comment a, Illustrations 1-2.
175. See Kalo, supra note 103, at 1150-62.
176. 357 U.S. at 246.
years after International Shoe, these courts generally did not interpret their jurisdictional statutes terribly expansively; indicative of the force of linguistic habit, they "often continued to use pre-International Shoe terminology." 177 More recently, there have been scores of cases declining jurisdiction despite the plaintiff's residency in the forum. 178 And a number of decisions can be

177. Note, supra note 148, at 1000.


Added to this list are the large number of cases from federal district courts in which jurisdic-
found in which one state gives full faith and credit to another's judgment, even
given the potential for protecting resident defendants by denying that the sister
state had jurisdiction.\textsuperscript{179} Why would there be so many cases like these if the
forces of local interest dominate?

It seems more productive to pursue another explanation for the Court's
latest tack. As suggested earlier, the decisions since \textit{International Shoe} have
not rested on a single approach to jurisdiction; rather, they combine contradic-
tory aspects of the past, leading to a situation in which lower courts under-
standably have not been able to see the light.\textsuperscript{180} This theme needs to be
pursued.

IV

Perhaps it could be maintained that the Supreme Court really was doing
the lower courts a favor by deciding \textit{World-Wide} in the way it did. Balancing
tests require judicial energy, more so than the application of a rule which
sharply limits the range of relevant considerations. It might be added that in
the main the Court's procedure will achieve equitable results, since by and
large a jurisdiction lacking minimal contacts with the defendant is unlikely to
be designated a fair forum under a balancing process. Professor Louis lends
support to this view by contending that "[o]bviously 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."\textsuperscript{181} Using this
assessment as a starting point, our utilitarian advocate would then discount any in-
justice by pointing to the offsetting economies resulting for the whole judicial
system.\textsuperscript{182}

This suggested defense for \textit{World-Wide} highlights some real obscurities in
its method. On the one hand, it is assumed that "mechanical" tests relieve the
burden of analysis, which is not necessarily true. While it may be "obvious"

\textsuperscript{179} See, e.g., Einhorn v. Home State Savings Assoc., 256 So. 2d 57 (Fla. Dist. Ct. App. 1971);
Bailey v. London Marina, Inc., 151 Ga. App. 73, 258 S.E.2d 738 (1979); Masters v. ESR Corp., 150
61, 212 N.E.2d 313 (1965); Dodson v. Fontenot, 285 So. 2d 328 (La. Ct. App. 1973); Robinson v.
Merlitie Land Sea & Sky, Inc., 61 Misc. 2d 462, 305 N.Y.S.2d 289 (Civ. Ct. N.Y. 1969), aff'd per curiam,
64 Misc. 2d 911, 316 N.Y.S.2d 455 (App. T. 1970); Esser v. Cantor, 55 Misc. 2d 235, 284
N.Y.S.2d 914 (Civ. Ct. N.Y.), aff'd per curiam, 55 Misc. 2d 720, 286 N.Y.S.2d 389 (App. T. 1967);

\textsuperscript{180} Some lower courts have complained rather forcefully about the lack of guidance from the
Supreme Court in the area of personal jurisdiction. See, e.g., Powder Horn Nursery, Inc. v. Soil &

\textsuperscript{181} Louis, supra note 59, at 430 n.163.

\textsuperscript{182} Anyone making such an argument would have to lower expectations for cost savings by
factoring the incredible persistence of American lawyers into the equation. Not only will briefs
and oral arguments continue to bring every conceivable factor to the courts' attention, but we can
expect new levels of ingenuity directed toward persuading the trier that the defendant has satisfied
the threshold erected by \textit{World-Wide}.
to some that a state should not be allowed jurisdiction when the defendant has "no contacts" with the forum, it is not always obvious when such contacts are lacking. A second consideration relates to the apparent assumption that it is usually "unfair" to require a defendant to answer a lawsuit where he or she has "no contacts." What is assumed here is that there is some relationship between a lack of "contacts" and the issue of fairness; this is an assumption that will not withstand scrutiny.

*International Shoe* started us on the "contacts" road, but it was an easy case on the facts—there was no real doubt that the corporation had extensive ties with Washington. Likewise, *Perkins v. Benguet Consolidated Mining Co.* presented a defendant that undeniably had substantial dealings with the forum—essentially its entire corporate activity was located there. Cases like *McGee* were more difficult, although not terribly so; defendants had directed business to a state in a tangible fashion, making what amounted to a physical presence. All of these were situations in which the ordinary use of the word "contact" clearly would apply.

Inevitably a case like *Hanson* had to come along, in which the defendant had neither carried on business in the forum, nor originally entered into an agreement with a resident of the state. Any number of tools could have been used to crack the problem, including the dissenters' argument that the Court should consider the relationship of the trust to the Florida probate proceedings, the convenience of resolving all issues related to the estate in one proceeding, the burdens on the parties, and the interests of the respective states. Instead of choosing one of these paths, the majority followed a mazy route which, while arriving at the correct destination, completely lost the traveller along the way.

Earlier in this Article it was explained that the *Hanson* Court's insistence on "contacts" between defendant and the forum was a direct product of "territorial limitations on the power of the respective States." After saying this, Chief Justice Warren went on to indicate why the trust company had insufficient "contacts" with Florida. His reasoning was mostly negative, consisting of a list of all the things the company had not done in Florida—no business was conducted or solicited there, none of the trust assets were located in the state, and the underlying transaction was consummated outside the jurisdiction. A discussion of *McGee* followed, which might have stopped after the Chief Justice distinguished the case by pointing to the defendant's having sought out interstate insurance business from a California resident.

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184. When the trust agreement was created, the settlor was a domiciliary of Pennsylvania; subsequently she moved to Florida, where an action naming the trustee as a defendant was commenced. See 357 U.S. at 238-41.
185. Id. at 258-61 (Black, J., dissenting, joined by Burton & Brennan, JJ.); id. at 262-64 (Douglas, J., dissenting).
186. See text accompanying notes 56-63 supra.
187. 357 U.S. at 251.
188. Id. at 251-52.
through the mails.\textsuperscript{189} Matters were not left there. \textit{Hanson} went on to stress California’s special jurisdictional statute, which embodied an interest in “providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State.”\textsuperscript{190} No such statute was present in \textit{Hanson}. Having completed this detour through an issue not strictly related to the defendant’s connection to the state, the Chief Justice proceeded to discount the interest Florida did have, assuring a convenient forum for the resolution of all issues relevant to distributing the estate. \textit{Hanson} disavowed finding jurisdiction on the ground that Florida was the “‘center of gravity’ of the controversy, or the most convenient location for litigation.”\textsuperscript{191} Rather, the Court required “some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\textsuperscript{192} In determining if defendant has had this relation with the forum, the state could not rely on the “unilateral activity of those who claim some relationship with a nonresident defendant.”\textsuperscript{193}

Evidently the \textit{Hanson} majority had in mind a special meaning for “contacts,” one much narrower than common usage suggests. Surely the trust company had contacts with Florida in some senses: it carried on business with a resident, sending mail to her there; profits were received from the Florida resident as a consequence of the business; the will, which contained a residuary clause having the potential of distributing the trust assets, was to be administered in Florida; the settlor retained substantial rights with respect to trust investments and appointments, all of which were exercised in Florida; and the primary trust beneficiaries were residents of Florida. Why didn’t these count toward determining if the defendant was “purposefully . . . conducting activities” in the forum, particularly when it continued the relationship for eight years, deriving profits all the while?\textsuperscript{194} The Court’s answer was that defendant had not “invok[ed] the benefits and protections” of the forum’s laws.\textsuperscript{195} But that expression is capable of the most elastic interpretations. Why did the trust company benefit from the forum’s laws any less than the insurance company in \textit{McGee}? Arguably the insurance company gained indirectly from regulatory laws allowing its industry to exist and prosper in California, but much the same could have been said in \textit{Hanson}. Florida laws protected communica-

\begin{commentary}

\textsuperscript{189} \textit{Id.} at 251.
\textsuperscript{190} \textit{Id.} at 252.
\textsuperscript{191} \textit{Id.} at 254.
\textsuperscript{192} \textit{Id.} at 253.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} Generally, a trustee may resign only with permission of an appropriate court, or upon obtaining the consent of the beneficiaries, or under the terms of the trust. \textit{See} \textsc{Restatement (Second)} of \textsc{Trusts} § 106 (1959). Unlike some states, Delaware has no statute governing resignations, nor does there appear to be any case authority directly on the subject. The trust agreement in \textit{Hanson} did not cover the possibility. \textit{See} Record at 17-29, Hanson v. Denckla, 357 U.S. 235 (1958). Other jurisdictions have ordinarily allowed resignation by judicial permission “if such resignation will not be unduly detrimental to the administration of the trust.” \textit{Restatement, supra, at} § 106 (Comment on Clause (a)).
\textsuperscript{195} 357 U.S. at 253.
\end{commentary}
tions with the company’s client, allowed appointments under the trust, provided an environment conducive to business relations, and would have offered a forum for suits by the trustee against the settlor.

None of this mattered to the Hanson majority since the action arose in Florida as a consequence of the settlor’s unilateral decision to move there. The notion of “benefitting from the forum’s laws,” then, had been given a limited construction. In some way the defendant must initiate a beneficial relationship with the jurisdiction.

The rationale for this circumscription cannot be gleaned from the Hanson opinion. We are told nothing more than that it is a natural result of territorial sovereignty. What does this signify? Did the Court mean to say that a defendant must be “present” in the jurisdiction in order to satisfy the requirements specified by Pennoyer and Story? Surely this was not intended since International Shoe had already exposed the intrinsic problem of an inquiry directed toward ascertaining “presence” in the jurisdiction:

To say that the corporation is so far “present” there as to satisfy the due process requirements . . . is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

If “presence” was not the concern, did the Court intend to protect Delaware from judicial encroachment by Florida? On reflection, the best justification for the Hanson holding is that it allowed Delaware law to apply, a result achieved by restraining Florida’s jurisdiction. Yet the same end could have been accomplished through the development of constitutional rules relating to conflicts of laws, something the Court has been reluctant to pursue.

Whatever interest Delaware had in this controversy would have been fully vindicated by a proper application of its laws. Achieving that aim through a jurisdictional ruling actually diserves Delaware by adding another case to its dockets; likewise the litigants suffer by being forced into an inconvenient forum. The only context in which the Court’s jurisdictional deference to Delaware makes sense is the international arena, in which jurisdiction follows enforcement power, and in which recognition of foreign law occurs only through comity. In a federal system there should be no a priori weight given to a particular forum when each state is bound to recognize the others’ judgments. The only relevant considerations relate to applying the appropriate

196. See text accompanying notes 132-43 supra.
197. 326 U.S. at 316-17.
199. See Silberman, supra note 5, at 80 & n.257.
200. See Martin, supra note 166, at 202.
201. Perhaps it could be argued that Delaware would want to try the case in order to insure a more accurate application of its laws. While there is something to be said for this, this concern would surely vary with the complexity of the issues, and accordingly might constitute a factor to be weighed in determining the best forum.
law and selecting a forum that minimizes the impact of transaction costs from the litigation.

This doctrinal fraility in Hanson is indicative of much more than a simple lack of symmetry. Underlying the problems exposed above is a serious weakness in the minimum contacts test itself. As long as the Court was dealing with what amounted to a physical contact with the forum, the standard was easily applied and produced few ill effects. When the cases became harder, the search for "contacts" began to lose coherence. Originally the idea was to look for "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" This would imply a focus on the fairness of the forum selected by plaintiff. In Hanson, however, the court emphasized the contacts themselves, as if they were meaningful apart from the inquiry directed toward the fairness of plaintiff's choice. When isolated, however, the word "contacts" is no more illuminating than the old term "presence." Each represents a conclusion, rather than a form of analysis—they are words to be used after we have decided that the demands of the fourteenth amendment have been satisfied.

Whenever a court employs words as shorthand substitutes for explanation, there inevitably arises a host of finely distinguished cases that display an escalating tendency to become removed from the issues lying behind the original words. A classic example is the "doing business" standard in vogue prior to International Shoe, which developed as a means for ascertaining if a corporation was "present" in the jurisdiction or had "consented" to suit there. "The law reports become cluttered with decisions as to what constituted 'doing business.'" Distinctions were drawn by the courts based on a variety of factors: whether there was a regular agency for solicitation; if business was continuous and substantial, or involved only purchasers; whether activities were carried on by subsidiaries, connecting carriers, or a regular office, and so on. Many of these auxiliary standards were clear enough in some situations; the difficulty came in understanding why the various items should matter.

Similarly, the "minimum contacts" system supplies no better rationale for accomplishing its purpose. What the Court has done is to develop secondary standards to explicate the idea behind "contacts," the principal one being the prohibition against considering "unilateral" actions. On closer scrutiny, the term "unilateral" is nothing more than a label for a conclusion. We may grant that a forum with no relation to the defendant other than the plaintiff's unilateral choice to file suit there ought not to be employed. The reason for this
conclusion may be expressed by saying the plaintiff's contact with the state does not matter, although a fuller explanation would point to a range of factors disqualifying the forum. Very few cases will be so simple. Usually the defendant has some other relations, even though they may be merely a consequence of a foreseeable move to the forum on the part of the plaintiff. We then have to ask why defendants should not be tied to these forums, given their pre-existing relations with the plaintiffs. Dismissing the case by invoking the "unilateral" distinction does not provide any principled explanation. It ends discussion without illumination, without providing any insight into what is to be accomplished by the qualification other than an arbitrary deference to defendants.

Nevertheless, Hanson came to an acceptable conclusion, albeit because an appropriate choice of law was secured through the circuitous medium of personal jurisdiction. We may be tempted to conclude from this outcome that the method used is capable of producing generally acceptable decisions with an attendant savings in judicial effort. While this is a seductive deduction, it fails to account for the essential tension inherent in using words that are the products of contradictory theoretical traditions. The "minimum contacts" test clearly differed from Pennoyer in many respects (the principal being the explicit recognition that process may be served extraterritorially), yet as has been developed earlier, International Shoe and Hanson never abandoned the concept that personal jurisdiction was founded on the powers of boundary-constrained sovereigns. To a large extent the contrast between the two sides of the minimum contacts face has been disguised by substituting abbreviated expressions (such as "unilateral activities") for more extensive elaborations of the supporting theories. These masks serve well enough when the drama comes to a satisfactory conclusion. At some point, usually when the play has left us more sad than wise, we begin to question what holds the plot together. World-Wide seems to epitomize this problem, but it is not the only instance, for the other recent cases—Shaffer, Kulko, and Rush—reveal a similar malady.

Of the three cases, Shaffer is the most egregious since the result (to deny jurisdiction on the ground that defendants lacked minimum contacts with Delaware) seems plainly wrong. The odd aspect of the case is its cursory treatment of this issue. After spending some sixteen pages detailing the history of jurisdiction to adjudicate since Pennoyer and demolishing the distinction between in rem and in personam actions, Justice Marshall devotes only one-fourth of that space to articulating why the defendants failed the minimum contacts test. This last portion of the opinion might be called a case of studied

206. Professor Kurland has written: "[Hanson v. Denckla] is more restrictive of a state's judicial jurisdiction than that urged by [Justice] Black, [but] it is nonetheless a workable and not unduly confining expression of the limitations of the Due Process Clause." Kurland, supra note 130, at 621.

207. See id. at 623: "Denckla and Vanderbilt [Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957)] reveal that the concept of territorial limitations on state power is still a vital one."
obscurity, a deliberate attempt to resolve the dispute while creating the narrowest possible precedential effect.

_Shaffer_ makes the startling observation that the defendants "simply had nothing to do with the State of Delaware."208 Unraveling this proposition requires acceptance of an unusually narrow meaning for the words involved. True, the defendants had never "set foot in Delaware," and the acts of alleged corporate mismanagement took place outside of the state.209 In a way, this sounds very much like a demand for some physical presence in the forum. Looking at the matter from another perspective, the defendants were closely linked to Delaware. Having accepted positions as officers or directors of a Delaware corporation (or its subsidiary), they benefited from the favorable management climate prevailing in the state.210 Their reputed misdeeds involved abuses of fiduciary relationships that damaged the corporation, a creature of the state's laws, thereby injuring shareholders, who are protected by Delaware law. Without even asking how many forum residents owned the corporation's securities,211 we can still argue that deleterious effects were produced in Delaware. Since the recovery from a successful derivative action falls to the corporation,212 a resident of the state, the harmful consequences of an uncompensated loss would be felt within Delaware. Naturally this is a bit artificial, given the fiction of corporate existence in the first place. Nonetheless, those who would seek to hide behind the fiction are, in this case, the very ones who take advantage of the myth when it serves their purposes.

Justice Marshall acknowledges these kinds of arguments, but he dismisses them as bearing only on choice of law, a subject _Hanson_ had severed from jurisdictional analysis.213 Despite the undisputed interest of Delaware in a just resolution of the controversy, Justice Marshall finds that concern insufficient to make the state "a fair forum."214 No direct interpretation is provided for this phrase, although evidently the reference is in part to the arguments just discussed. In addition, there is introduced the cryptic expression that defendants "had no reason to expect to be haled before a Delaware court."215 The vacuousness of this test is nowhere more apparent than here. Without repeating points made earlier,216 it must have been clear to any knowledgeable officer or director that Delaware had used the sequestration statute to compel the appearance of nonresident corporate officials.217 If the Court means something other than a lack of predictability of being sued there, the only remaining possibility is that the defendants would not have expected the fo-

208. 433 U.S. at 216.
209. _Id._ at 213.
210. _Id._ at 228 (Brennan, J., dissenting).
211. A showing of this sort, which the Court did not give plaintiff an opportunity to make, could have brought the "effects" of the out-of-state acts within the _Gray_ rationale.
212. _Id._ at 222 (Brennan, J., dissenting).
213. _Id._ at 215-16.
214. _Id._ at 215.
215. _Id._ at 216.
216. See text following note 91 _supra._
217. See 433 U.S. at 227 nn.5-6 (Brennan, J., dissenting).
rum to meet the minimum contacts test. Confining the defendants to reasonable expectations, the circle is closed: “haled into court” becomes another way of asserting (without proving) the fairness of the forum.

Justice Marshall’s other rebuttal to the recognition of Delaware’s interest points to the forum’s failure to have enacted a special jurisdictional statute covering corporate officials. The relevance of this is fairly mysterious considering that the opinion concludes by stressing defendants’ lack of “contacts, ties, or relations”\textsuperscript{218} as the reason for jurisdictional failure. These hardly can be supplied by a jurisdictional statute.\textsuperscript{219} If Justice Marshall intended to buttress the “haled into court” argument, he was somewhat more successful, although not overwhelmingly so, since the sequestration statute remained.

All told, this aspect of \textit{Shaffer} is a disappointing reminder of the hold \textit{Pennoyer} still exerts. While purporting to rest on an evaluation of “fairness,” the inquiry translates that term into “contacts,” which in turn amounts to a search for some sort of literal presence in the jurisdiction. No argument is given to demonstrate why Delaware’s manifest interest is counted only toward choice of law, other than a citation to \textit{Hanson}, which had merely asserted the divorce of jurisdiction and choice of law principles. What Justice Marshall ignores is that the forum’s concern transcends the mere desire to see its laws properly applied.\textsuperscript{220} Far more important in this instance is an interest in providing a forum in which the controversy can be best resolved. Considering the interstate character of the alleged wrongs, Delaware might have been the only place capable of serving the majority of directors with process (even accounting for the failure of the sequestration statute to reach non-stock owning directors). Of course we do not know for certain if this is true; the Court failed to give the plaintiff an opportunity to take discovery on this factor. But its refusal to remand for more complete investigation can be interpreted as saying that nothing the plaintiff might offer on this score would matter.\textsuperscript{221} Again the “minimum contacts” approach curtails discussion in favor of a dogmatic deference to defendants. At the same time the comprehensibility of the test itself becomes ever more elusive.

Indicative of \textit{Shaffer’s} rigid stance is the opinion’s failure to mention the actual burden that would be imposed on the officers and directors from a Delaware lawsuit. Under Delaware law,\textsuperscript{222} as in a number of other states,\textsuperscript{223} these defendants would have a right to indemnification against the corporation for expenses (including attorneys’ fees); such costs may be paid by the corporation in advance.\textsuperscript{224} Even when unsuccessful in their defense, the officers and

\textsuperscript{218} \textit{Id.} at 216. This is, of course, the familiar line from \textit{International Shoe}. As in \textit{Hanson}, and later \textit{World-Wide}, the Court omits \textit{International Shoe’s} supporting citation, which is to \textit{Pennoyer}. \textit{See} text accompanying note 62 \textit{supra}.

\textsuperscript{219} \textit{See} Silberman, \textit{supra} note 5, at 66.

\textsuperscript{220} Admittedly this interest is vindicated if another state fairly interprets Delaware’s laws. \textit{See} text accompanying notes 199-201 \textit{supra}.

\textsuperscript{221} The other explanation has been addressed earlier. \textit{See} note 151 \textit{supra}.

\textsuperscript{222} \textit{See} DEL. CODE ANN. tit. 8, § 145(e) (1974).


\textsuperscript{224} \textit{See} DEL. CODE ANN. tit. 8, § 145(e) (1974).
directors may be indemnified if they can show that their actions were non-negligent, taken in good faith, and not opposed to the best interests of the corporation. Most states have some statutory authority for indemnification; others recognize a common-law right when the defense prevails. Finally, provisions for indemnity are often inserted in corporate articles, by-laws, resolutions, and contracts. We may recall International Shoe's express acknowledgement that an "estimate of the inconveniences" resulting from litigation was "relevant" to the determination of whether minimum contacts exist. The construction given to "contacts" by Shaffer—and continued through World-Wide—excludes consideration of the real costs facing the defendant.

On the surface Kulko appears much more acceptable than Hanson and Shaffer; the case seems to avoid placing conclusive weight on the single variable of the defendant's "contact" with the forum. If anything, Kulko might come under fire for having listed so exhaustively the relative interests of the parties and the respective states that it becomes hard to assign values to the various factors enumerated. A balancing process can have exactly this undesirable result—the court simply runs through a catalogue of competing considerations, eventually to conclude with the bare assertion that the better view lies with one side or the other. Kulko cannot be accused of this shortcoming. The opinion does present an unusual degree of difficulty stemming from its somewhat chaotic organization; issues are discussed with little apparent order, making it seem as if the Court has failed to indicate which are the most decisive. After penetrating this barrier, one is left with the definite impression that no balancing is occurring at all. Rather, Justice Marshall has produced the domestic relations counterpart of Shaffer and, as such, much of the opinion amounts to sheer window dressing.

In its formal restatement of the minimum contacts test, Kulko acknowledges that "the interests of the forum State and of the plaintiff" are "to be considered." Immediately thereafter the Court eviscerates this opening to

225. See id. § 145(b).
227. See id. § 5, ¶ B (2d ed. 1971).
228. 326 U.S. at 317.
229. The Court discusses each of the following: the insignificance of defendant's limited presence in the forum some 13 years prior to the action, 436 U.S. at 92-93; the possible discouragement of reasonable visitation and custody agreements from a finding of jurisdiction in a state other than that of marital domicile, id. at 93, 97-98; that the children's presence in California benefited them, rather than the father, id. at 94 n.7, 94-97; the failure of defendant to have caused physical injury in the forum, id. at 96; the noncommercial nature of defendant's relation with California, id. at 97, 100, 101; that the marriage centered in New York, the separation occurred there, and the separation agreement was consummated in New York, id. at 97; defendant's inability to foresee that his acts would lead to the burdens of litigation in California, id. at 97-98; the ability of the Revised Uniform Reciprocal Enforcement of Support Act of 1968 to accommodate California's interests in the children's welfare, id. at 98-100; the forum's lack of a special jurisdictional statute, id. at 98; and the defendant's obligation to pay all of the plaintiff's litigation expenses, thus reducing the burden of a New York trial, id. at 95 n.8.
231. 436 U.S. at 92.
non-defendant considerations by adding: "[A]n 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."²³² These two statements are remarkably incongruous, despite their juxtaposition. Why should the Court “consider” something that in the end does not matter? The only reconciliation would come by treating the latter as a threshold obstacle which, if overcome, allows a court to address the other issues. One of the confusing aspects of *Kulko* is that these non-defendant factors are reviewed by the opinion, even though the Court stresses the insufficiency of defendant’s contacts with the forum.

*Kulko* emphasizes repeatedly that defendant had no association with California, especially nothing of a commercial nature.²³³ His only substantial connection came as a consequence of the plaintiff’s move to the forum, a “unilateral” act over which he had no control.²³⁴ While the children eventually followed their mother to California, the Court notes that it was they who benefitted from the new residency, not the defendant.²³⁵ Everything else about the case pointed back to New York: it was the place of marital domicile and consummation of the separation agreement.²³⁶ Put bluntly, the defendant had stayed in New York, and now the plaintiff expected him to litigate on the other side of the country.²³⁷ This was too much for the six-man majority. Defendant could not anticipate “being haled before” the California tribunal when he acquiesced in his children’s decision to move West.²³⁸

The remainder of the opinion is superfluous if we take seriously the Court’s elucidation of the core requirements for minimum contacts. By including extended discussions of such matters as the Revised Uniform Reciprocal Enforcement of Support Act of 1968 (URESA),²³⁹ the Court may have simply been demonstrating that its construction of the minimum contacts test was capable of achieving fair results. Unfortunately, the Court overlooks some serious structural problems in URESA that make it an unattractive alternative to a hearing in which both parties (and dependents) may appear and present live testimony.²⁴⁰ Moreover, the end result of the URESA system is a proceeding before a trier who physically is removed from those who require

²³². *Id.*

²³³. *Id.* at 97, 100, 101. While the marriage occurred in California, as well as two brief military stopovers, the Court rightly saw these as being jurisdictionally irrelevant given their remoteness from the present action. *Id.* at 93.

²³⁴. *Id.* at 93-94.

²³⁵. *Id.* at 94-96.

²³⁶. *Id.* at 97.

²³⁷. *Id.*

²³⁸. *Id.* at 97-98.

²³⁹. *Id.* at 98-100.

²⁴⁰. Primarily designed as a means for enforcing support obligations from abscending spouses, see Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAM. L.Q. 113, 113-14 (1978), URESA contains imperfections inherent in a scheme designed to assist those in need of support who cannot afford to track down the absent spouse. Under URESA, the person owed support (obligee) initiates the action in her home jurisdiction; the actual proceedings are conducted in the defendant’s (obligor’s) jurisdiction, with the obligee relying on paper submissions to prove her case. A court-appointed attorney (usually from the local district attorney’s office) often
support; the court will most likely have little idea of the social and economic conditions in the community where the dependents are residing.241

Whatever may be the flaws in URESA, Kulko might still be seen as coming to a tolerable conclusion since New York remains an available forum and the father is obligated by the support agreement to pay the mother's expenses associated with prosecuting the action there.242 Yet given the father's obligation to bear the burdens of litigation, the choice of forum is really insignificant from a standpoint of costs. The Court's emphasis on his inability to foresee the "substantial financial burden"243 of California litigation is factually inaccurate—presumably the burden of his traveling to California is the same as the reverse process.244 He may not have had the prescience to predict that California would be the forum, but he did agree to pay the expenses of long-distance litigation. Despite the essential irrelevance of the financial burdens, the Court forces the action to a location far removed from the locale now having the greatest interest in the children's welfare, and the best facility for judging their needs.

This aspect of Kulko demonstrates the essential arbitrariness of the method employed. Taking the case to be a contest between two parties, with decided weight given to one side, the Court ignores those who suffer most from the jurisdictional wrangling—the children. Naturally the Court should have considered, as it purported to do, the possible adverse effects on voluntary custody and visitation agreements of a rule that always required the supporting spouse to follow a mobile counterpart. Not every case will present this danger, as the facts of Kulko suggest. In addition, the Kulko situation (in which the supporting parent remains in the marital domicile while the dependents depart) is quite rare—normally the reverse occurs245—meaning that a case-by-case approach would not demand exceptional judicial resources. Probably the best overall solution would involve the initial divorce court's supervising a negotiated agreement on how the burdens of litigation will be

 prosecutes the case for the obligee. See id. at 115-33 (description of URESA). Professor Fox notes that while the obligor may make a personal appearance,

the obligee is normally restricted to a presentation solely on paper, a device which usually lacks the power and effect of oral argument. Even with the use of depositions, the hearing can take on a ping-pong effect (an obligee's deposition gives rise to a response by the obligor which triggers a second deposition by obligee to which the obligor responds, etc.) all of which may take a significant amount of time and several continuances.

Id. at 128-29. Some suggest that the lack of a personal appearance by an obligee results in reduced support duties. See Note, Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J. Fam. L. 537, 541 (1980). Additional problems confront those obligees who must rely on the public prosecutor to pursue the obligor; prosecutorial indifference (manifesting itself in unprepared counsel and delays) has been frequently cited as a significant flaw in the program. See id.; Fox, supra, at 124.

241. Thus, in Kulko a New York judge must evaluate the support required in an area about which he probably has no personal knowledge. The trier may have difficulty assessing such matters as an asserted need for private education, or the obligee's contention that employment prospects are unpromising.

242. See 436 U.S. at 95 n.8.

243. Id. at 97.

244. It could be more, in fact, if the New York court desired an examination of the children.

245. See Note, supra note 240, at 553.
shared, with the forum choice depending on where the dependents are residing permanently. Compulsory arbitration might be required to resolve any later disputes. This necessarily requires viewing jurisdiction as involving something other than paying close attention to state boundaries. Instead the issue is finding the best forum for protecting the dependents' interests, a goal which is obtainable only if we regard the state courts as cooperating entities. Parents have obligations arising from their decision to bear children, including the duty to share litigation costs associated with their protection; those responsibilities should be the overriding determinant of the jurisdictional choice.

It is difficult to say what ramifications Kulko will have both on the domestic relations front and elsewhere. One result may be that parents with custody will think very hard about a decision to move outside the state of marital domicile, a constraint the Court never mentions. Beyond the support cases, the logic of Kulko would seem to apply equally in the initial divorce and custody proceeding. Thus, a spouse who leaves to start a new life in another jurisdiction would arguably be unable to initiate divorce proceedings there, regardless of her intent to make the new home a permanent residence. While the Supreme Court has shown no inclination to abandon the domicile of the divorcing spouse as a basis for jurisdiction to dissolve the marriage,\footnote{246} the force of Kulko seems to undercut that ground when the defendant has had no contacts with the forum. Particularly with the general approval of no-fault divorce\footnote{247} and the serious arguments now made for eliminating the requirement of domicile for divorce jurisdiction,\footnote{248} such an extension of Kulko has little to recommend it. Given Shaffer's determination to consider all assertions of jurisdiction under the minimum contacts test, it is hard to see how the Court can preserve the existing fiction that the marriage is a res subject to \textit{ex parte} dissolution.\footnote{249} Shaffer apparently did continue the in rem action whereby the forum in which the property is located may extinguish rights of nonresidents.\footnote{250} While this makes sense when the defendant has placed property in a jurisdiction (or accepted benefits from its location there, as in Mulalloween), the movement of the marital "res" is something he cannot control. It is much more like \textit{Harris v. Balk}, falling squarely within the Court's disqualification of "unilateral" acts.

\textit{Rush v. Savchuk},\footnote{251} in which the \textit{Seider v. Roth}-type action was declared unconstitutional, came to an acceptable conclusion on the facts presented. The reason has not so much to do with jurisdiction as choice of law, for by depriving Minnesota of its adjudicatory base the Court probably made Indiana the only available forum. Indiana would bar the suit either by following

\begin{footnotes}
\item[246] \textit{See} Garfield, \textit{The Transitory Divorce Action: Jurisdiction in the No-Fault Era}, 58 \textsc{Tex. L. Rev.} 501 (1980).
\item[247] \textit{Id.} at 523-24.
\item[248] \textit{See} Garfield, \textit{supra} note 246.
\item[249] \textit{Id.} at 512.
\item[250] \textit{See} 433 \textsc{U.S.} at 208.
\item[251] 444 \textsc{U.S.} 320 (1980).
\end{footnotes}
its automobile guest statute,252 or applying its already expired statute of limitations.253 Like Hanson, then, the effect of the jurisdictional decision is to utilize the appropriate choice of law. Indeed, the primary evil flowing from Seider-type cases is the application of the forum's substantive law to tort actions that are the chief concerns of other jurisdictions.254

While the case might have been decided on conflicts grounds, the Court instead rolled out its heavy artillery, flatly declaring that an attempt to link the defendant to a jurisdiction via an insurer's contacts with the forum was "plainly unconstitutional."255 As in World-Wide (decided the same day), Rush demands a demonstration of the defendant's "judicially cognizable ties with a State"256 before other factors may be reached (such as the forum's interest in protecting a resident plaintiff by providing a forum). Added to this was the Court's insistence that the Seider action was not the same as a direct action against the insurer:

The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action.257

On one level this is correct—the insurer is liable only if the insured is held responsible. Legalisms aside, the insurer is the real party, the one defending and paying; the defendant cannot be bound by the result.258 Practically speaking, the individual defendant may be damaged in a noneconomic sense (by the attribution of wrongdoing), a point the Court notes.259 The question is why this should render the Seider procedure invariably unconstitutional. Every defendant faces some potential embarrassment when being sued, regardless of where the proceedings are held. The usual Seider defendant, whose interests will be protected by insurance counsel in any event, receives the same defense (with no additional burdens) irrespective of plaintiff's forum choice.

Generally we want tort cases tried in the place of the accident. Most likely one of the parties will reside there, the evidence will be readily available, and that jurisdiction will have the strongest interest in the case. But there may be times when these factors are not present: neither party may be a resident of the place of accident; no witnesses other than the parties might be available; or the physical evidence could be negligible or readily movable. Furthermore, acute hardships confront the plaintiff when there is no other do-

252. Id. at 322.
253. Id. at 322 n.2.
254. See Silberman, supra note 5, at 97-98.
255. 444 U.S. at 332.
256. Id.
257. Id. at 330-31.
258. See id., at 333-34 (Stevens, J., dissenting); World-Wide Volkswagen, 444 U.S. at 303-04 (Brennan, J., dissenting); Leathers, supra note 9, at 919.
259. 444 U.S. at 331 & n.20.
mestic forum. Requiring the plaintiff in these situations to pursue a defendant who will be represented by a national insurance company is really carrying a good idea too far.

A final point about *Rush* is worth noting. Unlike *Shaffer* and *Kulko*, there was a special jurisdictional statute in Minnesota authorizing the garnishment of a "debt" arising from an insurance contract. Despite the ambiguous intimation in *Shaffer* that such a provision might have altered the outcome, Minnesota's expressed interest was evidently of no consequence. This was not an oversight on the Court's part; the author of *Rush*, Justice Marshall, also wrote *Shaffer* and *Kulko*, and in his dissent Justice Brennan referred explicitly to the statute. What may have occurred is that a majority realized the inappositeness of any indication of forum interest to the initial determination of the defendant's constitutional contacts. Rather than leave us guessing, and further confounding the lower courts, they might have said what was on their minds.

V

In many respects *Pennoyer v. Neff* can be said to have presented a unified theory of jurisdiction. Resting upon a view of the federal union that emphasized the sovereign nature of the states, the case provided a rather complete picture of jurisdiction to adjudicate. A court knew it had authority over persons and property within the state's borders since that was one of the attributes of sovereignty. Likewise, it had no ability to reach those beyond the forum as that would be intruding on other sovereign powers. Service of process was the appropriate manifestation of the court's authority. Being the lineal descendant of civil arrest, process could be envisioned as the symbolic representation of the judiciary's sovereign powers.

Yet even as *Pennoyer* was decided it was evident that the unified base on which it supposedly rested was unstable. For one thing, there were the "status" cases, primarily divorces, in which *Pennoyer* allowed a domiciliary to sue a nonresident for dissolution of a marriage. Here the Court found an easy escape by declaring the "absolute right" of a state to determine "the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." This particular "right" of the state would, however, appear more relevant to choice of law, for there remained the problem of justifying the assertion of power over a defendant who was beyond the state's process. Oddly, *Pennoyer* gave a highly pragmatic answer to the jurisdictional quandary—if the state could not issue divorces, "the injured citizen would be without redress" when the defendant "removed to a State where no dissolution is permitted." Similar considerations sup-

260. *Id.* at 322-23 n.3.
261. *Id.* at 302 (Brennan, J., dissenting).
262. See *Leathers*, *supra* note 15, at 12.
263. 95 U.S. at 734-35.
264. *Id.* at 735.
ported an exception for the use of "consent" statutes requiring businesses to appoint agents to receive process within the state; for corporations this "provide[d] a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked . . . ."265

These exceptions could be rationalized well enough within the *Pennoyer* system: "status" cases might be analogized to property arrangements, with something like a real entity existing in the state; the consent laws were a way of requiring submission to state power as a prerequisite to conducting activities there. Nevertheless, the fit was awkward. To make the scheme work, the Court had to take a rather special view of the marriage relationship and make the assumption that the states could always exact consent as a condition for doing business. Not too long after *Pennoyer*, the cohesive strength of its underlying theory began to weaken. In part, the explanation was internal, such as when the Court came to recognize constitutional limitations on the states' power to exact consent.266 Of greater significance was the transformation of the American society as it entered the twentieth century; extraterritorial service of process became a necessity.

*International Shoe* overruled no cases; rather it was an attempt to provide "an appropriate rationale to demonstrate [the] consistency"267 of the decisions after *Pennoyer*. As we have seen, the Court explicitly recognized the continued validity of *Pennoyer*. The opinion itself was extraordinarily ambiguous. While the controversy presented was easily resolved, the reasoning provided was capable of exploitation by two rival camps. It was possible to view the case as opening the way for a type of constitutional forum non conveniens,268 modified to eliminate any nonprincipled bias toward one party or the other.269 Certainly cases like *McGee* could be seen as endorsing this interpretation. On the other side, *International Shoe* might have been taken as a mandate to continue seeing the relation of the defendant to the forum as the basic concern of the due process clause. *Hanson* was an example of this perspective.

Both of these positions were departures from *Pennoyer*, the former much more so than the latter. Neither provided, in itself, a unified theory. The first rested on a more fundamental premise, namely that the due process clause ought to protect both plaintiffs and defendants, while at the same time serving

265. *Id.*

266. *See* Flexner v. Farson, 248 U.S. 289 (1919). Nonetheless, the Court continued to employ "consent" until at least 1933; *see* Kurland, *supra* note 130, at 582.


268. *See*, e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Since Gilbert retained a bias toward honoring plaintiff's choice of forum, a more relevant analogy would be to cases authorizing transfer of venue under 28 U.S.C. § 1404(a) (1976). *See* Norwood v. Kirkpatrick, 349 U.S. 29 (1955). The main point is that the kinds of issues addressed by the federal cases on dismissal and transfer (and the way they are resolved) provide an alternative method for approaching state jurisdiction.

269. "Nonprincipled bias" here means a presumption for either plaintiffs or defendants that is indulged in before examining the factual situation. A rule generally requiring plaintiffs to pursue defendants in a forum is an example of such a bias. Note, however, that some fact patterns often will produce a tendency to favor a certain party. For instance, in products liability cases, plaintiffs should frequently be allowed a choice of forums. *See* text at notes 100-06 *supra*. In short, a bias can be principled.
the larger interests of a national society. With respect to the second, the deeper structure is more elusive. What may be present is an unreflective continuation of the ancient favor afforded to defendants in these matters. Or, if we take *Hanson* and *World-Wide* at their word, the defendant orientation is itself grounded in a conception of the political powers retained by the states. Regardless of the reason for giving weight to defendants, the inevitable result is an analysis that must pay close attention to state boundaries. By initiating a search for "contacts" with particular states, the courts are constrained to ask what the defendant has done with respect to the forum. As in the days when *Pennoyer* held unquestioned authority, the inquiry centers on whether the defendant has committed sufficient acts to justify the state's exertion of power.

Evidently the Court has now chosen the second of the paths leading from *International Shoe*, although its often obscure opinions, separated by a long period of silence, left the imprint that should be expected when the lower courts are told to follow contrary directions.

Those who saw *Shaffer* as somehow overruling *Pennoyer* simply missed the import of both cases. To be sure, *Shaffer* brought together in personam and in rem jurisdiction under one expression, and to that extent *Pennoyer* was modified. But in this regard, the effect of the decision was to protect further defendants' interests. Still, this feature of *Shaffer* does not capture the sense in which *Pennoyer* survives; it is simplistic to assume that *Pennoyer* stood merely for a strong tendency to assist defendants in avoiding process. This was the symptomatic feature of the case, not the essence. Instead, the more fundamental aspect of *Pennoyer* was its insistence that constitutional limitations on jurisdiction to adjudicate were a function of the constraints associated with a federation of sovereigns retaining independent judiciaries. In effect, the most recent cases combine this aspect of *Pennoyer* with a modified account of the relationship between the defendant and the forum that would suffice for allowing an assertion of jurisdiction. *Pennoyer* had placed physical presence at the center of this inquiry, but as the "status" and "consent" cases reveal, this was never a necessary condition—it was merely sufficient. We may assume that the Court will restrict "tag" jurisdiction whenever the occasion presents itself, thereby eliminating mere presence as an adequate basis. When that day arrives, the main point of *Pennoyer* will still persist: jurisdiction is acquired when defendants bring themselves within the range of a state’s power. Like magnetism, jurisdiction is a force field surrounding the forum, pulling defendants into its influence; when the force field is given too much energy, it interferes with other sources of power.

There is some discussion in *Shaffer* and the cases following it of factors beyond the contacts between the defendant and the forum. These are serially subordinate concerns, a second inquiry to be reached after the initial determination. Accordingly, we can expect judicial attention to be drawn increasingly toward distinguishing those contacts necessary to clear the initial hurdles. This future will be marked by mounting frustration, with distinctions appearing ever more arbitrary. The search for "contacts" is not simply beset by am-


bigness—again, that is a symptom, not the disease. More fundamentally, the
tory itself lacks any kind of sustaining foundation. Asserting that the vari-
ous states must respect each other's powers says nothing about practical limits.
In a day when physical presence defined the relationship, the theory had the
appearance of workability. Having abandoned, at least formally, the concept
of presence, no reference is available to define the required contacts. Given
the strong tie between language and theory, it is not surprising that the "mini-
mum contacts" cases have been resolved by the implicit analogies to physical
presence. Likewise, considering the often-exposed frailties of the presence
doctrine, it is unremarkable that the reasoning of the decisions (despite occa-
sionally acceptable results) resists penetration. 270

Any judicial system attempting to treat like cases alike is inexorably
drawn toward the promulgation of theory. Similarities and differences among
cases are noted through language, which abstracts elements from the many
particulars for comparison. A theory is a proposition that purports to establish
a relationship among otherwise discrete elements. Theories of law are inclined
to increase the scope of their coverage, to provide a more comprehensive
unity. In part this is the product of the constant appearance of new controver-
sies that demand resolution. Another side of the tendency relates to the desire
to leave no case outside of the justifying system; as the theory supplies the
rationale for the justice of the result, any case left beyond the theoretical pe-
riphery is relegated to a normative void. Such a case cannot even be discussed
intelligently: the language form demands abstraction in order to function,
which in turn is provided by theory.

There is nothing extraordinary, then, about the quest for a unified theory
of jurisdiction. The search is a reflection of human nature. And the judicial
system we know would not exist without the same aspects of human nature.
Caution is nevertheless in order. Any theory appears unifying, some more so
than others; the theory itself says nothing about its scope. It is the actual ap-
lication of the theory that demonstrates its sweep; yet we require additional
theory to determine when this application is appropriate. Similarly, the scope
of the theory is silent as to its fairness. Both the issues of scope and fairness
are resolved by still further theory. To the extent we employ language to or-
ganize the world, the regress will be perpetual. In the process we are captives
of our language, of the abstractions wedded to language.

Pennoyer v. Neff may be denounced, yet its influence continues. The the-
ory upon which it rests is deeply imbedded in our juridical language. We
remain in the grasp of a chimera.

270. Dissenting in World-Wide and Rush, Justice Brennan openly questioned the appropriate-
ness of continuing the "minimum contacts" approach, saying in part that "[t]he model of society
on which the International Shoe Court based its opinion is no longer accurate. Business people,
no matter how local their businesses, cannot assume that goods remain in the business' locality."
444 U.S. at 309 (Brennan, J., dissenting).