ARTICLES

The Death of the Constitutional Law of Personal Jurisdiction: From *Pennoyer* to *Burnham* and Back Again

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INTRODUCTION

I have a jigsaw puzzle sitting on a card table in the corner of my living room. I am not very adept at assembling puzzles, and do not really enjoy working on them. Nevertheless, for reasons that I cannot recall, I took this puzzle out of its box one evening and started to work on it. It is a complicated puzzle with over one thousand pieces. I have not made much progress on it; most of the border is completed, and some of the interior, but the bulk of it is unfinished. Occasionally I will work on it for a few minutes and connect a couple of pieces, but inevitably I get frustrated and turn my attention elsewhere. The puzzle's primary function, as my family is fond of pointing out, is to occupy space in the corner of our living room. It would be far better if I put the puzzle back in its box, put the box back on the shelf, and unloaded it at our next garage sale.

The Supreme Court's thousand-piece jigsaw puzzle is personal jurisdiction. For over a century American procedural law has labored under the suggestion that the due process clause of the fourteenth amendment limits the jurisdictional reach of state courts.[1] Although the Court, and most commentators, have not questioned the correctness of this major premise, I believe it is time to re-examine seriously the supposed fountainhead of our jurisdictional jurisprudence. In the end, I believe the Court should shelve its puzzle, abandon the notion that state court personal jurisdiction is a matter of constitutional law, and relinquish its role as the final authority on the general ability of state courts to reach beyond their borders.

The need for this re-examination is compelling in light of the Court's most recent opinion on personal jurisdiction, *Burnham v. Superior Court*.[2] In *Burnham*, a unanimous Court, to the probable surprise of most commentators,[3] and some lower courts,[4] upheld

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[1] Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (stating that "[s]ince the adoption of the Fourteenth Amendment . . . [the] enforcement [of judgments may be] resisted, on the ground that . . . [the] court has no jurisdiction").

[2] 110 S. Ct. 2105 (1990).

[3] Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979-80) (arguing tag jurisdiction does not survive *Shaffer*); Fyr, Shaffer v. Heitner*: The Supreme*

Court's Latest Last Words on State Court Jurisdiction, 26 EMORY L.J. 739, 770 (1977) (stating that "[t]he contacts formula could rarely be satisfied" in cases involving tag jurisdiction); Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429, 474 (1981) (stating that "[w]e may assume that the Court will restrict 'tag' jurisdiction whenever the occasion presents itself"); Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 61 (1984) (stating that "courts should discard the single factor jurisdictional basis of 'tagging' "); Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 329, 332 (stating that "*Shaffer* presumably renders unconstitutional the exercise of personal jurisdiction based solely on personal service in the forum"); Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 75 (1978) (stating that "if the power theory is rejected altogether [by *Shaffer*] . . . then the traditional basis of physical 'tag' for serving a defendant within a state . . . would be constitutionally suspect"); Vernon, *State Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997, 1021 (1977) [hereafter Vernon, *State Court*] (stating that after *Shaffer v. Heitner* availability of transient jurisdiction is "open to substantial doubt"); Vernon, *Single Factor Bases of In Personam Jurisdiction—Speculation of the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273, 303 (stating that availability of transient jurisdiction "doubtful" after *Shaffer v. Heitner*); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time For Change*, 63 OR. L. REV. 485, 492 (1984) (stating that "[t]he traditional basis for personal jurisdiction that is most vulnerable [after *Shaffer v. Heitner*] is service on the defendant while he is transiently present in the forum"); Note, Lockert v. Breedlove*: The North Carolina Supreme Court Rejects the Minimum Contacts Analysis Under the "Transient Rule" of Jurisdiction*, 66 N.C.L. REV. 1051, 1059-60 (1987) (criticizing North Carolina Supreme Court for upholding constitutionality of tag jurisdiction); *see also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (criticizing fairness of in-state service rule); *cf.* Reese, Shaffer v. Heitner*: Implications for the Doctrine of* Seider v. Roth, 63 IOWA L. REV. 1023, 1023 (1978) (stating that "it is by no means clear that *Shaffer v. Heitner* declares tag jurisdiction unconstitutional"); Note, *The Physical Presence Basis of Personal Jurisdiction Ten Years After* Shaffer v. Heitner*: A Rule in Search of a Rationale*, 62 NOTRE DAME L. REV. 713, 730 (1987) (stating that tag jurisdiction serves goal of providing plaintiff with a forum). Writing in 1929 Professor Dodd questioned the validity of tag jurisdiction:

> Not only is there thus reason to doubt the appropriateness in all cases of conducting litigation in a state which has no relation to the controversy except the fact that the defendant is temporarily present therein, there is also strong ground for arguing that it is often highly desirable and altogether appropriate to try a case in a state in which the defendant may not be present at all.

Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 438 (1929).

[4] *See, e.g.*, Nehemiah v. Athletics Congress of U.S.A., 765 F.2d 42 (3d Cir. 1985) (holding tag jurisdiction unconstitutional absent "minimum contacts" between defendant and forum); *accord* Harold M. Pitman Co. v. Typecraft

the constitutionality of one of the most exorbitant[5] state court jurisdictional devices: acquiring jurisdiction by personally serving (or "tagging") the defendant while she is temporarily present in the state.[6] More interesting than the result in *Burnham*, however, was the Court's constitutional rationale. For the first time the Court made an effort to examine its doctrine of jurisdictional due process in light of a more generalized approach to the due process clause of the fourteenth amendment. Although the approach taken by Justice Scalia, writing for a plurality of the Court, and the approach taken by Justice Brennan, writing in concurrence for four justices, evidenced polarized views of the fourteenth amendment generally, I believe that neither methodology will support substantial limitations on the reach of state courts. If this development foretells the end of Supreme Court intervention in the law of personal jurisdiction, it is an analytically sound and desirable step. If the Court plans to continue to dominate the jurisdictional landscape, however, it appears that we will have to continue to contend with the "patchwork of legal and factual fictions"[7] that have been developed under the guise of constitutional interpretation.

Part I of this Article traces the constitutionalization of American personal jurisdiction. Prior to the Court's watershed decision in *Pennoyer v. Neff*[8] the Court applied the "territorial principles" of personal jurisdiction. These principles divided personal juris-

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Software, Ltd., 626 F. Supp. 305 (N.D. Ill. 1986); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979); *cf.* Amusement Equip., Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985) (holding tag jurisdiction constitutional); Driver v. Helms, 577 F.2d 147 (1st Cir. 1978) (same), *cert. denied*, 439 U.S. 1114 (1979); Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980) (same); *In re* Marriage of Pridemore, 146 Ill. App. 3d 990, 497 N.E.2d 818 (1986) (same); Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987) (same).

[5] Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 554-55 (1989) (noting that *Pennoyer* framework "offered two equally exorbitant jurisdictional bases (personal service and attachment)"); Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 908 (1981) [hereafter Juenger, *Dismal Prospect*] (stating that *Pennoyer* "sanctioned two exorbitant practices: 'tag jurisdiction' and the quasi-in-rem holdup").

[6] Burnham v. Superior Court, 110 S. Ct. 2105, 2119 (1990) (plurality opinion).

[7] Shaffer v. Heitner, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part).

[8] 95 U.S. 714 (1877).

diction into two broad categories: in personam and in rem. Under the territorial principles a court could acquire in personam jurisdiction over a defendant only if she was served with process in the forum, voluntarily appeared, or consented to jurisdiction. In rem jurisdiction required that the defendant have property in the forum. If the defendant had property located within the forum, the territorial principles allowed a court to acquire jurisdiction by seizing or attaching the property at the commencement of the litigation.[9] Thus either category required a symbolic assertion of sovereignty. For in personam actions the service of summons within the territorial confines of the state symbolically asserted sovereignty. For in rem jurisdiction the seizure of property within the state's borders symbolically asserted sovereignty.

Also prior to *Pennoyer* the Court treated personal jurisdiction as a matter of federal common law.[10] Jurisdiction did not take on a constitutional dimension until *Pennoyer*. *Pennoyer* traditionally has been interpreted as incorporating the territorial principles of jurisdiction into the due process clause, thereby making personal jurisdiction a matter of constitutional concern.[11]

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9 An in rem judgment, however, could be enforced only against the property.

10 The Court treated personal jurisdiction as a matter of federal common law at least in the case of attempted *interstate* enforcement of a judgment. This treatment allowed the Court to retain the right to intervene in such a case.

11 *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); *see also* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 77-79 (assuming traditional bases of jurisdiction are matter of constitutional law); George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1107 (1990) (assuming personal jurisdiction is an issue of constitutional law); Hay, *Refining Personal Jurisdiction in the United States*, 35 INT'L & COMP. L.Q. 32, 34 (1986) (stating that contacts test assures protection of "personal liberty"); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 573 (1958) (assuming personal jurisdiction is an issue of constitutional law); Lewis, *supra* note 3, at 5-6 (describing post-*Pennoyer* efforts to fit jurisdictional assertions within "its tight theoretical confines"); McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 1 (1982) (stating that "soon after the ratification of the fourteenth amendment, the United States Supreme Court . . . held that the due process clause of that amendment imposed limitations on the states' authority to exercise judicial jurisdiction"); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 619-20

It is far from clear, however, that the Court meant *Pennoyer* to create a constitutional law of personal jurisdiction. This Article argues that a plausible reading of *Pennoyer* is that the Court did not intend to transform the substance of personal jurisdiction into a matter of constitutional law.[12] Whatever the *Pennoyer* Court's intentions, however, the Court eventually interpreted *Pennoyer* to stand for the proposition that the due process clause limits the reach of state courts. Since this full-blown constitutionalization of personal jurisdiction, the doctrine of "jurisdictional due process" has taken on a life of its own. Jurisdictional due process developed independently of the interpretation of due process in other contexts. Jurisdictional due process purports to protect a wide variety of interests, most of which are unrelated to the concepts of individual liberty or property that are at the heart of the due process clause.

Part II of this Article examines the Court's recent *Burnham* decision upholding the constitutionality of tag jurisdiction.[13] Justice Scalia, writing for a plurality of the Court, found tag jurisdiction constitutional because of its perceived historical pedigree.[14] In so doing, Scalia tied the due process clause to its historical process-based role, and thereby appeared to reject any substantial component of substantive fairness to the due process clause. Justice Brennan, writing in concurrence for four members of the Court, rejected Scalia's process-based thesis, but made clear in applying his standard of substantive fairness that his standard would strike down few, if any, assertions of state court jurisdiction.[15]

Part III of this Article argues that the time is ripe for the Court to get out of the business of regulating personal jurisdiction. The debate in *Burnham* revealed the huge analytical gulf that separates jurisdictional due process from the rest of the due process universe. Upon closer examination, one finds that the interests that jurisdictional due process supposedly serves can be illusory, not within the clause's sphere of protection, or not actually served by

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(1988) (describing *Pennoyer* as representing an "uneasy accommodation" between "specific" and "general" jurisdiction within a constitutional framework); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1122 (1966) (assuming personal jurisdiction is an issue of constitutional law).

12 *See infra* notes 132-54 and accompanying text.

13 Burnham v. Superior Court, 110 S. Ct. 2105, 2119 (1990).

14 *See infra* notes 403-08 and accompanying text.

15 *See infra* notes 432-35 and accompanying text.

limiting state court assertions of personal jurisdiction. As a consequence, the Court should end its endeavor to develop a constitutional law of personal jurisdiction and allow either state legislatures or Congress to regulate jurisdiction. Legislative reform is an alternative far preferable to the current state of affairs.

I. The Development of the Due Process Clause as a Limitation on State Court Personal Jurisdiction

In this part, I trace the constitutionalization of American personal jurisdiction law. The purpose of this discussion is not to "retell for the thousandth time the history of in personam jurisdiction."[16] Rather, the purpose is to concentrate on how we came to understand personal jurisdiction as an issue of constitutional law. Perhaps by examining the doctrine's bastard birth,[17] troubled adolescence,[18] undistinguished adulthood[19] and (I hope) feeble old age,[20] we can avoid being choked by its death grip.

A. 1812 to 1877: From Mills *to* Pennoyer

1. The Road to *Pennoyer*

Supreme Court intervention in state court assertions of personal jurisdiction did not, as one may sometimes gather, begin with *Pennoyer*. In fact, the Supreme Court decided a large number of cases on jurisdictional topics prior to *Pennoyer*.[21] A brief can-

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16 Weintraub, *supra* note 3, at 487.

17 *See infra* Part I(A).

18 *See infra* Part I(B).

19 *See infra* Part I(C).

20 *See infra* Part II.

21 *See, e.g.*, Creighton v. Kerr, 87 U.S. (20 Wall.) 8 (1873); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873); Crapo v. Kelly, 83 U.S. (16 Wall.) 610 (1872); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1870); Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Harvey v. Tyler, 69 U.S. (2 Wall.) 328 (1864); Miller v. Sherry, 69 U.S. (2 Wall.) 237 (1864); Nations v. Johnson, 65 U.S. (24 How.) 195 (1860); Jeter v. Hewitt, 63 U.S. (22 How.) 352 (1859); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); Harris v. Hardeman, 55 U.S. (14 How.) 334 (1852); Sargeant v. State Bank of Ind., 53 U.S. (12 How.) 371 (1851); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Lessee of Grignon v. Astor, 43 U.S. (2 How.) 319 (1844); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839); Voorhees v. Jackson, 35 U.S. (10 Pet.) 449 (1836);

vass of these cases puts *Pennoyer* in perspective.

In one of the earliest cases, *Mills v. Duryee*,[22] the Court, in an opinion authored by Justice Story, interpreted the Full Faith and Credit Act of 1790[23] to require that a state give conclusive effect to the judgments of sister states. Justice Johnson dissented, urging that Congress had not meant to alter the common-law rule of giving judgments evidentiary effect but not conclusive effect.[24] Johnson also argued that Congress had not meant to foreclose an interstate collateral attack[25] on a sister state judgment if the judgment was rendered in violation of the "eternal principle[] of justice"[26] that jurisdiction may not be exercised "over persons not owing [the State] allegiance or not subjected to [its] jurisdiction by being found within [its] limits."[27]

Five years later, in *Hampton v. M'Connel*,[28] the Court moved towards adopting Johnson's jurisdictional suggestion. In *Hampton* the defendants sought to attack the merits of the underlying judgment collaterally, an approach which the Court held to be foreclosed by *Mills*.[29] In a footnote, however, the Court suggested the availability of a collateral attack on jurisdictional grounds was a "question [that] is still open."[30]

What was open in *Hampton*, however, approached resolution in

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Elliott v. Peirsol, 26 U.S. (1 Pet.) 328 (1828); Mayhew v. Thatcher, 19 U.S. (6 Wheat.) 129 (1821); Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813).

22 11 U.S. (7 Cranch) 481 (1813).

23 Act of May 26, 1790, ch. 11, 1 Stat. 122, *as amended by* Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. § 1738 (1988)).

24 *See Mills*, 11 U.S. (7 Cranch) at 485-86 (Johnson, J., dissenting).

25 By the term "interstate collateral attack" I am referring to cases in which a plaintiff obtains a default judgment against a defendant in state A, and then, in the course of attempting to enforce the judgment in state B, is met with the objection that the courts of state A did not have jurisdiction over the defendant. An *interstate* collateral attack should be distinguished from an *intrastate* collateral attack. An intrastate collateral attack takes place when the plaintiff, after having obtained a default judgment in state A, attempts to enforce the judgment, and is met with a separate action by defendant, also brought in the courts of state A, to prevent enforcement of the default on jurisdictional grounds. The difference between these situations is important. *See infra* notes 59-61 and accompanying text.

26 *Mills*, 11 U.S. (7 Cranch) at 486-87.

27 *Id.*

28 Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 n.a (1818).

29 *Id.* at 235.

30 *Id.* at 235 n.a.

the next decade. In *Elliott v. Peirsol*,[31] the plaintiffs sought, in federal circuit court for Kentucky, to prevail on an ejectment action.[32] The plaintiffs founded their action upon a Kentucky state court judgment.[33] The defendants sought to attack collaterally the state court judgment for lack of subject matter jurisdiction.[34] Strictly speaking, *Elliott* did not involve interstate recognition of judgments, and thus did not directly implicate the full faith and credit concerns that animated *Mills*. The *Elliott* Court brushed this distinction aside, however, and held that a collateral attack based on jurisdictional grounds was permissible.[35]

All doubt about the availability of a collateral attack for either lack of personal jurisdiction or subject matter jurisdiction was removed by *D'Arcy v. Ketchum*.[36] In *D'Arcy* the plaintiffs were assignees of a note executed by each of the four defendants.[37] Upon nonpayment of the note the plaintiffs brought an action in the Superior Court of the City of New York.[38] The record lacked any evidence that any of the defendants had been served with process,[39] and only defendant Gossip appeared.[40] Subsequently, however, Gossip defaulted, and plaintiffs took judgment in the amount of the prayer.[41]

New York, at that time, had a "joint debtors" statute that provided for entry of judgment against each joint obligor as long as one of them was brought into court.[42] After taking judgment in the New York court, the plaintiffs sought to enforce the judgment by filing an action on the judgment in the federal circuit court for the District of Louisiana, the home of D'Arcy, one of the debtors

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31 26 U.S. (1 Pet.) 328 (1828).

32 *Id.* at 330.

33 *Id.* at 334.

34 *Id.* at 340.

35 *Id.*

36 52 U.S. (11 How.) 165 (1850).

37 *Id.* at 173.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* Actually, the judgment was for a few dollars less than the original note, although the judgment appears to have been in the amount of the prayer. The original note was in the amount of $1,461.87. *Id.* at 165. The judgment was in the amount of $1,418.81 plus $52.06 in costs. *Id.* at 166. The reason for the small difference is not revealed in the Court's opinion, although it may be that the debtors had made a small payment on the note.

42 *Id.* at 173.

not brought before the New York court.[43] After being served in the collateral Louisiana proceeding, D'Arcy resisted on the grounds that the plaintiffs had not served him with process in the underlying action.[44] The Court began its jurisdictional analysis by referring to general principles of international law that require a person to have notice and a day in court in order for a judgment to be binding.[45]

The Court then considered *Mills*, and concluded that its reasoning did not preclude a collateral attack on a judgment for lack of personal jurisdiction.[46] Congress, according to the *D'Arcy* Court, had meant to alter the common law only on the evidentiary effect of judgments, not on the availability of a collateral jurisdictional defense to attempted interstate enforcement.[47] On the merits of the jurisdictional argument, the Court also sided with defendant D'Arcy.[48] Again, according to principles of "international law," a nonresident defendant could only be held to answer in a court only if the defendant was "served with process or voluntarily made defence."[49]

D'Arcy was an important opinion for at least two reasons. First, it established the principle, initially articulated in Justice Johnson's dissent in *Mills*, that a collateral attack on a sister state judgment for lack of personal jurisdiction does not offend either the full faith and credit clause or its implementing statute. Second, and more important for our purposes, *D'Arcy* established that the Court could enforce rules of personal jurisdiction, without any specific constitutional directive, according to principles of inter-

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43 *Id.*

44 *Id.*

45 The Court stated:

> That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse. . . . We deem it free from controversy that these [authorities] are in conformity to the well-established rules of international law, regulating governments foreign to each other; and this raises the question, whether [the full faith and credit clause and the Full Faith and Credit Act of 1790] have altered the rule?

Id. at 174.

46 *Id.* at 176.

47 *Id.*

48 *Id.*

49 *Id.*

national law as the Court understood them. The *D'Arcy* Court made clear that its sole concern was with whether the full faith and credit clause and statute had *altered* these jurisdictional norms, and not with whether the clause and the statute gave the federal courts any independent authority to enforce jurisdictional rules. Rather, the *D'Arcy* Court evidently understood the principles of in personam jurisdiction to be a matter of common law that the federal courts could enforce if the plaintiff sought to enforce the judgment across state lines.[50]

Subsequently, the Court demonstrated that these principles were not entirely rigid. In *Lafayette Insurance Co. v. French*,[51] the plaintiff had obtained a default judgment in an Ohio state court against his insurer after serving a sales agent of the insurer in Ohio.[52] The defendant-insurer was an Indiana corporation.[53] The defendant resisted enforcement in an Indiana federal court on the grounds that the Ohio state court had lacked jurisdiction over it to enter the default.[54] Ohio had enacted a statute providing that any agent of an out-of-state corporation was "deemed" to be the corporation's agent for service of process.[55] The Court upheld this exercise of jurisdiction on the grounds that Ohio was free to extract the jurisdictional "consent" of nonresident corporations as a condition of doing business in Ohio.[56] *Lafayette* thus demonstrated that the territorial principles, as interpreted by the Court, did not foreclose some degree of jurisdictional innovation. In fact, the fictionalized notion of "consent" employed by *Lafayette* would come to be the centerpiece of the Court's jurisdictional jurisprudence several decades later.[57]

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50 Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852, 872-74 (1989) (stating that territorial principles of jurisdiction developed as a matter of international common law); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 503-04 (1981) [hereafter Whitten (pt. 1)] (same).

51 59 U.S. (18 How.) 404 (1855).

52 *Id.* at 404.

53 *Id.*

54 *Id.* at 405.

55 *Id.* at 407.

56 *Id.*

57 *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (holding not due process violation to deem that out-of-state automobile travellers have "consented" to jurisdiction in Massachusetts in litigation arising out of auto accidents within state). Although *Lafayette* was the first Supreme Court case to employ the highly fictionalized notion of consent, it appeared at least as

D'Arcy and *Lafayette* were cases involving interstate collateral attacks.[58] Interstate collateral attacks raise full faith and credit concerns.[59] A plaintiff of that era seeking enforcement of a judgment in a state other than the judgment-rendering state would argue that *Mills* required the second state to give conclusive effect to the first state's judgment. A defendant of that era raising a jurisdictional defense to the enforcement of the judgment would argue that the full faith and credit clause, and the 1790 statute, contained an exception for judgments rendered in violation of the prevailing international law standards of jurisdiction. *Intrastate* collateral attacks, in which enforcement is sought and resisted in the state of rendering, however, do not raise similar full faith and credit concerns. The full faith and credit clause and statute are directed only at the question of recognition of judgments across forums.[60] Unless some other constitutional provision applies, there is no reason that a state cannot give as much or as little effect to its *own* judgments as it chooses.[61]

Two cases decided shortly before *Pennoyer*, in which the Court applied state law to determine the propriety of intrastate recognition of judgments, illustrate this distinction between intrastate and interstate recognition. In the first case, *Cooper v. Reynolds*,[62] the plaintiff in the underlying action had obtained a default judgment in a Tennessee state court after obtaining a prejudgment attachment of the defendant's land.[63] Subsequently, the land was sold at a sheriff's sale and title passed to a third party.[64] The

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early as 1834 in lower court decisions. *See Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 920 (1960) [hereafter *State Court Jurisdiction*] (discussing state court "implied consent" decisions).

58 In other words, the plaintiffs sought to enforce the judgments in states other than where they were rendered, and were met with jurisdictional objections.

59 Transgrud, *supra* note 50, at 874 (noting applicability of full faith and credit clause and statute in interstate judgment-recognition cases); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 821-22 (1981) [hereafter Whitten (pt. 2)] (same).

60 Whitten (pt. 1), *supra* note 50, at 503-04.

61 Whitten (pt. 2), *supra* note 59, at 824 (stating that "[a] more plausible reason for the lack of authority on [Justice] Field's side [in *Pennoyer*] is that the state courts generally never dreamed of the territorial rules as limits on the power of their legislatures").

62 77 U.S. (10 Wall.) 308 (1870).

63 *Id.* at 314.

64 *Id.* at 312.

defendant in the underlying action then brought an action in Tennessee federal court to eject the party holding title under the sheriff's deed, claiming that the Tennessee state courts never obtained jurisdiction.[65] Although the Court disclaimed any ability to review directly the decision of the Tennessee court in the underlying action,[66] the Court ultimately determined that the Tennessee court had jurisdiction because "we believe this to be the law, as held by the courts of Tennessee."[67]

In the other case decided shortly before *Pennoyer*, *Galpin v. Page*,[68] the plaintiff in the underlying action "constructively" served an out-of-state infant defendant by publishing notice of the pendency of the action in a California newspaper.[69] This service was the basis for a decree entered against the underlying defendant without any appearance on her behalf.[70] After the underlying plaintiff took possession of some property under this decree, the underlying defendant commenced an action in California federal court to eject the underlying plaintiff on the grounds that the state court lacked jurisdiction.[71]

Justice Field, writing for the Court, commenced his discussion with a review of the general principles of territorial jurisdiction. In personam jurisdiction, according to Field, required either personal service of process within the state, or the voluntary appearance of the defendant.[72] Indeed, these were the same principles of international law that the Court had consistently applied in cases of *interstate* recognition of judgments.[73] Had these principles been fully applicable in an *intrastate* recognition case such as *Galpin*, however, the case would have been decided swiftly because the underlying defendant was not personally served, and no appearance was made on her behalf.[74] Noncompliance with the territorial principles of jurisdiction, however, was not a sufficient basis for Field to decide *Galpin*. After reviewing the record and territorial principles, Field concluded that the state court

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65 *Id.* at 315.
66 *Id.* at 315-16.
67 *Id.* at 321.
68 85 U.S. (18 Wall.) 350 (1873).
69 *Id.* at 353.
70 *Id.* at 354.
71 *Id.* at 355-56.
72 *Id.* at 365-66.
73 *See supra* notes 59-61 and accompanying text.
74 Galpin v. Page, 85 U.S. (18 Wall.) 350, 354-56 (1873).

lacked jurisdiction because service did not comply with the state's "service by publication" statute.[75] Field clearly stated that states were free to pass statutes extending their reach beyond the territorial principles; Field's analysis simply required a narrow reading of such statutes.[76]

These cases rounded out the jurisdictional picture on the eve of *Pennoyer*. Out-of-state judgments were entitled to conclusive effect under the full faith and credit clause and statute as interpreted by *Mills v. Duryee*.[77] Judgments need not be recognized, however, in interstate cases if entered without jurisdiction under the international rules of jurisdiction[78] as construed by the Supreme Court.[79] These rules as interpreted by the Court allowed for in personam jurisdiction based upon consent, voluntary appearance, or personal service within the forum, although the Court had shown some willingness to stretch the notion of consent.[80] In rem jurisdiction had to be based upon attachment of property within the state, and was effective only to the value of the property.[81] Different rules governed intrastate recognition cases; the sole question was whether the court rendering the judgment followed the applicable state statutes.[82]

2. *Pennoyer*

This legal history made *Pennoyer v. Neff*[83] an even more remarkable case.[84] Attorney J.H. Mitchell fired the first shot in *Pennoyer*

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75 *Id.* at 372-73.

76 Field stated:

> When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a *strict and literal compliance with the statutory provisions.*

Id. at 369 (emphasis added).

77 11 U.S. (7 Cranch) 481, 483-84 (1813).

78 *See supra* note 49 and accompanying text.

79 *See supra* notes 22-61 and accompanying text.

80 *See supra* notes 51-57 and accompanying text.

81 *See, e.g.*, Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873).

82 *See supra* note 76 and accompanying text. Intrastate recognition cases might be subject to a presumption against finding jurisdiction if the court exercises authority beyond the territorial principles. *See, e.g.*, Galpin v. Page, 85 U.S. (18 Wall.) 350, 356-57 (1873).

83 95 U.S. 714 (1877).

84 *Pennoyer* involved an extremely colorful cast of characters including "a

when he recovered a default judgment in Oregon state court in February, 1866 for less than $300 against his former client, Marcus Neff, for allegedly unpaid legal fees.[85] Neff, at that time, was not domiciled in Oregon and was not served with process while in the state.[86] Instead, Mitchell served Neff pursuant to the Oregon Code by publishing notice of the action in an Oregon newspaper for six weeks.[87] After Neff failed to answer the summons, Mitchell had Neff's real property within the state attached and sold at a sheriff's sale.[88] Pennoyer eventually came into possession of the property under the sheriff's deed resulting from the *Mitchell v. Neff* litigation.[89]

Years later, Neff returned to Oregon, and discovered Pennoyer in possession of the land, now alleged to be worth $15,000.[90] Neff then filed an ejectment action in Oregon federal court on September 10, 1874.[91] The lower federal court, in an opinion by Judge Matthew Deady, held for Neff, concluding that Mitchell had not complied with the Oregon substituted service statute in two particulars.[92] First, the Oregon statute required an affidavit from the newspaper's "printer," but Mitchell had provided the affidavit of an "editor" instead.[93] Second, the Oregon statute provided

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bigamous United States Senator who was elected under an alias [Mitchell], a governor of Oregon who used his inauguration as a platform to decry his loss in the case [Pennoyer], and an illiterate but litigious settler [Neff]." Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 479-80 (1987). For interesting historical accounts of the characters see *id.* at 480-90 and Silberman, *supra* note 3, at 33-34.

85 *Pennoyer*, 95 U.S. at 719.

86 *Id.* at 719-20.

87 *Id.* at 718; *see also* Perdue, *supra* note 84, at 484-85 (noting service methodology). The newspaper was the *Pacific Christian Advocate*, a publication "devoted primarily to religious news and inspirational articles," and having almost no circulation outside of Oregon. *Id.* at 485.

88 *Pennoyer*, 95 U.S. at 719-20.

89 *Id.* at 719. The Supreme Court's opinion implied that the purchaser at the sale was Sylvester Pennoyer. *Id.* at 736 (Hunt, J., dissenting). The dissent stated that "the land in question . . . was bought by the defendant Pennoyer, at a sale upon the judgment in such suit." *Id.* The majority opinion does not take issue with this assertion. *Id.* at 719. Judgment creditor Mitchell, however, actually bought the property, but then sold it three days later to Pennoyer. *See* Perdue, *supra* note 84, at 486.

90 *Pennoyer*, 95 U.S. at 719.

91 Perdue, *supra* note 84, at 487.

92 Neff v. Pennoyer, 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083).

93 *Id.* at 1287-88.

for service by publication when "the defendant after due diligence cannot be found within the state."[94] Deady concluded that Mitchell's cursory affidavit stating that Neff was "a nonresident of [Oregon], that he resides somewhere in the State of California, at what place affiant knows not," did not fulfill the statutory purpose of giving actual notice if reasonably possible.[95] Deady's cautious opinion was fully consistent with the Supreme Court's approach, most notably in *Galpin v. Page*,[96] of limiting the issue to statutory construction in *intrastate* collateral attacks.[97]

The Supreme Court entertained a writ of error from Pennoyer. The Court affirmed the lower court's holding, but on a far broader and less comprehensible rationale. Justice Field, writing for the Court, began his analysis with a review of the facts and the Oregon statute.[98] Field then digressed to note that a majority of the Court disagreed with Deady's construction of the Oregon statute.[99] The Court concluded that Mitchell's affidavit was sufficient because the statute required only an affidavit that satisfied the trial judge in the underlying action, and thus noncompliance with the statute was not a basis for collateral attack.[100] The Court also rejected the lower court's rationale that an affidavit of an

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94 OR. CODE CIV. PROC. § 55 (appearing in THE ORGANIC & OTHER GENERAL LAWS OF OREGON (1874)) (current version at OR. R. CIV. P. 7F).

95 Pennoyer v. Neff, 95 U.S. 714, 717 (1877) (quoting Mitchell's affidavit); *see also* Neff v. Pennoyer, 17 F. Cas. 1279, 1287 (C.C.D. Or. 1875) (No. 10,083).

96 85 U.S. (18 Wall.) 350 (1873).

97 *See supra* notes 68-76 and accompanying text.

98 *Pennoyer*, 95 U.S. at 719-20. Early in the opinion Field summarized the Oregon jurisdictional statutes as follows:

> The Code of Oregon . . . declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and in the last case, only to the extent of such property at the time the jurisdiction is attached." Construing this . . . provision to mean, that, in an action for money damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.

Id. at 720.

99 *Id.* at 721.

100 *Id.*

"editor" was insufficient, concluding that the term "printer" encompassed an editor.[101]

Field then turned his attention to the problem of jurisdiction with his now-famous dissertation on in rem and in personam jurisdiction. These rules, Field stated, flowed from "two well-established principles of public law."[102] The first principle was that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[103] The second was "that no State can exercise direct jurisdiction and authority over persons or property without its territory."[104] From these general principles Field attempted to derive the common law of jurisdiction as he understood it. In personam jurisdiction existed only if the defendant was served with process while in the forum, voluntarily appeared, or consented to jurisdiction.[105] In rem jurisdiction existed only if the defendant had property in the forum and the property came within the control of the court.[106] In rem judgment creditors could enforce only against the property brought within the court's control.[107]

Applying these principles, Field concluded that the Oregon state court lacked jurisdiction, and thus its judgment was void. As for in personam jurisdiction, the lack of in-state service or an appearance was fatal.[108] As for in rem jurisdiction, Field concluded that the failure to attach the property at the *commencement* of the litigation foreclosed the possibility of in rem jurisdiction.[109] Field cited no authority for this proposition, but reasoned that "jurisdiction . . . cannot be made to depend upon facts to be ascertained after [the court] has tried the cause and rendered the judgment."[110]

Field then began a canvass of several of the Court's cases on

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101 *Id.*

102 *Id.* at 722.

103 *Id.*

104 *Id.*

105 *Id.* at 724-25.

106 *Id.*

107 *Id.*

108 *Id.* at 727. In fact, the parties did not even argue that in personam jurisdiction existed, but focused instead upon the possibility of in rem jurisdiction. *See* Perdue, *supra* note 84, at 498 (citing Neff v. Pennoyer, 17 F. Cas. 1279, 1280-81 (C.C.D. Or. 1875) (No. 10,083)).

109 Pennoyer v. Neff, 95 U.S. 714, 728 (1877).

110 *Id.* at 728.

interstate recognition of judgments,[111] including a review of *D'Arcy*[112] and *Lafayette*.[113] Field recognized that these were cases of interstate recognition, stating that they all involved attempts "to enforce such judgments *in States other than those in which they were rendered*, under the [full faith and credit clause and the 1790 statute]."[114]

Field then faced the single greatest analytical difficulty in *Pennoyer*:[115] How to convert these principles of *interstate* recognition

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[111] *Id.* at 729-32.

[112] *See supra* notes 36-50 and accompanying text.

[113] *See supra* notes 51-57 and accompanying text.

[114] *Pennoyer*, 95 U.S. at 729 (emphasis added).

[115] Field clearly understood the monumental nature of the task facing him. After reviewing the law in interstate cases he noted:

> In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, — *it is difficult to see how the judgment can legitimately have any force within the State.* The language used [in the interstate cases] can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted.

Id. at 732 (emphasis added). The Court had always treated interstate and intrastate recognition cases separately and had always treated a federal court within a state as a state court for this purpose. The lone possible exception was Elliott v. Peirsol, 26 U.S. (1 Pet.) 328 (1828). *See supra* notes 31-35, 62-82 and accompanying text. Field, however, did not cite *Elliott* in this portion of his opinion.

Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873), authored by none other than Justice Field a mere four years earlier, illustrated this point neatly. *Galpin*, just as *Pennoyer*, was a case of intrastate recognition (a federal court confronting a judgment of its home state's courts). *See supra* notes 68-76 and accompanying text. In *Galpin*, however, Justice Field confined himself to interpreting the California statute. *See Galpin*, 85 U.S. (18 Wall.) at 369. In *Galpin*, the only role that Field saw for the territorial principles of jurisdiction was that a state attempting to extend its jurisdiction beyond the territorial principles lost the *presumption* of jurisdiction, and the recognizing forum would construe the statute against finding jurisdiction. *Id.* at 368. This modest assertion, however, was light years from the proposition that a state

to principles of general applicability that would govern even *intrastate* recognition cases. Field elected to invoke the due process clause to convert the interstate principles to intrastate principles.[116]

Field's analytical approach presented so many conundrums that it is probably not possible to catalog all of them. Nonetheless, a review of some of them is necessary to confront the major interpretive issues left in *Pennoyer*'s wake. The first difficulty was the timing of the case in relation to the ratification of the fourteenth amendment. Recall that the underlying state court judgment was entered in 1866, two years *before* ratification.[117] If the fourteenth amendment was a crucial element in invalidating the underlying judgment, and the opinion certainly suggested that this was so, how could it have acted retroactively? Commentators,[118] and more recently the Court,[119] have charitably referred to the due

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may not recognize one of its *own* judgments entered beyond the traditional limits of jurisdiction.

[116] Field stated:

> [T]he courts of the United States are not required to give effect to judgments [that would not be enforceable in interstate cases] when any right is claimed under them. Whilst they are not foreign tribunals in their relations to State courts, they are tribunals of different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.
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> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement *in the State* directly resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law. . . . To give [state] proceedings any validity [to determine] . . . the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Pennoyer, 95 U.S. at 732-33 (emphasis added).

[117] The underlying default judgment was entered in February, 1866. *See supra* text accompanying note 85. The fourteenth amendment was ratified in July, 1868. Proclamation 13, 40th Cong., 2d Sess., 15 Stat., app. at 708 (1868).

[118] *See* Perdue, *supra* note 84, at 502-03 (referring to due process analysis as "dictum" because of timing issue); Whitten (pt. 2), *supra* note 59, at 821 (same).

[119] Burnham v. Superior Court, 110 S. Ct. 2105, 2113-14 (1990) (plurality opinion).

process discussion as "dictum" because of this obvious problem of timing. The Court's language did not treat the discussion as surplusage, however; rather, it treated the due process clause as a central element of the case.[120] The more likely explanation is that Field was lulled by the fact that the collateral proceeding was not initiated until 1874,[121] six years *after* ratification, and simply overlooked the timing problem.

Another major difficulty was Field's treatment (or more correctly nontreatment) of *Galpin*. *Galpin* involved facts almost precisely parallel to *Pennoyer*.[122] Both *Pennoyer* and *Galpin* centered on the problem of recognition by a federal court of a state court judgment, based on service by publication, rendered in the federal court's home state. Moreover, both cases were decided after ratification of the fourteenth amendment.[123] In *Galpin*, Field treated the problem of recognition as one of statutory construction, never invoking the fourteenth amendment, and specifically affirming the right of states to exercise jurisdiction beyond the confines of the territorial rules of jurisdiction.[124] Field conspicuously ignored *Galpin* in *Pennoyer*, however, neither citing nor discussing it. Curiously, Justice Hunt's dissent in *Pennoyer* cited *Galpin*, stating that "[t]he case of *Galpin v. Page* . . . is cited in hostility to the views that I have expressed."[125] The inescapable inference is that some earlier draft of the *Pennoyer* majority opinion *did* attempt to deal with *Galpin*, and that Field eventually abandoned the task, realizing that the rationales, if not the holdings, of the cases were inconsistent.

All this, then, brings us to the central mystery of *Pennoyer*: what role is the due process clause supposed to play in personal jurisdiction? The opinion was ambiguous on this point. There are at least two possible readings, the first of which I will call the "expansive" view of *Pennoyer*, and the second the "limited" view of *Pennoyer*.

The expansive view of *Pennoyer* is that the Court intended for the due process clause to provide both a mechanism for challeng-

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120 *See Pennoyer*, 95 U.S. at 733.

121 *See supra* text accompanying note 91.

122 *See supra* notes 68-76 and accompanying text.

123 *Galpin* was decided in 1873. Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873). The *Galpin* decision came five years after the ratification of the fourteenth amendment. *See supra* note 117 and accompanying text.

124 *Galpin*, 85 U.S. (18 Wall.) at 371-72.

125 Pennoyer v. Neff, 95 U.S. 714, 743 (1877) (Hunt, J., dissenting).

ing, either interstate or intrastate, state court assertions of personal jurisdiction, *and* the contents of the jurisdictional rules themselves. Put another way, *Pennoyer*, under this view, meant to render unconstitutional *any* state court assertion of personal jurisdiction beyond the territorial principles and allow a defendant to attack the judgment either intrastate or interstate.[126]

Certainly, this is not an implausible reading of *Pennoyer*. Field's discussion of the territorial principles, complete with its division of in personam and in rem jurisdiction, was written as if etched in stone, and binding upon all governments through eternity.[127] Beyond this, Field included in his due process discussion the admonition that to give state proceedings "*any validity*" requires that a defendant "be brought within [the state's] jurisdiction by service of process within the State, or his voluntary appearance."[128]

The expansive view is further bolstered by the fact that the two commentators upon whom Field relied, Story[129] and Cooley,[130] seemed to take the view that due process limits the jurisdictional reach of state courts. Justice Hunt also took the expansive view of *Pennoyer* in his dissent, stating that "[t]he judgment of this court is based upon the theory that the legislature has no power to pass

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126 Professor Whitten, in a penetrating article written in 1981, argued for the expansive view, concluding that "[i]t was [the] imposition of the international territorial restrictions directly on the legislative power of states through the due process clause that constituted Field's major accomplishment, and there can be little doubt that the incorporation of these standards was his objective in *Pennoyer*." Whitten (pt. 2), *supra* note 59, at 833.

127 *Pennoyer*, 95 U.S. at 722-34. For instance, Field asserted that service by publication upon a nonresident "is ineffectual for any purpose." *Id.* at 727.

128 *Id.* at 733 (emphasis added).

129 J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 539, 546 (7th ed. 1872) (cited in *Pennoyer*, 95 U.S. at 722). Joseph Story was a Justice of the United States Supreme Court who has been described as "the greatest American conflicts lawyer." Juenger, *Governmental Interests and Multistate Justice: A Reply to Professor Sedler*, 24 U.C. DAVIS L. REV. 227, 252 (1990).

130 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 404-05 (1868) (cited in *Pennoyer*, 95 U.S. at 733-34). Thomas Cooley was a highly respected post-civil war commentator on constitutional law and an associate justice of the Michigan Supreme Court. *See generally* Jones, *Thomas Cooley and "Laissez Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967).

the law in question . . . and every proceeding under it is void."[131]

The "limited" view of *Pennoyer* is also plausible, however.[132] The limited view of *Pennoyer* is that Field intended for the due process clause to provide an avenue for challenging a state's exercise of personal jurisdiction in all cases, whether or not recognition of the judgment was sought interstate or intrastate, but did *not* intend to have the due process clause dictate the contents of those rules of jurisdiction. Put another way, Field, under the limited view, intended for defendants to have at least one chance to ensure that a state followed its own rules of jurisdiction, whatever those rules might be.

Understanding why the limited view is also plausible requires a return to Field's construction of Oregon's rules of personal jurisdiction.[133] Field construed the Oregon Code to allow for personal jurisdiction, either in rem or in personam, only in accordance with the territorial principles.[134] Thus, Field took no great issue with the Oregon Code on the subject of personal jurisdiction. Seen in this light, Field evidently viewed section 55 of the Oregon Code, the statute upon which the lower court fixed its attention, simply as a "notice" statute, not as a statute to extend Oregon's jurisdictional reach.[135] This reading, then, fits well with

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131 Pennoyer v. Neff, 95 U.S. 714, 736 (1877) (Hunt, J., dissenting) (emphasis added).

132 Although not employing my "expansive"/"limited" terminology to explain *Pennoyer*, other commentators have read *Pennoyer* in ways that I take to espouse the "limited," or a similar, view. *See, e.g.*, Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029-31 (1983) (assuming *Pennoyer*'s analysis does not necessarily enshrine territorial principles of jurisdiction); Perdue, *supra* note 84, at 505 (stating that "[*Pennoyer*] strongly suggests that the due process clause is not itself the source of the personal jurisdiction principles"); Transgrud, *supra* note 50, at 876 (stating that "Justice Field did not contend, nor could he, that the Due Process Clause was the source of the territorial rules of jurisdiction he articulated"). Writing in 1929, Professor Dodd noted the difference between the "internal" and "external" operation of judgments. *See* Dodd, *supra* note 3, at 432. Professor Dodd noted that English courts took the position that acts of Parliament could enlarge their jurisdiction, even though English courts would refuse to recognize judgments relying on similar jurisdictional bases in foreign countries. *Id.* at 433. Professor Dodd, however, viewed *Pennoyer* as collapsing the distinction between the internal and external operation of judgments, *id.* at 433 n.21, which is the essence of the "expansive" reading of *Pennoyer*.

133 *See supra* note 98 and accompanying text.

134 *Pennoyer*, 95 U.S. at 720.

135 *Id.* at 721-22 (construing § 55).

Field's confident assertion early in the opinion that the Oregon Code, as construed by the *Pennoyer* majority, "expresses a principle of general, if not universal, law."[136]

The long discussion of in personam and in rem jurisdiction that followed can be seen as an exposition of these "general principles" in an effort to give content to the Court's construction of the Oregon statutes set forth early in the opinion. With this understanding, it appears that the Court was far *less* concerned with the contents of Oregon's jurisdictional rules, because these were settled as a result of the Court's interpretation of Oregon law, and far *more* concerned with developing an enforcement mechanism for those rules. Field struggled primarily with the question of enforcement just prior to invoking the fourteenth amendment.[137] As Field noted, all of the cases upon which he wanted to rely were *interstate* enforcement cases, in which the jurisdictional question necessarily presented itself in the context of deciding whether to give the out-of-state judgment full faith and credit.[138] Field viewed this as an anomaly, however; an enforcement mechanism existed in interstate recognition cases, but not in intrastate recognition cases.[139]

Field's response to this perceived inadequacy was two-part. First, in cases in which the collateral proceeding took place in the federal court within the judgment-rendering state,[140] Field allowed an avenue of challenge by providing that the federal court should treat the state court as a *foreign*[141] court.[142] Field concluded:

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136 *Id.* at 720.

137 *Id.* at 732.

138 *Id.*

139 *Id.*

140 Cases such as the *Pennoyer* case itself.

141 Aside from the difficulty that it contradicted *Galpin* and other cases treating federal courts within the state as state courts for judgment recognition purposes, this was not an unreasonable interpretation of the Full Faith and Credit *Act* of 1790. *See supra* note 60 and accompanying text. Although the full faith and credit *clause*, U.S. CONST. art. IV, § 1, speaks only of state courts, the *Act* specifically refers to "every court of the United States." This language certainly could be understood to require the enforcement of full faith and credit standards in cases of federal court recognition of judgments rendered in their home state's courts, although the Court did not so interpret the statute in *Galpin*. *See* R. CASAD, JURISDICTION IN CIVIL ACTIONS, ¶ 2.02(1)(a), at 2-8 n.17 (1983).

142 Pennoyer v. Neff, 95 U.S. 714, 732-33 (1877).

> [T]he courts of the United States are not required to give any effect to judgments [that would not be enforceable in interstate cases] when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give the judgments of the State courts only the same faith and credit which the courts of *another* State are bound to give them.[143]

This cured the perceived problem of federal court enforcement, but left unaddressed the right of a collateral attack in the *same* state courts that rendered the judgment. For this matter, Field invoked the due process clause.[144] Field wrote:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such 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.[145]

Under the limited view, Field was concerned with the availability of at least one challenge to a state's exercise of personal jurisdiction; he was not concerned with binding the states to any certain scheme of personal jurisdiction.

Not only is the limited view plausible in light of the opinion, it is plausible in view of prior authority. The commentaries cited by Field were not necessarily inconsistent with the limited view. In the crucial passage in Story's treatise, in which he discussed assertions of jurisdiction beyond the territorial principles, he stated that "[t]he effects of all such proceedings *are purely local*; and elsewhere, they will be held to be mere nullities."[146] This, of course, was consistent with the limited view. Cooley's treatise was ambiguous on the point; in the crucial passage Cooley noted that "[t]he right of the legislature to prescribe such notice, *and to give effect as process*, rests upon the necessity of the case, and has been long recognized and acted upon."[147] As Professor Whitten's exhaustive survey of Cooley's citations has demonstrated, the only case that Cooley cited that might have supported the proposition that due process generally limits the jurisdictional reach of state

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143 *Id.* (emphasis added).

144 *Id.* at 733.

145 *Id.* (emphasis added).

146 J. STORY, *supra* note 129, at § 546 (emphasis added).

147 T. COOLEY, *supra* note 130, at 404; *see also* Whitten (pt. 2), *supra* note 59, at 827-28 (discussing ambiguity of Cooley's treatise on this point).

courts was *Beard v. Beard*,[148] which was itself ambiguous on this point.[149]

The limited view does not necessarily clash with prior Supreme Court authority either. In *Lafayette*,[150] for instance, the Court employed a notion of "consent" far broader than any previously known, and thus showed itself to be not entirely resistant to state jurisdictional innovation.[151] Although Field's omission of *Galpin* was still troubling, and probably intentional,[152] the limited view comes closer than the expansive view to reconciling *Pennoyer* with *Galpin* and similar cases. *Galpin* contemplated some substantial role for the states in defining their own jurisdictional reach.[153] *Galpin* simply demanded that states play strictly and literally by their own rules.[154] *Pennoyer*, under the limited view, evinced the same philosophy. *Pennoyer* simply created an avenue for defendants to enforce the jurisdictional rules.

In the final analysis it is impossible to demonstrate conclusively the authenticity of either the limited or the expansive view. Both views draw enough support from the text of the opinion and the background authority to pass the threshold of plausibility. The important point for our purposes, however, is that *both* views were plausible, and that *Pennoyer* itself did not settle the role of due process as a limitation on the reach of state courts.

B. 1877 to 1945: Pennoyer *to* International Shoe

1. 1877 to 1915: Interpreting *Pennoyer*

Pennoyer left the matter of whether there was a general constitutional limitation on the reach of state courts in splendid ambiguity. Either the limited or expansive view of *Pennoyer* was plausible given the text of the opinion and the precedential backdrop. Over the next sixty-eight years, between *Pennoyer* and *International Shoe*,[155] the Court produced a torrent of jurisdictional opinions.[156] In the years immediately following *Pennoyer*, the Court strongly suggested that the correct reading of *Pennoyer* was the

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148 21 Ind. 321 (1863).
149 *See infra* note 460 and accompanying text.
150 Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).
151 *See supra* notes 51-57 and accompanying text.
152 *See supra* text accompanying note 125.
153 *See supra* notes 68-76 and accompanying text.
154 *See supra* notes 75-76 and accompanying text.
155 International Shoe Co. v. Washington, 326 U.S. 310 (1945).
156 *See infra* notes 169 & 220 and accompanying text.

limited reading. Four decades passed, however, before the Court confronted the question explicitly.

Justice Field authored an illuminating opinion on the issue only three years after *Pennoyer*. In *Insurance Co. v. Bangs*,[157] Field contemplated that state courts could formulate their own jurisdictional rules, including rules of substituted service in in personam actions.[158] This comported only with the limited reading of *Pennoyer*. The expansive view asserts that *Pennoyer* incorporated the territorial principles into the due process clause and made them binding on the states, even in the context of a state court recognizing one of its own judgments. The expansive view, however, conflicts with Field's own statements in *Bangs* that state court jurisdictional rules may differ from federal jurisdictional rules.[159]

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157 103 U.S. 435 (1880).

158 In *Bangs*, the plaintiff, the minor son of the defendant's insured, brought an action to recover on two life insurance policies. *Id.* at 435. The plaintiff-beneficiary commenced the action in Minnesota state court and the defendant-insurer then removed it to Minnesota federal court. *Id.* In the interim, the defendant-insurer filed a declaratory relief action against the plaintiff-beneficiary in Michigan federal court, seeking an adjudication that a policy exclusion applied. *Id.* at 436. The beneficiary, formerly a domiciliary of Michigan, had a "general guardian" located in that state. *Id.* The marshall, unable to locate the beneficiary within Michigan, served the general guardian. *Id.* at 437. The Michigan federal court held service was sufficient, and subsequently entered judgment for the insurer. *Id.* The insurer then moved to amend its pleadings in the Minnesota action to set up the Michigan judgment as a bar. *Id.* at 436-37.

The Supreme Court held that the failure to serve the beneficiary in Michigan was fatal to jurisdiction in the Michigan federal court action. *Id.* at 439. In so holding, however, the Court distinguished this from state practice:

> The statute of Michigan . . . does not change the necessity of service of process upon the defendants in a case before a court of the United States . . . . It may be otherwise in the State courts; it may be that, by their practice, the service of process upon the general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some states such is the fact. . . . *Substituted service, by publication, against non-resident or absent parties, allowed in some States in purely personal actions*, is not permitted in the Federal Courts.

Id. at 439 (emphasis added).

159 Field dropped at least one other hint that he held the limited view of *Pennoyer*. In St. Clair v. Cox, 106 U.S. 350 (1882) (Field, J.), the Court considered recognition of a Michigan state court judgment. The Court concluded that the Michigan state court had jurisdiction, therefore entitling its judgment to recognition. *Id.* at 356. The Court found that the judgment

Four years later the Court gave a ringing endorsement to the limited reading. In *Hart v. Sansom*,[160] the Court refused to recognize a Texas state court judgment in Texas federal court because the state court lacked jurisdiction under the territorial principles.[161] The judgment had been entered after service by publication on a noncitizen of Texas.[162] The Court stated, however, that courts of the judgment-rendering state "might feel bound" to give effect to extra-territorial service statutes.[163] For this proposition the Court cited *Pennoyer*.[164] It is hard to imagine a clearer statement of the limited reading of *Pennoyer*. The only reason that a state court "might feel bound" to give effect to such statutes is that they are constitutional, at least in the case of a state court enforcing one of its *own* judgments. *Hart* illustrates where the limited and expansive readings of *Pennoyer* part company. The expansive reading advances the thesis that *Pennoyer* rendered such

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debtor, a corporation, had transacted enough business in Michigan to indicate its "consent" to service of process. *Id.* In the course of reaching this conclusion, Field, describing *Pennoyer* in circumscribed terms, stated that "[i]n *Pennoyer v. Neff* we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents *which would be received as evidence in the federal courts*." *Id.* at 353 (emphasis added). Again, Field would have no occasion to describe *Pennoyer* in these narrow terms if he held the expansive view to the effect that a state court judgment entered on a nonterritorial jurisdictional basis was void even within the judgment-rendering state.

160 110 U.S. 151 (1884).

161 *Id.* at 155. Plaintiff Hart sued in Texas federal court to recover land from which defendant had ejected him. *Id.* at 152. The defendant opposed the action with a Texas state court judgment entered against Hart, and others, purporting to quiet title in the defendants. *Id.* at 152-53. The defendant could not locate Hart, a noncitizen of Texas, in Texas and served him by publication. *Id.* at 153.

162 *Id.*

163 *Id.* at 155. In so doing, the Court offered the following summary of the law of the recognition of judgments:

> Such a decree, being *in personam* merely, can only be supported against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction, and constructive service of process by publication in a newspaper is not sufficient. *The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes*. But no court deriving *its authority from another government will recognize a merely constructive service* as bringing the person within the jurisdiction of the court.

Id. (emphasis added).

164 *Id.* at 156.

statutes unconstitutional without regard to the court in which recognition of the judgment was sought. The Court in *Hart*, however, recognized an exception if the judgment creditor sought recognition in the same state court rendering the judgment.[165] This comported only with the thesis advanced by the limited reading of *Pennoyer*.

In later years, the Court continued to write as if the limited view of *Pennoyer* were correct. In *Grover & Baker Sewing Machine Co. v. Radcliffe*, the Court noted with approval that the state courts of Maryland and Pennsylvania appreciated "the distinction between the validity of a judgment rendered in one State, under its local laws on the subject, and its validity in another state."[166] In *Goldey v. Morning News*,[167] the Court held that a federal court obtaining jurisdiction on removal was, like other federal courts, bound to honor state service of process only if it was consistent with the territorial principles of jurisdiction. In so holding, however, the Court preserved, by again citing *Pennoyer*, the distinction between recognition by courts of the judgment-rendering state, and recognition by courts of another governmental body, such as the federal courts or the courts of another state.[168]

These cases, then, and others,[169] represented two decades of clear dicta that *Pennoyer* did not effect a general limitation on the reach of state courts. Given the ambiguity of the *Pennoyer* opinion on this issue, and the fact that Justice Field authored some of the important post-*Pennoyer* opinions, one might have expected that the limited view had obtained a foothold. Inexplicably, however,

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[165] *Id.* at 153.

[166] Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 295 (1890).

[167] 156 U.S. 518, 525-26 (1895).

[168] The Court stated:

> *Whatever effect a constructive service may be allowed in the courts of the same government*, it cannot be recognized as valid by the courts of *any other government*.
>
> . . . .
>
> For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, *although there made in some other manner recognized as valid by its legislative acts and judicial decisions*, can be allowed no validity in the Circuit Court of the United States . . . .

Id. at 521-22 (citations omitted) (emphasis added).

[169] *See, e.g.*, Conley v. Mathieson Alkali Works, 190 U.S. 406, 411-12 (1903); Laing v. Rigney, 160 U.S. 531, 545 (1896); Wilson v. Seligman, 144 U.S. 41, 45 (1892).

the first time the Court faced a case squarely posing the issue, the Court appeared to assume the correctness of the *expansive* view of *Pennoyer*.

In *Connecticut Mutual Life Insurance Co. v. Spratley*,[170] a defendant-insurer defaulted in a Tennessee state court action brought by one of its insureds to recover on a life insurance policy. The insurer then brought a collateral attack on the judgment, also in Tennessee state court, to set aside the underlying judgment on the grounds that the Tennessee state courts lacked jurisdiction.[171] The insurer argued that it did not do enough business in Tennessee to fairly imply its consent to service, and that the person served was not an appropriate representative.[172]

The state court unquestionably followed the applicable Tennessee statutes because the statutes allowed for service on any agent of the corporation.[173] Applying its own state's statutes, the Tennessee Supreme Court upheld the exercise of jurisdiction.[174] The United States Supreme Court also upheld the exercise of jurisdiction, but viewed the question as a due process issue.[175] Using the territorial principles, the Court analyzed the propriety of the exercise of jurisdiction and, citing *interstate* cases, treated interstate principles as fully applicable.[176]

This mode of analysis was consistent only with the expansive view of *Pennoyer*. *Spratley* was a purely *intrastate* case; the judgment was both rendered and recognized in the Tennessee state courts. Thus, had the Court followed the limited view suggested by *Hart* and *Goldey*, the observation that the statutes allowed for service would have disposed of the case. Instead, without recognizing any potential significance of the distinction between interstate and intrastate cases, the Court uncritically adopted the expansive view.

The Court elevated the expansive view from dicta to holding less than a year later, although again without analysis. In *Dewey v. Des Moines*,[177] the Court exercised the prerogative it claimed for itself in *Spratley* to review jurisdictional assertions even in purely

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170 172 U.S. 602 (1899).
171 *Id.* at 604.
172 *Id.*
173 *Id.* at 609.
174 *Id.* at 622.
175 *Id.* at 609.
176 *Id.* at 615-22.
177 173 U.S. 193 (1899).

intrastate cases.[178] The analysis, however, was no more satisfactory than in *Spratley*. The Court again cited the interstate cases without any apparent appreciation of the potential distinction between those cases and intrastate cases, or its earlier dicta recognizing this distinction.[179]

Even after *Spratley* and *Dewey*, however, the limited view died slowly. In *Cooper v. Newell*,[180] decided only five weeks after *Dewey*, the Court repeated the *Goldey* language giving states free reign to recognize their own judgments as they saw fit.[181] In another striking case, also decided after *Spratley* and *Dewey*, the Court intimated the correctness of the expansive view at the beginning of the case.[182] At the end of the opinion, however, in denying interstate recognition to a Connecticut divorce decree, the Court stated that it did so "[w]ithout questioning the power of the State of Connecticut *to enforce within its own borders the decree of divorce which is here in issue.*"[183] Of course, Connecticut could enforce the

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178 In *Dewey*, the judgment-debtor was an individual domiciled in Illinois, but owning a parcel in Des Moines, Iowa. *Id.* at 194-95. The city of Des Moines assessed the owner's lot for improvements in an amount exceeding the value of his property; pursuant to an Iowa statute the contractor performing the improvements for the city obtained a personal judgment against him for the excess, without in-state service. *Id.* at 195. The owner then unsuccessfully collaterally attacked the judgment on jurisdictional grounds through the state courts to the Iowa Supreme Court. *Id.* at 197-98. The United States Supreme Court reversed the Iowa Supreme Court, concluding that the enforcement of such a judgment "against a non-resident . . . would amount to the taking of property without due process of law and would be a violation of the Federal Constitution." *Id.* at 202.

The result in *Dewey* was appealing given the unfairness of requiring a property owner to pay an assessment in excess of the property's value. Nevertheless, the Court disclaimed any review of the constitutionality of this aspect of the statute, confining itself to the jurisdictional issue. *Id.*

179 *See supra* notes 157-69 and accompanying text.

180 173 U.S. 555 (1899).

181 *Id.* at 568.

182 Haddock v. Haddock, 201 U.S. 562, 567 (1906) (stating "a personal judgment . . . rendered [by constructive service] is by operation of the due process clause of the fourteenth amendment void as against the non-resident, *even in the State where rendered*") (emphasis added).

183 *Id.* at 605 (emphasis added). *See generally* Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119 (1990) (discussing *Haddock* and varying practices of states in recognizing out-of-state decrees; noting distinction between interstate and intrastate effect of decrees).

decree within its own borders only if it were constitutionally permissible, a view consistent only with the *limited* view of *Pennoyer*.

The Court finally had to face the question directly in *Riverside & Dan River Cotton Mills v. Menefee*.[184] The plaintiff in *Menefee* filed suit in North Carolina state court against a Virginia corporation.[185] Plaintiff served the defendant by serving a member of the board of directors domiciled in North Carolina while the director was in North Carolina.[186] The defendant appeared specially in the North Carolina state courts to object to jurisdiction, and, after the trial court overruled the objection, defended on the merits and the court entered a judgment against it.[187]

On appeal, the North Carolina Supreme Court upheld the exercise of jurisdiction.[188] The North Carolina court noted the trial court's finding that the defendant had never engaged in any substantial business in North Carolina, nor bore any substantial relationship to the state.[189] Nonetheless, the North Carolina court held that, under the settled construction of the relevant state statutes, service on any director while in the state conferred jurisdiction.[190] The North Carolina court noted that the United States Supreme Court had reached the opposite result in *Goldey*[191] applying the territorial principles.[192] The North Carolina court, however, distinguished *Goldey* and similar cases by adopting the limited view, exactly the route suggested by the *Goldey* opinion itself.[193]

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184 237 U.S. 189 (1915).

185 *Id.* at 190. The action was for injuries plaintiff suffered in Virginia. *Id.*

186 *Id.*

187 *Id.* at 190-91.

188 Menefee v. Riverside & Dan River Cotton Mills, 161 N.C. 164, 76 S.E. 741 (1912), *rev'd*, 237 U.S. 189 (1915).

189 *Id.* at 165, 76 S.E. at 742.

190 *Id.* at 167, 76 S.E. at 743.

191 Goldey v. Morning News, 156 U.S. 518 (1895); *see also supra* notes 167-68 and accompanying text.

192 *Riverside*, 161 N.C. at 166-67, 76 S.E. at 743.

193 The North Carolina Supreme Court stated:

> [The United States Supreme Court has recently] cite[d] with approval the following from *Goldey v. Morning News*: "Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." Under our decisions above quoted, and upon which the plaintiff relied in bringing his action, the service is sufficient for a valid judgment, at least within our

The United States Supreme Court reversed, adopting the expansive view of *Pennoyer*.[194] The Court offered precious little analysis or explanation of the role of due process in personal jurisdiction, however, even when directly confronted with this major doctrinal issue left in the wake of *Pennoyer*. The Court discussed due process in three contexts. First, the Court seemed to assume that a due process challenge can be made at any time, and the limited reading of *Pennoyer* simply had the effect of postponing the inevitable.[195] The assumption that a due process challenge can always be made, however, is wrong.[196] The difference between the limited and expansive readings is the difference between allowing the judgment some effect (intrastate recognition) or no effect. This is not a problem of timing, it is a problem of the fundamental role of due process in personal jurisdiction.

> jurisdiction. What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration.

Id. at 167, 76 S.E. at 743.

194 The Court noted the conflict between the application of the territorial principles in *Goldey* and the North Carolina rule. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 195 (1915). The Court stated:

> It is however, unnecessary to pursue the subject from an original point of view, since in *Pennoyer* . . . it was said 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." And see . . . *Spratley*, where these principles were treated as self-evident.

Id. at 196 (citations omitted).

Commentators at that time recognized that *Menefee* had fully enshrined the expansive reading of *Pennoyer*. *See, e.g.*, Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflicts of Laws*, 39 HARV. L. REV. 533, 533 (1926) (citing *Menefee* for proposition that judgments rendered without personal jurisdiction are ineffectual for all purposes); Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 872 & n.9 (1919) [hereafter Scott, *Nonresidents Doing Business*] (same).

195 In reference to the North Carolina Supreme Court's decision, the Court stated:

> [W]hile admitting the operation of the due process clause, [the North Carolina rule] simply declines to make [the clause] effective. That is to say, [the rule] recognizes the right to invoke the protection of the clause but denies its remedial efficiency by postponing its operation . . . .

Menefee, 237 U.S. at 195-96 (citations omitted).

196 Even in treating the issue as one of timing, the Court probably overruled York v. Texas, 137 U.S. 15 (1890). *York* held that due process could not conceivably be implicated until the time of the enforcement of a judgment. *Id.* at 20.

In order to deny a judgment any effect, one must adopt the expansive thesis that the due process clause is the source of jurisdictional limitations that operate directly on the states. *Menefee* came no closer to explaining this thesis, however, than *Pennoyer* or any of *Menefee*'s other predecessors.[197]

The *Menefee* Court's next attempt to explain the role of due process drew upon *Pennoyer* and other cases involving judgment enforcement in courts other than the court that rendered the judgment.[198] The *Menefee* Court, quoting *Pennoyer*, stated 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."[199] This passage, however, particularly when read in context, plausibly meant that due process guarantees a defendant at least one chance to contest jurisdiction, not that the due process clause imports the territorial principles of jurisdiction and imposes them on the states.[200]

In its final attempt to explain the role of due process, the *Menefee* Court noted that *Spratley*[201] had treated the issue as "self-evident."[202] Earlier non-analysis, however, is a poor excuse for current non-analysis. *Spratley* appeared to miss the issue, not decide it.[203]

Thus, almost four decades later, the ambiguous seed planted by *Pennoyer* finally germinated. *Menefee* came no closer than *Pennoyer* to explaining why due process limits the reach of state courts, but it clearly decided the issue, finally resolving the shadowy debate between the limited and expansive readings of *Pennoyer* in favor of the expansive reading.

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197 The Court made a brief attempt to equate the territorial limitations to a due process right of notice, but abandoned the effort stating simply that the connection between due process and territorial restrictions on personal jurisdiction was "well-settled." *Menefee*, 237 U.S. at 193.

198 *Id.* at 193-94.

199 *Id.* at 196 (quoting *Pennoyer*, 95 U.S. at 733).

200 *See supra* notes 144-45 and accompanying text.

201 Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); *see also supra* notes 170-76 and accompanying text.

202 Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193 (1915). The Court should have cited Dewey v. Des Moines, 173 U.S. 193 (1899) as well for this proposition.

203 *See supra* notes 170-79 and accompanying text.

2. 1915 to 1945: Working within the Expansive View of *Pennoyer*

With the doctrine that due process limits the reach of state courts finally entrenched, although unexplained, the Court began to attempt to build a workable jurisdictional framework within the confines it had erected for itself. Its primary vehicle was the notion of "implied consent." A fictionalized doctrine of "consent" had appeared at least as early as *Lafayette*,[204] and took on added significance with the now-universal application of the territorial principles.

In *Kane v. New Jersey*,[205] the Court upheld a New Jersey law requiring motorists to fill out consent forms at the State line appointing a state official as their "agent" for service of process in the event of litigation arising out of an auto accident within the state. In *Flexner v. Farson*,[206] however, the Court, speaking through Justice Holmes, retreated slightly in holding that a business association had not "consented" to jurisdiction merely by doing business within the state. Holmes' brief opinion seemed to tie consent to the state's ability to exclude the entity,[207] an ability that the privileges and immunities clause circumscribes severely.[208] Commentators at that time, however, predicted that *Flexner*'s "ability to exclude" rationale would prove unworkable, and that the Court would confine the case to its alternative rationale that the individual served had ceased to act in any agency capacity for the defendant.[209]

The Court fulfilled these predictions in *Hess v. Pawloski*.[210] In

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204 Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); *see also supra* notes 51-57 and accompanying text. *See generally State Court Jurisdiction*, *supra* note 57, at 919-20 (noting rise of "consent" theory of jurisdiction); Dodd, *supra* note 3, at 436 (stating that "the consent theory has, as is well known, been employed as a basis for upholding judgments in which there is in fact no consent at all but merely the doing of certain acts within the state which the state has chosen to treat as involving consent to the exercise to its judicial power").

205 242 U.S. 160 (1916).

206 248 U.S. 289 (1919).

207 *Id.* at 293.

208 *See* Scott, *Nonresidents Doing Business*, *supra* note 194, at 887.

209 Burdick, *Service as a Requirement of Due Process in Actions In Personam*, 20 MICH. L. REV. 422 (1922); Scott, *Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563, 583-84 (1926) [hereafter Scott, *Nonresident Motorists*]; Scott, *Nonresidents Doing Business*, *supra* note 194, at 890-91.

210 274 U.S. 352 (1927).

Hess the Court upheld a Massachusetts statute which declared that nonresident motorists, by virtue of driving on state roads, had "consented" to the appointment of a state official as their agent for service of process in automobile accident cases.[211] Unlike the New Jersey statute considered in *Kane*, however, the Massachusetts statute mandated no border stop, no consent forms, and required no indicia of actual "consent." *Hess* thus demonstrated the Court's slavish devotion to, and the confining nature of, the categories created by the territorial principles. *Hess* required the Court to stretch the concept of consent beyond all recognition in order to uphold an intuitively reasonable statute.

It was against this backdrop that the Court issued its now-famous opinion in *International Shoe Co. v. Washington*.[212] Unlike previous cases, which had fixed on the fictional notion of consent to justify jurisdiction over out-of-state corporations,[213] the *International Shoe* Court fixed on the equally fictional notion of corporate "presence." The Court required that the corporate defendant have "certain minimum contacts" with the forum in order to "not offend 'traditional notions of fair play.' "[214]

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211 *Id.* at 354.

212 326 U.S. 310 (1945). The plaintiff in *International Shoe* was the State of Washington, which brought an action through a state administrative agency, and ultimately the state courts, to require the defendant, a Delaware corporation, to make statutorily required payments to the state unemployment insurance fund. *Id.* at 311-12. After the defendant had failed to make payments, the state initiated the proceeding by serving one of the defendant's salesmen in the state, and sending the notice of assessment by registered mail to the corporation's headquarters in Missouri. *Id.* at 312. The corporation objected to the state's personal jurisdiction at all stages of the proceedings, but the Washington courts upheld the exercise of jurisdiction. *Id.* at 312-13.

The stipulated facts showed that the defendant had its principal place of business in Missouri and was engaged in manufacturing footwear. *Id.* at 313. During the years for which the state sought contributions the defendant employed between eleven and thirteen salesmen under the supervision of the home office in Missouri. *Id.* Although the defendant had no permanent office in Washington, the salesmen were domiciled in Washington, and their activities were confined principally to the state. *Id.* The defendant supplied the salesmen with single shoes as samples; the salesmen would then take orders to be filled by the home office. *Id.* at 313-14. Commissions for the years at issue totalled over $31,000. *Id.* at 313.

213 *See, e.g.*, Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373 (1920); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

214 *International Shoe*, 326 U.S. at 316. In *International Shoe* the Court stated:

International Shoe has been widely heralded as the great "liberator" of personal jurisdiction from the formalisms of *Pennoyer*,[215] and it is undoubtedly true that *International Shoe* ushered in an era of expanded jurisdictional reach for state courts. The opinion, however, had two other aspects that were quite striking. First and foremost was the deference *International Shoe* paid to the past. As

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> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. (citations omitted).

The Court devoted much of the rest its opinion to attempting to flesh out the terms "minimum contacts" and "fair play." Fair play, the Court stated, requires enough "contacts . . . as to make it reasonable . . . to require the corporation to defend the particular suit." *Id.* at 317. Reasonableness depends, at least in part, on an "estimate of the inconveniences." *Id.* As for "minimum contacts," the Court gave two polar examples of that term. Minimum contacts might exist when the corporation engages in "systematic and continuous" activities in the forum. *Id.* at 320. At the other end of the spectrum, "single or occasional acts of the corporate agent" might be enough to constitute minimum contacts if related to the action sued upon. *Id.* at 318.

Applying its newly formulated test of corporate "presence" the Court held the defendant amenable to jurisdiction. *Id.* at 320. The defendant's activities resulted in a large volume of business, and thus met the "systematic and continuous" test. *Id.* The activities also met the "related act" test because "[t]he obligation which is here sued upon arose out of those very activities." *Id.*

215 *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 415-16 (1981) (treating *International Shoe* as a conceptual break from *Pennoyer*); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 783-84 (1983) (same); Mills, *Personal Jurisdiction Over Border State Defendants: What Does Due Process Require?*, 13 S. ILL. U.L. REV. 919, 919 (1989) (same); Note, *Personal Jurisdiction Over Nonresident Publishers and Authors: What Contacts Are Needed After* Keeton v. Hustler Magazine, Inc. *and* Calder v. Jones, 34 CATH. U.L. REV. 1125, 1130-31 (1985) [hereafter Note, *Publishers and Authors*] (same); Comment, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 511-12 (1984) (same). *Contra* Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 693 (1987) (stating that "*International Shoe* is consistent with *Pennoyer*'s conceptual framework").

with the opinions since *Menefee*,[216] the *International Shoe* Court adopted the expansive reading of *Pennoyer*.[217] Confined by this framework, the Court fit the assertion of jurisdiction into one of the traditional territorial bases, in this case in personam jurisdiction based on "presence."[218] *International Shoe* broke from the past, however, in the sense that it attempted to justify the exercise of jurisdiction over an out-of-state corporation on the basis of "presence" instead of "consent."[219] In relying on presence the Court appeared to leave behind the importance of the symbolic assertion of power by service. It is far from clear, however, that the "minimum contacts"/"fair play" standard was much different than the "doing substantial business" standard that the Court had employed previously in defining corporate "consent."[220]

The other striking aspect of *International Shoe* was the narrow scope of the opinion. The Court employed the minimum contacts test as a substitute for *corporate* presence. It was uncertain whether the minimum contacts test even applied to individual defendants, because unlike corporate defendants, an individual defendant's presence is hardly "fictional."[221]

True, *International Shoe* signalled a broader reach for state courts and an era of arguably fairer results. Nevertheless, at a

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216 *See supra* notes 205-14 and accompanying text.

217 *See* Whitten (pt. 2), *supra* note 59, at 837.

218 *International Shoe*, 326 U.S. at 320.

219 *Id.* at 316-18.

220 *See, e.g.*, Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373 (1920); International Harvester Co. of Am. v. Kentucky, 234 U.S. 579 (1914); Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573 (1910); Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U.S. 8 (1907); Caledonian Coal Co. v. Baker, 196 U.S. 432 (1905); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); Goldey v. Morning News, 156 U.S. 518 (1895); Mexican Cent. Ry. v. Pinkney, 149 U.S. 194 (1893); St. Clair v. Cox, 106 U.S. 350 (1882); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); *see also State Court Jurisdiction*, *supra* note 57, at 922 (noting similarity between tests for fictional "consent" and "presence"); Dodd, *supra* note 3, at 436 (stating that "the consent theory has, as is well known, been employed as a basis for upholding judgments in which there is in fact no consent at all but merely the doing of certain acts within the state which the state has chosen to treat as involving consent to its exercise of judicial power"). *See generally* Juenger, *Dismal Prospect*, *supra* note 5, at 912-13 (describing current "minimum contacts"/"purposeful availment" formula as "reincarnation" of implied consent doctrine).

221 *See* J. LANDERS, J. MARTIN & S. YEAZELL, CIVIL PROCEDURE 90-91 (2d ed. 1988) (noting uncertainty as to whether *International Shoe* was to apply to individual defendants).

more fundamental level, *International Shoe*'s failing was every bit as profound as *Pennoyer*'s and *Menefee*'s. *International Shoe* accepted the prevailing dogma that the due process clause acts as a limitation on state court assertions of personal jurisdiction. At a time when the inadequacies of the territorial principles ought to have been apparent, the Court chose to perpetuate the still-unexplained myth that personal jurisdiction is an issue of constitutional law governed by the fourteenth amendment. As a consequence of accepting that myth, the *International Shoe* Court had to justify its exercise of jurisdiction in terms of the metaphor of corporate "presence." As one prescient commentator on these jurisdictional metaphors wrote almost two decades *before* the *International Shoe* decision: "[A] state [should not] be limited in its activities under the Constitution by the scope of a metaphor."[222] Although the verbiage has changed somewhat over the years, the same constitutional metaphor continues to haunt the law of personal jurisdiction.

C. *Beyond* International Shoe

In a sense, my account of the development of personal jurisdiction is upside-down. With some notable exceptions,[223] present-day commentators have concentrated heavily on jurisdictional developments after 1945,[224] and less heavily on jurisdictional history before 1945. All of this is perfectly understandable. The

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222 Scott, *Nonresident Motorists*, *supra* note 209, at 576.

223 *See, e.g.*, Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195 (1984) [hereafter Juenger, *Jurisdiction Comparison*] (discussing *Pennoyer* era jurisdictional concepts); Perdue, *supra* note 84 (same); Silberman, *supra* note 3 (same); Transgrud, *supra* note 50 (same); Whitten (pt. 1), *supra* note 50 (same); Whitten (pt. 2), *supra* note 59 (same).

224 *See, e.g.*, Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 24-40 (1988) (concentrating on post-1945 cases); Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 252-73 (1988-89) (same); Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C.L. REV. 729, 731-87 (1988) (same); Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 2-3 (1987) (same); Note, *Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 49 OHIO ST. L.J. 853, 855-57 (1988) [hereafter Note, *Jurisdiction After*] (same); Note, *Personal Jurisdiction in the Post-*World-Wide Volkswagen *Era—Using a Market Analysis to Determine the Reach of Personal Jurisdiction*, 60 WASH. L. REV. 155, 157-61 (1984) [hereafter Note, *Market Analysis*] (same).

Supreme Court has formulated and reformulated the minimum contacts test many times in the last forty-five years, often in ways that have appeared inconsistent with prior formulations.[225] A tremendous amount of scholarship has been devoted to attempting to untangle this case law,[226] and each new case brings a flood of commentary.[227]

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225 *See infra* notes 377-82, 522-34 and accompanying text.

226 *See, e.g.*, Abrams, *Power, Convenience and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1 (1982) (analyzing recent case law); Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983) (same); Brilmayer, *supra* note 11 (same); Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723 (1988) (same); Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986) (same); George, *supra* note 11 (same); Hay, *supra* note 11 (same); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241 (same); Kurland, *supra* note 11 (same); Lewis, *supra* note 3 (same); McDougal, *supra* note 11 (same); Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989) (same); Twitchell, *supra* note 11 (same); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983) (same); von Mehren & Trautman, *supra* note 11 (same); Youngblood, *Constitutional Constraints on Choice of Law: The Nexus Between* World-Wide Volkswagen *and* Allstate Insurance Co. v. Hague, 50 ALB. L. REV. 1 (1985) (same); Comment, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984) (same); Note, *Minimum Contacts in Contracts Cases: A Forward Looking Reevaluation*, 58 NOTRE DAME L. REV. 635 (1983) (same); *see also* Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 917 n.3 (noting large number of articles on personal jurisdiction and minimum contacts test).

227 *See, e.g.*, Fyr, *supra* note 3 (discussing *Shaffer*); Gelfand, *A Dissenting View of* Asahi Metal Industry Co., Ltd. v. Superior Court, 39 S.C.L. REV. 873 (1988); Knudsen, Keeton, Calder, Helicopteros and Burger King—International Shoe's *Most Recent Progeny*, 39 U. MIAMI L. REV. 809 (1985); Levine, *Preliminary Procedural Protection for the Press From Jurisdiction in Distant Forums After* Calder *and* Keeton, 1984 ARIZ. ST. L.J. 459; Maltz, *Reflections on a Landmark:* Shaffer v. Heitner *Viewed From a Distance*, 1986 B.Y.U. L. REV. 1043; Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669; Murphy, *supra* note 224 (discussing *Asahi* and *World-Wide*); Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp v. Rudzewicz, 1986 ARIZ. ST. L.J. 585; Reese, *supra* note 3 (discussing *Shaffer*); Riesenfeld, Shaffer v. Heitner*: Holding, Implications, Forebodings*, 30 HASTINGS L.J. 1183 (1979); Stephens, *The Single-Contract as Minimum Contacts: Justice Brennan "Has It His Way"*, 28 WM. & MARY L. REV. 89 (1986) (discussing *Burger King*); Stravitz, *supra* note 224 (discussing *Asahi*); VanDercreek, *Jurisdiction Over the Person—the Progeny of*

My focus is different. As the discussion above shows, the entry of due process into the jurisdictional universe occurred sometime between 1877 and 1915, and was at best unexplained and at worst a misreading of *Pennoyer*.[228] I am thus more concerned with the fundamental question of why the Court employs the minimum contacts test, or any test for that matter, to limit state court jurisdiction, and less concerned with the nuances of that test as it has developed over the last forty-five years. Accordingly, my treatment of the modern jurisdictional cases concentrates on what light they shed on the basic question of the role of due process as a limitation on personal jurisdiction.

After *International Shoe*, the next word from the Court on personal jurisdiction was *Mullane v. Central Hanover Bank & Trust Co.*[229] In *Mullane* the Court held that the corporate trustee of a common trust containing 113 individual trusts, in an action to settle the trust accounting, had jurisdiction over the beneficiaries, even those domiciled out of state.[230] The Court, however, did

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Pennoyer *and the Future of* Asahi, 13 NOVA L. REV. 1287 (1989); Vernon, *State Court, supra* note 3 (discussing *Shaffer*); Weber, *Purposeful Availment*, 39 S.C.L. REV. 815 (1988) (discussing *Asahi*); Welkowitz, *supra* note 224 (discussing *Burger King*); Note, *Publishers and Authors, supra* note 215 (discussing *Calder* and *Keeton*); Comment, Asahi Metal Industry Co. v. Superior Court: *The Stream of Commerce Theory, Barely Alive But Still Kicking*, 76 GEO. L.J. 203 (1987); Note, Burger King Corporation v. Rudzewicz: *The Minimum Contacts Test Meets the Modern-Day Franchise Agreement*, 20 J. MARSHALL L. REV. 169 (1986); Note, *Keeping Your Single-Contract Ball out of Another State's Court*, 33 LOY. L. REV. 419 (1987) (discussing *Burger King*); Note, Burger King Corp. v. Rudzewicz: *Flexibility v. Predictability in In Personam Jurisdiction*, 64 N.C.L. REV. 880 (1986); Note, *Jurisdiction After, supra* note 224 (discussing Asahi); Note, *Personal Jurisdiction and the Due Process Clause: An Evaluation of the Fairness Factors*, 19 PAC. L.J. 1459 (1987) (discussing *Asahi*); Note, *Specific and General Jurisdiction—The Reshuffling of Minimum Contacts Analysis*, 59 TUL. L. REV. 826 (1985) (discussing *Helicol*); Note, *Civil Procedure—Muddying the Stream of Commerce Theory*—Asahi Metal Industry Co. v. Superior Court, 36 U. KAN. L. REV. 191 (1987); Note, *Market Analysis, supra* note 224 (discussing cases following *World-Wide*).

[228] *See supra* notes 155-203 and accompanying text.

[229] 339 U.S. 306 (1950).

[230] *Id.* at 311-13. *Mullane* is best known for its holding that notice by publication was inadequate for due process purposes, at least with regard to those beneficiaries to which the trustee had ready access to mailing addresses. *Id.* at 318. The Court's division of the due process requirement of notice and the due process requirement of personal jurisdiction had always been quite clear. *See, e.g.*, Griffin v. Griffin, 327 U.S. 220, 228 (1946). *Mullane*, however, presented the division in stark terms, striking down the

not cite *International Shoe*, and upheld jurisdiction on more generalized reasoning.[231] For the first time, the Court cast doubt upon the categories of in rem and in personam, terming them "elusive and confused."[232] Instead of trying to categorize the action, the Court upheld jurisdiction based on the "insistent and rooted" interest of each state to be able to close trusts.[233]

Although ignoring *International Shoe* in *Mullane*, the Court placed talismanic reliance on it in an opinion decided the same term, *Travelers Health Association v. Virginia*.[234] In *Travelers* the Court concluded that the Virginia state courts had jurisdiction to enforce state blue sky laws against an out-of-state corporation that provided health insurance by mail to approximately 800 Virginia citizens.[235] Though the rationales were similar, *Travelers*, unlike *Mullane*, relied on the contacts formula. In *Travelers* the Court concluded that "the contacts and ties of [the insurance company] with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justifies subjecting [the insurance company]" to jurisdiction.[236]

Travelers was an example of contacts-based jurisdiction in which the contacts "related" to the cause of action. This first type of

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judgment on notice grounds, but refusing to strike it down for lack of personal jurisdiction.

231 *Mullane*, 339 U.S. at 312. Instead of discussing the contacts test, the Court apparently found that the presence of a state "interest" was enough to assert jurisdiction. *Id.* at 312-13.

232 *Id.* at 312. This rejection of the categories of in rem and in personam led one commentator to conclude that the Court had created a new category of "jurisdiction by necessity." Fraser, *Jurisdiction by Necessity—An Analysis of the* Mullane *Case*, 100 U. PA. L. REV. 305 (1951). Indeed it does appear that refusal to allow jurisdiction in the New York state courts, the home state of the trustee, would have made settlement of the trust impossible, since the noncontingent beneficiaries would have been indispensable parties. *Id.*

233 *Mullane*, 339 U.S. at 313. Some commentators have concluded that *Mullane*'s jurisdictional holding can be squared with a contacts analysis. *See, e.g.*, Brilmayer, *supra* note 11, at 108. In light of the Court's development of the "purposeful availment" formula in Hanson v. Denckla, 357 U.S. 235 (1958), *see infra* notes 250-58 and accompanying text, it is very difficult, however, to reconcile *Mullane* with current jurisdictional theory. *See* Fraser, *supra* note 232, at 305-08 (noting difficulty of reconciling *Mullane* with contacts test); Hay, *Judicial Jurisdiction Over Foreign Country Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 450 n.83 (1984) (same); Lewis, *supra* note 3, at 61-62 (same).

234 339 U.S. 643 (1950).

235 *Id.* at 646.

236 *Id.* at 648.

jurisdiction suggested by *International Shoe*[237] would come to be known as "specific jurisdiction."[238] *Perkins v. Benguet Consolidated Mining Co.*,[239] decided the same year, provided an example of the other type of contacts-based jurisdiction. This other type of contacts-based jurisdiction, now called "general jurisdiction," does not require that the contacts relate to the cause of action.[240] In *Perkins* the Court concluded that the Ohio courts had jurisdiction for all purposes over a corporation, engaged primarily in Philippine mineral mining, which relocated its headquarters to Ohio during the Japanese occupation of the Philippine Islands.[241] The Court applied the contacts test, describing it as a test of "general fairness."[242] The Ohio courts had jurisdiction because "[t]he amount and kind of activities . . . make it reasonable and just to subject the corporation to jurisdiction."[243]

The Court issued its next jurisdictional opinion seven years later in *McGee v. International Life Insurance Co.*[244] *McGee* generally is regarded as the high-water mark for state court jurisdictional authority under the contacts test.[245] In *McGee* the Court concluded that a California citizen, the beneficiary of a life insurance policy issued by the Texas-based corporate defendant, could obtain jurisdiction in the California state courts in an action to collect on the policy.[246] The policy alone, sold knowingly to a California citizen, provided sufficient "minimum contacts" with California.[247] The Court's rationale was a hodgepodge of factors.

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237 *See* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); *see also* Youngblood, *supra* note 226 (discussing *International Shoe*'s division of jurisdictional categories).

238 *See, e.g.*, Brilmayer, *supra* note 11, at 80-83 (describing contacts-based jurisdiction in which contacts relate to cause of action as "special jurisdiction" and unrelated contacts-based jurisdiction as "general jurisdiction"); von Mehren & Trautman, *supra* note 11, at 1136 (same).

239 342 U.S. 437 (1952).

240 *See, e.g.*, Twitchell, *supra* note 11, at 613 (describing "general" jurisdiction as "dispute-blind"); von Mehren & Trautman, *supra* note 11, at 1136 (stating unrelated contacts can be foundation of "general jurisdiction").

241 *Perkins*, 342 U.S. at 445-48.

242 *Id.* at 445.

243 *Id.*

244 355 U.S. 220 (1957).

245 *See, e.g.*, Weintraub, *supra* note 3, at 489 (stating that *McGee* "was the high-water mark of personal jurisdiction").

246 *McGee*, 355 U.S. at 223.

247 *Id.*

The Court identified what it termed California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[248] Also apparently important was the possibility that failure to allow jurisdiction in California might "judgment-proof" the defendant by making it uneconomical to pursue modest claims in the insurer's home state.[249]

Ironically, in the same term, the Court delivered the opinion that was most responsible for subsequent contraction of state court jurisdictional reach. In *Hanson v. Denckla*[250] the Court concluded that the Florida state courts did not have jurisdiction over a Delaware corporate trustee, and thus could not adjudicate the disposition of trust assets, even though the trust settlor had subsequently domiciled herself in Florida.[251]

The explanation of the rationale for the holding in *Hanson*, however, was not very illuminating.[252] Distinguishing *McGee*, the Court purported to be unable to find an analogous "manifest"

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[248] *Id.* The Court stated that this manifest interest was embodied in a special California statute giving residents jurisdiction over out-of-state insurers on policy claims. *Id.* at 221.

[249] *Id.* The Court noted the possibility of "inconvenience" to the insurer, but concluded it was "certainly nothing which amounts to a denial of due process." *Id.* at 224. Inconvenience, according to the Court, must be measured by the realities of "modern transportation." *Id.* at 223.

[250] 357 U.S. 235 (1958).

[251] The trust had been settled in Delaware, but the settlor later relocated to Florida, where she conducted some matters of trust administration and where she lived until her death. *Id.* at 238-39. Chief Justice Warren's opinion avoided a serious injustice, because the Florida decree purporting to invalidate the trust effectively took $400,000 assets from the settlor's deceased daughter's children (the settlor's grandchildren), and passed them under her will to the settlor's living daughters (the aunts of the grandchildren), each of whom had *already* received over $500,000 each under the will. *Id.* at 240.

[252] The Chief Justice stated:

> [I]t is a mistake to assume that [the] trend [toward expanded personal jurisdiction] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of the territorial limitations on the power of the respective States. However 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" that are a prerequisite to its exercise of power over him.

Id. at 251 (citations omitted).

state interest.[253] Although the Florida courts clearly had statutory authorization to take jurisdiction, the Court viewed Florida's lack of a "special"[254] jurisdictional statute as significant.[255] The Court also viewed the Delaware trustee's contacts as inconsequential.[256] The contacts of the trustee were entitled to little weight because they were based on "the unilateral activity" of others.[257] Contacts had constitutional significance, according to the *Hanson* court, only if they demonstrated that the defendant had "purposefully avail[ed]" itself of the benefits and protections of the forum state.[258]

The jurisdictional opinions of the 1950s thus cast a dizzying array of weights on the jurisdictional balance. "Forum state interest" apparently gave a jurisdictional bonus to the *Mullane*,[259] *Travelers*[260] and *McGee*[261] plaintiffs but was not available to the *Hanson* plaintiff. Providing a single forum to "settle matters of trust administration" was determinative in the decision to allow jurisdiction in *Mullane*,[262] but never made an appearance in *Hanson*. The existence or nonexistence of a "special" jurisdictional statute entered the calculus in *McGee*[263] and *Hanson*,[264] but not in *Perkins* or *Travelers*. Jurisdiction was primarily a matter of weighing the burdens to the parties in *Travelers*, *Perkins* and *McGee*, but in *Hanson* we were told that jurisdictional restrictions were "more than a guarantee of immunity from inconvenien[ce]," they were "a consequence of the territorial limitations on the powers of the respective States."[265]

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253 *Id.* at 252.

254 The Court apparently had in mind a particularized jurisdictional statute, such as the California statute in *McGee*, expressly giving policyholders jurisdiction over insurance companies. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 273 (1957). The particularized jurisdictional statute is in contrast to a more "general" jurisdictional statute. *See Hanson*, 357 U.S. at 251-52.

255 *Hanson*, 357 U.S. at 252.

256 *Id.*

257 *Id.* at 253.

258 *Id.*

259 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950).

260 Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950).

261 McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

262 *Mullane*, 339 U.S. at 312-13.

263 *McGee*, 355 U.S. at 223-24.

264 Hanson v. Denckla, 357 U.S. 235, 252-53 (1958).

265 *Id.* at 251.

If anything was clear from the 1950s opinions, it was that the Court had completely lost sight of the due process clause. These opinions made no attempt to explain their results in terms of conventional due process analysis. Rather, these opinions proceeded as if the words "minimum contacts" and "purposeful availment" had somehow found their way into the fourteenth amendment, and jurisdiction was simply a matter of giving content to those terms. In a certain sense, the Court lost sight of the "minimum contacts" test as well. "Minimum contacts" was a metaphor to explain the metaphor of corporate presence. Yet the Court wrote as if the phrase itself had constitutional significance.

The *Hanson* opinion was especially illustrative in this regard. The Court reasoned in *Hanson* that jurisdictional limitations were linked with notions of "sovereignty" and "territorial limitations."[266] It is true that the pre-*Pennoyer* common-law jurisdictional structure, with its arbitrary rules and limitations, was the result of ancient notions of sovereignty.[267] That hardly explained, however, why these doctrines had constitutional significance, particularly in the context of interpreting the due process clause. Nor did the Court explain how sovereignty was embedded in the term "minimum contacts," why Florida's assertion of jurisdiction in this purely private dispute jeopardized Delaware's sovereignty, or how the "purposeful availment" formula protected the still-undefined notion of sovereignty.

For almost the next two decades the Court was mercifully silent on the subject of personal jurisdiction. Lower courts, employing the "something-for-everyone" version of the minimum contacts test left in the wake of the 1950s opinions, extended their reach considerably.[268] In 1977, however, the Court reentered the fray.

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266 *Id.*

267 *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) (noting, while discussing common law rules of jurisdiction, that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established").

268 *See, e.g.*, Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); J. Henrijean & Sons v. M. V. Bulk Enter., 311 F. Supp. 417 (W.D. Mich. 1970); Forsythe v. Cohen, 305 F. Supp. 1194 (D. R.I. 1969); Anderson v. Penncraft Tool Co., 200 F. Supp. 145 (N.D. Ill. 1961); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *see also* F. JAMES & J. HAZARD, CIVIL PROCEDURE § 2.16, at 81-83 (3d ed. 1985).

In *Shaffer v. Heitner*,[269] the Court considered the constitutionality of the jurisdictional practice fondly known as "quasi-in-rem holdup,"[270] a product of the *Pennoyer* era. In *Shaffer*, the plaintiff brought a shareholder's derivative action in Delaware state court against the directors of Greyhound corporation, which was incorporated in Delaware.[271] The plaintiff named twenty-eight directors as defendants, and, pursuant to a Delaware statute, had the stock and options of twenty-one of the defendants "sequestered," or attached, for the purpose of obtaining in rem jurisdiction.[272] The defendants specially appeared to object to jurisdiction, but the Delaware courts turned back the jurisdictional challenge.[273]

The United States Supreme Court, however, reversed. In the most famous aspect of the *Shaffer* case, the Court concluded that the presence of property in the forum state could no longer automatically confer in rem jurisdiction as it had in the *Pennoyer* era.[274] In rem actions, the Court reasoned, are in truth actions against the property owner, not the property.[275] Assertions of in rem jurisdiction, as well as assertions of in personam jurisdiction, therefore, should require "minimum contacts" between the property owner, the "true" defendant, and the forum.[276] Although ownership of property that had its situs in the forum state *might* provide these contacts, it would not *necessarily* provide the necessary contacts.[277] The Court concluded that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[278] and overruled *Pennoyer* to the extent it was "inconsistent with this standard."[279]

Applying its newly formulated standard to the director-defendants, the Court concluded that they lacked the contacts necessary to confer jurisdiction on the Delaware courts.[280] The Court

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269 433 U.S. 186 (1977).

270 *See* Juenger, *Dismal Prospect*, *supra* note 5, at 908 (describing "quasi-in-rem holdup" as an "exorbitant" jurisdictional basis).

271 *Shaffer*, 433 U.S. at 189.

272 *Id.* at 192.

273 *Id.* at 193-95.

274 *Id.* at 206.

275 *Id.* at 207 n.22.

276 *Id.* at 212.

277 *Id.* at 209.

278 *Id.* at 212.

279 *Id.* at 212 n.39.

280 *Id.* at 213-17.

described the minimum contacts test as resting on "the relationship among the defendant, the forum, and the litigation, rather than upon the mutually exclusive sovereignty of the States."[281] This formulation, of course, was in stark contrast to the "territorial limitations" language of *Hanson*.[282] The Court, however, attempted to explain away the contrast in a footnote stating that the *Hanson* language "simply makes the point that the States are defined by their geographical territory."[283]

Two additional considerations bolstered the Court's finding of insufficient contacts between Delaware and the defendants. First, the Court allowed the matter of a state "special" jurisdictional statute[284] to assume a prominent role.[285] The plaintiff argued that Delaware had a "strong interest" in adjudicating cases alleging mismanagement of corporations incorporated under its state statutes.[286] The Court reasoned that "[t]his argument is undercut by the failure of the Delaware Legislature to [specifically] assert the state interest" in the state's long-arm statute.[287] Second, according to the Court, the record did not show that the defendants "purposefully availed" themselves of the benefits of Delaware law.[288] Simply accepting a position as a director of a Delaware corporation, according to the Court, was not by itself sufficient for jurisdiction.[289]

The Court did not wait another twenty years to resolve its next personal jurisdiction case. The next term the Court decided *Kulko v. Superior Court*.[290] In *Kulko* the plaintiff brought an action in the California state courts for increased child support against

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281 *Id.* at 204.

282 Hanson v. Denckla, 357 U.S. 235, 251 (1958).

283 Shaffer v. Heitner, 433 U.S. 186, 204 n.20.

284 *See supra* note 254 and accompanying text.

285 *Shaffer*, 433 U.S. at 214.

286 *Id.*

287 *Id.*

288 *Id.* at 216.

289 *Id.* at 216-17. Only Justices Stevens and Brennan expressed any serious reservations with the Court's opinion. Stevens concurred only in the judgment because the manner in which "the Court's opinion may be applied in other contexts [wa]s not entirely clear." *Id.* at 219 (Stevens, J., concurring). Brennan agreed that all assertions of jurisdiction should require minimum contacts, but dissented from the application of the test, finding the record too scant and the conclusion that the defendants lacked a sufficient nexus with Delaware untenable. *Id.* at 219-20 (Brennan, J., concurring in part and dissenting in part).

290 436 U.S. 84 (1978).

the defendant, her former husband, a New York resident.[291] The California Supreme Court rejected defendant's challenge to jurisdiction.[292]

The Supreme Court reversed and held that California's assertion of jurisdiction over the father was unconstitutional. In doing so, the Court employed another "mixed-bag" formulation of the contacts test.[293] It stated that the "interests of the forum State and of the plaintiff are . . . to be considered."[294] The Court's formulation, however, was primarily defendant-oriented, terming the defendant's interests "essential."[295] The father, according to the Court, had not "purposefully availed" himself of the benefits of the forum state, because he had merely acquiesced to the altered custody arrangement, not actively endorsed it.[296] The Court also showed its continued fascination with "special" jurisdictional statutes.[297] Although California's long-arm statute authorized jurisdiction "on any basis not inconsistent" with the Constitution,[298] the Court noted the lack of a "particularized" jurisdictional statute in concluding that California's "interest" in adjudicating the matter was weak.[299]

The Supreme Court next considered personal jurisdiction two years later and issued, on the same day, two decisions with far-reaching implications. In the first decision, *World-Wide Volkswagen*

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291 *Id.* at 88. The couple was married on a three-day stop-over in California, but immediately thereafter moved to New York. *Id.* at 87. The couple separated and divorced, with the wife relocating to California. *Id.* The husband took custody of the children during the school year, agreeing to pay his former wife child support for the months the children lived with her. *Id.* After the children decided to live with their mother during the school year, and the father acquiesced, the mother sued in California state court to increase support payments to reflect the new arrangement. *Id.* at 87-88.

292 *Id.* at 88-89. The California court held that this case involved a reasonable exercise of jurisdiction because defendant "had purposefully availed himself of the benefits and protections of the laws of California" by sending his daughter to live in California with her mother. *Id.* at 94 (citations omitted).

293 *Id.* at 91.

294 *Id.* at 92.

295 *Id.*

296 *Id.*

297 *See supra* note 254 and accompanying text.

298 CAL. CIV. PROC. CODE § 410.10 (West 1973).

299 Kulko v. Superior Court, 436 U.S. 84, 98 (1978).

Corp. v. Woodson,[300] the Court concluded that the Oklahoma state courts could not take jurisdiction in a products liability action over the New York seller and the Northeastern-states regional distributor of an automobile. The automobile, bought and sold in New York, was involved in a rear-end collision in Oklahoma while being driven through that state as the plaintiffs, the Robinsons, relocated from New York to Arizona.[301]

World-Wide laid to rest any speculation that the limiting of state court jurisdictional reach in *Hanson*[302] was a result-driven fluke. Although *Hanson*'s "state sovereignty" language was left for dead only four years earlier in *Shaffer*,[303] the *World-Wide* Court offered this analysis of the minimum contacts test:

> The concept of minimum contacts . . . perform[s] two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. 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 coequal sovereigns in a federal system.[304]

Citing *Hanson*, the Court elaborated that due process, "acting as an instrument of interstate federalism," could deprive a state court of jurisdiction "[e]ven if the defendant would suffer minimal or no inconvenience."[305]

Despite the elaborate homage paid to "interstate federalism," the Court analyzed the case in terms of the defendant's relationship to Oklahoma. Foreseeability that the car would journey to other states, including Oklahoma, was not a basis for jurisdiction over the out-of-state seller and distributor.[306] The foreseeability that was "critical to due process" was that the defendant "should reasonably anticipate being haled into court there."[307] The Court also found the "purposeful availment" test unsatisfied because the car reached Oklahoma only through the "unilateral

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300 444 U.S. 286, 299 (1980).

301 *Id.* at 288.

302 Hanson v. Denckla, 357 U.S. 235 (1958); *see also supra* notes 250-67 and accompanying text.

303 Shaffer v. Heitner, 433 U.S. 186, 204 n.20 (1977); *see also supra* notes 280-83 and accompanying text.

304 *World-Wide*, 444 U.S. at 291-92.

305 *Id.* at 294.

306 *Id.* at 295.

307 *Id.* at 297. Due process included this element, the Court explained, because it "allows potential defendants to structure their primary conduct" to avoid out-of-state litigation. *Id.*

activity" of the Robinsons.[308]

The companion case, *Rush v. Savchuk*,[309] involved an exercise of so-called *Seider*[310] jurisdiction. *Seider* jurisdiction occurs when the plaintiff obtains quasi-in-rem jurisdiction by attaching the defendant's contractual right to have his automobile insurer defend and indemnify in accident litigation in any state in which the insurer does business. In *Rush*, the plaintiff attached the defendant's policy in Minnesota, the plaintiff's home state, even though the accident occurred in Indiana and the defendant lived in Indiana.[311] Applying *Shaffer*, the Court held that the Minnesota courts lacked jurisdiction over the defendant because he lacked contacts with that state.[312] The Court declined the invitation to impute the insurer's contacts to its insured, concluding that such a rule would unconstitutionally "shift the focus . . . from the relationship among the defendant, the forum and the litigation to that among the plaintiff, the forum, the insurer and the litigation."[313]

As quickly as the "sovereignty" rationale came back into fashion in *World-Wide*, it went out of style in the Court's opinion next term in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites*

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308 *Id.* at 297-98. The Court distinguished the situation at hand from a hypothetical case in which the product was sold or resold in the forum state in "the stream of commerce." *Id.* at 298. The Court compared the situation at hand to Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (upholding jurisdiction in action alleging defective component part of boiler when part and boiler were resold in forum state).

309 444 U.S. 320 (1980).

310 Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966).

311 *Rush*, 444 U.S. at 322. The plaintiff attached the policy in Minnesota apparently in an effort to avoid Indiana's guest statute and contributory negligence rule. *Id.* at 325 n.8.

312 *Id.* at 327-28.

313 *Id.* at 332. Only Justice Brennan would have found jurisdiction in both *Rush* and *World-Wide*. He filed a joint dissenting opinion in both cases. For Brennan, the larger issue was the continued vitality of the contacts test. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 307-08 (1980) (Brennan, J., dissenting). The minimum contacts principle, "with its almost exclusive focus on the rights of defendants, may be outdated." *Id.* at 308. Brennan was unable to perceive how the defendants' due process rights were implicated without inconvenience to the defendants. *Id.* at 309. He would not have found inconvenience to be constitutionally significant "merely because the defendant has to board a plane to get to the site of a trial." *Id.* at 309, 311.

de Guinee.[314] In *Bauxites* a federal district court, in a diversity action, found personal jurisdiction over the defendants as a sanction because they failed to comply with several discovery orders to produce documents relating to whether the defendants had minimum contacts with the forum state.[315] Analyzing the matter as a problem of state court jurisdiction,[316] the Court concluded that the district court had the power to impose the sanction because personal jurisdiction is a waivable right, and defiance of discovery orders can constitute a waiver.[317] In the course of noting the waivable nature of personal jurisdictional rights, Justice White, also the author of *World-Wide*, wrote for the Court in *Baux-*

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314 456 U.S. 694 (1982).

315 *Id.* at 699. The defendants — after several warnings from the district judge, including a direct threat that the judge would "find" jurisdiction if the discovery orders were not obeyed — still refused to turn over most of the requested documents. *Id.*

316 Although the Court did not discuss the issue, it implicitly adopted the long-standing view of the Second Circuit that federal district courts sitting in diversity have the same jurisdictional reach as their home state's courts. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (en banc) (holding federal courts must adhere to state court rules of personal jurisdiction in diversity cases). For a comprehensive treatment of the jurisdictional reach of the federal courts see Sann, *Personal Jurisdiction in Federal Question Suits: Towards a Unified and Rational Theory for Personal Jurisdiction Over Non-Domiciliary and Alien Defendants*, 16 PAC. L.J. 1 (1984); *see also* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987). In *Omni*, the Supreme Court adopted the view that even in federal question cases, Federal Rule of Civil Procedure 4(e) requires a federal court to look to its home state's long-arm statute, absent an explicit congressional provision for some other rule of personal jurisdiction. *Id.* at 105. In Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987), the Court explicitly reserved the question of whether the jurisdictional authority of the federal courts under the due process clause of the fifth amendment might be greater than the authority of state courts under the fourteenth amendment. *Id.* Some lower courts have taken the view that the fifth amendment is less confining than the fourteenth, and employed a "national contacts" approach to the personal jurisdiction of the federal courts. *See, e.g.*, Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967); *see also* Note, *National Contacts as a Basis for In Personam Jurisdiction Over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982) (arguing federal authority is broad enough to take into account "national contacts"). *But cf.* Fullerton, *Constitutional Limitations on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. REV. 1 (1984) (arguing fifth amendment due process does not allow for personal jurisdiction on national contacts basis if forum is "fundamentally unfair" to defendant).

317 *Bauxites*, 456 U.S. at 704-05.

ites that personal jurisdiction was "not . . . a matter of sovereignty, but . . . a matter of individual liberty."[318] White explained the obvious incongruence between this assertion and *World-Wide*'s "sovereignty" rationale by noting that the individual liberty interest preserved by the due process clause is what ultimately motivates limitations on state sovereign power.[319]

In a limited sense, *Bauxites* was an improvement over other personal jurisdiction opinions in the modern era. For once, the Court appeared to have read the fourteenth amendment before launching into another long opinion reciting a huge laundry list of factors, all with variable weights, and all supposedly informing the "constitutional" analysis. Justice Powell, in his concurrence in the judgment in *Bauxites*, worried aloud that the Court's rejection of the "sovereignty" rationale would spell the end of the minimum contacts test.[320] Although his prediction unfortunately remains unfulfilled, perhaps *Bauxites* was the first crack in the foundation of the constitutionalized structure of jurisdiction.

Two years later the Court, on the same day, decided two brief and unanimous opinions upholding jurisdiction in defamation actions. In *Keeton v. Hustler Magazine, Inc.*,[321] the plaintiff, admittedly to take advantage of New Hampshire's generous six-year statute of limitations, filed a diversity libel action in federal court in that state, where defendant-publisher sold 10,000 to 15,000 of

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318 *Id.* at 702.

319 *Id.* at 702 n.10. White stated in *Bauxites*:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States. . . .
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> . . . .
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> . . . The restriction on state sovereign power in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id.

320 *Id.* at 713-14 (Powell, J., concurring).

321 465 U.S. 770 (1984).

its allegedly libelous magazines. In *Calder v. Jones*,[322] the plaintiff filed an action in her home state of California against the author and the editor of a nationally circulated magazine[323] that published an unflattering story accusing her of excessive drinking. In both cases the Court upheld jurisdiction while repeating the "defendant, forum, litigation" formula[324] articulated in *Shaffer*. Perhaps the most important doctrinal development in these two cases came in the discussion in *Keeton* of the "forum state interest." The *Keeton* plaintiff was not a resident of New Hampshire, and her journey to New Hampshire's courts was undeniably a forum-shopping excursion.[325] The defendants argued that plaintiff's lack of domicile in New Hampshire diminished that state's "interest" in the litigation to the point that it no longer had jurisdiction.[326] Justice Rehnquist, however, writing for the Court described the "forum state interest" factor as a "surrogate"[327] for other factors in the jurisdictional calculus, and rejected the suggestion that forum-shopping is always objectionable.[328]

The Court decided one other jurisdictional case that term: *Helicopteros Nacionales de Colombia, S.A. v. Hall* (*Helicol*).[329] The case was tried in the Texas state courts and resulted in a plaintiffs' verdict of approximately $1.1 million.[330] The Texas Supreme Court rejected the defendant's jurisdictional challenge.[331] The United States Supreme Court reversed, holding that the Texas courts lacked jurisdiction.[332] Applying the test for general jurisdiction[333] of "continuous and systematic" activities first suggested in *Inter-*

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322 465 U.S. 783 (1984).

323 The author and editor were residents of Florida; the magazine was a Florida corporation with its principle place of business in Florida and its largest circulation in California. *Id.* at 785.

324 *Calder*, 465 U.S. at 788; *Keeton*, 465 U.S. at 775.

325 *Keeton*, 465 U.S. at 775.

326 *Id.* at 776.

327 The Court apparently meant that its earlier references to "forum state interest" were a roundabout way of referring to the plaintiff's interest in obtaining relief. *Id.*

328 *Id.*

329 466 U.S. 408 (1984).

330 *Id.* at 412-13.

331 *Id.*

332 *Id.* at 418-19.

333 The Court understood the argument of plaintiffs' counsel to concede the issue of "specific" jurisdiction, and thus analyzed the case only in terms of "general" jurisdiction. *Id.* at 415 & n.10.

national Shoe, and developed somewhat in *Perkins*,[334] the Court found the defendant's contacts insufficient to support jurisdiction.[335] The Court rejected the suggestion that "purchases, and related trips, standing alone" were enough of a nexus with the forum state.[336] The narrowly written opinion in *Helicol*, however, contrasted sharply with the expansively written opinion in *World-Wide*, until then the Court's most recent pronouncement on jurisdiction in tort actions.[337]

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334 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); *see also supra* notes 239-43 and accompanying text.

335 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984). The *Helicol* plaintiffs were the survivors of four Americans killed in a helicopter crash in Peru. *Id.* at 409-10. The Americans were employees of a Peruvian consortium, and were riding in a helicopter owned by defendant Helicol, a Colombian corporation. *Id.* The plaintiffs alleged that the cause of the crash was Helicol's inadequate training of its pilot and pilot error. *Id.* at 425-26 (Brennan, J., dissenting). Helicol negotiated for and purchased the helicopter, along with 80% of Helicol's total fleet, in Texas from Texas-based Bell Helicopter Company at a price of $4 million. *Id.* at 411. The negotiation session that led to the agreement that Helicol would provide helicopter transportation services for the Americans' employer took place in Texas. *Id.* Helicol also had its pilots trained at the Bell facility in Texas. *Id.*

336 *Id.* at 417. Although the majority opinion in *Helicol* did not attempt any substantial reformulation of the contacts test, the opinion was surprising for the heavy reliance it placed on a pre-*International Shoe* case, *Rosenberg Bros. & Co. v. Curtis Brown Co. Id.* (citing Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923)). The *Rosenberg* Court concluded that regular trips by agents of a clothing dealer to make purchases within the forum were insufficient to imply the dealer's "presence" in the forum. *Rosenberg*, 260 U.S. at 518. The *Helicol* majority viewed *Rosenberg* as factually analogous to the corporation's purchase of helicopters in Texas. *Helicol*, 466 U.S. at 417-18. As Justice Brennan, the sole dissenter, pointed out in his opinion, the Court did little to explain why it had chosen to resurrect *Rosenberg*. *Id.* at 422 (Brennan, J., dissenting). The analogy to *Rosenberg* was not particularly powerful given the relatively close nexus between the purchases and the theory of relief sued upon in *Helicol*. *Id.* at 424-25; *see supra* note 335.

337 The Court cast some indirect light on personal jurisdiction in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). *Shutts* involved a 28,000 member plaintiff class action brought in Kansas state court by individual lessors of various gas fields against the producer-lessee for unpaid royalties. *Id.* at 799. Pursuant to Kansas procedure, once the class was certified, plaintiffs sent notices by mail to potential class members, requiring them to affirmatively "opt-out" if they did not want to participate. *Id.* at 801. The defendant argued that the Kansas state courts could constitutionally take jurisdiction only over those *plaintiffs* who had minimum contacts with the forum. *Id.* at 802. The Court, however, refused to equate absent class

In the Court's next opinion, *Burger King Corp. v. Rudzewicz*,[338] Justice Brennan, the perennial dissenter in personal jurisdiction cases, finally "had it his way."[339] In *Burger King* the plaintiff, a national fast food franchisor headquartered in Florida, sued one of its Michigan-based franchisees in a diversity action in a Florida federal district court, alleging breach of the franchise agreement.[340] Brennan began his opinion with a seven-page laundry list of the various formulations of the minimum contacts test over the years since *International Shoe*.[341] Brennan noted the "liberty interest" formulation in *Bauxites*,[342] the "structuring primary conduct" rationale of *World-Wide*,[343] the "fair warning" rationale of *Keeton*,[344] the "continuing relationships" rationale of both *McGee* and *Travelers*,[345] the "manifest [forum state] interest" rationale of *McGee* and *Keeton*,[346] the "modern transportation" rationale of *McGee*,[347] and the "unilateral activity"/"purposeful availment" formula of *Hanson*,[348] among others. Purporting to "apply" this unwieldy set of "principles," the Court concluded that jurisdiction would lie in Florida.[349] The Court noted that the contract in

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members with defendants. *Id.* at 807. The Court reasoned that "[t]he purpose of [the minimum contacts] test [as applied to defendants], of course, is to protect a defendant from the travail of defending in a distant forum." *Id.* The Court also repeated *Bauxites'* rejection of the "sovereignty" rationale. *Id.* Both the burdens and risks to an absentee plaintiff, the Court concluded, were sufficiently slight that the Kansas "opt-out" notice, allowing potential plaintiffs to refuse participation, was adequate to protect their interests. *Id.* at 812.

338 471 U.S. 462 (1985).

339 Apologies to counsel for the defendants, *see id.* at 483 n.25 (stating that "when Burger King is the plaintiff, you won't 'have it your way' "(quoting Brief for Appellee 19)). Apologies also to Perschbacher, *supra* note 227, at 585 (declaring that "Brennan ha[d] it his way") and Stephens, *supra* note 227, at 89 (same). All of these people clearly have priority on this pun.

340 *Burger King*, 471 U.S. at 468. The franchise agreement was of substantial magnitude, calling for in excess of $1 million in payments over a twenty-year period. *Id.* at 467.

341 *Id.* at 471-78.

342 *Id.* at 472 n.13.

343 *Id.* at 472.

344 *Id.*

345 *Id.* at 473.

346 *Id.*

347 *Id.* at 474.

348 *Id.* at 474-75.

349 *Id.* at 478.

question had a substantial connection with Florida because the franchisor's operation was headquartered in Florida, and the defendants were aware that they were negotiating with a Florida-based corporation.[350] The Court also placed heavy emphasis on a choice-of-*law* provision in the contract directing application of Florida law in the event of a dispute.[351] Although noting that the jurisdictional and choice-of-law standards differ, the Court relied on the contract provision as evidence that the defendants "purposefully invoked the benefits and protections of" Florida's laws.[352]

Until recently the final link in the chain of modern jurisdictional cases was *Asahi Metal Industry Co. v. Superior Court*.[353] *Asahi* grew out of a products liability action filed in California state court when a tire blew out on plaintiff's motorcycle, seriously injuring him and killing his wife.[354] The plaintiff's complaint named as one of the defendants the Taiwanese manufacturer of the tube, Cheng Shin Rubber Industrial Co., Ltd.[355] Cheng Shin then filed a complaint (termed a "cross-complaint" in California) against the manufacturer of the valve assembly, Asahi Metal Industry Co., seeking indemnity.[356]

Asahi objected to California's exercise of jurisdiction over Cheng Shin's cross-complaint for indemnity against Asahi. The trial court, with analytical clarity sorely missing throughout the appellate review of the case, orally denied the motion stating: "Asahi obviously does business on an international scale. It is not unreasonable that [it] defend claims of defect in [its] product on an international scale."[357] The California Supreme Court, reversing the intermediate appellate court, affirmed the trial court and upheld the exercise of jurisdiction.[358]

The Court might have used *Asahi* simply as a vehicle to resolve

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350 *Id.* at 479-80.

351 *Id.* at 481-82.

352 *Id.* at 482.

353 480 U.S. 102 (1987).

354 *Id.* at 105-06.

355 *Id.* at 106.

356 *Id.* Cheng Shin purchased a large number of valves from Asahi; sales to Cheng Shin accounted for about 1% of Asahi's income in 1981 and 1982. *Id.* Cheng Shin sold a large number of its tubes in the United States; about one-fifth went to California, and a large fraction of those tubes, perhaps as much as 20%, incorporated Asahi valves. *Id.* at 106-07.

357 *Id.* at 107.

358 *Id.* at 107-08. While Asahi chased its jurisdictional objection up the

a long-simmering dispute among the lower courts as to how to apply *World-Wide*'s "stream-of-commerce"[359] language,[360] partic-

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appellate ladder, all aspects of the case, except for the Cheng Shin-Asahi indemnity dispute, settled. *Id.* at 106.

359 *See supra* note 308 and accompanying text.

360 *See, e.g.*, Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984) (defendant's component part resold in forum, jurisdiction asserted); Nelson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983) (distributor purchased shirt sold by retailer in forum, jurisdiction asserted), *cert. denied*, 465 U.S. 1024 (1984); Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983) (defendant Japanese manufacturer produced 300,000 splices, one splice arrived in forum on ocean liner, jurisdiction asserted); Raffaele v. Compagnie Generale Maritime, S.A., 707 F.2d 395 (9th Cir. 1983) (shipment passing through forum state to another state injures dock worker, jurisdiction asserted); Horne v. Adolph Coors Co., 684 F.2d 255 (3d Cir. 1982) (manufacturer unsuccessfully tried to prevent products from being sold in forum, jurisdiction asserted); Myers v. John Deere, Ltd., 683 F.2d 270 (8th Cir. 1982) (shipment passing through forum injures customs inspector, jurisdiction asserted); Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981) (single box of wine shipped to forum, jurisdiction asserted); Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155 (9th Cir. 1980) (single shipment of fertilizer to forum, jurisdiction asserted); Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) (sale of insurance to owner of ship outside forum, ship ran aground in forum, jurisdiction asserted over insurer), *cert. denied*, 450 U.S. 912 (1981); Graco, Inc. v. Kremlin, Inc., 558 F. Supp. 188 (N.D. Ill. 1982) (small amount of paint resold in forum, jurisdiction asserted); Bodines, Inc. v. Sunny-O, Inc., 494 F. Supp. 1279 (N.D. Ill. 1980) (single sale of orange juice in forum, jurisdiction asserted); Bryant v. Ceat S.P.A., 406 So. 2d 376 (Ala. 1981) (tire resold in forum, jurisdiction asserted over tire manufacturer), *cert. denied*, 456 U.S. 944 (1982); Secrest Mach. Corp. v. Superior Court, 33 Cal. 3d 664, 660 P.2d 399, 190 Cal. Rptr. 175 (1983) (single leveling machine sold in forum, jurisdiction asserted); St. Joe Paper Co. v. Superior Court, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981) (sale of boxes outside forum state, plaintiff later shipped boxes to forum state, jurisdiction asserted), *cert. denied*, 455 U.S. 982 (1982); Ford Motor Co. v. Atwood Vacuum Mach. Co., 392 So. 2d 1305 (Fla.) (component part of car resold in forum, jurisdiction asserted over component manufacturer), *cert. denied*, 452 U.S. 901 (1981); Burns v. District Court, 97 Nev. 237, 627 P.2d 403 (1981) (car leased outside forum, plaintiff took car to forum state and was injured in accident involving car, jurisdiction asserted against lessor). *But cf.* Hunt v. Erie Ins. Group, 728 F.2d 1244 (9th Cir. 1984) (defendant insurer sold no insurance in forum, plaintiff was third party beneficiary of insured, plaintiff's subsequent move to forum insufficient contacts with forum for jurisdiction over insurer); Humble v. Toyota Motor Co., 727 F.2d 709 (8th Cir. 1984) (component parts manufactured and sold outside forum not sufficient contacts); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.) (company modified vessel outside forum, sole contact with forum was arrival of vessel

ularly in component parts cases. Instead, the case resulted in a splintered opinion, although a unanimous result, finding that California lacked jurisdiction.[361] Justice O'Connor, in a portion of her opinion that received only four votes, concluded that component resale, absent other factors (such as forum-state advertising) indicating an intent to serve the forum market, was insufficient to establish minimum contacts.[362] Justice Brennan's opinion, also commanding four votes, including the vote of *World-Wide* author Justice White, concluded that component resale was sufficient for jurisdiction, even without other indicia of intent to serve the forum market.[363] Justice Stevens, who joined neither Brennan's nor O'Connor's opinion, expressed no firm view as to the correct stream-of-commerce test, but reasoned that O'Connor's test, even if valid, was misapplied to the facts of the case.[364]

The one thing that eight of the Justices[365] agreed upon, however, was that quite aside from the outcome of the "minimum contacts"/"stream of commerce" debate, jurisdiction was "unreasonable," and therefore unconstitutionally asserted.[366] *Asahi*, if

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at forum's port, not sufficient contacts), *cert. denied*, 454 U.S. 1085 (1981); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981) (repair of ship that eventually traveled to forum not sufficient contacts); Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175 (9th Cir. 1980) (proposed marketing scheme to include forum state not sufficient contacts); 500 Motors, Inc. v. Superior Court, 122 Cal. App. 3d 827, 176 Cal. Rptr. 349 (1981) (automobile insurance sold outside forum, plaintiff drove to forum, insufficient contacts).

361 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (plurality opinion).

362 *Id.* at 108-13.

363 *Id.* at 116-21 (opinion of Brennan, J., concurring in part and concurring in judgment).

364 *Id.* at 121-22 (opinion of Stevens, J., concurring in part and concurring in judgment).

365 Justice Scalia joined the portion of O'Connor's opinion finding a lack of "minimum contacts", but did not join the portion of her opinion concluding that jurisdiction was "unreasonable" for reasons other than a lack of minimum contacts. *Id.* at 105.

366 *Id.* at 113-16. In the portion of her opinion joined by eight of the Justices, Justice O'Connor reasoned:

> We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend upon an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's

nothing else, demonstrated the incredible durability of the notion that "federalism" plays a role in evaluating the constitutionality of state court assertions of jurisdiction.[367] Although *Asahi* did not resurrect specifically the "sovereignty" language of *World-Wide*, the "shared interest" language[368] that it pulled from the grave was in much the same vein.

The most surprising aspect of *Asahi*, however, was its conclusion that the existence of "minimum contacts" was a necessary, but not sufficient, condition for the exercise of jurisdiction.[369] Although the Court obliquely suggested that "minimum contacts" were necessary but not sufficient in *Burger King*[370] and *World-Wide*,[371] *Asahi* was the first time it appeared to affect the result. It may well be, as some have suggested, that *Asahi* was bound to its peculiar facts; two alien parties battling in a state courthouse after all the domestic parties have settled and gone home.[372] *Asahi*, however, muddied the law of personal jurisdiction even further at a time when lower courts and parties were having an extremely difficult time trying to "apply" the Court's maddeningly unstable constitutional "test" for personal jurisdiction.[373]

Perhaps the kindest thing one can say about the modern-era

> interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." [citing *World-Wide*].
>
> A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.

Id. at 113-14. O'Connor then went on to note that because the underlying case had settled, California's "interest" was "slight." *Id.* at 114.

367 Although *Asahi* involved alien defendants, and thus did not implicate the "interests" of "the 'Several States,' " O'Connor postulated a similar doctrine on the *international* scale. *Id.* at 115.

368 *See supra* note 366.

369 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

370 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985).

371 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (suggesting that minimum contacts has "two functions": protecting defendant against distant and inconvenient forums, and ensuring that States do not reach beyond their limits as co-equal sovereigns).

372 *See supra* note 358; *see also* Perschbacher, *supra* note 227, at 589 n.27 (arguing *Asahi*'s range of application is narrow).

373 *See supra* note 360.

jurisdictional cases is that they represent a "flexible" approach.[374] In my view, however, personal jurisdiction is more of a constitutional tumbleweed. It has no original roots in the Constitution. The suggestion in *Pennoyer* that due process has anything to do with the territorial reach of state courts was ill-considered.[375] The transformation of *Pennoyer*'s collateral attack rationale to an all-encompassing rationale in *Menefee*[376] was similarly ill-considered. Further, this tumbleweed has not stayed in one spot long enough to grow any roots. The Court has listed a huge number of factors in its modern jurisdictional cases, but without ascribing any particular weight to any of the factors, preferring to throw several of them in the pot and then magically arriving at the result. Finally, the factors have not been consistent. In the space of twenty-nine years the Court has accepted,[377] then rejected,[378] then accepted,[379] then rejected,[380] and then accepted[381] the "federalism" or "sovereignty" factor in the jurisdictional calculus.[382] Like a tumbleweed, the constitutional law of personal jurisdiction has been blown from place to place with the winds of whatever verbal formulation strikes the Court's fancy.

II. *BURNHAM V. SUPERIOR COURT*

The tumbleweed's next and most recent stop on its aimless journey was *Burnham v. Superior Court*.[383] As it turned out, the

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374 *See* Lewis, *supra* note 3 (calling for "flexible tests under uniform standards").

375 Pennoyer v. Neff, 95 U.S. 714, 733 (1877); *see also supra* notes 115-16 and accompanying text.

376 Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); *see supra* notes 184-202 and accompanying text.

377 Hanson v. Denckla, 357 U.S. 235, 251 (1958).

378 Shaffer v. Heitner, 433 U.S. 186, 204 & n.20 (1977).

379 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

380 Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

381 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-15 (1987).

382 *See* Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983) [hereafter Lewis, *Three Deaths*] (discussing various rises and falls of "sovereignty" rationale in cases through *Bauxites*).

383 110 S. Ct. 2105 (1990).

reports[384] of *Pennoyer*'s death were greatly exaggerated. In *Burnham* the Court upheld the constitutionality of tag jurisdiction.[385]

Burnham centered on the pending divorce action of Dennis and Francie Burnham.[386] Mrs. Burnham filed for divorce in California state court in early 1988.[387] Shortly after Mrs. Burnham filed the California action, Mr. Burnham, a domiciliary of New York, visited California to conduct business and to visit his children for three days.[388] At the conclusion of his visit he was served with process in the California proceeding.[389] He unsuccessfully moved to quash service in the trial court, and California's intermediate appellate court denied mandamus relief.[390] The California Supreme Court denied a hearing, allowing the Supreme Court to direct a writ of certiorari to the intermediate appellate court to review the jurisdictional holding.[391]

Like *Asahi*,[392] *Burnham* produced a unanimous result with splintered reasoning. Justice Scalia announced the judgment of the Court, but only the Chief Justice and Justice Kennedy joined his opinion in full.[393] Scalia began with a brief review of the effect of judgments entered without jurisdiction.[394] Consistent with the Court's approach since *Menefee*,[395] Scalia adopted the expansive view of *Pennoyer* that extra-jurisdictional judgments are both void in the judgment-rendering court and not entitled to recognition

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384 Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977) (purporting to overrule *Pennoyer*); *see also supra* note 3 and accompanying text.

385 *Burnham*, 110 S. Ct. at 2119.

386 *Id.* at 2109. The couple was married in West Virginia in 1976 and then moved to New Jersey in 1977. *Id.* Ten years later they decided to separate. Like the former Mrs. Kulko, *see* Kulko v. Superior Court, 436 U.S. 84 (1978); *see also supra* notes 290-99 and accompanying text, Mrs. Burnham decided to leave the Northeast for the more temperate climes of Northern California; but, unlike Mrs. Kulko, Mrs. Burnham took the children with her. *Burnham*, 110 S. Ct. at 2109.

387 *Id.* Mr. Burnham had filed for divorce in New Jersey but never served the complaint. *Id.*

388 *Id.*

389 *Id.*

390 *Id.*

391 *Id.*

392 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); *see also supra* notes 353-73 and accompanying text.

393 *Burnham*, 110 S. Ct. at 2109.

394 *Id.* at 2109-10.

395 Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); *see also supra* notes 205-14 and accompanying text.

in other courts.[396] His further discussion on this point, however, was ambiguous. Scalia stated that even prior to the fourteenth amendment "American courts invalidated, or denied recognition to, judgments that violated [the] common-law principle[s]" of jurisdiction.[397] If Scalia meant that pre-*Pennoyer* courts struck down judgments that conflicted with the territorial principles even in intrastate recognition cases in which the extra-territorial service was authorized by statute, he was wrong. The authority to strike down judgments in intrastate cases was not suggested until *Pennoyer*, and not settled until *Menefee*.[398] If, however, Scalia meant that *Pennoyer* equated judgment invalidity within the state with nonrecognition of the judgment in other courts, he was simply restating the expansive view of *Pennoyer*.[399]

With the expansive view of *Pennoyer* repeated, and the authority to review California's exercise of jurisdiction thereby claimed,

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396 *Burnham*, 110 S. Ct. at 2109.

397 *Id.*

398 *See supra* notes 184-202 and accompanying text. The possible exception was Beard v. Beard, 21 Ind. 321 (1863), which Scalia did not cite. *See infra* note 460.

399 None of the several cases Scalia cited for this proposition, however, cast any doubt on the validity of the limited reading of *Pennoyer*. The only Supreme Court case cited, Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336 (1850), involved an attempt by an Ohio federal court to recognize an Ohio state court judgment. Consistent with other cases of its era, such as Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873), *see supra* notes 68-76 and accompanying text, and Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870), *see supra* notes 62-67 and accompanying text, the *Boswell* court treated the question of federal court recognition of a home state judgment as an issue of *statutory* construction, thus strongly implying that states had authority to define their own jurisdictional reach. *See Boswell*, 50 U.S. (9 How.) at 349-50. In fact, the Court in *Boswell* suggested that a collateral attack on the judgment would be impermissible unless allowed by Ohio procedure. *Id.* at 349-50 (stating that "the validity of [the judgment] could not be questioned collaterally" unless attack would be allowed in Ohio state courts). The only other federal case cited by Scalia, Picquet v. Swan, 19 F. Cas. 609 (No. 11,134) (C.C. Mass. 1828) (Story, J.), involved the question of whether to enter a default judgment for nonappearance. In this case Story treated the question of whether service was authorized in the federal court as a question of statutory interpretation of the relevant portions of the federal Judiciary Act. *Id.* at 610. The state cases Scalia cited, *e.g.*, Evans v. Instine, 7 Ohio 273 (1835); Steel v. Smith, 7 Watts & Serg. 447 (Pa. 1844), are interstate recognition cases. One of the state cases, Grumon v. Raymond, 1 Conn. 40 (1814), is curious because, although it does use the phrase "*coram non judice*", *see id.* at 46, the issue is the validity of a search warrant.

Scalia briefly reviewed the post-1945 cases.[400] Scalia noted that the primary deviation from the strict territorial categories of jurisdiction was the contacts-based substitute for presence developed in *International Shoe*.[401] With this framework in place Scalia asked whether "due process requires a . . . connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him."[402]

Scalia then turned his attention to the history of tag jurisdiction, terming it "[a]mong the most firmly rooted principles of personal jurisdiction in [the] American tradition."[403] Scalia noted that Story's Commentaries[404] had endorsed the principle.[405] Scalia reviewed some of the modern criticism of Story's statement of that principle by Professors Hazard and Ehrenzweig,[406] but concluded that the relevant question was whether "Story's understanding [of the validity of tag jurisdiction] was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted."[407] Scalia, after reviewing state decisional law from the nineteenth and early twentieth centuries, concluded that state courts at the time of the adoption of the fourteenth amendment were nearly unanimous in holding that in-state service of a transient defendant suffices to confer jurisdiction.[408]

Reviewing modern decisions, Scalia concluded that "[t]his American jurisdictional practice is, moreover, not merely old, it is continuing."[409] Scalia noted that the only courts that have abandoned "tag" jurisdiction have done so under the belief that it is unconstitutional absent minimum contacts between the defendant and the forum.[410] Yet this view, Scalia noted, required one

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400 *Burnham*, 110 S. Ct. at 2110.

401 *Id.*

402 *Id.*

403 *Id.*

404 *See supra* note 129 and accompanying text.

405 *Burnham*, 110 S. Ct. at 2110-11.

406 As the *Burnham* plurality noted, Professors Hazard and Ehrenzweig concluded that Story's view that tag jurisdiction was a universally recognized basis for jurisdiction was not uncontroverted as an historical matter. *Id.* at 2111 (citing Ehrenzweig, *supra* note 3 and Hazard, *supra* note 226).

407 *Burnham*, 110 S. Ct. at 2111.

408 *Id.* at 2111-13.

409 *Id.* at 2113.

410 *Id.*; *see* cases cited *supra* note 4.

to look at minimum contacts not only as a surrogate for the traditional territorial bases of jurisdiction, but as a *replacement* for them as well.[411] Scalia, however, found the replacement theory untenable.[412]

Rejecting the replacement theory required Scalia to face the *Shaffer* Court's conclusion that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[413] Scalia reasoned that this sentence, when taken alone, seemed to support the replacement theory; and tag jurisdiction, whatever else it might be, is certainly an "assertion of state-court jurisdiction."[414] Scalia argued, however, that this reading "wrenches [this sentence] out of context."[415] All *Shaffer* meant to do, according to Scalia, was to require that in rem jurisdictional assertions have a jurisdictional basis which would suffice for an in personam action.[416]

Scalia insisted that the plurality was "in no way receding from or casting doubt upon the holding of *Shaffer* or any other case."[417] His summary of the *Burnham* plurality's methodology, however,

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411 *Burnham*, 110 S. Ct. at 2115. Scalia viewed the issue as essentially a question of whether minimum contacts was an addition to the traditional bases of jurisdiction (and hence a "surrogate" for them) or whether minimum contacts was the *sine qua non* for jurisdiction (and hence a replacement for the traditional bases). *Id.*

412 *Id.* Scalia stated:

> The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by analogy to "physical presence" and it would be perverse to say it could now be turned against the touchstone of jurisdiction.

Id. Actually, the statement that the minimum contacts test developed "by analogy" to "physical presence" is not strictly accurate. The traditional basis was *service* while present, not mere presence. *International Shoe*'s most notable development was its apparent termination of the notion that *service* had independent significance. *See supra* notes 216-20 and accompanying text.

413 *Burnham*, 110 S. Ct. at 2115 (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977)). In plain terms, the language from *Shaffer* appears to endorse the "replacement" theory of minimum contacts by making minimum contacts the *sine qua non* of jurisdiction. *See supra* note 406.

414 *Burnham*, 110 S. Ct. at 2115-17.

415 *Id.* at 2115.

416 *Id.* at 2116.

417 *Id.*

suggested otherwise.[418]

Justice Brennan, writing for himself, Justice Marshall, Justice Blackmun and Justice O'Connor, concurred in the result reached by Scalia, but not much else.[419] Brennan agreed that in-state service "generally" allows a state to exercise jurisdiction, but disagreed that tag jurisdiction was necessarily constitutional by virtue of its "pedigree."[420] Brennan would have made history "an important factor" in determining the constitutionality of a jurisdictional rule, but also saw the need to "undertake an 'independent inquiry into the . . . fairness of the prevailing in-state service rule.' "[421]

Brennan began by reviewing *Shaffer*.[422] He pointed out that *Shaffer* rejected the constitutionality of quasi-in-rem hold-up,[423] a jurisdictional practice with at least the degree of historical acceptance that attaches to tag jurisdiction.[424] Brennan reasoned that although *Shaffer*'s holding could be read narrowly to apply only to in rem jurisdiction, its mode of analysis could not.[425] Brennan noted that commentators and lower courts generally had read *Shaffer* broadly enough to cover tag jurisdiction.[426]

Brennan then turned his attention to the historical roots of tag

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418 *Id.* at 2116-17. Scalia summarized the plurality's methodology:

> It is fair to say, however, that while our holding today does not contradict *Shaffer*, our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it . . . . Where . . . a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified." . . . For new procedures hitherto unknown, the Due Process Clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.

Id. (citations omitted).

419 *Id.* at 2120 (Brennan, J., concurring).

420 *Id.*

421 *Id.* (quoting plurality opinion).

422 *Id.* at 2120-22.

423 *See supra* note 270 and accompanying text.

424 *Burnham*, 110 S. Ct. at 2121.

425 *Id.*

426 *Id.* at 2121-22.

jurisdiction. Brennan described the rule as a "stranger" at common law, relying on Professor Hazard's and Professor Ehrenzweig's criticism of the portion of Story's treatise endorsing tag jurisdiction.[427] Brennan also described tag jurisdiction as "weakly implanted" in American law as of 1868, and not receiving "wide currency until well after . . . *Pennoyer*."[428]

Brennan acknowledged, however, that tag jurisdiction has been with us for "perhaps a century."[429] This fact, Brennan reasoned, provides a defendant passing through a state with " 'clear notice that [he] is subject to suit' in the forum."[430] Brennan also described tag jurisdiction as "consistent with reasonable expectations and . . . entitled to a strong presumption that it comports with due process."[431]

Brennan then attempted to square California's assertion of jurisdiction with the minimum contacts formula. Transient presence, Brennan concluded, constitutes purposeful availment because of the "significant benefits provided by the State."[432] Tag jurisdiction, Brennan asserted, also avoids the "asymmetry" that out-of-staters can file in state courts as plaintiffs, but avoid jurisdiction as defendants.[433] Finally, Brennan described the burdens on a tagged defendant as "slight."[434] "Modern transportation" and "a variety of procedural devices," according to Brennan, have greatly reduced the onus of defending oneself.[435]

Scalia's plurality opinion and Brennan's concurrence engaged in a piqued debate regarding the historical roots of transient jurisdiction.[436] Scalia stated that he could only "marvel" at Jus-

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427 *Id.* at 2122 n.8 (citing Ehrenzweig, *supra* note 3 and Hazard, *supra* note 226).

428 *Id.* at 2122-24.

429 *Id.* at 2124.

430 *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1986)).

431 *Id.*

432 *Id.* at 2124-25. Brennan wrote that "[Mr. Burnham's] health and safety [were] guaranteed by the State's police, fire and emergency medical services; he [was] free to travel on the State's roads and waterways; he likely enjoy[ed] the fruits of the State's economy as well." *Id.* at 2125.

433 *Id.*

434 *Id.*

435 *Id.*

436 *See id.* at 2112 n.3 (plurality opinion); *id.* at 2122 n.8 & 2123 n.9 (Brennan, J., concurring). The principal opinions saved their harshest invective for the footnotes, although Section III of Scalia's opinion was an

tice Brennan's assertion that tag jurisdiction " 'was rather weakly implanted in American jurisprudence.' "[437] Scalia pointed to the opinions he cited indicating that at least nine states recognized tag jurisdiction before *Pennoyer*.[438] Brennan, however, relying on modern criticism,[439] argued that Story's acceptance of the transient rule was "as a historical matter . . . almost surely wrong."[440] Brennan also pointed to three cases[441] that he maintained showed something less than unanimous American acceptance of tag jurisdiction.[442]

If one frames the debate on the extremely narrow terms that Scalia desired — the acceptance of tag jurisdiction by American courts in 1868 — Scalia had the better of the argument. As the cases he cited demonstrate, American courts, albeit perhaps uncritically, widely accepted tag jurisdiction.[443] The cases Brennan cited simply do not cast doubt on American acceptance of tag jurisdiction in the nineteenth century.[444] Of course, merely

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addendum for the purpose of providing "[a] few words in response to Justice Brennan's concurrence." *Id.* at 2117.

437 *Id.* at 2112 n.3 (plurality opinion).

438 *Id.*

439 Brennan also cited the writings of Professors Ehrenzweig and Hazard. *Id.*; *see supra* note 406.

440 Burnham v. Superior Court, 110 S. Ct. 2105, 2122 n.8 (1990) (Brennan, J., concurring).

441 Gardener v. Thomas, 14 Johns. 134 (N.Y. Sup. Ct. 1817); Molony v. Dows, 8 Abb. Pr. 316 (N.Y. Common Pleas 1859); Coleman's Appeal, 75 Pa. 441 (1874); *see infra* note 444.

442 *Burnham*, 110 S. Ct. at 2123 n.9.

443 *Id.* at 2111-12. A recent commentary concluded that American acceptance of tag jurisdiction was pervasive prior to *Pennoyer*. Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 93 (1990) (stating that "[a]lthough not confirmed by the Supreme Court until 1850, the service of process rule had been well established in state court decisions, as well as in decisions of the lower federal courts, since at least the beginning of the nineteenth century").

444 *Gardener*, as Scalia suggested, *see* 110 S. Ct. at 2112 n.3, probably is best viewed as a discretionary declination of jurisdiction, or forum non conveniens, case. *Gardener*, 14 Johns. 134. *Molony* really is a subject matter jurisdiction case, holding that courts of equity lack the competence to enforce foreign criminal and quasi-criminal laws, but reaffirming their ability to adjudicate ordinary tort and contract actions based on in-state service. *Molony*, 8 Abb. Pr. at 327-28. Also confirming the view that *Molony* is a subject matter jurisdiction case is the fact that the responsive pleading was a general denial, *see id.* at 317, not a special appearance, which would waive an objection based on *personal* jurisdiction. *Coleman* questions the

because Scalia had the better of the debate on these terms does not mean that these *should* have been the terms of the debate. Brennan was surely correct that *Shaffer* rejected history as the talisman of jurisdiction.[445]

Nevertheless, as Scalia pointed out, even shifting the debate to Brennan's terms would do little to advance Brennan's cause.[446] Brennan purported to find that Mr. Burnham's three day visit to California constituted "minimum contacts."[447] To say that this conclusion stretched the concept of minimum contacts is to understate the matter severely. Strangely, neither principal opinion discussed *Kulko*[448] at any length, which, except for the fact of in-state service, involved almost identical facts.[449] In *Kulko*, the Court specifically rejected the notion that a three day stop-over was enough for jurisdiction, stating that such a holding would make a "mockery" of the due process clause.[450] As Scalia also pointed out, the "benefits" that Mr. Burnham was supposed to have accrued in his three day jaunt to California would have been absent in a fifteen minute stay, although fifteen minutes is more than long enough to get tagged with process.[451]

Justice White joined Scalia's historical discussion of tag jurisdiction, but not the portion of Scalia's opinion that seemed to cast doubt on *Shaffer*. White wrote briefly to state that tag jurisdiction "is so widely accepted throughout this county that [he] could not

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fairness not of tag jurisdiction, but its cousin, quasi-in-rem holdup. *Coleman*, 75 Pa. at 450.

As Brennan pointed out, however, the *English* tradition was not so clear. Currently, the Common-Market countries, including England, will not recognize judgments based upon tag jurisdiction. *See* Juenger, *Jurisdiction Comparison*, *supra* note 223, at 1206-07 (noting Brussels Convention, governing jurisdiction between Common Market Countries, does not provide for tag jurisdiction).

445 *Burnham*, 110 S. Ct. at 2120-22. Scalia's effort to limit *Shaffer* to the in rem context was at odds with that case's rejection of those very categories. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

446 *Burnham*, 110 S. Ct. at 2117-19.

447 *Id.* at 2124-25 (Brennan, J., concurring).

448 Kulko v. Superior Court, 436 U.S. 84 (1978).

449 *See supra* notes 290-99 and accompanying text.

450 *Kulko*, 436 U.S. at 86.

451 *Burnham*, 110 S. Ct. at 2118; *see also* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant served with process while flying over Arkansas in airplane, jurisdiction asserted).

possibly strike it down."[452] Justice Stevens, as has been his custom in major conflicts cases,[453] concurred only in the judgment, refusing to join either principal opinion.[454] Stevens was content to note "that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case."[455]

Easy perhaps for Justice Stevens, but as with so many other Supreme Court jurisdictional decisions, *Burnham* raised many more questions than it answered. Justice Scalia's historical approach, which garnered three and one-half votes, was inconsistent with *Shaffer*. Justice Brennan's opinion, which garnered four votes, paid homage to *Shaffer*, but its result was inconsistent with the minimum contacts test.

Happily, there is a solution. As I shall discuss presently, Brennan and Scalia took giant leaps down different roads to the same destination. That destination is a place where the Court no longer regards personal jurisdiction as an issue of constitutional law, and it is a far, far better place than where we find ourselves now.

III. The Road Ahead

A. The End of Due Process as a Limitation on Personal Jurisdiction

Scalia's opinion and Brennan's concurrence in *Burnham* evinced diametrically opposed views of the due process clause of the fourteenth amendment. Scalia posited the clause essentially as an instrument of history, tying it to its traditional, largely process-based, role. Brennan denied this thesis, and complained that to adopt Scalia's view would be to "assume[ ] that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago."[456] Yet neither Brennan's nor Scalia's theory will support substantial limitations on state court personal jurisdiction.

The major problem with attempting to limit the reach of state

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452 *Burnham*, 110 S. Ct. at 2119 (White, J., concurring in part and concurring in judgment).

453 *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 320-32 (1981); Shaffer v. Heitner, 433 U.S. 186, 217-19 (1977).

454 *Burnham*, 110 S. Ct. at 2126 (Stevens, J., concurring).

455 *Id.*

456 *Id.* at 2121 n.3 (Brennan, J., concurring).

courts under Scalia's view is that, as an historical matter, the phrases "due process of law," and its Magna Carta equivalent "law of the land," did *not* connote any limitation on personal jurisdiction.[457] A majority of the states, as of 1868, did not view these phrases, which appeared in many state constitutions and were invoked as terms of "natural justice," as forbidding legislative extensions of state court jurisdiction beyond the territorial principles.[458] The leading commentators of the time, Cooley and Story, were ambiguous on the point.[459] Only one state case from that era even possibly suggested a different view.[460]

Another problem with Scalia's historical analysis is that nothing in the history of the adoption of the fourteenth amendment suggests a departure from the preratification understanding of the term "due process," at least in this context. Nothing in the historical materials makes any direct reference to the subject of per-

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457 Transgrud, *supra* note 50, at 877-79; Whitten (pt. 2), *supra* note 59, at 799-804.

458 Whitten (pt. 2), *supra* note 59, at 803-04 (stating that "the predominant pre-fourteenth amendment view would have rejected due process as limiting the legislature's power to exceed the *territorial* rules of jurisdictions and only slightly limiting the power to modify pure notice rules" (emphasis in original)).

459 *See supra* notes 129-30 and accompanying text.

460 In Beard v. Beard, 21 Ind. 321 (1863), an Indiana state court entered a decree of divorce and alimony against the defendant, apparently no longer a domiciliary of the state, based on service by publication. *Id.* at 322. In a collateral proceeding to enforce the judgment, also in the Indiana state courts, the Indiana Supreme Court held that enforcement was improper. *Id.* at 328. It was not clear, however, whether the court voided the judgment on notice or jurisdictional grounds. *See* Transgrud, *supra* note 50, at 877-78 (suggesting decision rested on notice grounds); *cf.* Whitten (pt. 2), *supra* note 59, at 799-800 (reading *Beard* as incorporating international rules of jurisdiction as binding internal rules). The court stated at the end of its opinion that "a State can not give its laws or jurisdiction an extra-territorial operation" and struck down the judgment in question as "not obtained by due course of law." *Beard*, 21 Ind. at 328. Earlier in the opinion, however, the court's concern seemed to be the poor notice given to the defendant, and the fact that he did not have any actual knowledge of the proceeding against him. *Id.* at 322, 328. Even if one takes the view that *Beard* was a jurisdictional decision, however, it represented a decidedly minority view. Whitten (pt. 2), *supra* note 59, at 799-804; *see also* Transgrud, *supra* note 50, at 877-78 (stating that majority of states at time of ratification of fourteenth amendment did not view due process as limitation on state court assertions of jurisdiction); Whitten (pt. 1), *supra* note 50, at 584-85, 605-06 (same); Whitten (pt. 2), *supra* note 59, at 799-800 (same).

sonal jurisdiction.[461] In fact, the due process clause, by and large, took a back seat to the equal protection clause, and the overall goal of promoting racial equality, during the framing and ratification of the amendment.[462] When the subject of the due process clause did arise during the ratification process, the general assumption was that the term "due process" had a well-settled meaning as a consequence of the preratification decisions interpreting the term.[463]

Furthermore *Pennoyer* cannot be viewed as an authoritative, contemporaneous construction of the due process clause to limit the jurisdiction of state courts. *Pennoyer* was ambiguous as to whether due process limits the jurisdictional reach of the state courts, and plausibly read to mean only that states were required to follow their own rules of personal jurisdiction.[464] More importantly, the Supreme Court consistently read *Pennoyer* in this limited fashion for twenty-two years, and did not explicitly abandon this view until 1915, *forty-seven years after* the ratification of the fourteenth amendment.[465]

Scalia's approach also entailed great deference to the state legislatures in preserving tag jurisdiction.[466] If, however, the *Burnham* plurality was willing to defer to the judgment of state legislatures in this context, it ought to be willing to uphold their long-arm statutes against constitutional attack in other contexts. Scalia's primary concern was avoiding "uncertainty."[467] The true route to predictability, however, is to take the Constitution out of the equation. Indeed, deferring to legislative judgment with respect to state court jurisdiction would restore the historical balance that the *Burnham* plurality saw as the primary function of the

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461 Whitten (pt. 2), *supra* note 59, at 804-05.

462 J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-90 (1951).

463 Whitten (pt. 2), *supra* note 59, at 809-10 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866)).

464 *See supra* notes 132-54 and accompanying text.

465 *See supra* notes 155-94 and accompanying text.

466 Scalia stated that "[w]e do not know of a single State . . . statute . . . that has abandoned in-State service as a basis of jurisdiction." Burnham v. Superior Court, 110 S. Ct. 2105, 2113 (1990) (plurality opinion). He commented that state legislatures are free to eliminate tag jurisdiction. *Id.* at 2116. Finally, he noted that "the states have overwhelmingly declined to . . . limit[ ] or abandon[ ] [tag jurisdiction], evidently not considering it to be progress." *Id.* at 2119.

467 *Id.*

due process clause.[468]

Brennan's concurrence offered no more reason to limit state court jurisdiction. The problem with which Brennan tacitly struggled was the analytical rift that has opened between jurisdictional due process in the "minimum contacts" era and due process analysis generally.[469] Since at least *United States v. Carolene Products Co.*,[470] the Court has reviewed most assertions of state authority deferentially, requiring only that they have a rational basis.[471] The minimum contacts test, however, developed independently, and has turned out to be a far more searching inquiry. There is nothing "irrational" about litigating a products liability case with all of the defendants in the forum in which the accident occurred,[472] or litigating a shareholder's derivative action in the state of incorporation,[473] or litigating the validity of a trust in the domicile of the settlor,[474] or litigating the proper level of child support in domicile of the children.[475] Nonetheless, the minimum contacts test has struck down each of these state court assertions of personal jurisdiction. The problem with which Brennan struggled was that many assertions of jurisdiction that are sensible and "rational" do not pass muster under the minimum contacts test.

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468 *Burnham*, 110 S. Ct. at 2116-17 (plurality opinion) (stating that due process requires procedures to conform to "traditional notions of fair play and substantial justice").

469 Although a bit awkward to classify as substantive or procedural, jurisdictional due process is a closer relative to substantive due process. *See* Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291, 1293 (1983) (comparing jurisdictional due process to substantive due process approach of *United States v. Carolene Products Co.*); Perdue, *supra* note 84, at 508 n.183 (stating that jurisdictional due process is species of substantive due process); Welkowitz, *supra* note 224, at 24-25 (same).

470 304 U.S. 144, 152 n.4 (1938) (concluding absent existence of fundamental right or suspect classification state action need only have rational basis).

471 *E.g.*, Williamson v. Lee Optical Of Okla., Inc., 348 U.S. 483 (1955) (holding that statute allowing only licensed ophthalmologists or optometrists to sell optical equipment has rational basis and does not violate due process clause of fourteenth amendment).

472 *Cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

473 *Cf.* Shaffer v. Heitner, 433 U.S. 186 (1977).

474 *Cf.* Hanson v. Denckla, 357 U.S. 235 (1958).

475 *Cf.* Kulko v. Superior Court, 436 U.S. 84 (1978).

Brennan's solution was to reformulate the minimum contacts test in a way that was much more deferential to the states, and consequently more in accord with the rationality standard generally demanded by substantive due process. I doubt, however, that the reformulated test can strike down any assertions of state court jurisdiction. Brennan placed his heaviest reliance on the prevalence of tag jurisdiction, which, he reasoned, apprised Mr. Burnham of his amenability to suit.[476] If a defendant can be charged with knowing the history of jurisdictional practice in the United States for the last century or so, however, he can be charged with knowledge of a state's long-arm statute. Under Brennan's formulation, courts should consistently uphold long-arm statutes on the grounds that they provide the defendant with "clear notice" of amenability to suit. In fact, given the substantial debate as to the post-*Shaffer* vitality of tag jurisdiction,[477] long-arm statutes probably give *better* notice of amenability to suit.

Furthermore, nothing in Brennan's formulation of the contacts test warrants interference with a state court's decision to assert jurisdiction. Brennan found that a fleeting presence in a state was "purposeful availment" of the protections of the forum.[478] In this limited sense, however, "availment of the protections" means little more than the state has not allowed itself to dissolve into anarchy. Following this reasoning, we all avail ourselves of a state's protections every time we do something as tangentially connected with a state as receive a letter from someone within the state, or fly over it in an airplane.[479] Moreover, Brennan relied on the slight burdens to a transient defendant because of modern transportation and the availability of procedural devices, such as summary judgment motions and flexible discovery.[480] This rationale, however, applies to all defendants, no matter what their connection with the forum or where they are served with process.

Brennan and Scalia agreed on more than they realized. *Burn-*

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476 Burnham v. Superior Court, 110 S. Ct. 2105, 2124 (1990) (prevalence of tag jurisdiction gives defendant "clear notice" he is subject to suit in forum) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 286, 297 (1980)).

477 *See supra* notes 3-4 and accompanying text.

478 *Burnham*, 110 S. Ct. at 2124-25.

479 *Cf.* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant amenable to jurisdiction in forum state after being tagged with service while flying over forum in an airplane).

480 *Burnham*, 110 S. Ct. at 2125 n.13 (Brennan, J., concurring).

ham forced the Court to confront the monster it has created in trying to create a constitutional law of personal jurisdiction. In the final analysis, however, neither Scalia's historical interpretation, nor Brennan's substantive interpretation, of the due process clause provided any reason to limit state court assertions of personal jurisdiction.

Yet this does not end the matter. Over the past decades, the Court has offered a multitude of rationales for limiting personal jurisdiction. Perhaps something in the Court's past formulations might again provide a reason to perpetuate Supreme Court intervention in the law of personal jurisdiction. With that possibility in mind, let us turn to the major themes that have been played out in the Court's jurisdictional decisions.

The most on-again, off-again theme in personal jurisdiction is the notion that constitutional intervention in personal jurisdiction is necessary to preserve interests of "federalism" or "sovereignty."[481] The last time the Court retreated from this theme, in *Bauxites*,[482] it did so under fire from some heavy academic guns,[483] and with good reason. As the Court correctly pointed out in *Bauxites*, the due process clause is a guarantor of personal rights, which does not square with the concept of the clause as an "arbitrator" between jealous states.[484]

Beyond that, it is hard to see what personal jurisdiction in civil disputes has to with federalism. Was the Union in danger because Oklahoma had asserted jurisdiction over the New York seller of a defective automobile that exploded on an Oklahoma highway?[485] Was Delaware threatening to secede because Florida invalidated a trust settled in Delaware?[486] Probably no one in the state governments of either of the two supposedly offended states knew, or would have cared if they had known, about these cases. With a considerable stretch of the imagination, one might come up with a case in which asserting jurisdiction in a civil case might

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481 *See supra* notes 377-82 and accompanying text.

482 Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

483 *See, e.g.*, Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. REV. 1112 (1981) (stating that sovereignty rationale is incompatible with due process); *see also* Lewis, *Three Deaths*, *supra* note 382 (written after *Bauxites*) (same).

484 *Bauxites*, 456 U.S. at 702 n.10.

485 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

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

spark state jealousies. Nevertheless, the remedy is not the heavy gun of due process.[487] The remedy is the legislative authority granted to Congress under the full faith and credit clause.

Another persistent gremlin in the jurisdictional calculus is the notion of "forum state interest."[488] In any strong form, this factor resembles the "state sovereignty" factor, and fails for the same reason.[489] Due process does not have anything to do with "battling" sovereigns, it has to do with protecting individual rights. More recently, the Court has described this factor as a "surrogate" for other factors in the jurisdictional calculus.[490] The Court probably meant by this that "forum state interest" was a circumlocution for the "plaintiff's interest," at least if the plaintiff sued in her own state. With that understanding, "forum state interest" is at least a possibility, because plaintiffs are "persons" protected by the clause. If the Court meant anything more than that, however, the "forum state interest" factor, like the sovereignty or federalism factor, must fall by the wayside as a reason for the Court to intervene in personal jurisdiction.

Another rationale offered by the Court at various times was the prevention of "jurisdictional surprise," or requiring a state's assertion of personal jurisdiction to be "foreseeable."[491] At first glance this is a more appealing possibility, because it has the appearance of involving individual rights. Moreover, the due process clause undeniably protects persons from certain "surprises," such as proceedings without notice,[492] bizarre choice-of-law rules,[493] and the retroactive application of statutes and novel

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487 *See* Juenger, *Dismal Prospect*, *supra* note 5, at 914 (stating that in *Allstate Ins. Co. v. Hague* the Court unjustifiably "train[ed] the heavy guns of due process and full faith and credit on a rather piddling controversy between private parties").

488 *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186, 219 (1977).

489 *See* Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 770-71 (1982) [hereafter Lewis, *Forum State Interest*] (stating that "forum state interest" factor resembles "sovereignty" factor and is incompatible with due process).

490 *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984).

491 *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2124 (1990) (Brennan, J., concurring); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

492 *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

493 *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

judicial decisions.[494] The "surprise" involved in being haled before a foreign court, however, is of a different kind. Simply requiring a defendant to answer and defend does not mean that a defendant will be found liable. The ultimate issue, after all, is liability. Any rational defendant would rather defend successfully in an out-of-state court than suffer a big judgment at home. At a deeper level, however, as demonstrated by Justice Brennan's concurrence in *Burnham*, the "jurisdictional surprise" argument is circular. Any expectation that a defendant has of avoiding an out-of-state court is a function of the jurisdictional rules themselves. Thus the "jurisdictional surprise" argument cannot justify the contents of jurisdictional rules, it simply describes a consequence of having such rules.

This brings us to the final, and most appealing, possibility, the notion that limitations on personal jurisdiction promote "fairness" or "convenience" to the defendant.[495] A defendant is undeniably a "person" protected by the due process clause. She stands to lose "property" if the case goes badly, and, therefore, a defendant has a constitutional right to have access to "process" before losing her property.[496] The Court has suggested,[497] and Professors Gottlieb,[498] Weintraub,[499] and Whitten[500] all have advanced with some force, the right to have access to process as a rationale for using the due process clause to analyze jurisdiction. Professors Weintraub and Whitten would require the defendant to show some "practical" inability to defend the case because of the choice of forum.[501] Professor Gottlieb would take into account several factors, including the size of the claim, designed to make essentially the same inquiry.[502]

All of these proposals are much more palatable alternatives than the Court's approach of the last several years. Certainly the formula resulting from such an approach would have no resem-

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494 *See, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

495 *See, e.g.*, *World-Wide*, 444 U.S. 286; Kulko v. Superior Court, 436 U.S. 84 (1978); *Shaffer*, 433 U.S. 186.

496 *See* Lewis, *Forum State Interest*, *supra* note 489, at 771 (noting procedural component of due process protection).

497 Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

498 Gottlieb, *supra* note 469, at 1328-34.

499 Weintraub, *supra* note 3, at 522-28.

500 Whitten (pt. 2), *supra* note 59, at 846-48.

501 *See* Weintraub, *supra* note 3, at 522-28; Whitten (pt. 2), *supra* note 59, at 846-48.

502 *See* Gottlieb, *supra* note 469, at 1328-34.

blance to "minimum contacts."[503] Even this clipped back and more sensible role for due process, however, does not justify a constitutional law of personal jurisdiction.

Just as surely as the defendant has property at stake in civil litigation, so does the plaintiff, in the form of an expectation of recovery, or as the Court has described it, in the form of a cause of action.[504] Thus any constitutional analysis must take into account both of these interests. The notion that either party will be unable to defend or pursue in a distant forum in the vast majority of interstate cases, however, ignores the realities of civil litigation.

The "inconvenience" rationale depends upon the elaborate metaphor of a civil party temporarily relocating to the forum state to defend or pursue the case.[505] In reality, civil litigation does not operate in this manner at all. Depositions and other discovery devices take place anywhere the parties designate, and are not tied to the forum.[506] The only events tied to the forum are those requiring judicial supervision, such as pretrial motions. Motions require the presence of counsel, but a party is free to hire a lawyer close to the courthouse. The only time a party is likely to travel is in the improbable event that the case goes to trial.[507]

Examining three classes of cases should make the point that the convenience rationale is, at a minimum, severely overstated. The first class is high-stakes interstate litigation in which the parties stand to lose or gain a tremendous amount depending on the outcome of the litigation. Products liability cases, with death or severe injury, such as *Asahi*, *Helicol* and *World-Wide* are good examples of this class of cases. The suggestion that defendants such as these are practically impaired in defending is implausible. By and large, large law firms with offices all over the world represent

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503 Current minimum contacts dogma might prevent a defendant from travelling to a courthouse five minutes away because she would have to cross a state line to get there.

504 Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

505 *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (describing assertion of personal jurisdiction as "hal[ing]" defendant before court); Whitten (pt. 2), *supra* note 59, at 846 (stating that one of burdens on defendant is "living temporarily away from home").

506 *See, e.g.*, FED. R. CIV. P. 28 (stating that depositions may be taken anywhere in world before certified reporter).

507 *See* Pieras, *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U.L. REV. 943, 943 (1986) (stating that only six percent of federal civil cases filed go to trial).

these sorts of defendants.[508] If litigating in another forum is likely to increase the defense costs, defense counsel has the option of hiring local counsel to handle motions and other matters requiring trips to the courthouse.

This is not to suggest that interstate litigation, with parties and evidence spread out over the country, or maybe the globe, is as inexpensive as purely local litigation. Quite clearly, interstate litigation is more expensive as a rule. Consider the facts of *World-Wide*. Most of the evidence relating to injury was in Oklahoma, where the Robinsons were treated after the accident. Evidence of any pre-existing medical conditions of the plaintiffs was in New York, with the Robinsons' most recent family doctors. Evidence of damages, such as lost income, was both in New York and Arizona, the Robinsons' intended destination and presumably the location of a new job. The physical evidence, such as the wrecked Audi, was in Oklahoma. Evidence of the financial condition of the defendants, which might be relevant to punitive damages, was at their headquarters in New York, the Northeast, and probably Europe. Because of the interstate character of the dispute, doctors in two states may be deposed, experts may be flown to Oklahoma to examine the wreck, and business records from several states and Europe may be subpoenaed.

The choice of *forum*, however, does little or nothing to affect the impact of litigating an interstate case. Requiring the suit against the car dealer to proceed in New York does not magically move the Oklahoma doctors and the wrecked Audi halfway across the country. In fact, the truly "convenient" forum for all concerned was probably Oklahoma because the bulk of the evidence, particularly the wrecked car, was in that state. Certainly, the Supreme Court's solution, litigating against the manufacturer in Oklahoma and against the seller and the retailer in New York,[509] was not "convenient" by any standards.

Often, the asserted "inconvenience" is a Trojan Horse. As Professor Juenger has pointed out, in *World-Wide* the real reason for the defense motion to dismiss the dealer and the retailer was

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508 *See, e.g.*, San Francisco Chronicle, July 31, 1990, at C1, col. 2 (describing merger between Pillsbury, Madison & Sutro and Lillick & McHose, resulting in offices and clients throughout United States and Pacific Rim).

509 *World-Wide*, 444 U.S. at 299 (concluding Oklahoma state courts lack jurisdiction over dealer and retailer).

to create complete diversity.[510] Complete diversity allowed the defendant to remove the case to Oklahoma federal court. The Oklahoma federal court had a reputation for drawing much more defense-oriented jury panels than Creek County, Oklahoma, the state court forum.[511] In the name of preventing plaintiffs' forum shopping, the Court gave a helping hand to a brilliant piece of defense forum shopping.

The second class of cases is one in which the stakes are lower but still substantial, and the parties are probably less sophisticated. Interstate divorce cases, such as *Kulko* and *Burnham*, are good examples of this class. Parties such as the Burnhams and the Kulkos probably are not represented by large law firms with offices throughout the country. The task of acquiring competent representation in the forum, however, is not insurmountable. Local lawyers can provide referrals; state and local bar associations keep lists of lawyers by specialty. Since the downfall of bans on lawyer advertising,[512] consumers of legal services also have access to other sources of information about lawyers. Moreover, the home-state party has no particular advantage in finding representation. Both of the Burnhams found counsel to pursue the jurisdictional issue all the way to the United States Supreme Court, a process that probably consumed more time and energy than litigating any disputes in their dissolution.

Yet, at a more fundamental level, nothing about the choice of *forum* will change the interstate character of the *Kulko* and *Burnham* disputes. No doubt it is more onerous to litigate with a spouse who is on the other side of the country than with one who still lives in the same city. If child custody and visitation are issues, evidence of how the children relate to each parent would be at both ends of the country. Marital property may be scattered between two or more states. Evidence of earning capacity and life-style may be divided between states. Nonetheless, the case must be litigated *somewhere*, and no forum is a panacea.

Both of the parties have a constitutional right to litigate and to protect their property interests at stake in the litigation. The Court may have good reasons, as in *Kulko*,[513] to prefer that such

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510 Juenger, *Dismal Prospect*, *supra* note 5, at 911.

511 *Id.*

512 Bates v. State Bar, 433 U.S. 350 (1977) (holding ban on attorney advertising violates first amendment).

513 Kulko v. Superior Court, 436 U.S. 84 (1978) (holding that father cannot be required to litigate issue of child support in forum other than

cases be litigated in the marital domicile. Surely, however, the preference in *Kulko* was not constitutionally compelled. The former Mrs. Kulko was probably not in any better position to litigate away from home than Mr. Kulko; Mr. Burnham was probably no better equipped to litigate away from home than Mrs. Burnham. Yet none of these parties was likely in a position such that litigating elsewhere would disadvantage them substantially, and certainly not enough to deprive them of realistic access to process.

The third class of cases consists of cases of much smaller magnitude. Suppose a New York consumer has a $500 dispute with a California mail-order company over goods purchased through the mail. Such a case, if worth litigating anywhere, is only worth litigating in a very informal setting, such as small claims court. In a case this small, it is much more plausible that it is not economically rational for *either* party to pursue the matter unless the case is litigated at home. The problem, again, however, is that neither forum, California or New York, eliminates the interstate character of the dispute. The case must be litigated *somewhere*, and although good reasons may exist for preferring the consumer over the mail-order company, or vice versa, the preference is not constitutionally compelled. Both parties have a protectable property interest in the putative litigation.

Even in two-bit litigation, in which it is at least plausible that bringing a defendant to a foreign forum might amount to a deprivation of property without realistic access to process, jurisdictional rules are not any help in their present convoluted form. Let us assume that our hapless consumer is summoned to appear in a California court, or face a default judgment for $500, plus the mail-order company's court costs. If the consumer hires a lawyer, the lawyer may well recognize the possibility of a jurisdictional defense. The lawyer, however, will also recognize two other considerations. The first is that a motion to dismiss for lack of jurisdiction is not a sure winner, particularly in light of *Burger King*.[514]

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marital domicile because he had not "purposefully availed" himself of benefits of alternate forum); *see also supra* notes 290-99 and accompanying text.

514 Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *see also supra* notes 338-52 and accompanying text. The *Burger King* opinion does suggest a different result might obtain in a "simple" contractual relationship, as opposed to the twenty year franchise relationship at issue in *Burger King*. *Id.* at 485. *Burger King* comes close to announcing, however, a per se rule that a contractual breach with a forum-domiciled party is minimum contacts within

The second is that asserting the jurisdictional defense will require the lawyer to bill greatly in excess of the amount in dispute. The most economical course in a case this small probably is to defend on the merits.[515]

Of course, no amount of analysis could prove that a state court assertion of jurisdiction *never* amounts to a constitutional deprivation of property without realistic access to process. Perhaps there are some cases in which a defendant is put to the test of defending or defaulting, and it is economically rational for the defendant to make a motion to dismiss for lack of personal jurisdiction. This much, however, should be clear: if there are such cases, they are few and far between. Such a motion should require a defendant to show a practical inability to defend.[516] Beyond that, a defendant must show the availability of some other forum in which the plaintiff can meaningfully pursue the claim. Unless the defendant can make that additional showing, dismissal is nothing more than trading one constitutional deprivation for another.

These dismissals, however, are best not termed "jurisdictional" dismissals; the resulting doctrine is a closer kin to forum non conveniens. My concerns with the terminology are two-fold. First, the term "jurisdictional" connotes categorical rules that are inconsistent with the highly fact-specific inquiry necessary. By leaving the door open even a crack, we might find ourselves right back where we started, with a set of "rules" that do little or nothing to promote the limited constitutional interests at stake. Second, forum non conveniens dismissals are far more flexible than jurisdictional dismissals. The dismissing court in a forum non conveniens case has, for instance, the power to require the defendant to waive the statute of limitations as a defense in future pro-

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the forum. *Id.* at 463-64. The Court upheld a Florida long-arm statute providing for jurisdiction in breach of contract actions involving a forum-domiciled party. *Id.* In any event, how the hypothetical motion to dismiss would be resolved is unclear.

515 If the consumer does not hire a lawyer, she will probably not be able to preserve the jurisdictional issue (due to lack of sophistication), let alone wade through the constitutional issues and meaningfully assert the jurisdictional defense. *See, e.g.*, FED R. CIV. P. 12(h)(1) (requiring personal jurisdictional defense to be raised immediately, or it is waived).

516 *See, e.g.*, Gottlieb, *supra* note 469, at 1326-27 (suggesting multifactor test to show inability to defend); Weintraub, *supra* note 3, at 525-27 (suggesting defendant must show practical impairment of defense); Whitten (pt. 2), *supra* note 59, at 846-48 (same).

ceedings.[517] This power may well be necessary to avoid trading one constitutional injury for another.

Beyond the extremely limited constitutional doctrine of forum non conveniens, however, the Constitution has no other general role in regulating state court assertions of personal jurisdiction. Certainly, none of the defendants in *any* of the cases that have reached the Supreme Court should have been dismissed under the proposed test. None of these defendants came close to making a showing of a practical inability to defend in the forum and the availability of a realistic alternative forum for the plaintiff. Absent such a showing, the Constitution requires deference to the state's decision to assert jurisdiction.

This approach not only is more faithful to the limited constitutional interests at stake, it corrects a long-standing Supreme Court navigational error. Due process has been an unwelcome stranger to personal jurisdiction. The Court did not explain in *Pennoyer* why it was invoking due process; it did not explain in *Menefee* why it was expanding its role. The idea that personal jurisdiction is an issue of constitutional law began, and has continued, without critical analysis from the Court. *Burnham* may have offered a ray of hope. The inescapable inference from both Scalia's approach and Brennan's approach is that the Court rarely has any business regulating state court assertions of jurisdiction, which is precisely where I think the matter should come to rest.

At this juncture, it is important to make clear what I am *not* arguing. I am not arguing that state long-arm statutes should be insulated from constitutional review. For instance, if a state were to enact a long-arm statute that gave a jurisdictional preference to plaintiffs of only one racial group, such a statute doubtlessly would violate the equal protection clause.[518] If a state long-arm statute gave a jurisdictional preference to in-state plaintiffs, but not out-of-state plaintiffs, such a statute doubtlessly would violate the privileges and immunities clause.[519] Absent such a bizarre statute, however, or the limited circumstances discussed above, long-arm jurisdiction is not unconstitutional.

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517 *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

518 *Cf.* Loving v. Virginia, 388 U.S. 1 (1967) (ban on interracial marriages violates equal protection clause).

519 *Cf.* Austin v. New Hampshire, 420 U.S. 656 (1975) (higher tax on nonresidents doing business within state than on residents violates privileges and immunities clause of fourteenth amendment).

Further, I am not arguing that the *notice* cases, such as *Mullane*,[520] should be overruled, insofar as these cases hold that a defendant has a constitutional right to have notice of a pending action that affects her interests. But, of course, notice is much different than personal jurisdiction. A defendant can get air-tight notice, such as personal service of process outside the forum state, and still not be amenable to jurisdiction, at least under current jurisdictional doctrine.

Finally I am not arguing that jurisdiction should be a free-for-all, unregulated phenomenon. There are plenty of sound reasons for, and sensible methods of, regulating jurisdiction. These choices, however, are *legislative*, not constitutional, choices. The due process clause does not give the Court the final word on personal jurisdiction.

B. Practical Alternatives and Consequences

In a different context the Fourth Circuit once observed that "[a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice."[521] Perhaps the analytical infirmities in the Court's approach could be forgiven if the Court were doing a good job of promulgating practical, sensible jurisdictional rules. With the Fourth Circuit's observation in mind, let us turn to the Supreme Court's jurisdictional results.

The Court has held that a corporate trustee can get jurisdiction over the beneficiaries in the trustee's home state,[522] but not vice versa.[523] Child support claimants are not necessarily entitled to litigate the support issue in their own state,[524] unless, of course, they manage to tag the defendant while she passes through the state.[525] A shareholder wishing to sue a large corporation's directors for bad corporate management is not necessarily entitled to litigate in the state of incorporation,[526] but a large corporation can drag one of its nickel-and-dime franchisees to the corpora-

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520 Mullane v. Central Hanover Bank & Trust Co., 339 U.S 306 (1950); *see also supra* notes 229-33 and accompanying text.

521 United States v. A.H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947).

522 *Mullane*, 339 U.S. 306 (1950).

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

524 Kulko v. Superior Court, 436 U.S. 84 (1978).

525 Burnham v. Superior Court, 110 S. Ct. 2105 (1990).

526 Shaffer v. Heitner, 433 U.S. 186 (1977).

tion's home state.[527] Products liability suits almost always require more than one suit if the plaintiff wants to sue all of the defendants in the chain of distribution.[528] American plaintiffs suing foreign defendants are not necessarily entitled to an American forum, even if the defendant purchases the instrument of injury in America.[529] Plaintiffs in actions for defamation, a constitutionally regulated and supposedly disfavored tort,[530] can pick and choose among forums,[531] but other tort plaintiffs cannot.[532] Purely fictional factors, such as whether the forum state has enacted a "special" jurisdictional statute, count heavily,[533] but practical factors, such as the fact that the defense is being conducted by the insurer, count for nothing.[534]

I doubt that these results pass the "serious adult effort" standard. Certainly, they are nothing that one would seek to emulate if creating jurisdictional rules from scratch. Worse than the strange results, however, is the lack of predictability and the resources consumed litigating the most elementary of questions: Where can I file suit? Professor Casad noted that there were at least 3,900 reported personal jurisdiction decisions between 1960 and 1983.[535] The number of unreported cases must have been exponentially greater. It is bad enough to tell the Robinsons and the Heitners of the world that their suit cannot be brought in the most logical and sensible forum; it is worse yet to tell them so only after three levels of appellate review, with the result flipping back and forth as each new court reviews the case.

Intense judicial supervision, complicated doctrine, and unpredictable results are a necessary cost if the social consequences are

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527 Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

528 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

529 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

530 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

531 Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

532 *Helicol*, 466 U.S. 408; *World-Wide*, 444 U.S. 286.

533 Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

534 Rush v. Savchuk, 444 U.S. 320 (1980).

535 R. CASAD, *supra* note 141, at v.

extremely important.[536] Personal jurisdiction, however, is not one of those areas in the law in which the stakes are so high. The real social costs are a consequence of the convoluted doctrine that engenders expensive litigation before the parties even get to the starting gate. Recall our hapless consumer involved in the $500 dispute with a mail-order company across the country. The only jurisdictional defense of any practical benefit to the consumer is one that is sufficiently clear that it effectively deters the mail-order company from suing in its home state, or makes the motion to dismiss a sufficiently routine matter so that asserting it does not exceed the amount in controversy. Under current law, even if the consumer has a jurisdictional defense, it does her no good because the mail-order company's claim to jurisdiction in its home state is colorable,[537] and the consumer's defense is expensive to assert.

Getting the Court out of the business of regulating personal jurisdiction would be a giant step in the right direction. The most immediate consequence would be to throw the matter back to the states. Some states have given up trying to draft long-arm statutes and have simply enacted statutes that incorporate the constitutional standards by reference.[538] Others are in effectively the same position because their state courts have interpreted their long-arm statutes to go to the constitutional limits.[539] There is

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536 *Cf.* Brown v. Board of Educ., 347 U.S. 483 (1954) (segregated schools violate equal protection clause of fourteenth amendment).

537 *See supra* note 514.

538 *See* ALA. R. CIV. P. 4.2; CAL. CIV. PROC. CODE § 410.10 (West 1973); NEB. REV. STAT. § 25-536 (1989); N.J. R. CT. 4:4-4(c)(1); OKLA. STAT. ANN. tit. 12, § 2004 (West Supp. 1990); 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981); R.I. GEN. LAWS § 9-5-33 (1985); S.D. CODIFIED LAWS ANN. § 15-7-2 (Supp. 1990); TENN. CODE ANN. § 20-2-214(6) (1990); UTAH CODE ANN. § 78-27-22 (Supp. 1987); WYO. STAT. § 5-1-107(a) (1977). *See generally* Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233 (1990) (discussing interpretation of long-arm statutes).

539 *See, e.g.*, Schoel v. Sikes Corp., 533 F.2d 930 (5th Cir. 1976) (Ala. law); Interstate Paper Corp. v. Air-O-Flex Equip. Co., 426 F. Supp. 1323, 1324-25 (S.D. Ga. 1977) (Ga. law); Jonz v. Garrett/Airesearch Corp., 490 P.2d 1197, 1199 (Alaska 1971); Kilcrease v. Butler, 293 Ark. 454, 455, 739 S.W.2d 139, 140 (1987); LaNuova D & B, S.p.A. v. Bowe Co., 513 A.2d 764, 768 (Del. 1986); Cowan v. First Ins. Co. of Haw., Ltd., 61 Haw. 644, 649, 608 P.2d 394, 399 (1980); Woodring v. Hall, 200 Kan. 597, 438 P.2d 135 (1968); Petroleum Helicopters, Inc. v. Avco Corp., 513 So. 2d 1188 (La. 1987); Jarstad v. National Farmers Union Prop. & Cas. Co., 92 Nev. 380, 387, 552 P.2d 49, 53 (1976); Fields v. Volkswagen of Am., Inc., 555 P.2d 48

every reason to be optimistic, however, that with the matter placed back in the legislative arena, states will draft sensible and clear long-arm statutes. Certainly the European experience with the Brussels Convention, which regulates personal jurisdiction among member nations of the European Common Market, has been very positive.[540] As the Brussels Convention demonstrates, legislative efforts are bound to be more successful, particularly from the standpoint of clarity and predictability, than attempting to create doctrine on a case-by-case basis from uncertain constitutional underpinnings.[541]

An even better alternative, particularly for those who fear parochial state legislatures, is congressional action to create uniform national standards. There is little doubt that Congress has the authority to enact such a statute under the full faith and credit

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(Okla. 1976); Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984); Olmstead v. American Granby Co., 565 P.2d 108, 114 (Wyo. 1977). *But cf.* Green v. Advance Ross Elec. Corp., 86 Ill. 2d 431, 436, 427 N.E.2d 1203, 1206 (1981) (stating that "[a] statute worded in the way ours is should have a fixed meaning without regard to changing concepts of due process").

540 Juenger, *Jurisdiction Comparison, supra* note 223, at 1205 (citing Brussels Convention on Recognition of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 15 O.J. EUR. COMM. (No. L 299) 32 (1972) (entered into force Feb. 1, 1973)). Professor Juenger summarized the major provisions of the Brussels Convention as follows:

> 1. The courts at the defendant's domicile (or, in the case of an enterprise, its principal place of business) have general jurisdiction;
> 2. Enterprises that maintain a branch or other establishment in a member state can be sued there on causes of action arising out of these local operations;
> 3. Limited personal jurisdiction is provided for in contract and tort actions;
> 4. There is exclusive local jurisdiction in actions concerning real property, the internal affairs of corporations and other associations, and rights recorded in public registers;
> 5. Certain classes of plaintiffs, *i.e.*, consumers, policyholders and support claimants, are accorded the jurisdictional privilege to litigate in the member state in which they are domiciled;
> 6. Special rules liberally authorize joining and impleading parties not otherwise subject to the jurisdiction of the court in which the principal action is pending;
> 7. By means of forum selection clauses the parties can stipulate to the jurisdiction of member state courts.

Id. at 1196-97 (citations omitted).

541 *See id.* (noting confused state of American jurisdictional law).

clause,[542] and probably under the commerce clause as well.[543] Congress has legislated competently in this area before,[544] and, with a little luck, it will do as well as the drafters of the Brussels Convention.

CONCLUSION

The history of American personal jurisdiction is a rocky one. The Court set off in the wrong direction in *Pennoyer* and compounded its navigational error in *Menefee*. Since then, personal jurisdiction doctrine has drifted aimlessly, producing an unacceptably confused and irrational set of jurisdictional "rules." The Court's most recent decision in *Burnham* offered some hope. Although the constitutional methodology of the plurality opinion written by Justice Scalia and the concurrence written by Justice Brennan stood at polar opposites, in both opinions the Court appeared closer than ever to realizing that personal jurisdiction is not, as a general proposition, an issue of constitutional law. If the Court is truly willing to shelve its jurisdictional jigsaw puzzle, perhaps some order can be created out of the chaos. Legislative action, either by the states or Congress, offers some promise in reducing the toll currently taken in the form of bizarre results and unnecessary litigation over the most elementary of questions: Where can I sue?

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542 *See* Whitten (pt. 2), *supra* note 59, at 851 (noting probable need for congressional action). In fact, some congressional action is probably necessary in any event, because the Court's current interpretation of the Full Faith and Credit Act of 1790 is apparently still tied to the territorial principles of jurisdiction. *See supra* notes 22-50 and accompanying text. This might lead to the anomaly that states could avoid recognizing jurisdictionally sound judgments rendered in other states. *See id.* at 851-52.

543 *See* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 234 (1967) (discussing effect of commerce clause on personal jurisdiction).

544 *See* Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073 (1983) (noting success of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, Pub L. No. 96-611, 94 Stat. 3566 (codified at 28 U.S.C. § 1738A (1988); 42 U.S.C. § 663 (1988); 18 U.S.C. § 1073 (1988)).