Death of a Salesman? Forum Shopping and Outcome Determination Under *International Shoe*

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TABLE OF CONTENTS

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> I don't say he's a great man. Willy Loman never made a lot of money. His name was never in the paper. He's not the finest character that ever lived. But he's a human being, and a terrible thing is happening to him. So attention must be paid. He's not to be allowed to fall into his grave like an old dog. Attention, attention must finally be paid to such a person.
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> — *Linda Loman, in* Death of a Salesman[1]

INTRODUCTION

For better or worse, *International Shoe Co. v. Washington*[2] remains the cornerstone of modern personal jurisdiction analysis. Even at the ripe-old age of fifty, *Shoe*'s minimum contacts and "traditional notions of fair play and substantial justice"[3] doctrinal framework still provokes considerable discussion. As this Symposium attests, jurisdiction remains a topic of lively debate and the fount of an astounding amount of academic commentary.[4]

Naturally, much of the attention paid to *International Shoe*, including that of judges and prominent procedural scholars, has been critical.[5] As we all know, the decision replaced the rigid,

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[1] ARTHUR MILLER, DEATH OF A SALESMAN 56 (Viking Press 30th ed. 1967).

[2] 326 U.S. 310 (1945).

[3] *Id.* at 316 ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not 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.'") (citations omitted).

[4] Spirited debate, for example, has ensued on the contours of "general" jurisdiction—jurisdiction over a non-resident defendant in a dispute that is *un*related to the defendant's contacts with the state seeking to assert jurisdiction—and "specific" jurisdiction—jurisdiction over a dispute that is related to defendant's contacts with the state. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (coining this phraseology). *Compare* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (criticizing courts for distorting general jurisdiction category and offering alternative terminology) *with* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) (claiming that Twitchell's alternative fails to cure weakness of current doctrine). Since the Supreme Court adopted this bifurcated mode of analysis in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), lower courts have grappled with defining the link between a dispute and defendant's contacts with the forum state necessary for the exercise of specific jurisdiction. *See* Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1276-86 (1993) (summarizing conflicting case law in area).

[5] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 308 (1980) (Brennan, J., dissenting) (observing that *International Shoe*'s analytic framework "may be

yet clear and predictable, territorial regime established by *Pennoyer v. Neff*[6] with a flexible, perhaps free-wheeling, mode of analysis.[7] *Shoe*'s critics contend, among other things, that the benefits of its flexibility are outweighed by its lack of predictability.[8] Courts, for example, have been left to define "fair play and

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outdated" because, "[t]hough its flexible approach represented a major advance, the structure of our society has changed in many significant ways since . . . 1945"); *In re* DES Cases, 789 F. Supp. 552, 573 (E.D.N.Y. 1992) (Weinstein, J.) ("There is considerable doubt about the current existence of a unitary, coherent jurisdictional due process standard.") (citations omitted); LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 34-40 (1986) (acknowledging existence of some fairly rudimentary "open questions" in current personal jurisdiction jurisprudence); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) ("Clearly, it is time to jettison minimum contacts. *International Shoe* is bankrupt."). *But see* Earl M. 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 (finding coherence in developing personal jurisdiction doctrine).

[6] 95 U.S. 714 (1877). Although today's conventional wisdom is that *Shoe* replaced *Pennoyer*'s jurisdictional framework, Professor Hazard, twenty years after the decision, lamented *Pennoyer*'s staying power and the failure of *Shoe* to offer a readily acceptable alternative. *See* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 242. As exemplified by Burnham v. Superior Court, 495 U.S. 604 (1990), which upheld the exercise of jurisdiction over a defendant served with process though only briefly present in the state, parts of *Pennoyer* may well live today.

[7] *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 54 (1990) ("*International Shoe* has been widely heralded as the great 'liberator' of personal jurisdiction from the formalisms of *Pennoyer*, and it undoubtedly is true that *International Shoe* ushered in an era of expanded jurisdictional reach for state courts.") (footnote omitted).

[8] *See, e.g.*, Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 COLO. L. REV. 1, 14 (1993) ("Obviously, the term 'minimum contacts' is far too vague to guide the decisions of real-life cases. Nor does it guarantee fair decisions."); Rex R. Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 629 ("[S]ince *International Shoe*, the due process limits on personal jurisdiction have been stated as broad principles using vague terms that are difficult to apply in specific cases."); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991) ("Jurisdictional doctrine is in chaos. The constitutional reach of state-court personal jurisdiction has become one of the most frequently litigated issues on the civil docket, and there is much more to come.") (footnote omitted).

Some judges have expressed the desire for rule-based certainty in the world of jurisdiction. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 626 (1990) (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J.) (rejecting Justice Brennan's "totality of the circumstances" approach to personal jurisdiction on ground that it would "guarantee[] what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence"); *id.* at 628 (White, J., concurring in part, concurring in judgment) (refusing to invalidate transient jurisdiction and emphasizing that "[o]therwise, there would be endless, fact-specific litigation in the trial and appel-

substantial justice," a standard affording little guidance but requiring consideration of what has been termed the "Gestalt factors."[9]

Nor are there definitive rules about when a state court might exercise personal jurisdiction over a nonresident defendant in some of the most commonplace situations.[10] Besides breeding litigation,[11] uncertainty may result in serious injustice,[12] an iro-

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late courts, including this one."); *infra* text accompanying notes 310-13 (observing that before *Burnham*, state courts resisted application of minimum contacts analysis to transient jurisdiction). For analysis of the claim that legal rules should be clear and predictable in order to limit judicial discretion, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992).

[9] Donatelli v. National Hockey League, 893 F.2d 459, 471 (1st Cir. 1990). *See generally* Leslie W. Abrahamson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441 (1991) (summarizing case law in area and identifying myriad of factors that courts consider in evaluating fairness of jurisdictional assertion).

[10] Take, for example, the relatively straightforward, and eminently important, fact patterns that have bedeviled the Supreme Court in recent years. When may a nonresident component part manufacturer whose product causes injury in the state where it was sold, be sued there? *Compare* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (O'Connor, J.) (emphasizing that "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State" and does not create minimum contacts with state) *with id.* at 117 (Brennan, J., concurring in judgment) (disagreeing with plurality on issue and emphasizing that jurisdiction is proper "[a]s long as a participant in th[e] process is aware that the final product is being marketed in the forum State").

Similarly, when is the "tagging" of a non-resident with a summons and complaint within the state sufficient for that state's courts to exercise jurisdiction over that person? *Compare Burnham*, 495 U.S. at 610 (plurality opinion) (Scalia, J.) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.") *with id.* at 633 (Brennan, J., concurring in judgment) ("Tradition, though alone not dispositive, is of course relevant to the question whether the rule of transient jurisdiction is consistent with due process.") (emphasis omitted) (footnote omitted). *See generally* Symposium, *The Future of Personal Jurisdiction: A Symposium on* Burnham v. Superior Court, 22 RUTGERS L.J. 559 (1991) (analyzing *Burnham* from variety of perspectives).

[11] *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992) ("Because outcomes are often difficult to predict, parties are inclined to litigate the question of personal jurisdiction in every case where the issue is not crystal clear."); *see also id.* at 1590 n.11 (observing that, in slightly over one year, there were 350 published personal jurisdiction decisions).

[12] *See* 2 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 6.01, at 6-2 (2d ed. 1991) ("If a court lacks jurisdiction, it obviously is desirable to discover that fact before much time or energy is wasted in a futile action."); Borchers, *supra* note 7, at 102 (lamenting "lack of predictability and resources consumed litigating" jurisdictional question and unfairness to plaintiffs in refusing to exercise jurisdiction over nonresident defendants "only after

ny in light of the fact that fairness is one of *Shoe*'s touchstones. "Arbitrary particularization"[13] has not remedied the litigation-breeding uncertainty of *International Shoe.*

These problems are not likely to go away. To the contrary, observers in the future are likely to see *International Shoe*'s jurisdictional framework with increasing frequency. The 1993 amendments to the Federal Rules of Civil Procedure expand the territorial jurisdiction of the federal courts in federal question cases and require the courts to apply *Shoe* to unsettled terrains.[14] In addition, Congress amended the general venue statute in 1988 and 1990 in ways that made jurisdictional analysis more central to venue decisions.[15] Burgeoning international trade[16] also may

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three levels of appellate review, with the result flipping back and forth as each new court reviews the case"); *see also infra* text accompanying notes 273-94 (offering examples of costs of uncertainty); *see, e.g.*, Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 395 (1992) (describing increased litigation and accompanying delay caused by ad hoc balancing analysis that fails to establish rules through court decisions).

[13] Hazard, *supra* note 6, at 283.

[14] *See* Fed. R. Civ. P. 4(k)(2) (providing that, in federal question case in which federal statute fails to provide for service of process, federal court in certain circumstances may exercise personal jurisdiction over defendant so long as defendant has constitutionally sufficient contacts with nation). Before the recent amendments to Rule 4, the personal jurisdiction difficulties in federal question cases, especially when the pertinent statute failed to provide for service of process, were numerous. *See generally* Casad, *supra* note 11, at 1592-97. New difficulties may arise under the amended rule. *See* David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction*, 152 F.R.D. 249, 252-55 (1994) (discussing amended rule and questions it raises).

[15] *See* 28 U.S.C. § 1391(a)(3), (c) (1988 & Supp. IV 1992). Congress amended § 1391(c) in 1988 to provide that a corporation "shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction." In 1990, Congress amended § 1391(a)(3) to add a venue option in diversity cases: "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." Pub. L. No. 101-650, § 311, 104 Stat. 5089, 5114 (1990); *see also* Pub. L. No. 102-572, § 504, 106 Stat. 4506, 4513 (codified at 28 U.S.C. § 1391(a) (Supp. IV 1992)) (amending § 1391(a)(3) to make clear that this option is available only "if there is no district in which the action may otherwise be brought").

For a thorough and thoughtful analysis of these amendments to the venue statute, *see* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 769-82 (1991); *see also* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981) (analyzing relationship between personal jurisdiction and venue before recent amendments); Christian E. Mammen, Note, *Here Today, Gone Tomorrow: The Timing of Contacts for Jurisdiction and Venue Under 28 U.S.C. § 1391*, 78 CORNELL L. REV. 707 (1993) (studying relationship between personal jurisdiction and venue under amended

increase the number of disputes over whether state and federal courts may exercise jurisdiction over foreign defendants, a particularly perplexing application of *International Shoe*.[17]

When considering the debate over jurisdiction, one might wonder whether this is much ado about nothing. The conventional wisdom is that the issue underlying many personal jurisdiction disputes is *where*, not *whether*, a case will be heard. As another civil procedure icon, *Erie Railway Co. v. Tompkins*,[18] emphasized, the availability of multiple forums for the litigation of

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venue statutes). In combination, "the curious effect of the new venue criteria is a substantial expansion of venue choices . . . and hence the encouragement of even wider-ranging forum shopping than had been the case." Oakley, *supra*, at 775.

The upshot is that, in certain circumstances, venue is appropriate if personal jurisdiction over the defendant is proper. The conflation of personal jurisdiction and venue, which traditionally have been viewed as analytically distinct, see, e.g., 1 CASAD, *supra* note 12, § 1.03, at 1-17 to 1-19, allows personal jurisdiction to serve double duty in some instances, especially when a corporation is a defendant. In some ways, the amendments embrace the idea that "'[j]urisdiction must become venue.'" Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 113 (1971); *see also* Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 NW. U. L. REV. 711 (1979) (advocating linkage of personal jurisdiction and venue analyses in disputes touching on several states). The precise relationship of venue and personal jurisdiction currently is being litigated in the lower courts. *See, e.g.*, Library Publications, Inc. v. Heartland Samplers, Inc., 825 F. Supp. 701 (E.D. Pa. 1993); United States Fidelity & Guar. Co. v. Mayberry, 789 F. Supp. 901 (E.D. Tenn. 1992); Harrison Conference Servs., Inc. v. Dolce Conference Servs., Inc., 768 F. Supp. 405 (E.D.N.Y. 1991).

[16] *See, e.g.*, General Agreement on Tariffs and Trade, 33 I.L.M. 1125 (1994); North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296-456, 612-799, 33 I.L.M. 649-57, 663-64, 671-80 (1994).

[17] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); *see also* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 802-34 (1988) (criticizing anomalous law of personal jurisdiction over foreign defendants); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 124-27 (1983) (listing difficulties of applying minimum contacts analysis to noncitizens); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J 501, 504-16 (1993) (criticizing application of jurisdictional doctrine to foreign defendants and proposing federal legislation to address problems). This has been especially true in the lower courts since the Supreme Court's decision in *Asahi*. *See, e.g.*, Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482 (9th Cir. 1993); Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993); Mylan Lab., Inc. v. Akzo, N.V., 2 F.3d 56 (4th Cir. 1993); A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76 (2d Cir. 1993); United Elec. Radio & Mach. Workers v. 163 Pleasant St. Corp., 987 F.2d 39 (1st Cir. 1993); Shute v. Carnival Cruise Lines, Inc., 863 F.2d 1437 (9th Cir. 1988), *rev'd on other grounds*, 499 U.S. 585 (1991).

[18] 304 U.S. 64 (1938).

a single dispute should not mean that a litigant can shop among alternatives for the desired outcome.[19] Rather, a dispute, at least in theory, should be decided in a similar way wherever it is brought. With few exceptions, an inquiry into whether a forum may exercise personal jurisdiction over a defendant should be nothing more than "an estimate of the inconveniences," not a determination of winners and losers.[20]

However, as suggested by the old adage about the "home-field advantage," the location of the forum adjudicating a dispute is critically important.[21] Litigators are well aware of the careful

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[19] *Cf.* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) ("A change of venue . . . generally should be, with respect to state law, but a change of courtrooms.").

There is deep ambivalence about forum shopping in American legal thought. *See* Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 244 (1958) (observing that forum-shopping "is rather generally condemned in the literature of conflict of laws, though not quite so generally in the cases" and that it may "be too bitterly and too broadly condemned"); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (arguing that, despite its bad name, forum shopping is not all bad); Harold G. Maier, *Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law*, 56 ALBANY L. REV. 753, 769 (1993) ("Recitation of the shibboleth 'forum shopping' provides neither insight nor answer."); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 322 (1994) ("Forum-shopping is not a disparaging term; it is part of a litigator's job.") (emphasis omitted); *see also* George D. Brown, *The Ideologies of Forum Shopping — Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649 (1993) (analyzing inconsistency in Supreme Court decisions on propriety of forum shopping). *Compare* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (refusing to disturb clear forum shopping by plaintiffs) *and* Ferens v. John Deere & Co., 494 U.S. 516 (1990) (adopting choice of law rule in diversity case that encourages forum shopping) *with* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (establishing choice of law rule in diversity cases designed to discourage forum shopping).

[20] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930) (Hand, J.).

In the rare case in which an alternative forum is effectively unavailable, dismissal of the case on jurisdictional grounds is tantamount to a victory on the merits. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Rush v. Savchuk, 444 U.S. 320 (1980). In that circumstance, jurisdiction by necessity is at least a theoretical possibility. *See Helicopteros*, 466 U.S. at 419 n.13 (declining to consider assertion of jurisdiction by necessity because record failed to show that all defendants could not be sued together in single forum); Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977) (reserving question of jurisdiction by necessity was possibility in quasi in rem case); *cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 n.22 (1981) (suggesting that dismissal on forum *non conveniens* grounds would be inappropriate if alternative forum was unavailable).

[21] *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 252-55 (1991) (offering reasons why jurisdictional determination will greatly influence resolution of case that cannot be remedied through choice of law principles); *see also* Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation — There is No Law But Forum Law*, 28 VAL. L. REV. 1 (1993)

maneuvering over *where* a lawsuit will proceed and believe — rightly or wrongly — that the answer to the "where" question may drastically impact the ultimate outcome of the case. Jurisdictional disputes often turn on the preferences of parties[22] for one court, or one court system, over another. Put simply, litigants in the United States, within certain bounds, forum shop.[23] A plaintiff shops for the optimal forum, presumably the one considered most likely to return a victory on the merits.[24] In turn, a defendant may attempt to defeat plaintiff's forum choice by utilizing a panoply of procedural tools (*e.g.*, motions to dismiss for lack of personal jurisdiction or forum *non conveniens*, motions to transfer, and removal, to name a few) and move the case to a forum more to its liking. The belief that forum choice is critically important to how a dispute is resolved is consistent with the Realist insights about the importance of judges, as opposed to simply "the law," in deciding a case.[25]

Surprisingly, the tug-of-war between the theoretical world where the forum does not matter, and the practitioner's world in which the particular forum is of great importance, has been largely ignored. The impact of the fight over the location of a lawsuit on the final disposition of a case is rarely mentioned, much less carefully scrutinized. We wondered whether, as practicing attorneys believe, the outcomes of the battles over the proper forum bear any sort of relationship to the ultimate disposition of the cases. It may be simplistic to assume that whoever won the jurisdictional dispute automatically would prevail on

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(contending that, once jurisdiction has been established, courts in effect apply some version of law of forum state).

[22] Or, more accurately, their attorneys. *See* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 896-911 (1931) (analyzing role of attorney in selecting court in which to bring suit).

[23] *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9 (1963) ("The social costs of forum-shopping are difficult to estimate, but every attorney knows it is practiced . . . ."); *see also* Frederic X. Shadley & Linda E. Maichl, *The Jurisdictional Aspects of Litigation Involving International Clients*, 45 FED. INS. & CORP. COUNS. 113, 141 (1995) ("[T]he forum chosen may have a substantial impact on the outcome of the litigation.") (authored by practicing attorneys); *infra* text accompanying notes 275-79, 291-94 (discussing forum shopping in personal jurisdiction cases before the Supreme Court).

[24] *See* Wendy C. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 561-73 (1991) (offering three reasons relating to desire to prevail on merits why litigants care about forum choice: convenience, bias, and choice of law).

[25] *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

the merits, not suffer as harsh a judgment as in another forum, or succeed in obtaining a favorable settlement. Still, one might expect to see in the aggregate at least *some* tangible benefit to jurisdictional victors; otherwise, rational litigants would not be willing to devote resources to litigating the matter.

Some prominent commentators implicitly question this thesis. They suggest that, because other legal questions are more central to the outcome of a lawsuit, judicial review of assertions of jurisdiction is misplaced. So far as determining the outcome of a lawsuit, conflicts of law principles are trumpeted as being more important than jurisdiction.[26] The resolution of a personal jurisdiction dispute and a decision on the law to apply to a dispute, however, are not completely independent.[27] The decisionmaker unquestionably influences the choice of law. Nor would it be surprising to learn that two or more variables influenced the outcome of a lawsuit.

Before studying the relationship between forum selection and outcome, we draw some insights from *International Shoe Co. v. Washington* that shed light on today's jurisdictional quandaries. Because *Shoe* was a relatively easy case under then-current jurisdictional doctrine, it was an odd vehicle for establishing the jurisdictional framework to be carried forward into the twenty-first century.[28] Before the Court's decision, the lower courts

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[26] *See* Bruce Posnak, *The Court Doesn't Know Its* Asahi *From Its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 876-79, 899 & n.130 (1990) (arguing that jurisdictional decision has little impact on ultimate disposition of case and that choice of law is more important); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 82-83 (1978) ("The impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction, which merely directs the parties to an appropriate forum in which to litigate their case."). Oddly enough, a state's conflicts principles generally receive minimal judicial scrutiny. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1991) (ruling that application of forum state's law is constitutionally permissible so long as state has significant contacts with dispute such that application of its law is neither arbitrary nor fundamentally unfair).

[27] *See* Earl M. Maltz, *Visions of Fairness — The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751, 760-64 (1988); Perdue, *supra* note 24, at 570-73; Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869, 874-79 (1981); Robert A. Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1031 (1978); *see also* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 602 (1993) ("[B]ecause of its impact on choice-of-law, personal jurisdiction often means the difference between winning and losing, or at least between a large and a small judgment.") (footnote omitted).

[28] *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam*

had developed an elaborate web of legal fictions designed to satisfy *Pennoyer v. Neff*'s formalisms. These included whether the corporation by its actions impliedly "consented" to suit in the state, whether its conduct amounted to "presence" in the state, or whether it was "doing business" in the state.[29] Observing the irreconcilable, often outcome oriented, case law, jurists and scholars of the era clamored for reform.[30] For example, Judge Learned Hand wrote that "[i]t scarcely advances the argument to say that a corporation must be 'present' in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered."[31] Even though the Supreme Court easily could have employed any one of the prevalent theories of the day to hold that the International Shoe Company was amenable to suit in the state of Washington, it reached out to repair a doctrine in serious disarray.

To better understand today's jurisdictional debates, Part I of this Article revisits the long-forgotten facts and legal context of *International Shoe*. The case is a product of its times, an era of rapidly increasing interstate commerce, as demonstrated by large business' increasing use of travelling salesmen across the nation. It dealt with legislation designed to ameliorate some of the harsh economic consequences of the Great Depression. And, it was a case in which the resolution of the jurisdictional dispute dictated the outcome of the case. *International Shoe* shows the Supreme Court seizing on an "easy" case in order to remedy the uncertainty in the law of jurisdiction. In contrast to the jurisdictional predicament that we are in today in which flexibility has caused uncertainty, the uncertainty resulted from the courts' attempts to avoid the inflexibility of the *Pennoyer v. Neff* frame-

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Jurisdiction of State Courts: From Pennoyer *to* Denckla, 25 U. CHI. L. REV. 569, 586 (1958); International Shoe Co. v. Washington, 326 U.S. 310, 322 (1945) (Black, J., writing separately).

[29] *See* Kurland, *supra* note 28, at 577-86.

[30] *See, e.g.*, Frene v. Louisville Cement Co., 134 F.2d 511, 516-17 (D.C. Cir. 1943) (Rutledge, J.); Austin W. Scott, *Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563, 583-84 (1926) [hereafter Scott, *Nonresident Motorists*]; Austin W. Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 890-91 (1919) [hereafter Scott, *Nonresidents Doing Business*].

[31] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

work. Courts seeking to avoid its perceived unfairness, particularly with respect to the exercise of jurisdiction over out-of-state corporations engaged in interstate commerce, created numerous exceptions to rationalize the assertion of jurisdiction. These exceptions made the jurisdictional outcome in any individual case highly uncertain with the particular facts of the case making all the difference. In rejecting the territorial rigidity of *Pennoyer v. Neff*, the Court in *International Shoe* crafted a brand new minimum contacts test—that is, that the defendant must have minimum contacts with the forum state—with little assistance from the case law or the parties.

Part II considers the legacy of *International Shoe* and tests the litigator's belief that resolution of the jurisdictional question affects the disposition of a case on the merits. To do so, we study *International Shoe* and its nineteen progeny, in which the Supreme Court squarely decided a territorial jurisdiction question, and attempt to reconstruct the ultimate outcomes of each of the cases. We found a clear correlation in these cases between the party who prevailed on jurisdiction and the victor on the merits. In almost 90% of the sample, the party who prevailed on jurisdiction also won on the merits. Although the limited evidence is in no way conclusive, it nonetheless suggests that the current jurisdictional framework is but another example of a procedural rule having a distinct substantive impact.[32]

As a review of *International Shoe* shows, the jurisdictional milieux from which the Court created the "minimum contacts" test is remarkably similar to today's. With the information gleaned from *Shoe*'s progeny in mind, we articulate some modest, though necessarily inchoate, thoughts about reform. Simple deference to state judgments on the propriety of jurisdiction, a move consistent with the Supreme Court's due process jurisprudence in other areas, would represent an improvement. Though this may seem at odds with the correlation uncovered in our study (as well as with our general views about the proper role of the judiciary in reviewing constitutional challenges to state action),

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[32] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-8, at 72 (2d ed. 1988) ("[I]n recent years, particularly in the area of standing, the [Supreme] Court has gone to great lengths in manipulating justiciability doctrine to achieve substantive goals.") (footnotes omitted).

we believe that such deference is warranted in light of the proven inability of the courts to establish clear, even-handed jurisdictional rules. To the extent that a court's assertion of jurisdiction may affect the outcome of a case, more scrutinizing review of the actual disposition and critical decisions influencing that disposition, not the exercise of jurisdiction, may be in order.

I. WHAT HAPPENED IN *INTERNATIONAL SHOE*

International Shoe was a reaction to the litigation spawned by its doctrinal predecessor *Pennoyer v. Neff*. The symbiotic — if not ironic — relationship between the two frameworks should not be underestimated. In the post-Civil War era, the law of personal jurisdiction was thought to need certainty of expression and clarity of application. *Pennoyer*'s equation of due process with territoriality satisfied both needs.

The regime's very cogency, however, produced subsequent demands for exceptions to the rule of territoriality. In the *Pennoyer* era, the law, if literally applied, was thought to produce harsh results in many instances. The Supreme Court, following the lower federal and state courts, reacted by injecting much-needed flexibility into the regime. Personal jurisdiction jurisprudence indeed became more flexible, but at the expense of certainty. Eventually, the Court would have no choice but to address the new problems of personal jurisdiction created by *Pennoyer*.

Two developments leading up to *International Shoe* are especially intriguing. First, the "minimum contacts/fair play and substantial justice" formula was a reaction to litigants' demands for predictability and flexibility — demands similar to those that produced *Pennoyer* in the first place. Second, the crucible in which the Court developed the new formula was perhaps the quintessential outcome determinative case. *International Shoe* was an action brought by a public agency of the State of Washington to collect a tax on the employment of resident salesmen by a nonresident corporation. If Washington had personal jurisdiction over the out-of-state corporation, then tax liability would automatically attach.[33]

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[33] Professor Chemerinsky damns this part of the Article with faint praise by stating that

A. *Before the Litigation: The Problems with* Pennoyer v. Neff

1. Flexibility

The *Pennoyer* regime's chief virtue lay in its establishment of an apparently clear and simple rule: a defendant found within the territory of a state was automatically subject to the exercise of personal jurisdiction by the courts of that state.[34] Justice Holmes unabashedly expressed the theory underlying the rule: "The foundation of jurisdiction is physical power."[35] If a person was not found within the territory, then the sovereign was impotent to enforce the judgment — and so lacked jurisdiction.[36]

Unfortunately the regime's chief virtue was also its primary vice. Over time, territoriality proved too inflexible a tool for a developing national economy. Determining whether a defendant could be "found" within the territory was relatively easy in an era when crossing state boundaries was more arduous and less frequent. But the new century brought greater ease in interstate communications and transportation and the refinement of the corporate form as a method of organizing business ventures.[37]

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it "describes the factual background" of *International Shoe*. Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 863 (1995). While Part I places the "minimum contacts/fair play and substantial justice" formula in historical context, it also analyzes and explains, supported by the empirical work in Part II, why the International Shoe Company might have sought to avoid the exercise of personal jurisdiction — to prevail on the merits.

[34] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877). The Court put it as follows:

> The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.

Id.

[35] McDonald v. Mabee, 243 U.S. 90, 91 (1917). Even *International Shoe* paid homage to this notion. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person.").

[36] *See* E. Merrick Dodd, Jr., *Jurisdiction in Personal Actions*, 23 U. ILL. L. REV. 427, 429 (1929); Scott, *Nonresidents Doing Business*, *supra* note 30, at 872-73. *But see* Kurland, *supra* note 28, at 574 (citing authorities for proposition that "power" basis of jurisdiction is nonexistent in civil law).

[37] *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957) (acknowledging "the fundamental transformation of our national economy over the years" and explaining: "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. . . . At the same time modern transportation and commu-

Besides increasing the potential for nonresidents to cause injury in a state, these developments made it harder to catch up with the people whose conduct created mischief in the forum state. Wrongdoers could simply avoid setting foot there.

Corporations proved particularly troublesome in two respects. First, as a practical matter, the *Pennoyer* regime could produce unfair results. A plaintiff, if she could afford it, might be forced to travel a great distance to find a proper forum in which to sue a nonresident corporation even though the injury resulted in her home state.[38] Reacting to the unfairness, courts began to carve out exceptions designed to preserve the plaintiff's choice of forum or to protect the defendant from having to defend in such a forum, all because *Pennoyer*'s strict territoriality was thought to produce an unfair result.[39]

Second, as a doctrinal matter, the *Pennoyer* regime was built atop a house of cards. As respected jurists[40] and commentators[41] of the day observed, the two key traditional bases of measuring personal jurisdiction over individual defendants — "presence" and "consent" — make little sense when applied to fictitious entities like the corporation. A corporate defendant can never be physically "present" anywhere in the sense a natural

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nication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

[38] *See* Donald M. Larmee, Comment, *Corporations — Foreign Corporations — Service of Process Based upon Solicitation*, 35 MICH. L. REV. 969, 972 (1937); *see also* Friedrich K. Juenger, *Judicial Jurisdiction in the United States and European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1197 (1984) ("[I]t proved difficult to cope with the obverse effects of *Pennoyer*, i.e. its failure to provide a forum for meritorious causes where neither the defendant nor sufficient property could be found within the state.").

[39] The main exception was for so-called "solicitation" cases involving nonresident corporations that allegedly solicited business within the forum state primarily through designated agents physically present there. *International Shoe* itself was a solicitation case. *See infra* text accompanying notes 62-104 (describing nature of International Shoe salesmen's activities in Washington). For thoughtful discussions of the solicitation cases of this era, see International Milling Co. v. Columbia Transp. Co., 292 U.S. 511, 517-21 (1934); Frene v. Louisville Cement Co., 134 F.2d 511, 514-17 (D.C. Cir. 1943); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930) (Hand, J.); Louis P. Haffer, *Personal Jurisdiction Over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B.U. L. REV. 639, 647-66 (1937).

[40] *See, e.g.*, *Hutchinson*, 45 F.2d at 141-42 (Hand, J.) (criticizing "presence" theory); Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (Hand, J.) (criticizing "consent" and "doing business" theories).

[41] *See, e.g.*, Scott, *Nonresident Motorists*, *supra* note 30, at 574-77; Scott, *Nonresidents Doing Business*, *supra* note 30, at 880-85; *see also* Kurland, *supra* note 28, at 577-86.

person can be.[42] And it is absurd to believe a foreign corporation, having taken care to incorporate and establish facilities outside the forum state, may be presumed nevertheless to have "consented" to jurisdiction there.[43] Nor did dressing up "presence" and "consent" together as something called "doing business" help much.[44] As Professor Kurland observed, the "doing business" theory "provided no basis for growth since it offered a conclusion rather than a reason."[45]

2. Predictability

In responding to the demand for flexibility, both the Supreme Court and the lower federal and state courts turned out a cornucopia of conflicting decisions. After a time it was impossible for plaintiffs or defendants to predict whether virtually identical facts would confer jurisdiction in a given case or not.

For examples of this confusion, we need look no further than the so-called "ticket agency" cases,[46] in which the defendant was usually a foreign railroad corporation operating in interstate commerce but maintaining no permanent offices or warehouses, keeping no merchandise, and designating no individual to receive service of process in the state seeking to exercise jurisdiction. In each case, the question was whether the activities of one or more ticket agents, physically present in the state for the purpose of soliciting passenger or freight service, was sufficient to subject the railroad to suit in tort.

Although the facts of these cases were practically indistinguishable, the results varied widely. On the one hand, the Supreme Court announced that Kentucky could reach a nonresident corporation charged with criminal antitrust violations owing to the conduct of its sales agents in the forum.[47] It also upheld an assertion of jurisdiction by New York over a Texas railroad for a

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[42] *See, e.g.*, Scott, *Nonresident Motorists*, *supra* note 30, at 574-75.

[43] Indeed, in a number of cases, the foreign corporate defendant refused to give any type of consent, express or implied, or withdrew consent previously given. *See* Haffer, *supra* note 39, at 655-66 (discussing cases).

[44] *See Hutchinson*, 45 F.2d at 141-42.

[45] Kurland, *supra* note 28, at 585; *see also supra* text accompanying note 31 (quoting Learned Hand's similar criticisms of presence theory).

[46] *See* Larmee, *supra* note 38, at 973.

[47] *See* International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

personal injury claim.[48] On the other hand, the Court denied assertions of jurisdiction by Minnesota over a Kansas railroad,[49] by New York over a Pennsylvania railroad,[50] and by Pennsylvania over a New York railroad[51] on the same type of claim.

Consistency fared no better in decisions regarding the activities of solicitors performing similar functions in other industries. Upheld were assertions of jurisdiction by New York over a Pennsylvania coal distributor,[52] by the District of Columbia over a Kentucky cement maker,[53] and by California over a well-known Minnesota law book publisher.[54] Denied were assertions of jurisdiction by Louisiana over a nonresident tobacco company[55] and by New York over two nonresident newspaper publishers.[56]

The sheer number of attempts by the Court to set the record straight was itself partly to blame. Between *Pennoyer* in 1877 and *International Shoe* in 1945, the Supreme Court produced a "torrent" of decisions attempting to define the precise circumstances under which a state could hale defendants into its courts consistent with the Due Process Clause.[57] "To one who is seeking a clear and applicable formula," one commentator wrote, "the cases in this field offer but little aid because of the confusion created by the multitude of decisions upon the problem."[58]

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[48] *See* St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913).

[49] *See* Davis v. Farmers Coop. Equity Co., 262 U.S. 312 (1923).

[50] *See* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917).

[51] *See* Green v. Chicago, B. & Q. R.R., 205 U.S. 530 (1907).

[52] *See* Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917).

[53] *See* Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943).

[54] *See* West Publishing Co. v. Superior Court, 128 P.2d 777 (Cal. 1942).

[55] *See* People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918).

[56] *See* Lauricella v. Evening News Publishing Co., 15 F. Supp. 671 (S.D.N.Y. 1936); Loeb v. Star & Herald Co., 175 N.Y. 412 (1919).

[57] *See* Borchers, *supra* note 7, at 43; *see also* Kurland, *supra* note 28, at 573 ("[T]he courts, both state and national, were occupied in filling the interstices of the doctrines announced by [*Pennoyer*].").

The Court decided at least 53 cases on the subject during the 68 years between *Pennoyer* and *International Shoe*. *See* Borchers, *supra* note 7, at 43-53 (discussing or noting 18 cases); Kurland, *supra* note 28, at 574-86 (discussing or noting another 35 cases). In contrast, the Court issued 20 decisions in the 50 years since *International Shoe*.

[58] Larmee, *supra* note 38, at 969; *see* Hutchinson, v. Chase & Gilbert, 45 F.2d 139, 142 (2d Cir. 1930) ("It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.").

Professor Kurland observed that, by 1945, personal jurisdiction doctrine was so badly in a state of disrepair that the time for the Court to set its house in order was long overdue.[59]

B. During the Litigation: The Record Below

Today the name *International Shoe* is shorthand for the measure of personal jurisdiction over nonresident defendants. But originally the case was also about the travelling salesman of American folklore and the rise of a major American company. The long-forgotten transcript of record,[60] together with information gleaned from reported lower federal and state court decisions[61] and other public records, tells their stories and exemplifies how the Court seized on an otherwise unremarkable case to change the law.

1. The Travelling Salesman

On October 14, 1941, Edward S. Alley, a veteran travelling shoe salesman whose territory included Seattle, Washington, was served with an Order and Notice of Assessment.[62] Addressed "To International Shoe Company, a Corporation," the document bore the seal of Commissioner E.B. Riley of the Office of Unemployment Compensation and Placement[63] in Olympia, Washington. In pertinent part, it read:

> It appears to the Commissioner that you have failed or refused to pay contributions or interest due the Unemployment Compensation Fund for the period Jan. 1, 1937 through Dec.

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[59] Kurland, *supra* note 28, at 586.

[60] Transcript of Record, International Shoe Co. v. Washington, 326 U.S. 310 (1945) (No. 107) [hereafter Record].

[61] *See* International Shoe Co. v. State, 154 P.2d 801 (Wash.), *aff'd sub nom.* International Shoe Co. v. Washington, 326 U.S. 310 (1945); City Capital Assocs. v. Interco, Inc., 860 F.2d 60 (3d Cir. 1988); Allied Leather Corp. v. Interco, Inc., 1993 U.S. Dist. LEXIS 6128 (S.D.N.Y. 1993); *In re* Interco, Inc., 1992 Bankr. LEXIS 1872 (Bankr. E.D. Mo. 1992); Overkamp v. International Shoe Co., 297 So. 2d 500 (La. Ct. App. 1974); International Shoe Co. v. Lovejoy, 257 N.W. 576 (Iowa 1934).

[62] *See* Record, *supra* note 60, at 1. Although the return of service upon Alley prepared by the process server was dated October 10, 1941, the text of the document and the seal of the notary public both indicate that the actual date of service was October 14, 1941. *See id.* at 3.

[63] *See id.*

> 31, 1940 and that said contributions or interest are now delinquent.
>
> It Is Therefore Ordered by the Commissioner, pursuant to the power conferred upon him by Chapter 162, Laws of 1937, as amended, that the contributions or interest due and owing by you for said period are hereby determined to be the sum of Six Thousand and 00/100 Dollars ($6,000.00),[64] and said contributions or interest are hereby assessed against you.[65]

Chapter 162, known as the Unemployment Compensation Act of 1937,[66] was the law conferring upon the Commissioner the power to collect contributions to the state's unemployment compensation fund. Encouraged by the New Deal Congress to spread the financial burden of supporting the unemployed,[67] the Washington legislature passed the Act while the Great Depression was in full swing.[68]

E.B. Riley, Washington's Commissioner of Unemployment Compensation and Placement, issued the Order and Notice of Assessment because he believed the company was not paying taxes[69] owed due to its employment of travelling shoe salesmen, such as Ed Alley, who lived and worked in Washington. In fact, shortly before Alley was served, another salesman at the compa-

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[64] The figure was an estimate. *See id.* at 18. During the proceeding, the parties stipulated that the correct sum owed, if any, was $3,159.24. *See id.* at 16, 22. Thus, a $3,000 dispute eventually made its way to the Supreme Court.

[65] *Id.* at 1-2.

[66] Wash. Rev. Stat. § 9998 (Supp. 1941). The Washington law was similar to unemployment insurance schemes enacted by many states during the Depression. A state agency collected a tax levied on each employer for wages paid within the state and administered the fund created by the taxes collected. When an employee of a tax-paying employer filed a claim for benefits due to involuntary unemployment, the agency provided a modest compensation, usually for a limited period of time, from an account established on behalf of the employer. Unemployment compensation systems of this type continue to exist today in virtually every state of the Union. *See* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 313-15 (1994).

[67] *See* I.R.C. § 1606(a) (1946) ("No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce . . . .").

[68] *See generally* Casebeer, *supra* note 66, at 259-311 (explaining theory underlying unemployment compensation).

[69] The law became effective on January 1, 1937, the same date on which Commissioner Riley claimed the company's payroll tax obligations began to accrue. *See* Record, *supra* note 60, at 1. International Shoe apparently had never paid Washington unemployment taxes.

ny apparently lost his job and filed a claim for benefits.[70] The record does not disclose precisely what happened,[71] but it is possible that a lack of money in the company's "account" available to pay the claim triggered the attempt to collect taxes from the International Shoe Company.[72]

Within days of service upon Alley, the Order and Notice of Assessment found its way into the hands of officials of the International Shoe Company at its corporate headquarters in St. Louis, Missouri.[73] On October 18, just four days after service upon Alley, the company, acting through local counsel, filed with the Commissioner's office a Special Appearance, Motion to Quash Service, and Objection to Jurisdiction,[74] and requested a hearing. The company raised four separate but related objections, including the two federal questions that the Supreme Court eventually decided.[75]

December 9, 1941 was a Tuesday. The hearing went forward at 10:00 a.m. as scheduled.[76] Appeals Examiner J.R. Walsh presided. Appearing on behalf of the Commissioner's Unemployment Compensation Division were William J. Millard Jr. and his deputy John Lindberg, both of the state Attorney General's

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[70] *See id.* at 7.

[71] The benefits claimant is not identified, but may have been either Oscar K. Anderson, who, like Alley, worked in the Friedmann-Shelby branch, or Burt M. McKay, who worked in the Peters branch. *See id.* at 20. Payroll records for the years 1937 through 1940, part of an exhibit attached to the stipulation entered into by the parties in the proceedings before the Appeal Tribunal of the Office of Unemployment Compensation and Placement, show that Anderson and McKay earned the lowest commissions of all the Washington salesmen during 1939 and earned no commissions in 1940. *See id.* at 20-21; *infra* Table A (summarizing commissions earned). Neither salesman was employed by the company when the claim was likely filed and either may have been released for poor performance.

[72] The record offers no other alternative explanation.

[73] The company also was served by first class mail at its St. Louis headquarters. *See* Record, *supra* note 60, at 18. The morning of the hearing, Alley's "boss," a "Mr. Williams," advised Alley by wire that he was coming to Washington, presumably to see Alley. Williams advised Alley that the company's annual salesmen's convention, scheduled for December, had been cancelled due to "this emergency and uncertain conditions." *Id.* at 13.

[74] *Id.* at 4.

[75] *See infra* text accompanying notes 128-30 (describing arguments).

[76] The request for hearing had been granted on December 1. On that date, Executive Appeal Examiner W.G. Preston scheduled a hearing before the Appeal Tribunal for the Office of Unemployment Compensation and Placement to take place in Seattle at 10:00 a.m. on December 9, 1941. *See* Record, *supra* note 60, at 5. Meanwhile, Pearl Harbor was bombed on Sunday, just two days before the hearing, and the United States declared war on Japan on Monday.

office.[77] Millard was the son of Washington Supreme Court Justice William Millard Sr. Ironically, when three years later the case was appealed to the state's highest court, Justice Millard would cast one of two dissenting votes to deny the exercise of jurisdiction that his son sought to secure below.[78]

Appearing on behalf of the International Shoe Company was Allen Orton of Stern, Orton & Stern, a Seattle law firm.[79] Orton would pull the laboring oar for the company as it unsuccessfully navigated the hazardous waters of the Washington state legal system for the next three years. The morning's proceedings did not last long. Most of the evidence was offered through stipulation.[80] According to the stipulation,[81] the International Shoe Company had no place of business in the State of Washington. The company neither maintained a general agent nor made contracts for the sale or purchase of goods there. It main-

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[77] *See id.* at 7.

[78] The Millards formed a controversial father-and-son legal team. The voters in 1948 declined to confirm Millard Sr. after 21 years on the Washington Supreme Court. Before the election, five of his own colleagues, led by the then-current chief justice, took the extraordinary step of publicly accusing him of delaying his vote in a case seeking approval of a multi-million dollar sale of the privately-held Puget Sound Power & Light Company to a public utility. Millard Sr. eventually cast the deciding vote against the sale. *See* CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH 250, 251-52 (1991) [hereafter SHELDON, HIGH BENCH]; *see also* State *ex rel.* Public Util. Dist. v. Wylie, 182 P.2d 706 (Wash. 1947). Moreover, Attorney General Troy Smith, who eventually pursued the *International Shoe* case to the U.S. Supreme Court, issued a report finding that, as a sitting justice, Millard Sr. had wrote a bad check and borrowed money from pinball operators and a club official during the pendency of a case in which the latter had a pecuniary interest. Although Smith's report "eliminat[ed] criminal action and intent from consideration," it did find Millard Sr. had failed to "avoid the appearance of evil." SHELDON, HIGH BENCH, *supra*, at 252. Finally, Millard Sr. suffered serious financial setbacks, and rumors that he had accepted bribes swirled around him. *See id.* at 252-53. Nevertheless, eight years later, Millard Sr. became only the fourth justice in Washington history to serve a second, interrupted term on the state's high court when he was elected to fill a seat in 1956. *See id.* at 253.

For an account of the charges leveled against Millard Sr., see CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 117-22 (1988).

Millard Jr. served as his father's law clerk during the failed re-election campaign of 1948. *See* SHELDON, HIGH BENCH, *supra*, at 362. He twice unsuccessfully ran for election to the high court, the first time in 1950 and the second — as a sort of running mate of his father's — in 1956. *See id.* at 196, 252-53.

[79] *See* Record, *supra* note 60, at 7.

[80] *See id.* at 15-18.

[81] *See id.*

tained no stock of merchandise in the state and made no deliveries of merchandise in intrastate commerce.[82]

Moreover, recited the stipulation, the company's only connection to Washington was its employment of salesmen in the state. During each of the years 1937 through 1940, the company employed eleven to thirteen salesmen who resided in the state. Each salesman was assigned a designated territory and given a sample line consisting of just one shoe of a pair. In his designated territory, the salesman visited buyers "in the trade" — shoe retailers — to show the product line and offer it for sale. Sometimes the salesman rented permanent sample rooms in "business buildings" or temporary sample rooms at hotels located in the cities to which he travelled. Expenses for the rentals were reimbursed by the company.[83]

Furthermore, according to the stipulation, the salesman was authorized only to solicit orders. He had no authority to approve sales or accept payment. No salesman could authorize credit to any buyer. All decisions to approve sales and extend credit came from company headquarters in St. Louis.[84]

Finally, the stipulation provided, no salesmen had authority to fill orders. When the company accepted an order, it would be filled by shipment f.o.b.[85] from some point outside the state. The order was invoiced at the point of shipment and payable there. Practically all orders of merchandise were approved in and shipped from St. Louis.[86]

The hearing presented just one glitch. At first, Millard and Lindberg could not agree to the part of the stipulation describing the company as requiring shoe salesmen to spend time each year in St. Louis receiving "direct personal instructions" from company officials as to their duties, including the manner and

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[82] The company maintained it was engaged in *inter*state, but not *intra*state, commerce. *Id.* at 4, 16. Under prevailing law, this curious distinction was believed to immunize the company — and indeed, all foreign corporations — from the exercise of personal jurisdiction by the forum state. *See infra* text accompanying note 220.

[83] *See* Record, *supra* note 60, at 16-17.

[84] *See id.* at 17.

[85] F.O.B., short for "free on board," means that title and responsibility for the costs of delivery, including insurance and transportation, remain with the seller until the time of actual delivery. *See* BLACK'S LAW DICTIONARY 599 (5th ed. 1979); *see also* U.C.C. § 2-319(1) (1990) (offering similar definition).

[86] *See* Record, *supra* note 60, at 17.

means of selling.[87] The company wanted to stipulate that every salesman was to attend a convention to brush up on the product line, selling techniques, local and national economic conditions, and information about shoe construction and new types of footwear.[88]

But Millard and Lindberg, as attorneys are wont to do, demanded proof. Orton agreed to furnish it if the hearing were continued, so after only a few minutes Examiner Walsh called a recess until the afternoon. In the meantime, the stipulation was admitted into evidence.[89]

And so the testimony offered by the company to supplement the stipulation came to be buried in the record.[90] For reasons even local counsel Allen Orton did not fully understand,[91] his client[92] in St. Louis directed him to call the one and only live witness who would ever be heard in the case: Edward S. Alley.

The hearing resumed at 1:00 p.m. Alley was sworn. On direct examination by Orton,[93] Alley testified that he had worked at the International Shoe Company for nearly eighteen years. After joining the company in 1924, Alley moved to the Friedmann-Shelby branch in 1936 and began selling shoes in the State of Washington.

Alley testified salesmen were required to go to St. Louis for a week-long convention — a series of instructional meetings with company officials — held at least once a year, but twice "[i]f our territories [were] not doing well."[94]

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[87] *See id.* at 8.

[88] *See id.*

[89] *See id.* at 9.

[90] The Supreme Court opinion makes no express mention of Alley's testimony, but does refer to "evidence and a stipulation of facts" that were not in dispute. International Shoe Co. v. Washington, 326 U.S. 310, 312 (1945).

[91] Orton stated: "I have no doubt that the proof [sought by Millard and Lindberg] can readily be produced. We could have had it here this morning. I don't know what the significance of it is, but my clients insist that it be in there." Record, *supra* note 60, at 7-8.

[92] Mr. O. Rumer, International Shoe Company's counsel in St. Louis, apparently directed the company's defense and required Orton to submit briefs for prior approval. *See id.* at 8.

[93] *See id.* at 10-14 (testimony of Edward S. Alley).

[94] *Id.* at 11. The company was organized into four operating branches: Roberts, Johnson & Rand; Peters; Friedmann-Shelby; and Specialty. *See id.* at 16. Every salesman from each branch attended these conventions, which were conducted simultaneously in separate hotels for the employees and executives of each individual branch. *See id.* at 11.

Alley's testimony was remarkable for demonstrating how much control the company exercised over the daily activities of its travelling salesmen. The annual convention was a mini-marathon,[95] at the end of which lay the prize of reimbursement of

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[95] The first day of the convention was the general meeting. The general manager talked about the branch's accomplishments compared to the company's expectations. Other company officials, like the "hide [sic] buyer," might address conditions within their expertise and how such conditions affected the company's fortunes. Record, *supra* note 60, at 11 (testimony of Edward S. Alley).

Over the next couple of days or so were group meetings. Salesmen were divided into small groups to discuss specific types of shoes, such as children's and juveniles' shoes, men's shoes, women's shoes, and work shoes. There was also a meeting on merchandising these shoes. The presentations were detailed. Alley testified:

> For instance, I am group No. 5, . . . I will be in a merchandising meeting where there will be a style man, and he will be telling us about the style trends for the coming season, what colors for instance are going to sell, what kind of patterns, and while he is talking to my group, some other man is talking on women['s] shoes in another group.

Id. at 11 (testimony of Edward S. Alley).

After the group meetings came a series of general meetings within the division. First was a general meeting about advertising. Following the general meetings, each salesman had to spend a day in which he met with every department manager in his branch. The salesman was given a card bearing the name of the general manager, the sales manager, the credit manager, the merchandising manager, the advertising manager, and the cashier. Alley described the process:

> We have to see each one of these men personally, starting with the general manager . . . . [He discusses] how we are getting along, how the family is and that sort of thing, then we go to our sales manager and if we are not doing too well, then there is a real honest to[] goodness session. If you are doing well, he will pass us off with a little congratulation, if not why then he goes over the territory town by town. He asks what the matter is with Puyallup, Port Angeles, or will say, "What is the matter, you are not getting the volume out of Seattle," all that sort of thing.

Id. at 12.

The record does not reveal precisely whether Alley was ever told, "You are not getting the volume out of Seattle," but the context suggests that he might have been. Table A summarizes the average commissions earned annually by International Shoe Company salesmen residing in Washington from 1937-40.

expenses the salesman had to front for staying in hotels and renting sample rooms while on the road.[96]

TABLE A

Rank	Salesman	Average
1	Umphery, Allen K.	$ 5394.47
2	Swanson, Harry B.	$ 4052.34
3	Kelley, Bernard J.	$ 3573.89
4	Hall, John H.	$ 3535.19
5	Ebling, Carl A.	$ 3111.08
6	McDonough, Earl E.	$ 2678.63
7	Rackam, Joshua T.	$ 2660.60
8	Alley, Edward S.	$ 2493.34
9	McKay, Burt M.	$ 2364.83 (DATA AVAILABLE FOR 1937-1939 ONLY)
10	Hall, Carl W.	$ 2130.02
11	Thatcher, Raymond C.	$ 1824.81 (DATA AVAILABLE FOR 1939-1940 ONLY)
12	Anderson, Oscar K.	$ 872.62
13	Richards, Frederich W.	$ 834.75 (DATA AVAILABLE FOR 1939-1940 ONLY)
14	Masterson, Maxwell J.	$ 350.00 (DATA AVAILABLE FOR 1937 ONLY)

As the table shows, Alley's average commissions ranked in the bottom half of commissions earned by all the company's salesmen residing in Washington. The amount of commissions suggest that International Show was doing a substantial amount of business in the state. For 1937-40, the company paid nearly $134,000 in commissions to salesmen in Washington. *See* Record, *supra* note 60, at 22, 61. Assuming that a commission of five percent was paid, International Shoe's total sales in Washington would have been nearly $2.7 million during this period.

[96] A card issued to the salesman for the final day of meetings needed to be signed by the manager in charge of each meeting. The meeting with the sales manager was supposed to resolve problems regarding the failure to sell enough shoes. At the end of the meeting the manager signed the card. Then, Alley testified, the salesman went to a meeting where he would "really have something" — the meeting with the credit manager:

Ironically, Alley testified, he was supposed to leave for the annual convention on the spring product line scheduled to begin on December 15, just six days after the hearing. According to Alley:

> I received instructions to leave for St. Louis this coming Thursday night, to be in St. Louis by Sunday to attend this convention and *when all this emergency came up*, the boss, Mr. Williams, came out here, and he has wired me to stay here, that Mr. Williams was coming here, and he told me this morning, *in view of this emergency and uncertain conditions*, they had cancelled the convention and that is the only exception since I have been out here.[97]

The record does not clarify whether by "this emergency" and "uncertain conditions" Alley meant the Order and Notice of Assessment served upon him, the bombing of Pearl Harbor and subsequent Declaration of War, or both. We do know these terms meant something important, because December 1941 marked the only time a convention had been cancelled since Alley had moved to Washington.[98]

A strong case can be made for Alley's having meant, at the least, the unemployment tax dispute.[99] The International Shoe

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> We go over each account, the accounts that you figure that he is not giving enough credit, that you could double your volume if they gave you $500 more credit on him and you fight that out, and other accounts, they say they should not ship at all, and you put up a fight to keep him on the credit list and when you are through with [the credit manager], he signs your card and then you go down on the line with each one . . . .

Id. at 12-13 (testimony of Edward S. Alley).

Next down the line, Alley testified, was the merchandise manager, who provided information "about what to sell and how much to sell" in the salesman's territory. Afterward came the correspondence manager, who "brings out maybe that you have not answered your mail," pulls out the salesman's folder, and goes over each piece of mail until every one is "cleaned up." "And finally," Alley testified, "after you are all through you can take your card to the cashier and he signs it and he gives us our expense money. That is the way you get your expense money, when you prove you are through." *Id.* at 13.

The end of the convention, as conventions often do, featured a banquet "where we have an inspirational social time, big boys all wishing us well and we have a big dinner." *Id.* (testimony of Edward S. Alley). The next day salesmen were to clear up any remaining business and leave town by evening to get back on the road. *See id.*

[97] *Id.* (emphasis added).

[98] *See id.* at 10.

[99] The company's previous experience in similar litigation suggests it had sought to avoid the type of conduct by its salesmen that could create the grounds for personal juris-

Company, as the series of events suggest, took the Commissioner's case quite seriously. The company did not ignore the summons, as some foreign corporations might have done, but swiftly retained counsel and entered a special appearance. The company vigorously opposed jurisdiction by filing briefs and ultimately pursued all available appeals.[100] And of course, it sought a continuance to call Alley, who left his regular duties to testify that afternoon.

How the company defined the status of salesmen like Alley seemed to change at each step in the appellate ladder. Before the Appeal Tribunal of the Office of Unemployment Compensation and Placement, salesmen were "employees."[101] Before the Washington Supreme Court, they were "solicitors who take orders" or "order-takers."[102] Finally, before the United States Supreme Court, they were "mere" solicitors.[103] There the company scoffed:

> It would be manifestly impolitic to uphold service upon a salesman in a case not involving a sale. It would require of mere soliciting salesmen, notoriously happy-go-lucky fellows, good mixers, a higher degree of judgment and responsibility than that for which they are selected . . . . It would require of mere soliciting salesmen qualities which are rarely found in them.[104]

The irony of these comments is worthy of Willy Loman himself. In Arthur Miller's classic tale of the travelling salesman, Loman, weary of the road after years of drumming for the same employer, plans to ask the boss for a desk job. Instead, he gets fired for failing to get enough business out of his territory. In *International Shoe*'s rendering, another traveling salesman, Ed Alley, must spend six months on the road before permitted to ask for reimbursement of his expenses, and must attend a week-

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diction needed under then-extant law. *See infra* text accompanying notes 142-48 (discussing International Shoe Co. v. Lovejoy, 257 N.W. 576 (Iowa 1934)).

[100] *See* infra text accompanying notes 158-62.

[101] *See, e.g.*, Record, *supra* note 60, at 10 (remarks of Allen Orton), 16 (stipulation).

[102] *See, e.g.*, Appellant's Opening Brief at 43-44, 49, International Shoe Co. v. State, 154 P.2d 801 (Wash.) (No. 29296), *aff'd sub nom.* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[103] *See, e.g.*, Appellant's Brief at 18-19, International Shoe Co. v. Washington, 326 U.S. 310 (1945) (No. 107) [hereafter Appellant's Brief].

[104] *Id.* at 22-23.

long convention in Missouri, where his performance is critiqued, before he can even do that. Each man is expected to shoulder the up-front burdens of the company's distribution system — for without solicitors there can be no sales — but is held in contempt for his skill and willingness to do so. In Alley's case, this meant not being worthy of accepting service of process for the company, a ministerial act at best.

2. The Company

a. Rise, Fall, and Rise Again

Let us step back for a moment from the immediate dispute culminating in the historic Supreme Court decision to consider where the dispute occurred in the history of the International Shoe Company. The company was the product of the merger of two St. Louis footwear companies formed during the nineteenth century. In 1836 Henry W. Peters founded the Peters Shoe Company.[105] In 1898 Jackson Johnson, Oscar Johnson, Edgar Rand, and John E. Roberts established the Roberts, Johnson & Rand Shoe Company.[106] RJ&R was a footwear jobber, or middleman, which bought shoes from manufacturers and sold them to retailers. On December 28, 1911, the two competitors merged and incorporated in Missouri as the International Shoe Company.[107] On March 16, 1921, the company reincorporated in Delaware but maintained its principal place of business in St. Louis.[108]

The company experienced considerable growth. Beginning in 1935, it earned an annual spot on Standard & Poor's index of the nation's 500 largest companies.[109] By the time the Commissioner's Order and Notice of Assessment was served upon Ed Alley, the International Shoe Company was the largest shoe manufacturer in the United States.[110]

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[105] *See* Jack Wessling, *International Shoe Name May Be Dropped; To Consolidate with Florsheim Shoe Company*, FOOTWEAR NEWS, Mar. 21, 1988, at 1.

[106] *See id.*

[107] *See* STANDARD & POOR'S CORP., STANDARD CORPORATE DESCRIPTIONS 8499 (Feb. 1995) [hereafter STANDARD & POOR'S].

[108] *Id.*

[109] *See* Jackey Gold, *The Ravaging of Interco*, FIN. WORLD, Jan. 8, 1991, at 38.

[110] *See* Lawrence Graves, *International Shoe in St. Louis Identity Crisis*, ST. LOUIS BUS. J.,

In 1945, the year of the Supreme Court's decision, the International Shoe Company ranked among the 100 largest domestic corporations. That year the company tallied assets of $89 million and produced revenues of $149 million.[111] Losing the case had little impact on the company's good fortune. After World War II the International Shoe Company continued to grow. In 1953, the company entered the retail business when it purchased Florsheim Shoe Company.[112] The next year, the company became truly "international" when it bought Savage Shoes of Canada.[113]

During the 1960s and 1970s, the company anticipated increased competition from low-cost domestic and foreign competitors and, over the next three decades, not only diversified its holdings in the footwear industry, but also expanded into manufacturing and distribution operations in the apparel and furniture industries.[114] On March 2, 1966, International Shoe Company changed its name to Interco Incorporated.[115] In its diversification efforts, Interco later acquired furniture makers Ethan Allen, Broyhill, and Lane.[116] It also bought sports shoe manufacturer Converse Inc.[117] By 1988, Interco employed 59,000 people and had $3.3 billion in annual sales.[118]

Mar. 21, 1988, at 1A. A major employer during the Great Depression, the company expanded to 45 plants capable of producing 45 million pairs of shoes per year. *See id.* In 1941, these plants were located in Arkansas, Illinois, Kentucky, Missouri, New Hampshire, New York, North Carolina, and Pennsylvania. The job of selling the product nationwide was done through four branches: Roberts, Johnson & Rand; Peters; Friedmann-Shelby; and Specialty. *See* Record, *supra* note 60, at 15-16.

[111] *See Corporate Scoreboard: The Top 100 — 1945*, FORBES, July 4, 1987, at 126.

[112] *See* HOOVER'S HANDBOOK OF AMERICAN BUSINESS 636 (1994) [hereafter HOOVER'S].

[113] *See id.*

[114] *See id.*

[115] *See* STANDARD & POOR'S, *supra* note 107, at 8499. The decision was painful to members of founder Edgar Rand's family, who had feared the International Shoe Company would become merely an operating subsidiary of Interco. *See* Graves, *supra* note 110, at 1A. In 1987, the International Shoe division was liquidated. *See* Letter from Lynn Chipperfield, General Counsel of Interco, Inc., to Andrew F. Brimmer (Nov. 19, 1993) [hereafter Chipperfield Letter] (on file with authors). And on September 16, 1988, the International Shoe Company plant that had been operating since 1912 was closed. *See Shoe Plant to Close*, UPI, July 29, 1988, *available in* LEXIS, Nexis Library, UPI File.

[116] *See* HOOVER'S, *supra* note 112, at 636.

[117] *See* STANDARD & POOR'S, *supra* note 107, at 8499.

[118] *See* Pat Widder, *Dealmaking Gone Awry*, CHI. TRIB., Oct. 27, 1991, Business, at 1.

During the 1980s Interco, like many of America's largest and most profitable companies, was the target of hostile takeover attempts. To fend off one attempt in 1988, the company borrowed $1.8 billion to pay a special dividend to shareholders.[119] The tactic defeated the takeover but created an unmanageable debt structure. To pay down the debt, Interco sold off many of its apparel and retail operations for less-than-expected yields.[120]

By 1990 Interco was no longer listed in the Standard & Poor 500.[121] On January 24, 1991, the company and its thirty operating subsidiaries filed for reorganization under Chapter 11 of the United States Bankruptcy Code in what ranked at the time as one of the five biggest bankruptcies in American history.[122]

But Interco trimmed its operations and struggled back onto its feet. Despite the size and complexity of the proceedings, the debtor's plan of reorganization was approved within just fifteen months of the filing, and on August 3, 1992, the company emerged from bankruptcy.[123] The company was divided into two operating groups and four major wholly owned subsidiaries: Florsheim and Converse in the footwear group and Broyhill and Lane in the furniture group. In 1992 Interco earned its first profit since 1987.[124] In 1993 the company earned another profit.[125] Interco at that time had 22,000 employees and total revenues of almost $1.5 billion.[126]

Today the case of *International Shoe Company v. Washington* has all but faded from the company's institutional memory. At Interco's headquarters in St. Louis it is remembered as "primari-

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[119] *See* HOOVER'S, *supra* note 112, at 636. The takeover attempt and Interco's response were the subject of litigation. *See* City Capital Assocs. v. Interco, Inc., 696 F. Supp. 1551 (D. Del.), *aff'd*, 860 F.2d 60 (3d Cir. 1988).

[120] *See* HOOVER'S, *supra* note 112, at 636.

[121] *See* Gold, *supra* note 109, at 38.

[122] *See In re* Interco, Inc., Jointly Adm'd Case No. 91-40442-172, 1992 Bankr. LEXIS 1972, at *3-*4 (Bankr. E.D. Mo. Nov. 19, 1992). The filing listed seven separate series of publicly held debt and equity securities, secured bank claims of over $1 billion, and scheduled non-consolidated liabilities of nearly $32 billion. More than 100,000 creditors and parties in interest participated in the proceedings. *See id.*

[123] *See* STANDARD & POOR'S, *supra* note 107, at 8499.

[124] *See* HOOVER'S, *supra* note 112, at 636.

[125] *See* INTERCO, INC., ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 22 (Mar. 28, 1994) (Form 10-K report).

[126] *See* STANDARD & POOR'S CORP., REGISTER OF CORPORATIONS, DIRECTORS, AND EXECUTIVES 1326 (1994).

ly a tax case" — not as the leading case on personal jurisdiction instantly recognizable to generations of American law students.[127]

b. Litigation Strategy

Despite the company's size, officials in St. Louis exercised control over all aspects of its far-flung operations. Indeed, the extent to which headquarters exercised control over nearly every facet of operations, including the conduct of its travelling salesmen in the State of Washington, would become the centerpiece of its jurisdictional defense. That defense was based on four arguments:

> (a) Process had not been properly served upon an "agent" of the company as required by the Unemployment Compensation Act.
> (b) The company did not furnish "employment" within the state as required by the Act.
> (c) The company was not "doing business" in the state, and therefore immune from personal jurisdiction.
> (d) The company was a foreign corporation engaged solely in interstate commerce, and therefore immune from the state's taxing authority.[128]

Arguments (a) and (b) raised independent questions of state law concerning the meaning of specific provisions in the Unemployment Compensation Act of 1937 and, consequently, never made it to the Supreme Court. Arguments (c) and (d) raised

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[127] The company's general counsel reported:

> Unfortunately, because of the passage of time and the liquidation of International Shoe's operations [in 1987], we do not have any records which would help us to answer your questions about the aftermath of the *International Shoe* case. None of our current employees has any independent recollection. Although *International Shoe* has come to be known as a civil procedure case, as I re-read it it was apparent to me that to us it was primarily a tax case — we did not want to pay unemployment taxes to the State of Washington. . . .

Chipperfield Letter, *supra* note 115, at 2.

The contemporaneous view of lawyers and academics seemed to be in accord with the company's. In an issue of the *Columbia Law Review* paying tribute to Chief Justice Stone shortly after his death, two commentators characterized *International Shoe* as a tax case. *See* Herbert Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 784 (1946); Russell Magill, *Stone on Taxation*, 46 COLUM. L. REV. 747, 756 & n.1 (1946).

[128] *See* Record, *supra* note 60, at 4.

the key federal questions on which the Court would note probable jurisdiction.[129] But the Court would summarily reject the commerce clause argument as inconsistent with its emerging jurisprudence of expanded state power to regulate interstate commerce.[130] Thus the procedural posture of the case set up its "outcome-determinativeness": if the Court approved Washington's exercise of personal jurisdiction over the company, then the merits of its power to tax would be resolved as well.

The company's careful structuring of its sales force may be explained as part of a comprehensive defensive litigation strategy. The International Shoe Company anticipated that from time to time it might be haled into court in states where it did not wish to defend. At the least the company could probably be forced to defend in Delaware, where it was incorporated, and the eight states, including Missouri, where it maintained manufacturing operations. But by carefully exercising control over salesmen from St. Louis and minimizing their authority, the company might avoid being forced to defend lawsuits in potentially unfavorable fora, such as the State of Washington.

Recall the prevailing jurisprudence before *International Shoe.* Whereas "mere solicitation" of business by a foreign corporation operating in interstate commerce was constitutionally insufficient to subject the corporation to personal jurisdiction,[131] "solicitation plus" other activities by the corporation was sufficient.[132] Among the many activities in the forum counting toward the "plus" were maintaining an office or warehouse, making deliveries, taking collections, and handling claims in the state.[133] Even engaging "continuously and regularly in 'mere solicitation'" in the forum might qualify.[134]

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[129] *See id.* at 123 (order noting probable jurisdiction).

[130] *See* International Shoe Co. v. Washington, 326 U.S. 310, 321 (1945) ("[O]nly a word need be said of appellant's liability for the demanded contributions to the state unemployment fund."); *see also* William B. Lockhart, *A Revolution in State Taxation of Commerce,* 65 MINN. L. REV. 1025, 1025 n.4 (1981) (citing inconsistent Supreme Court decisions in 1940s on state power to tax interstate commerce).

[131] *See, e.g.,* International Harvester Co. v. Kentucky, 234 U.S. 579, 587 (1914); *see also* Green v. Chicago, B. & Q. Ry., 205 U.S. 530, 533 (1907) (stating that "nothing more" than solicitation is insufficient).

[132] *See, e.g.,* Frene v. Louisville Cement Co., 134 F.2d 511, 515 (D.C. Cir. 1943).

[133] *See id.* at 516 (citing cases).

[134] *Id.* (quotations in original); *see, e.g., International Harvester,* 234 U.S. at 585 (holding

These rules evolved during the sixty-eight years of jurisdictional litigation that followed *Pennoyer*. In fact, there were many reported decisions dealing with corporate defendants which, like the International Shoe Company, depended on travelling salesmen to market their goods or services.[135] For our purposes, three of these cases stand out as particularly important.

In *Harbich v. Hamilton-Brown Shoe Co.*,[136] defendant, similar to the International Shoe Company, was a footwear manufacturer incorporated in Missouri with a principal place of business in St. Louis. Plaintiff brought an action for personal injuries suffered in a collision between a truck operated by defendant's driver and an automobile operated by plaintiff. Service of process was made upon Smith, defendant's travelling salesman, in Texas. Smith was paid "a monthly salary for his services."[137] Defendant objected on the grounds that the salesman was not an agent authorized to accept service and, in addition, lacked authority to sell merchandise, make sales contracts, or otherwise bind the company.[138] Only the St. Louis headquarters could do these things. Plaintiff responded that he was in the retail shoe business and was paid sales visits by drummers, who brought samples and quoted prices, every month to six weeks. This had gone on for "a great many years."[139] Plaintiff added that he had known Smith "for the past year and a half or two years."[140] The district court held defendant was "doing business" within Texas and subject to suit there. Although the court's opinion lacks significant analysis,[141] it is a good bet that defendant's continuous, years-long solicitation, coupled with its payment of a salary to Smith, constituted the "plus" needed to satisfy the rule.

"continuous course of conduct in the business of solicitation of orders" sufficient for exercise of jurisdiction).

[135] For a cogent summary of many of these cases, see *Frene*, 134 F.2d at 513-17.

[136] 1 F. Supp. 63 (S.D. Tex. 1932).

[137] *See id.*

[138] *See id.*

[139] *Id.* at 65.

[140] *See id.*

[141] The district judge acknowledged that the Supreme Court had "laid down no all-embracing rule by which it may be determined what constitutes the doing business by a foreign corporation in such a manner as to subject it to a given jurisdiction." *Id.* (internal quotations omitted).

In *International Shoe Co. v. Lovejoy*,[142] defendant, the International Shoe Company itself, was sued by the landlord of a shoe retailer for wrongful removal of a stock of shoes at premises leased in Iowa. Service was made upon Sommerhauser, an Iowa-based salesman. The retailer apparently had defaulted not only on its lease, but also on its credit obligation to the International Shoe Company.[143] One night, Sommerhauser, who had taken orders from the retailer, entered the leasehold, packed up the company's stock of shoes, and shipped them back to St. Louis.[144]

Lovejoy is an important case if only for revealing a much different picture of the company's operations in Iowa than in Washington. Indeed, the business of the company looked more like that of the Hamilton-Brown Shoe Company in Texas than what it would look like to the Supreme Court when it decided *International Shoe*. For example, in Iowa the company kept a permanent display room in a Des Moines hotel to show samples to customers and take their orders.[145] Sommerhauser, the salesman, did not extend credit but did pass along to the company credit information and from time to time he collected payments.[146] And he had a "practice" of aiding, if not inducing, persons such as the defaulting retailer to establish stores and engage in the shoe business.[147] This last factor, if not the others, caused the Iowa Supreme Court to uphold the assertion of jurisdiction based on the conclusion that the company's operations "amounted to more than the mere solicitation of orders. It manifested an intention upon the part of the [International Shoe Company] to engage in business in this state."[148]

Finally, in *West Publishing Co. v. Superior Court*,[149] a famous law book publisher was sued, similar to the situation that the International Shoe Company would soon find itself in, by the

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[142] 257 N.W. 576 (Iowa 1934).

[143] *See id.* at 577.

[144] *See id.*

[145] *See id.* at 577-78.

[146] *See id.*

[147] *Id.* at 578.

[148] *Id.*

[149] 128 P.2d 777 (Cal.), *cert. denied*, 317 U.S. 700 (1942).

state to collect a use tax levied on sales activity in the state.[150] Defendant ran its California operations much as the International Shoe Company ran its Washington operations: West maintained no permanent offices or warehouses, kept no stock, and authorized no agent to receive service of process in the state.[151] All orders were placed through a force of full-time resident salesmen, subject to approval at headquarters in St. Paul, Minnesota, where they had to return once a year for instructions.[152] Unlike salesmen of the International Shoe Company, however, salesmen of defendant extended credit, assisted in collections, did trouble-shooting to resolve misunderstandings, worked out of semi-permanent "headquarters" in law firms that had agreed to provide shelf space for books in exchange for use of those books, and listed their telephone numbers under the company's name in the Los Angeles and San Francisco directories.[153] The California Supreme Court upheld the exercise of jurisdiction.

The International Shoe Company, presumably aware of these and related decisions, carefully structured its distribution operations to look like "mere solicitation" rather than "solicitation plus." The company eliminated permanent sample rooms. It paid commissions rather than salaries. And it got rid of any discretion in resident salesmen to extend credit, collect payments, do "trouble-shooting," or advise retailers.

Judge, soon to be Justice, Rutledge understood as well as anyone the implications of such a strategy. As author of the leading 1943 case of *Frene v. Louisville Cement Co.*,[154] he all but predicted this very strategy:

> Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of "selling" the customer has been passed. No business man would regard "selling," the "taking of orders," [or] "solicitation" as not "doing business." The merchant or manufacturer considers

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[150] *See id.* at 778.

[151] *See id.*

[152] *See id.*

[153] *See id.* at 778-79. The trial court ultimately entered judgment in favor of the state after trial. *See* People v. West Publishing Co., 216 P.2d 441 (Cal. 1950).

[154] 134 F.2d 511 (D.C. Cir. 1943). The *Frene* decision is dated January 25, 1943. Rutledge was confirmed as an Associate Justice on February 8, 1943. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 148-49 (1985).

> these things the heart of the business. It is perfectly possible under the "mere solicitation" rule, for a foreign corporation to confine its entire market to a single jurisdiction, yet carefully by limiting its activities there to the soliciting phase, to force each of its customers having cause for legal redress to seek it in the foreign forum of incorporation. *By careful segregation of the "selling" phase in the place of market, a substantially complete immunity to liability in the practical sense, could be created.*[155]

Immunity from state taxation is exactly what the company sought. Certainly the company did not want to pay the tax the Commissioner sought to collect.[156] Perhaps it also feared that the Washington tribunals would too readily find for the government in an action to collect a state tax from a foreign corporation.[157] Alley's testimony, which was intended to bolster all of the company's arguments, demonstrates how the company might have structured its distribution network to serve a litigation strategy.

Of course, at no stage in the appellate process did any tribunal of the State of Washington rule in favor of the International Shoe Company. The Appeal Tribunal,[158] the Commissioner of Unemployment Compensation and Placement,[159] the King County Superior Court,[160] and the Washington Supreme Court[161] each agreed the company must not only defend in Washington but also pay the tax. The United States Supreme Court affirmed.[162]

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[155] *Frene*, 134 F.2d at 516 (emphasis added).

[156] *See* Chipperfield Letter, *supra* note 115, at 2.

[157] Each of the four Washington tribunals to hear the matter affirmed the Commissioner's power to tax the company. *See infra* text accompanying notes 158-61.

[158] *See* Record, *supra* note 60, at 23, 30, 35.

[159] *See id.* at 38.

[160] *See id.* at 41.

[161] International Shoe Co. v. State, 154 P.2d 801 (Wash.), *aff'd sub nom.* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[162] *International Shoe*, 326 U.S. 310.

C. The Culmination of the Litigation: Chief Justice Stone's Opinion Revisited

The judgment of the Washington Supreme Court was affirmed by the United States Supreme Court in short order.[163] The case was argued on November 14, 1945 and decided just nineteen days later on December 3, 1945. In the now-famous opinion by Chief Justice Stone, the Court fashioned the "minimum contacts/fair play and substantial justice" formula so familiar today.[164]

The result was, in a fashion, unanimous.[165] In a separate opinion labeled neither as a concurrence nor a dissent, Justice Black seemed to embrace the result, but thought the case so insignificant that he would have dismissed the appeal as insubstantial.[166]

Chief Justice Stone's opinion is worth re-examining with the benefit of fifty years of hindsight. The record, together with a handful of extant drafts and correspondence between the Justices reveal some curious things about not only the contemporaneous considerations of the Justices, but also the uncertain future portended by the new formula.

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[163] *Id.*

[164] 326 U.S. at 316.

[165] *Id.* (Stone, C.J., joined by Reed, Frankfurter, Douglas, Murphy, Rutledge & Burton, JJ.). Justice Black filed a separate opinion. *Id.* at 322. Justice Jackson "took no part in the consideration or decision of [the] case. *Id.* at 322.

[166] *Id.* at 322-26 (Black, J., writing separately). The Reporter of Decisions cryptically indicated that Justice Black "delivered the following opinion." *Id.* at 322. As Professor Silberman points out, Justice Black's opinion predicted that the "minimum contacts/fair play and substantial justice" test would prove unworkable in practice. *See* Linda J. Silberman, *"Two Cheers" For* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 755-56 (1995). Wrote Justice Black:

> [I]t is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. . . . The Court . . . has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

International Shoe, 326 U.S. at 323 (Black, J., writing separately).

In retrospect, Chief Justice Stone's opinion is notable for at least three reasons: (1) *International Shoe* was actually an easy case that did not require the Court to break new legal ground, (2) the origins of the minimum contacts/fair play and substantial justice test were — and remain — quite mysterious, and (3) the rule announced was truly outcome determinative.

1. An "Easy" Case

As discussed previously,[167] the "presence" and "implied consent" theories — sometimes applied in combination with the "doing business" theory — of personal jurisdiction proved troublesome when applied to nonresident corporations. Much of the trouble, as Justice Holmes,[168] Judge Hand,[169] and others[170] suggested, was caused by the illusory, metaphysical task of determining corporate "presence."[171] For all its shortcomings, however, this traditional doctrinal framework easily could have accommodated the facts of *International Shoe.* The case, which was brought to protect travelling salesmen residing in the State of Washington, could have been disposed of without reformulating the law of personal jurisdiction over non-resident corporations as developed over the seven decades following *Pennoyer v. Neff.*[172] Chief Justice Stone himself showed how this might have been done.

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[167] *See supra* text accompanying notes 29-31, 34-59.

[168] *See, e.g.*, Flexner v. Farson, 248 U.S. 289, 293 (1919) (Holmes, J.) .

[169] *See, e.g.*, Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930) (Hand, J.).

[170] *See, e.g.*, Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930).

[171] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Chief Justice Stone explained:

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact . . . it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

Id. at 316-17 (citations omitted).

[172] 95 U.S. 714 (1877).

Under the "presence" theory, Stone noted, a foreign corporation was said to be present in any state where it was "doing business."[173] "Mere solicitation" of business within the state by agents of the corporation was not sufficient to constitute doing business.[174] Rather, there had to be "solicitation plus":[175] "additional activities . . . sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."[176]

The Washington Supreme Court had held, and Chief Justice Stone agreed, that such "additional activities" were to be found in the International Shoe Company's display of samples together with its salesmen's residence in the State of Washington "continued over a period of years."[177] Both activities produced a "substantial volume" of merchandise regularly shipped by the company to purchasers in the state.[178] Because these things added up to "doing business" in Washington, Stone concluded that the company had to be "present" there too.[179]

Under the "implied consent" theory, Stone suggested, the result would have been the same.[180] A foreign corporation that had not specifically agreed to be haled into the forum state nevertheless could be found to have manifested its agreement to the same by "consent . . . implied from its presence in the state through acts of its authorized agents."[181] Recognizing that this formula was a "legal fiction," Chief Justice Stone explained: "more realistically it may be said that those authorized acts [are] of such a nature as to justify the fiction."[182]

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[173] *International Shoe*, 326 U.S. at 314.

[174] *Id.* at 315.

[175] *Id.* at 314.

[176] *Id.*

[177] *Id.* at 314-15.

[178] *Id.* at 315. The record does not say exactly what the dollar value of this "substantial volume" was, though it reflects that the company paid a total of almost $134,000 in commissions from 1937 to 1940. *See* Record, *supra* note 60, at 22, 61; *see also supra* note 95 (providing information on commissions paid by International Shoe to its Washington salesmen over this period and speculating about the total volume of business that the company did in state from 1937-40).

[179] *International Shoe*, 326 U.S. at 320.

[180] *See id.* at 318.

[181] *Id.*

[182] *Id.*

Here too, the Washington Supreme Court had held, and Stone agreed, that the International Shoe Company had engaged in "regular and systematic solicitation of orders" in Washington.[183] This activity produced a "continuous flow" of the company's product into the state.[184] Undeniably this meant that the company was "conducting activities" there, something Stone called, consistent with the parlance of the times, "a privilege."[185] The exercise of this privilege created "obligations."[186] To the extent that those obligations were connected with the activities within the state, Stone concluded that "a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[187]

As this discussion demonstrates, the facts of *International Shoe* did not compel the creation of a new theory of personal jurisdiction.[188] But the Court did so anyway. Ironically, there was some precedent (if any were needed) for using an innocuous case as a vehicle for undertaking a major recodification of the law in this area. Nearly seventy years earlier, the Court turned a similar trick in *Pennoyer v. Neff*.[189] There Justice Field announced the traditional yardstick for measuring whether the exercise of state jurisdiction over non-residents — territoriality — would satisfy the new Due Process Clause of the Fourteenth Amendment.[190] Yet, as Justice Field himself demonstrated, the case might have been disposed of on independent state law grounds.[191] Thus, Field's pronouncement, like Chief Justice Stone's formulation of the minimum contacts/fair play and substantial justice test, was unnecessary to the decision.[192]

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[183] *Id.* at 314.

[184] *Id.*

[185] *Id.* at 319.

[186] *Id.*

[187] *Id.* (citations omitted).

[188] *See e.g.*, Kurland, *supra* note 28, at 586.

[189] 95 U.S. 714 (1877).

[190] *See id.* at 733.

[191] *See id.* at 721 (recognizing that district court decided case on ground that requirements for notice by publication under Oregon statute had not been satisfied).

[192] *See* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 568-70 (1995).

2. The Mysterious Origins of the "Minimum Contacts/Fair Play and Substantial Justice" Formula

Where did the "minimum contacts/fair play and substantial justice" formula come from? One of the most curious things about *International Shoe* is the lack of a good answer to this question.

As of December 3, 1945, our research showed that the formula lacked direct precedent in any prior reported opinion of the Supreme Court, the lower federal courts, or the state courts. No prior scholarly commentary appears to have proposed or discussed such a rule. And neither the transcript of record[193] nor the litigants' briefs[194] for the Court mentioned, let alone advocated or criticized, the new formula. Even the few surviving persons we contacted who might have had personal, contemporaneous knowledge about the drafting of the opinion were unable[195] or unwilling[196] to shed any light on the matter.

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[193] *See* Record, *supra* note 60.

[194] *See* Appellant's Brief, *supra* note 103; Brief of Appellees, *id.* (filed Oct. 27, 1945); Appellant's Reply Brief, *id.* (filed Nov. 13, 1945).

[195] *See, e.g.*, Letter from Philip B. Kurland to Christopher D. Cameron (July 11, 1994). Professor Kurland, the noted Supreme Court scholar and law clerk to Justice Frankfurter during the Court's October 1945 Term, responded to our inquiry as follows:

> Alas, I can offer you neither reflections nor records of the events surrounding the decision in International Shoe. The case did not play a big part in my big adventure that was the 1945 Term.
>
> I wish you well in your project, but I cannot convert my wishes into horses that you can ride.

Id.

[196] *See, e.g.*, Letter from Eugene H. Nickerson to Christopher D. Cameron (Aug. 3, 1994). Judge Nickerson, sitting on the United States District Court for the Eastern District of New York, was a law clerk to Chief Justice Stone during the Supreme Court's October 1945 Term. He responded to our inquiry, in relevant part, as follows:

> Thanks for the letter about International Shoe.
>
> I do not feel free to discuss what role I had in the opinion or to talk about what I learned as a law clerk about Justice Stone's views on the case.
>
> . . . .
>
> You certainly have an interesting project, and I am sorry I cannot help you more.

Id. Our research turned up no correspondence on *International Shoe* in Chief Justice Stone's personal papers at the Library of Congress. *See* ALEXANDRA K. WIGDER, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE 184-86 (1986) (describing Chief Justice Stone's papers).

Adding to the ambiguity is the absence of internal Court records revealing any significant debate about the new course the Justices were charting for the law of personal jurisdiction.

The only, albeit ambiguous, clues as to the origins of the formula are found in two documents among Chief Justice Stone's official papers: an early draft opinion by him bearing the handwritten date of either November 24 or 27 ("the November 24/27 draft"), and a subsequent "Memorandum for the Court" by him dated November 27 ("the November 27 memo").[197]

The November 24/27 draft contains the following crucial paragraph:

> 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 service of 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. Compare *Pennoyer* v. *Neff*, 95 U.S. 714, 733, with *McDonald* v. *Mabee*, 243 U.S. 90, and *Milliken* v. *Meyer*, 311 U.S. 457, 463. Cf. *Blackmer* v. *United States*, 234 U.S. 421. See *Hess* v. *Pawloski*, 274 U.S. 352; *Young* v. *Masci*, 289 U.S. 253.[198]

Of course, this paragraph represents the essence of the modern theory of personal jurisdiction. It appeared in the November 24/27 draft at page 5 and was eventually reported almost verbatim in the final version at page 316 in volume 310 of *United States Reports*.

The November 27 memo made minor changes to this paragraph. The memo says *in toto*:

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[197] The Chief Justice's entire file on *International Shoe* totalled no more than 28 pages. Our thanks to Carole Weiner of the Southwestern University School of Law Library for obtaining a copy of the file from the collections of the Manuscript Division of the Library of Congress.

[198] International Shoe Co. v. Washington, 326 U.S. 310 (1945) (No. 107), draft op. at 5.

> I am amending the third sentence in the first paragraph on page 5 of my [draft] opinion to read as follows:
>
> > But now that the *capias ad respondendum* has given way to personal service of 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." *Milliken* v. *Meyer*, 311 U.S. 457, 463. See Holmes, J. in *McDonald* v. *Mabee*, 243 U.S. 90, 91. Compare *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313, 318, 319. See *Blackmer* v. *United States*, 284 U.S. 421 and *Hess* v. *Pawloski*, 274 U.S. 352; *Young* v. *Masci*, 289 U.S. 253.[199]

The text announcing the new test is identical in both documents as well as in the final reported opinion.[200] The four changes made in the paragraph by the November 27 memo related only to identification of authorities cited in support of the rule and to punctuation.

First, the citation to *Pennoyer v. Neff* in the November 24/27 draft was dropped in favor of the citation to *Milliken v. Meyer*.[201] *Milliken* was moved up to provide direct support for the phrase "traditional notions of fair play and substantial justice,"[202] which now appeared between quotation marks. Second, the citation to *McDonald v. Mabee*[203] was modified to note Justice Holmes' authorship. Third, a *compare* citation to *Hoopeston Canning Co. v. Cullen*[204] was added. Finally, the signal *cf.* before the citation to *Blackmer v. United States*[205] was dropped in favor of the signal *see*. This attention to *Bluebook* niceties is more remarkable for reflecting how little rather than how much is known about Stone's thinking.

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[199] Memorandum for the Court from Harlan F. Stone (Nov. 27, 1945).

[200] *See International Shoe*, 326 U.S. at 316.

[201] 311 U.S. 457 (1940).

[202] *Id.* at 463.

[203] 243 U.S. 90 (1917).

[204] 318 U.S. 313, 318-19 (1943).

[205] 284 U.S. 421 (1932).

None of the cases cited in either document directly supports the proffered formula as the proper test of personal jurisdiction under the Due Process Clause. *Milliken* and *McDonald*, the principal cases upon which Chief Justice Stone relied, were cases upholding the exercise of personal jurisdiction based upon substituted service of process upon natural persons. Similarly, *Blackmer* and *Hess v. Pawloski*[206] were cases upholding assertions of jurisdiction based on substituted service. In addition, both *Milliken* and *Blackmer* involved the exercise of personal jurisdiction by a sovereign over a citizen not physically present within the sovereign's territory, a situation very different from that at issue in *International Shoe*.[207] *Hoopeston Canning* was a case upholding the power of a state to require as a condition of doing business that nonresident insurance associations agree to obey the state's insurance regulations. And *Young v. Masci*[208] was a personal injury case upholding the forum state's application of its law in a suit against a nonresident based on an injury in the state.

In fact, the words "minimum contacts" do not appear in any of these authorities. Although the phrase "traditional notions of fair play and substantial justice" appears in *Milliken v. Meyer*, Justice Douglas, the opinion's author, had used it there to test whether substituted service satisfied the dictates of due process.[209] As support for this test, Douglas himself offered a citation to Justice Holmes' opinion in *McDonald v. Mabee*, another case about substituted service. Stone cited *McDonald v. Mabee* too. But neither *Milliken v. Meyer* nor *McDonald v. Mabee* identified the "traditional notions of fair play and substantial justice" to which the phrase referred. Nor did either case explain how to look for them. Indeed, in Holmes' opinion, the words "fair

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[206] 274 U.S. 352 (1928).

[207] *See Blackmer*, 284 U.S. at 438-39 (upholding exercise of in personam jurisdiction in U.S. courts over U.S. citizen served in France as authorized by federal statute); *Milliken*, 311 U.S. at 462-63 (upholding assertion of jurisdiction by state over one of its citizens not present in state).

[208] 289 U.S. 253 (1933).

[209] *See Milliken*, 311 U.S. 457, 463 (1940) ("[T]he adequacy [of substituted service] so far as due process is concerned is dependent on whether or not the form of substituted service provided . . is reasonably calculated to give him actual notice and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice are satisfied.") (citation omitted).

play" appeared on one page and the words "substantial justice" appeared on the next.[210]

Our conclusion that the Chief Justice lacked direct support for the new formula, however, does not imply a criticism of his adept judicial craftsmanship. Although "minimum contacts/fair play and substantial justice" was indeed a "novel principle,"[211] it was a principle that attempted to meet the key doctrinal need of its day — to inject much-needed flexibility into the limits of state court power over nonresident wrongdoers — without straying too far from the moorings of existing precedent. Working with limited materials, Chief Justice Stone nevertheless engineered a basic shift in the way jurisdiction was to be analyzed.[212]

Certainly the oddest citation of all was to *Pennoyer* in the November 24/27 draft. It is taken for granted today that *International Shoe* overruled much of *Pennoyer*. Why would Stone have cited the very precedent that he was rejecting?[213]

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[210] *See* McDonald v. Mabee, 243 U.S. 90, 91, 92 (1917).

[211] Juenger, *supra* note 38, at 1198.

[212] *See* John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 UC. DAVIS L. REV. 591, 752 (1995) (praising "Virtue of *International Shoe* as a Model for Jurisdictional Reform"). Professor Juenger recognized the momentous change in the law of personal jurisdiction, though he questioned its efficacy:

> Although it retained the notion that due process is the fountainhead of jurisdiction, the [*International Shoe*] Court inverted the relationship between the Constitution and the power of state courts. *Pennoyer* established that an adjudication comported with due process only if the court had jurisdiction pursuant to common law principles. In contrast, *International Shoe* teaches that process is due, unless it transgresses "traditional notions of fair play and substantial justice." In other words, whereas Justice Field had ascertained compliance with due process from fixed jurisdictional rules, Justice Stone purported to deduce the outer limits of jurisdiction from the "vague due process clause." This new rationale expanded the potential reach of state jurisdiction. . . . Seizing upon the opinion in *International Shoe*, state legislatures began to enact long-arm statutes to broaden their courts' power to adjudicate.

Juenger, *supra* note 38, at 1198 (footnotes omitted).

[213] Of course, the citation to *Pennoyer* in support of the "minimum contacts/fair play and substantial justice" formula was dropped in the November 27 memo and in the final version. But a citation to *Pennoyer* for the more innocuous statement — "Historically. . . presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him" — appears in the final version. *See International Shoe*, 326 U.S. at 316. Professor Borchers called this aspect of Stone's opinion "quite striking" and characterized it as "the deference *International Shoe* paid to the past." Borchers, *supra* note

There is little in the record to suggest that the Chief Justice's colleagues discussed the crucial paragraph, much less had misgivings about the new formula. Justice Frankfurter sent back a copy of Stone's memo marked "O.K. — F.F."[214] Justice Douglas returned a copy of the last page of the opinion with a notation reading: "Very good — I agree."[215] On November 27, Justice Reed wrote a one-page memorandum to Chief Justice Stone to express concern about whether Washington's requirement of notice by registered mail to the International Shoe Company was sufficient to give actual notice,[216] but Stone's response the next day seemed to reassure him.[217]

7, at 54.

One of Stone's biographers has pointed out the Chief Justice had a habit, when overruling precedent, of borrowing language from the old rule to fashion the new one. *See* ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 508 (1968).

[214] Memorandum for the Court from Harlan F. Stone (Nov. 27, 1945) (on file in archives of Frankfurter, J.).

[215] International Shoe Co. v. Washington, 326 U.S. 310 (1945) (No. 107) (draft of Stone, C.J.) (on file in archives of Douglas, J.).

[216] *See* Memorandum from Stanley Reed to the Chief Justice (Nov. 27, 1945). Justice Reed wrote:

> My delay in making return in this case is due to my hesitancy about your statement on page 8, reading as follows:
>
> [N]or can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.
>
> With the extension of the doctrine of substituted service, it seems to me that the states are required by due process to do what they reasonably can to see that the defendant has actual notice of the pendency of the suit. . . .
>
> It may seem trivial to decide constitutional issues on whether a state requires evidence of delivery instead of depending on good luck with the registered letter. It may have been trivial in [Wuchter v. Pizzuti, 276 U.S. 13 (1928)] to knock out the judgment because of an insufficient statute when the defendant had actual notice. In the next case the statute may only require an unregistered letter or a notice tacked to the door of the courthouse. For me, we are somewhere near the line. . . .

Id.

[217] We cannot tell whether Chief Justice Stone disposed of this problem by writing, through a discussion with Justice Reed, or both. A memorandum to Reed was found in the archives, but it bears the notation "not sent." *See* Memorandum from Harlan F. Stone to Stanley Reed (Nov. 28, 1945). In that memorandum, the Chief Justice attempted to mollify Reed by referring him to Miedreich v. Lauenstein, 232 U.S. 236 (1912), for the proposition that service was good under the Fourteenth Amendment where "the local procedure for giving service is reasonably calculated to give actual notice . . . although no actual notice was in fact given." *Id.* Stone concluded: "I am adding the *Miedreich* case to follow the citation of *Wuchter* v. *Pizzuti*." *Id.* But *Miedreich* is not cited anywhere in the final version of

Only Justice Black was troubled by the crucial paragraph. In a memorandum to "the Members of the Conference" dated November 28, he amended a draft of his opinion by inserting the following paragraph:

> It is true that this Court did use the terms "fair play" and "substantial justice" in explaining the philosophy underlying the holding that it could not be "due process of law" to render a personal judgment against a defendant without notice to and an opportunity to be heard by him. *Milliken v. Meyer*, 311 U.S. 457-464. In *McDonald v. Mabee*, 243 U.S. 90, 91, cited in the *Milliken* case, Mr. Justice Holmes speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of "fair play," which even the common law would have deemed "contrary to natural justice." And previous cases had indicated that the ancient rule against judgments without notice had stemmed from "natural justice" concepts. But no one of all these cases purports to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notion of "natural justice." I should have thought the Tenth Amendment settled that.[218]

Although Black concurred in the result, his concern that the Court was reviving the era of natural law was duly expressed in the final version of his separate opinion.[219]

3. Completely Outcome Determinative

The final curious thing about Chief Justice Stone's opinion is how the Court's determination of the personal jurisdiction question was completely intertwined with the disposition on the merits — namely, whether the State of Washington had the power to impose upon the International Shoe Company the payroll tax funding its unemployment compensation scheme. *International Shoe* is generally thought of as a personal jurisdiction case. But the company actually raised two separate constitutional challenges. First, of course, the company contended that the state lacked the power to hale it into the Washington courts.

Stone's opinion. The particular passage that troubled Reed appears unchanged. *See International Shoe*, 326 U.S. at 320-21.

[218] Memorandum to the Members of the Conference from Hugo L. Black (Nov. 28, 1945).

[219] *See International Shoe*, 326 U.S. at 322-26 (Black, J., writing separately).

Most of Stone's opinion is devoted to turning back this challenge. Second, the company argued, as business litigants so often did during the *Lochner* era, that the State had no power to tax interstate commerce.[220] Although Stone devotes barely two paragraphs to rejecting this argument, his analysis foreshadowed just how closely intertwined jurisdictional and merits questions could be under the regime of *International Shoe*.

"Only a word need be said," Chief Justice Stone wrote, "of appellant's liability for the demanded contributions to the state unemployment fund."[221] For the purpose of considering the company's constitutional challenge, he accepted the Washington Supreme Court's construction of the statute in question as imposing a tax on the "privilege" of employing shoe salesmen within the state.[222] He explained that the right to employ labor has been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution.[223] He noted specifically that such a tax imposed to fund employment compensation had been held constitutional by the Court.[224] Then Stone delivered the crucial blow:

> Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to suit to recover it. *The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax.*[225]

This was precisely the result the International Shoe Company had feared. In its brief for the Court, the company asserted that personal jurisdiction is "a question of whether or not a defen-

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[220] *See, e.g.*, Standard Dredging Co. v. Murphy, 319 U.S. 306, 308 (1943); Perkins v. Pennsylvania, 314 U.S. 586, 586 (1942) (per curiam).

[221] 326 U.S. at 321.

[222] *Id.*

[223] *See id.*

[224] *See id.*

[225] *Id.* (citations omitted) (emphasis added).

dant must respond to a tribunal of a plaintiff's choice. . . . In every such case the question is what jurisdiction will enforce a liability created prior to the service of process questioned."[226] But, the brief added, personal jurisdiction also had to do with

> the origin of an obligation . . . . The question of jurisdiction to assess a tax is a question of substantive, not procedural law, for, lacking jurisdiction to assess in Washington, there is not power in any officer of that State to make an assessment elsewhere, and absent a valid assessment, the obligation does not exist. . . . It is a question of control. *Power to assess a tax implies that the state has jurisdiction to license, to regulate, to exclude.*[227]

The notion that an adverse determination as to personal jurisdiction would also be adverse on the merits was perfectly consistent with the company's view of the case. In the end, *International Shoe* was not about personal jurisdiction, it was about paying taxes.[228] The company simply did not want to pay them in Washington.[229] If the company lost the choice-of-forum battle, then surely it would lose the tax assessment war too.

II. TERRITORIAL JURISDICTION AFTER *INTERNATIONAL SHOE*: WHY PERSONAL JURISDICTION MATTERS

This Part of the Article reviews the Supreme Court's jurisdiction decisions since *International Shoe* and considers the relationship between the decision on jurisdiction and the final disposition of each case.

A. Methodology and Results

To inquire into the outcomes of the jurisdiction cases, we first identified twenty Supreme Court decisions, including *International Shoe*,[230] from December 1945 through June 1995.[231] All in-

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[226] Appellant's Brief, *supra* note 103, at 12 (citation omitted).

[227] *Id.* at 12-13 (emphasis added).

[228] *See supra* note 127 and accompanying text.

[229] The company's position seemed to be that any unemployment taxes owed ought to be paid in Missouri where the company was headquartered. *See* Appellant's Brief, *supra* note 103, at 25 ("The record is silent whether or not Missouri has taxed this employment. It is believed there is no question but that it could tax it.").

[230] We will not recount the intricacies of each of these cases, which others have ably done. *See, e.g.*, Borchers, *supra* note 7, at 56-87 (analyzing Court's jurisdictional

volved either in personam or quasi in rem[232] jurisdiction, which involve analytically similar inquiries.[233] The cases are listed in chronological order in Appendix I.

The difficult part of the task was tracking the subsequent history of each case. We first found any published decisions in connection with proceedings after the Supreme Court resolved the jurisdictional dispute. To determine the outcome of unpublished dispositions, we sent letters inquiring about the disposition to counsel of record for each party in each case. A research assistant attempted to contact by telephone those who failed to reply or whose response warranted clarification.

Although some of the cases were decades old, we received at least one written or oral response in eighteen of the twenty cases.[234] Ten attorneys or party representatives responded in writing.[235] A research assistant interviewed sixteen attorneys, in-

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jurisprudence from *International Shoe* through *Burnham*); Kurland, *supra* note 28, at 586-623 (summarizing Supreme Court decisions from *International Shoe* through *Hanson v. Denckla*).

[231] There were no jurisdictional cases pending before the Court in the October 1994 Term as this Article went to press in May 1995.

[232] *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 3.2-3.17, at 95-162 (2d ed. 1993) (outlining differences between in personam, in rem, and quasi in rem jurisdiction).

[233] *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). *See generally* Earl M. Maltz, *Reflections on a Landmark:* Shaffer v. Heitner *Viewed From a Distance*, 1986 B.Y.U. L. REV. 1043; Silberman, *supra* note 26. *But see* Burnham v. Superior Court, 495 U.S. 604, 619-22 (1990) (Scalia, J.) (plurality opinion) (concluding that this language in *Shaffer v. Heitner* did not apply to transient jurisdiction).

[234] We did not receive a response from counsel of record for any of the parties in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), or Hanson v. Denckla, 357 U.S. 235 (1958).

[235] Chipperfield Letter, *supra* note 115; Letter from H. Merrill Pasco, attorney for Travelers Health Association, to Andrew F. Brimmer (Nov. 30, 1994) [hereafter Pasco Letter]; Letter from Soledad Cagampang de Castro, Vice President-Legal & Audit, Benguet Corp., successor to Benguet Consolidated Mining Co., to Andrew F. Brimmer (Apr. 22, 1994) [hereafter Castro Letter]; Letter from Robert V. Schnabel, attorney for Benguet Corp., successor to Benguet Consolidated Mining Co., to Professor Kevin R. Johnson (July 8, 1994) [hereafter Schnabel Letter]; Letter from Sidney Ravkind, responding for attorney for Lulu McGee, to Andrew F. Brimmer (Nov. 8, 1993) [hereafter Ravkind Letter]; Letter from Edmund K. Trent, attorney for Insurance Company of Ireland, to Andrew F. Brimmer (Mar. 11, 1994) [hereafter Trent Letter]; Letter from John G. Kester, attorney for Calder, to Andrew F. Brimmer (Nov. 11, 1993) [hereafter Kester Letter]; Letter from George E. Pletcher, attorney for plaintiffs in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, to Andrew F. Brimmer (Nov. 11, 1993) [hereafter Pletcher Letter]; Letter from Thomas J. Whalen, attorney for Helicopteros Nacionales de Colombia, to Andrew F. Brimmer (Nov. 23, 1993)

cluding two attorneys who had sent written responses.[236] In an attempt to clarify some responses, one of the co-authors contacted three attorneys previously interviewed by the research assistant.[237] In all, there were twenty-four different respondents.

We were able to establish the final outcome of seventeen of the eighteen cases in which we received a response.[238] With a fair degree of confidence, we inferred the disposition of the two cases in which we were unable to obtain a response.[239] In the

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[hereafter Whalen Letter]; Letter from Graydon S. Staring, attorney for Asahi Metal Industry Co., to Andrew F. Brimmer (Nov. 12, 1993) [hereafter Staring Letter]. These letters are on file with the authors.

[236] Telephone Interview of Michael Maschio, attorney for shareholder Heitner (Nov. 19, 1993) [hereafter Maschio Interview]; Telephone Interview of John R. Reese, attorney for officer and director defendants in *Shaffer v. Heitner* (Nov. 15, 1994) [hereafter Reese Interview]; Telephone Interview with Lawrence H. Stotter, attorney for Sharon Kulko Horn (Nov. 29, 1993) [hereafter Stotter November 1993 Interview]; Telephone Interview with Edward Borkon, attorney for Savchuk (Jan. 7, 1994) [hereafter Borkon Interview]; Telephone Interview with John G. Kester, attorney for Calder (Apr. 13, 1994) [hereafter Kester Interview]; Telephone Interview with Jefferson Greer, attorney for Robinsons in original action (Jan. 7, 1994) [hereafter Greer Interview]; Telephone Interview with Winton Woods, current attorney for Robinsons and law professor at University of Arizona School of Law (Jan. 12, 1994) [hereafter Woods Interview]; Telephone Interview of Jack Redhair, attorney for Jefferson Greer in malpractice action by Robinsons (Jan. 12, 1994) [hereafter Redhair Interview]; Telephone Interview with Gregory Holmes, attorney for Hustler Magazine (Jan. 6, 1994) [hereafter Holmes Interview]; Telephone Interview with Thomas Oehmke, attorney for Rudzewicz (Nov. 17, 1993) [hereafter Oehmke Interview]; Telephone Interview with Harold Greenleaf, attorney for Shutts (Nov. 19, 1993) [hereafter Greenleaf Interview]; Telephone Interview with Graydon S. Staring, attorney for Asahi Metal Industry Co. (Nov. 19, 1993) [hereafter Staring Interview]; Telephone Interview with Richard Sherman, attorney for Dennis Burnham in Supreme Court (Dec. 17, 1993) [hereafter Sherman Interview]; Telephone Interview with Dennis Burnham (Jan. 6, 1994) [hereafter Burnham Interview]; Telephone Interview with Richard Cutler, attorney for bondholders in *Republic of Argentina v. Weltover, Inc.* (Jan. 11, 1994) [hereafter Cutler 1994 Interview]; Telephone Interview with Gail Morse, attorney for Quill Corp. (Nov. 11, 1993) [hereafter Morse Interview]. Andrew Brimmer, who conducted the interviews, contemporaneously prepared memoranda summarizing them. The memoranda are on file with the authors.

[237] Telephone Interview with Lawrence H. Stotter, attorney for Sharon Kulko Horn (May 3, 1994) [hereafter Stotter May 1994 Interview]; Telephone Interview with Winton Woods, attorney for Robinsons (April 22, 1994) [hereafter Woods April 1994 Interview]; Telephone Interviews with Richard Cutler, attorney for bondholders in *Republic of Argentina v. Weltover, Inc.* (Nov. 7, 1994 and Jan. 10, 1995) [hereafter Cutler 1994-95 Interviews]. The co-author who conducted the interviews contemporaneously prepared memoranda summarizing them. The memoranda are on file with the authors.

[238] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), is the only case of this group for which we were unable to make even an educated guess about the final disposition.

[239] *See* Hanson v. Denckla, 357 U.S. 235 (1958); Mullane v. Central Hanover Bank &

end, we determined the final disposition with a fair degree of accuracy in 19 of the twenty cases in the sample.

Besides offering information about the outcome of the case, a number of attorneys relayed impressions and other information about the litigation. This qualitative data offered some unique insights into whether and how the resolution of the jurisdictional issue affected the ultimate disposition on the merits.

From the responses, we compiled Appendix II, which summarizes the salient information uncovered about the subsequent histories of the Supreme Court's jurisdictional cases in the *Shoe* era.

1. Quantitative Data

We determined the ultimate disposition of eighteen of the twenty Supreme Court jurisdiction decisions since 1945. Most striking about our study was the discovery of a strong positive correlation between jurisdictional determination and merits disposition.[240] In seventeen of the nineteen cases (about 89.5%), the party that prevailed on personal jurisdiction ultimately triumphed on the merits in either a judicial decision or a favorable settlement.[241] *Put differently, the party who won in the*

Trust Co., 339 U.S. 306 (1950).

[240] This finding is consistent with a survey of transnational cases dismissed on *forum non conveniens* grounds conducted by Professor David Robertson. *See* David W. Robertson, *Forum* Non Conveniens *in America and England: "A Rather Fantastic Fiction"*, 103 L. Q. REV. 398, 417-21 (1987). The survey found that, after dismissal in the U.S. courts, none of the plaintiffs in the 85 cases in the sample prevailed at trial. In almost 50% of the personal injury and 27% of the commercial cases, plaintiffs gave up their claim or settled for less than 10% of the potential value. *See id.* at 419-20. Although this result may not be surprising, and perhaps even obvious, see Weintraub, *supra* note 19, at 335, it often is ignored in judicial and academic analyses of the doctrine of forum *non conveniens*. *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion"*, 29 TEX. INT'L L.J. 353, 371 (1994) ("[I]n the real world, everyone knows that international plaintiffs who suffer forum non conveniens dismissals in the United States are typically unable to go forward in the hypothesized foreign forum. But in the legal world . . . , the real-world effects are obscured.") (footnote omitted).

[241] It is important to emphasize that a "merits winner" referred to in Appendix II does not necessarily mean that the litigant received all relief sought in the complaint. If that were the sole criterion for determining who prevailed on the merits, there would be few merits winners because the common practice is to request more relief than one expects to recover. *See* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1259 (2d ed. 1990) (referring to "artificially inflated amounts of damage in the pleadings"); *see also* Bail v. Cunningham Bros., 452 F.2d 182, 190 (7th Cir. 1971) (discussing "anachro-

forum shopping battle won on the merits in almost 90% of the cases.

Table 1 summarizes the data for the nineteen cases for which we were able to determine the final disposition.

TABLE 1

Outcome of 19 Supreme Court Cases by Jurisdiction and Merits

	Merits Winner	
Jurisdiction Winner	Plaintiff	Defendant
Plaintiff	10 (52.6%)	2 (10.5%)
Defendant	–	7 (36.8%)

Percentages rounded to closest 0.1%.

In all seven cases in which the defendants successfully challenged jurisdiction, they eventually won on the merits.[242] In ten

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nistic character" of ad damnum clause in light of fact that clause has little utility). We recognize that the definition of success on the merits is not as cut-and-dried as one might think at first glance. *See* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726-28 (1988) (analyzing various definitions of success in constitutional tort litigation); Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 676-77 (1987) (same). We have attempted to define "success" in each case as that term is commonly understood by litigants.

As explained in Appendix II, *infra*, we made a few judgment calls in determining which party prevailed on the merits. For example, we classified a substantial settlement that came on the heels of a jurisdictional victory for plaintiff as a victory for plaintiff. *See infra* Appendix II (discussing subsequent history of Calder v. Jones, 465 U.S. 783 (1984)). On the other hand, a settlement for a minimal sum reached after a jurisdictional defeat for plaintiff was classified as a defeat for plaintiff. *See infra* Appendix II (discussing subsequent history of Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)).

[242] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (case pending in foreign forum settled on terms favorable to defendant); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (alternative forum unavailable); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (action not pursued against defendants dismissed on jurisdictional grounds and remaining defendants prevailed on merits after

of the twelve cases in which the plaintiffs thwarted a defense challenge to jurisdiction, they prevailed on the merits.[243] Defendants prevailed on the merits after losing on jurisdiction in the remaining two cases.[244] It is telling that in not a single case did a defendant who won on jurisdiction ultimately lose on the merits.

These results are not startling in light of our intuition about litigants' forum shopping propensities. We would expect plaintiffs to sue in a court thought to be favorable for them. Consequently, when plaintiffs prevailed on jurisdiction, one might expect that they would be more likely to prevail on the merits. When defendant successfully challenged jurisdiction, the case ordinarily was shifted to a forum that plaintiff perceived as less favorable and that defendant believed to be more favorable.

Tables 2 and 3 provide additional information about all of the Court's jurisdictional decisions since 1945.

TABLE 2

Supreme Court Cases Finding Personal Jurisdiction
(20 cases)

	Yes	No	Total
Jurisdiction?	13 (65%)	7 (35%)	20 (100%)

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case removed from state to federal court); Rush v. Savchuk, 444 U.S. 320 (1980) (alternative forum unavailable); Kulko v. Superior Court, 436 U.S. 84 (1978) (action not pursued in alternative forum); Shaffer v. Heitner, 433 U.S. 186 (1977) (action not pursued in alternative forum); Hanson v. Denckla, 357 U.S. 235 (1958) (prevailed on merits in other forum).

[243] Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992); Burnham v. Superior Court, 495 U.S. 604 (1990); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[244] Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

TABLE 3

Outcome of Supreme Court's Personal Jurisdiction Cases by Year
(20 cases)

Years	Jurisdiction	No Jurisdiction	Total
1945-60	5 (83.3%)	1 (16.7%)	6
1960-75	-	-	0
1975-80	-	4 (100%)	4
1981-90	6 (75%)	2 (25%)	8
1991-June 1995	2 (100%)	-	2

Tables 2 and 3 show that, contrary to some assertions,[245] the Supreme Court has been apt to find that state courts may assert jurisdiction over nonresident defendants. The Burger and Rehnquist Courts, ready and willing to defer to the exercise of state power in other circumstances,[246] upheld the exercise of jurisdiction in eight of fourteen cases and eight out of ten since 1981.

One noticeable exception to the pro-plaintiff trend is evident in the 1975 to 1980 time frame. In four consecutive cases, the Court ruled unconstitutional a state court's attempt to exercise jurisdiction over nonresident defendants.[247] This might be ex-

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[245] *See, e.g.*, Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 39-40 (1992) ("Not coincidentally, the minimum contacts standard which focused solely on the actions of the defendant resulted in defendants winning most of the jurisdictional cases decided by the Supreme Court, usually because such defendants were more powerful than the plaintiffs.") (footnotes omitted).

[246] *See infra* text accompanying notes 321-23 (discussing Supreme Court's deferential review of economic regulation by state actors).

[247] *See* Juenger, *supra* note 38, at 1200 ("Breaking a long period of silence, [the Supreme Court] decided four jurisdictional cases in as many years, all of which struck down what the Court considered to be overly expansive exercises of state power."); Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407 (1980) (analyzing Su-

plained by the Court's long hiatus (1958 to 1977) from jurisdictional matters. The Court may have seen a necessity to halt the steady expansion of state court jurisdiction over this period.[248]

The Supreme Court's jurisdiction decisions can be broken down by subject matter. In every contracts,[249] intentional tort,[250] and tax[251] case, the Court concluded that the exercise of personal jurisdiction satisfied the dictates of due process. Conversely, the Court has yet to find jurisdiction appropriate in a products liability[252] or quasi in rem case.[253] The family law cases were split,[254] suggesting the special difficulties in this area.[255]

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preme Court's jurisdiction decisions during this period).

[248] *See* Martin B. Louis, *Jurisdiction Over Those Who Breach Their Contracts: The Lessons of* Burger King, 72 N.C. L. REV. 55, 58 (1993).

[249] Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2164 (1992); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463 (1985); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 697 (1982); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 221-22 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 307 (1950). For purposes of this categorization, we define a "contracts" case to include the interpretation of any written legal instrument.

[250] Calder v. Jones, 465 U.S. 783, 785 (1984) (libel); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772 (1984) (libel); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439 (1952) (shareholder suit); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 645 (1950) (state securities law).

[251] Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1907 (1992); International Shoe Co. v. Washington, 326 U.S. 310, 311 (1945).

[252] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980).

[253] Rush v. Savchuk, 444 U.S. 320, 322 (1980); Shaffer v. Heitner, 433 U.S. 186, 216-17 (1977). *Shaffer*, a shareholder derivative suit alleging wrongful conduct by corporate officers and directors, arguably belongs in the intentional tort category. However, because the assertion of jurisdiction was over property, not the putative tortfeasors, we have placed the decision in the quasi in rem category.

[254] *Compare* Burnham v. Superior Court, 495 U.S. 604, 626-27 (1990) (permitting exercise of personal jurisdiction over non-resident in divorce action) *with* Kulko v. Superior Court, 436 U.S. 84, 100-01 (1978) (denying exercise of jurisdiction over non-resident father in child support matter). We, perhaps erroneously, omitted one family law case from our sample, May v. Anderson, 345 U.S. 538 (1953). In that case, which is criticized in Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting* International Shoe *to Family Law*, 28 U.C. DAVIS L. REV. 1047, 1051 (1995), the Court found that an Ohio court was not required by the Full Faith and Credit Clause to give effect to a child custody decree issued by a Wisconsin court lacking personal jurisdiction over the mother. This case did not cite, much less discuss, *International Shoe* and offered little more than a conclusion as analysis.

[255] *See* Carol S. Bruch, *The 1989 Inter-American Convention on Support Obligations*, 40 AM. J. COMP. L. 817, 826-29, 841-47 (1992) (analyzing jurisdictional problems in child support area); Linda J. Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive*

The Supreme Court scrutinized the exercise of jurisdiction by the California courts more than that of any other state in the post-*Shoe* era, five of the twenty cases.[256] The Court considered the exercise of jurisdiction of only one other state, Florida, more than once.[257] Because the long arm statutes of a number of other states extend jurisdiction to the limits of the due process clause,[258] the frequency with which California's is interpreted appears attributable to something other than simply its breadth.[259] Possibilities include the once-popular view that California was a "plaintiff-friendly" forum and the state's large civil docket.[260]

The study also shed some light on the relationship between jurisdiction and choice of law. The forum exercising jurisdiction applied its law in thirteen of twenty (65%) cases.[261] In six of

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Rules of Jurisdiction and Implications for Choice of Law, 22 RUTGERS L.J. 569, 590-95 (1991) (same). For an innovative proposal designed to clarify the jurisdictional rules through legislation, see Bruch, supra note 254.

In the remaining case, which deviated from the standard pattern of a nonresident defendant challenging jurisdiction, the Court rebuffed defendant's challenge to a state court's assertion of jurisdiction over absent class members. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-14 (1985). *See generally* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986) (analyzing impact of *Shutts*); Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995) (analyzing difficult due process questions left open by *Shutts* in mandatory class actions).

[256] *See Burnham*, 495 U.S. 604; *Asahi*, 480 U.S. 102; Calder v. Jones, 465 U.S. 783 (1984); *Kulko*, 436 U.S. 84; McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[257] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Hanson v. Denckla, 357 U.S. 235 (1958).

[258] *See infra* text accompanying notes 331-35 (discussing long-arm statutes that expressly, or as interpreted, extend to constitutional limits).

[259] *See* CAL. CIV. PROC. CODE § 410.10 (West 1995) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States.").

[260] *See* Samuel Krislov & Paul Kramer, *20/20 Vision: The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1920 (1993) (summarizing statistics showing that, in 1990, California's civil caseload was nation's highest).

[261] Republic of Argentina v. Weltover, 112 S. Ct. 2160, 2163 (1992); Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1908 (1992); Burnham v. Superior Court, 495 U.S. 604, 608 (1990); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985); *Burger King*, 471 U.S. at 469; Calder v. Jones, 465 U.S. 783, 786 n.5 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 699 (1982); *Hanson*, 357 U.S. at 242; Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 307-09 (1950); International Shoe Co. v. Washington, 326 U.S. 310, 313

the twenty cases, however, the Court did not apply any law because it dismissed the case and a subsequent case was settled or never brought.[262] In one case, it was not certain which law was applied to the dispute.[263] Thus, in none of the nineteen cases did the court apply any law other than that of the forum.[264]

All this said, we weigh the results with some skepticism.[265] Objective data showing how a case would have fared in another forum is not readily available. Because cases are generally tried only in one locale, it is impossible to compare results in the same case in different forums.[266] Moreover, the composition of the small sample composed exclusively of Supreme Court decisions significantly limits the generality of any conclusions that might reasonably be drawn. Nine of the twenty cases in the sample were already decided on the merits by the time they went to the Supreme Court.[267] Merits losers, for obvious rea-

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(1945). In McGee v. International Life Ins. Co., 355 U.S. 220, 221 (1957), we assume that the California court applied California law to a life insurance contract dispute entered by a nonresident insurance company with a California citizen. There is no evidence that the California court applied anything other than California law.

[262] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108 (1987); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

[263] *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). It is not clear which law plaintiff's claims were based on. *See* Petition in Perkins v. Benguet Consol. Mining Co., Court of Common Pleas of Clermont County, Ohio, No. 22185 (Apr. 4, 1947). We do not hazard even an educated guess in light of the fact that the shareholder's complaint sought dividends from a foreign business entity.

[264] This lends support to the claims of some that decisions on choice of law and jurisdiction matters are integrally related. *See supra* note 27 (citing authorities).

[265] In criticizing the empirical analysis of this section, Professor Chemerinsky ignores that we expressly acknowledge the limitations to the conclusions that can reasonably drawn from the sample, which our Article highlighted in detail before he wrote his reply. *See* Chemerinsky, *supra* note 33, at 864-65. As we shall explain, we reject the suggestion that the limits require that the results be disregarded. In addition, some of the ill-considered arguments made by Professor Chemerinsky attempting to cast doubt on the results, appear to be little more than make-weights. *See id.* at 865 (suggesting that lower court on remand might be influenced by Supreme Court's jurisdictional decision in deciding merits of case).

[266] *But see* Hanson v. Denckla, 357 U.S. 235, 242-43 (1958) (highest courts of two states reached contrary results in a will contest); *infra* Appendix II (summarizing subsequent history of case).

[267] *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1907 n.1 (1992); Shutts v. Phillips Petroleum Co., 472 U.S. 797, 799 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469-70 (1985); *Helicopteros*, 466 U.S. 408; *Hanson*, 357 U.S. at 242-43; McGee v. International Life Ins. Co., 355 U.S. 220, 221(1957); Travelers v. Health Ass'n v. Virginia *ex rel.* State

sons, are more likely to appeal a personal jurisdiction finding than merits winners. Parties who appeal a jurisdictional issue to the Supreme Court clearly believe that the issue is critical to the disposition of the case, a relatively easy decision once one has lost on the merits. In the run-of-the-mill case, it is not clear that, if a defendant unsuccessfully moves to dismiss for lack of personal jurisdiction at the outset of a lawsuit, it is as likely to lose on the merits as the sampling of Supreme Court decisions might suggest. If the party who loses on jurisdiction ultimately wins on the merits, for example, it will not appeal.

All this said, because motions to dismiss are costly in a number of different ways, a moving party presumably would challenge jurisdiction when it believes that the forum is not optimal and that a better alternative exists. Consequently, some correlation, perhaps not as strong as that found in the Supreme Court decisions, between the jurisdictional finding and merits disposition might be expected in cases finally resolved in the lower state and federal courts.[268] This is a possible avenue for future study.

Despite the caveats, the study suggests, at a bare minimum, that jurisdictional rules may have an impact on the substantive outcomes of cases. A strong correlation exists between the Supreme Court's jurisdictional finding and ultimate merits disposition in the territorial jurisdiction cases in the *International Shoe* era. Such a relationship would tend to encourage parties to litigate — and litigate aggressively — the jurisdictional question. It helps explain why some parties resist the exercise of jurisdiction all the way up to the Supreme Court. When the stakes are high, incentives to litigate exist even with a small likelihood of success. Whatever else is said about *International Shoe*'s doctrinal framework, its fact-specific inquiry leaves considerable leeway for

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Corp. Comm'n, 339 U.S. 643 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); International Shoe Co. v. Washington, 326 U.S. 310, 312-13 (1945).

[268] Unable to dispute the relationship, Professor Chemerinsky asserts that this *correlation* fails to establish *causation*, that is, that the jurisdictional decision in fact caused the party losing the jurisdictional battle also to lose on the merits. *See* Chemerinsky, *supra* note 33, at 864. We agree. It unquestionably is the case that factors other than the exercise of jurisdiction may have influenced the final dispositions of the cases. However, the strong correlation suggests that the jurisdictional findings had *some* impact on the outcome of the cases. Professor Chemerinsky fails to offer any explanation for the strong correlation.

argument in many cases. Consequently, given the upside potential (*i.e.*, winning the lawsuit) *and* the absence of clear jurisdictional rules, one would expect litigators to find it difficult to resist litigating the issue. Indeed, with such a huge upside potential, the amorphousness of the minimum contacts/fairness test invites a clever litigator to argue about the assertion of jurisdiction.[269]

2. Qualitative Data

As expected, representatives of parties involved in the Supreme Court's jurisdiction cases offered many thoughts and comments about their experiences. Although the views of self-interested attorneys should be taken with a grain of salt,[270] the responses generally supported our quantitative findings — namely, that resolution of a personal jurisdiction dispute greatly affected the disposition of a lawsuit. A number of respondents readily agreed that the personal jurisdiction decision significantly influenced the outcome of the case.[271] This is true even when more than one discussed the same case.[272]

For example, in *Asahi Metal Industry Co. v. Superior Court*,[273] Asahi, a Japanese corporation that had convinced the Court that suit against it in California violated due process, settled the case for a relatively small sum.[274] An even clearer example is *Keeton v. Hustler Magazine, Inc.*[275] After the Supreme Court held that Hustler could be sued for defamation in New Hampshire, plaintiff on remand won a $2 million jury verdict.[276] Keeton's forum

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[269] *See* Casad, *supra* note 11, at 1593 (discussing inclination of parties to litigate personal jurisdiction whenever issue is not perfectly clear).

[270] We would not expect an attorney to admit that he or she spent the large amount of time necessary to prepare and argue a case in the Supreme Court on an endeavor thought to be insignificant. Consequently, one might guess that attorneys might exaggerate the impact that a jurisdictional decision by the Supreme Court had on the disposition of a case.

[271] *See* Pletcher Letter, *supra* note 235; Whalen Interview, *supra* note 236; Oehmke Interview, *supra* note 236; Greer Interview, *supra* note 236; Woods Interview, *supra* note 236.

[272] *See* Pletcher Letter, *supra* note 235 (discussing *Helicopteros*); Whalen Letter, *supra* note 235 (same); Maschio Interview, *supra* note 236 (discussing *Shaffer v. Heitner*); Reese Interview, *supra* note 236 (same).

[273] 480 U.S. 102 (1987).

[274] *See infra* Appendix II (explaining subsequent history).

[275] 465 U.S. 770 (1984).

[276] *See* Keeton v. Hustler Magazine, Inc., 815 F.2d 857, 858 (2d Cir. 1987); *infra* Appen-

shopping for the most advantageous forum is undisputable. She sued in New Hampshire only after the Ohio courts ruled that her libel claim was time-barred under its laws.[277] New Hampshire had "an unusually long (six-year) limitations period for libel actions. [It] was the *only* State where . . . suit would not have been time-barred when it was filed."[278] Despite the blatant forum shopping, the Court did not register disapproval. As Justice Rehnquist wrote for the Court, Keeton's "successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."[279]

At times, cost concerns played a prominent role in the parties' decision to resist the exercise of jurisdiction.[280] Counsel for the franchisor in *Burger King Corp. v. Rudzewicz*[281] estimated that it cost three to four times more to litigate in Florida, where Burger King sued, than in Michigan, where the defendants resided and the franchise was located.[282] Lacking the financial largesse of Burger King, the franchisor was at a relative financial disadvantage, which took its toll in the long run, in absorbing

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dix II (detailing subsequent history). Similarly, after the Supreme Court ruled that the defendant in Calder v. Jones, 465 U.S. 783 (1984), was amenable to a libel suit in California, plaintiff negotiated a favorable settlement. *See infra* Appendix II (explaining subsequent history).

[277] *See Keeton*, 465 U.S. at 772-73 n.1.

[278] *Id.* at 773 (emphasis added).

[279] *Id.* at 779; *see also supra* text accompanying notes 18-25 (noting ambivalence about forum shopping). There is evidence of forum shopping in other cases as well. *See* Stotter May 1994 Interview, *supra* note 237 (suggesting that Sharon Kulko Horn, in filing suit in California, was forum shopping and that she declined to pursue action after Supreme Court precluded exercise of jurisdiction); *infra* Appendix II (explaining subsequent history of Kulko v. Superior Court, 436 U.S. 84 (1978)); Burnham Interview, *supra* note 236 (stating that he resisted California's jurisdiction by appealing case because of fear that California court would treat business that he owned as marital property even though it was classified as separate property under New Jersey settlement agreement); *infra* Appendix II (explaining subsequent history of Burnham v. Superior Court, 495 U.S. 604 (1990)).

[280] *See* Edward A. Purcell, *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 445-49 (1992); *see also* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 113 (1987) (emphasizing that, in fairness analysis, "court must consider the burden on the defendant" among other factors).

[281] 471 U.S. 462 (1985).

[282] *See* Oehmke Interview, *supra* note 236. It matters little whether the attorney's estimate of the relative costs was in fact accurate. Rather, it is attorney perceptions, which influenced the course chosen, which are most important.

the costs. In part because of the costs, Rudzewicz, after losing the jurisdictional dispute in the Supreme Court, settled at a significant personal loss rather than pursue appeals on the merits that, if successful, would only have paved the way for further litigation in Florida.[283] Similarly, after the Court in *Shaffer v. Heitner*[284] precluded the exercise of jurisdiction over non-resident officers and directors of a Delaware corporation by the Delaware courts, the shareholder, attributing the decision to cost concerns, declined to pursue the case elsewhere.[285]

A careful look at two products liability cases illustrates concrete injustice flowing from *International Shoe*'s application. The travails of personal jurisdiction litigation are readily visible in the much-criticized decision of *Helicopteros Nacionales de Colombia v. Hall*.[286] The survivors of four U.S. citizens killed in an accident in Peru had recovered a jury verdict of over $1.1 million in the Texas courts before the Supreme Court threw the case out for lack of jurisdiction over the foreign defendants.[287] As plaintiffs' attorney aptly summarized, the case ended unceremoniously: "[W]hat happened was that the survivors did not collect any additional damages from any source, anywhere, anytime!"[288]

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[283] *See* Oehmke Interview, *supra* note 236; *see also* Burger King Corp. v. MacShara, 724 F.2d 1505, 1508 (11th Cir. 1984) (mentioning substantive grounds on appeal that were not ruled upon by court because it found exercise of jurisdiction to be unconstitutional), *rev'd sub nom.* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *infra* Appendix II (discussing subsequent history of *Burger King*).

Rudzewicz paid $75,000 to Burger King in the settlement. *See* Oehmke Interview, *supra* note 236. He also paid nearly $500,000 in attorneys' fees and costs and lost the restaurant, including $40,000 in franchise fees and $250,000 in improvements. *See id.*

[284] 433 U.S. 186 (1977).

[285] *See* Maschio Interview, *supra* note 236; *see also* Burnham Interview, *supra* note 236 (stating that cost of appealing jurisdictional ruling was over $90,000). Recall that *Shaffer* was a derivative suit brought by a shareholder who owned one share of stock in the corporation at issue. *See* Shaffer v. Heitner, 433 U.S. 186, 189 (1977). Such suits often are run primarily by the attorney who pursues the action with the incentive of recovering attorneys' fees; attorney decisions to pursue such actions are primarily economic ones. *See generally* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-98 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-27 (1991).

[286] 466 U.S. 408 (1984). For incisive criticism of the decision, see Twitchell, *supra* note 4, at 636-43; Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 916-18 (1988).

[287] *See Helicopteros*, 466 U.S. at 412.

[288] Pletcher Letter, *supra* note 235. Despite the implicit suggestion in this statement that

Counsel for Hall believed that in Colombia, the residence of Helicopteros Nacionales de Colombia, and Peru, the place of the accident, the maximum recovery for wrongful death was $2500.[289] Clear jurisdictional rules might have averted the lengthy, costly, and ultimately wasteful years of litigation.[290]

The lengthy history of *World-Wide Volkswagen v. Woodson*[291] further demonstrates the costs of uncertain jurisdictional rules in a rather ordinary products liability case. After a fiery automobile accident in Oklahoma, Harry and Kay Robinson, New York citizens, sued in Oklahoma state court in Creek County. To prevent removal of the case to federal court where juries were thought to be less favorably inclined toward plaintiffs than those of Creek County, they named two New York defendants, Seaway, the retailer, and World-Wide Volkswagen, the regional distributor.[292] Their forum shopping assumptions proved to be entirely

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plaintiffs recovered *some* damages, it does not appear that any were received. *See* Whalen Letter, *supra* note 235 ("[T]o my knowledge, the plaintiffs . . . ultimately obtained no recovery by settlement or by judgment inside or outside the United States.").

[289] *See* Pletcher Letter, *supra* note 235. Again, it is unimportant whether this statement is in fact true. Rather, it is attorney perceptions that are important. *See supra* note 282 (noting primary importance of attorneys' perceptions to litigation decisions).

[290] *See Helicopteros*, 466 U.S. at 409-10 (observing that, while accident occurred in January 1976, Supreme Court decided case in April 1984).

[291] 444 U.S. 286 (1980). As one court aptly put it, the case "has a protracted history which we need not detail other than to say that the plaintiffs have been unsuccessful in obtaining relief for injuries suffered in a tragic automobile accident" in 1977, with related litigation that continued well into the 1990s. Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1370 (10th Cir. 1991) (citations omitted).

The Court's decision in *World-Wide Volkswagen* has not gone unchallenged. *See, e.g.*, Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 77-78, 80-96 (criticizing *World-Wide Volkswagen*); Martin H. Redish, *Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1119-20, 1143 (1981) (same).

[292] *See infra* Appendix II (describing subsequent history of case); *see also* ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES § 7.04, at 565 (1986); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 500 n.98 (1984). For a full description of the facts of the case and the forum shopping decisions made by the parties, see Charles W. Adams, World-Wide Volkswagen v. Woodson — *The Rest of the Story*, 72 NEB. L. REV. 1122, 1122-31 (1994). The Supreme Court apparently did not understand the forum shopping taking place. *See World-Wide Volkswagen*, 444 U.S. at 317 (Blackmun, J., dissenting) ("I am somewhat puzzled why plaintiffs . . . are so insistent that the regional distributor and the retail dealer . . . who handled the ill-fated Audi automobile involved in this litigation be named defendants. It would appear that the manufacturer and the importer, whose subjectability to Oklahoma jurisdiction is not challenged before this Court, ought not to be

accurate. After the Supreme Court invalidated the exercise of jurisdiction over the New York defendants by the Oklahoma courts, the remaining defendants (Audi and Volkswagen) removed the case to federal court based on diversity jurisdiction and the jury returned a defense verdict.[293] The Robinsons never pursued the New York defendants in a separate action. Although litigation in a related lawsuit continued well into the 1990s, the Robinsons have not recovered damages for unquestionably severe injuries.[294]

In conclusion, the quantitative and qualitative data show the importance of the Supreme Court's jurisdictional finding to the disposition of the merits. Litigants generally make forum selections based precisely on that consideration, as well as on the relative costs of litigation among various fora. The sagas of *Keeton*, *Burger King*, *Helicopteros*, and *World-Wide Volkswagen* demonstrate the parties' forum shopping propensities—propensities not surprising when one considers the importance attached by the parties to forum choice and, as this study suggests, the importance of resolution of the jurisdictional dispute to the outcome of the case.

B. Implications for Jurisdictional Theory

We will not revisit the volumes written on jurisdiction theory in recent years. Our study, however, has several modest implications for future research. The correlation between the decision on the jurisdictional question and the merits disposition sup-

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judgment proof.").

Factors besides the jury pool may have influenced the Robinsons to proceed in Oklahoma, such as the convenience of the Oklahoma forum, the lower costs of pursuing all claims against all defendants in one forum, and the desire to avoid the possibility of inconsistent judgments. *See* Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 448-49 (1981). The Robinsons also may have wanted an Oklahoma forum because of a preference for Oklahoma as opposed to New York law on contributory negligence. *See* Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Ins. Co. v. Hague, 14 U.C. DAVIS L. REV. 841, 848 n.23, 851 & n.56 (1981). The Robinsons could have satisfied all of these desires by proceeding in federal court in Oklahoma, though for subject matter jurisdiction reasons this was not possible. State court was the only Oklahoma forum in which the Robinsons could have litigated the claims against *all* of the defendants.

[293] *See* Borchers, *supra* note 7, at 97 (observing that Court sanctioned "brilliant piece of defense forum shopping").

[294] *See infra* Appendix II (describing litigation).

ports the hypothesis that jurisdictional decisions may significantly influence the final disposition of a lawsuit. As Linda Loman might have put it, "attention must finally be paid" to this relationship.

1. A Call for Greater Certainty

Our study lends support to the pleas of commentators for more certain jurisdictional rules. As we have seen,[295] the costs of uncertainty at times have been great. Unfortunately, uncertainty in the most commonplace situations has increased, rather than decreased, as *International Shoe* has matured. Most notably, the inability of a majority of the Court in *Asahi Metal Industry Co. v. Superior Court*[296] and *Burnham v. Superior Court*[297] to agree on the proper analysis applicable to run-of-the-mill fact situations has contributed to this development. Indeed, the law on the stream-of-commerce theory[298] and transient jurisdic-

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[295] *See supra* text accompanying notes 273-94.

[296] 480 U.S. 102 (1987). Although unable to reach agreement on whether the foreign defendant whose component part ended up in a product sold in California had minimum contacts with the state, see *supra* note 10, a majority of the Court held that under the facts of the case it was unfair to subject the foreign defendant to jurisdiction there. *See Asahi*, 480 U.S. at 113-16.

[297] 495 U.S. 604 (1990); *see supra* note 10 (noting Justices' division in reasoning on transient jurisdiction); *see also* Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 595 (observing that *Burnham* "again f[e]ll short of settling an important issue, perhaps even more so than in *Asahi*") (footnote omitted). Conflicting views on the proper mode of constitutional interpretation may have caused the Court's fragmentation. *See supra* note 10 (contrasting Justice Scalia's and Justice Brennan's disagreement about the role of tradition in interpreting due process clause in *Burnham*); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory — A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689 (1991) (analyzing debate between Justices Scalia and Brennan in *Burnham* in terms of constitutional theory generally).

The plurality opinions in both *Asahi* and *Burnham* by their very nature facilitate uncertainty. *See generally* John F. Davies & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59 (analyzing confusion in lower courts resulting from efforts to interpret and apply Supreme Court plurality opinions).

[298] Pre-existing law strongly suggested that a component manufacturer reasonably aware that its product would be integrated into a product to be sold in a state would be subject to suit in that state. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.") (citing Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill.

tion[299] was clearer *before* the Court squarely decided cases in these areas.[300]

To make matters worse, the Court has eschewed the opportunity to create definitive rules. To the contrary, the Court has mandated case-by-case, fact-specific inquiry. For example, in *Burger King Corp. v. Rudzewicz*, the Court specifically emphasized that a contract entered into by a nonresident with a resident of

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1961)).

Some of the questions left open by the Court's fragmented opinion on the stream-of-commerce theory are analyzed in Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 18-21 (1988) and Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55 (1988). Lower courts have been left the difficult task of grappling with *Asahi*'s fallout. *See, e.g.*, Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 943-47 (4th Cir. 1994); Renner v. Lanard Toys Ltd., 33 F.3d 277, 281-83 (3d Cir. 1994); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 n.4 (8th Cir. 1994); Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1565-68 (Fed. Cir. 1994); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 419-21 (5th Cir. 1993); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546-52 (11th Cir. 1993); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 682-83 (1st Cir. 1992); Dehmlow v. Austin Fireworks, 963 F.2d 941, 946-48 (7th Cir. 1992); Soo Line R.R. v. Hawker Siddeley Canada, Inc., 950 F.2d 526, 529-30 (8th Cir. 1991); Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383, 385-88 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); Parry v. Ernst Home Ctr. Corp., 779 P.2d 659, 663-68 (Utah 1989).

[299] In invalidating the exercise of quasi in rem jurisdiction by a state court over intangible property deemed to be located within the state by operation of law, the Court in Shaffer v. Heitner, 433 U.S. 186, 212 (1977), stated without qualification that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (emphasis added). Commentators, and some courts, read this as spelling the demise of transient jurisdiction. *See, e.g.*, Nehemiah v. The Athletics Congress, 765 F.2d 42, 46-47 (3d Cir. 1985); Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979-80); David H. Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997, 1021 (1978). Justice Scalia's plurality opinion in *Burnham* effectively said that the Court did not mean what it said in *Shaffer*. *See Burnham*, 495 U.S. at 619-22 (Scalia, J.) (plurality opinion).

[300] Professor Chemerinsky claims that the Court's decisions in recent years in fact have added certainty to jurisdictional doctrine and offers Shaffer v. Heitner, 433 U.S. 186 (1977), which extended the *International Shoe* test from in personam to quasi in rem jurisdiction, as one example. *See* Chemerinsky, *supra* note 33, at 866. This contention, besides ignoring the uncertainty spawned by the Court with respect to ordinary assertions of jurisdiction in *Asahi* and *Burnham*, is a non sequitur. It in essence boils down to the argument that the extension of the uncertain *Shoe* test to quasi in rem actions somehow increases certainty. Contrary to Professor Chemerinsky's claim, *Shaffer v. Heitner* is an example of *Shoe*'s uncertainty being spread to a new area. In addition, Professor Chemerinsky asserts, without explanation, that *World-Wide Volkswagen*, *Asahi*, and *Burnham* "clarified" the test of personal jurisdiction. *See id.* at 866. In making this assertion, he completely ignores the wealth of evidence analyzed in this Article, as well as in other contributions to this Symposium, to the contrary.

the forum state does not automatically mean that the state may assert jurisdiction over that nonresident. The Court instead offered a number of contract-specific factors for lower courts to weigh.[301] The "holding" of the cases reflects that emphasis — that a twenty-year franchise agreement with a Florida choice of law provision entered into by sophisticated Michigan residents with a Florida corporation was sufficient to justify the exercise of jurisdiction over them in Florida. Not surprisingly, the fact-laden "holding" spawned the next generation of litigation in the lower courts concerning the exercise of jurisdiction over non-resident defendants in contract disputes.[302]

Repeated forays into a particular subject matter of cases by the Court have failed to add much clarity even to that specific area. Despite the fact that the Court decided two libel and defamation cases in the 1980s,[303] litigation on jurisdiction continues in the lower courts in cases with minor factual variations from the fact patterns assessed by the Court.[304]

State, as well as federal, courts have been forced to deal with the fallout. Litigation over personal jurisdiction abounds in the bread-and-butter of state court dockets. Just in the 1990s, the highest courts of a number of states have been forced to resolve jurisdictional disputes in basic family law matters,[305] garden va-

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[301] 471 U.S. 462, 478-79 (1985); *see also id.* at 485-86 ("'[T]he facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'") (citation omitted) (footnote omitted).

[302] *See, e.g.*, Pritzker v. Yari, 42 F.3d 53, 61-63 (1st Cir. 1994); Francosteel Corp. v. M/V Charm, 19 F.3d 624, 626 (11th Cir. 1994); Sunbelt Corp. v. Noble, Denton & Assocs., 5 F.3d 28, 29-30 (3d Cir. 1993); Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 478-79 (3d Cir. 1993); Waste Management, Inc. v. Admiral Ins. Co., 649 A.2d 379, 384 (N.J. 1994); Federal Deposit Ins. Corp. v. Hiatt, 872 P.2d 879 (N.M. 1994).

[303] *See* Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

[304] *See, e.g.*, TicketMaster-New York, Inc. v. Alioto, 26 F.3d 201, 212 (1st Cir. 1994) (holding that Massachusetts federal court sitting in diversity could not exercise jurisdiction over California resident who allegedly made defamatory comment during unsolicited telephone interview with reporter for Massachusetts newspaper); Wilson v. Belin, 20 F.3d 644 (5th Cir. 1994) (holding that federal court in Texas sitting in diversity could not exercise jurisdiction over nonresidents concerning statements made by telephone to reporter included in newspaper article in Texas). The uncertainty of the area is exemplified by the three opinions in Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1490-91 (9th Cir. 1993) in which the court affirmed the dismissal on jurisdictional grounds of a libel suit against Swedish doctors based on articles published in international medical journals.

[305] *See, e.g., In re* Marriage of Bushaw, 501 N.W.2d 518, 519 (Iowa 1993) (modification of

riety personal injury,[306] including products liability,[307] cases, and ordinary contracts actions.[308] In short, the problem is not one of simple uncertainty on the fringes, which is commonplace in many areas of the law. Rather, the core of jurisdiction doctrine is unsettled.[309]

Interestingly, a number of courts before *Burnham*,[310] emphasizing the need for clarity, resisted the application of minimum contacts analysis to transient jurisdiction.[311] For example, in

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dissolution decree); Pries v. Watt, 410 S.E.2d 285, 286 (W. Va. 1991) (spousal support); *In re* Marriage of Kimura, 471 N.W.2d 869, 871 (Iowa 1991) (divorce).

[306] *See, e.g.*, Tatro v. Manor Care, Inc., 625 N.E.2d 549, 549-50 (Mass. 1994) (slip-and-fall case); Myers v. Kallestead, 476 N.W.2d 65 (Iowa 1991) (dram shop act action).

[307] *See, e.g.*, Sorrells v. R & R Custom Coach Works, Inc., 636 So.2d 669 (Miss. 1994) (motor home); Kachur v. Yugo Am., Inc., 632 A.2d 1297, 1298 (Pa. 1993) (automobile); Arguello v. Industrial Woodworking Mach. Co., 838 P.2d 1120, 1121 (Utah 1992) (woodworking machine); Hill v. Showa Denko, K.K., 425 S.E.2d 609, 610-11 (W. Va. 1992) (drug).

[308] *See, e.g.*, Western States Equip. Co. v. American Amex, Inc., 868 P.2d 483, 484-85 (Idaho 1994) (equipment leasing contract); St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co., 847 P.2d 705 (Mont. 1993) (automobile insurance contract); Trerotola v. Cotter, 601 A.2d 60 (D.C. 1991) (employment contract).

[309] *Cf.* BRILMAYER, *supra* note 5, at 34 ("At this time, there are almost more open questions than there are settled areas."). As well as the attendant costs that we have seen, the uncertainty in jurisdictional doctrine may have fueled the revitalization of previously disfavored forum selection clauses. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991) (emphasizing that "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources") (citation omitted); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13, 17 (1972) (emphasizing that forum selection clause might avoid "much uncertainty and possibly great inconvenience to both parties" and "was clearly a reasonable effort to bring vital certainty"); *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) ("The federal judicial system has a strong interest in the correct resolution of [forum selection clause] questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses."). Despite the gains in certainty and the possible fostering of international trade, see *Bremen*, 407 U.S. at 8-9, forum selection clauses may have some harsh results. For example, in *Carnival Cruise Lines*, the Court held that a Washington consumer was bound by a forum selection clause in a cruise ticket purchased in Washington and forced to litigate a personal injury claim in Florida. *See, e.g.*, Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise, 67 WASH. L. REV. 55 (1992) (criticizing decision); Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992) (same).

[310] *See supra* note 299 (noting that, after *Shaffer v. Heitner*, some thought that minimum contacts analysis applied to all assertions of jurisdiction by state courts).

[311] *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 268-69 (5th Cir. 1985);

Humphrey v. Langford,[312] the Georgia Supreme Court emphasized that

> various commentators have suggested that *Shaffer* represented the end of jurisdiction merely by personal service on a transient within the forum. We, however, believe that there are compelling reasons to uphold such jurisdiction rather than strike it down based upon cases which do not mandate such a result. *We believe that it is not practical to have classifications of sojourners in the state. Where does a court draw a line between sojourners here for an evening of bowling and sojourners who commute to the state on a daily basis? Some individuals are constant or perennial sojourners. Some have no identifiable place of residence.*[313]

Simple uncertainty in a doctrinal area, a characteristic observed by many in the law of personal jurisdiction, is not uncommon to many areas of the law. Critics, including the Legal Realists and their intellectual descendants, long ago trumpeted legal indeterminacy.[314] Nonetheless, uncertainty in the law of personal jurisdiction may have particularly pernicious effects. This is especially true if, as the data presented here strongly suggests, forum choice significantly impacts case disposition.

If the party prevailing in a personal jurisdiction dispute (and thus on forum choice) is more likely to prevail on the merits, defendants are more likely to contest jurisdiction and plaintiffs are more likely to resist the challenge. This situation, combined with the disarray of jurisdiction doctrine, is a ready-made recipe for increased litigation.[315] Uncertainty in the law breeds litiga-

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Humphrey v. Langford, 273 S.E.2d 22, 22-24 (Ga. 1980); Lockert v. Breedlove, 361 S.E.2d 581, 584-85 (N.C. 1987); El-Maksoud v. El-Maksoud, 568 A.2d 140, 142-44 (N.J. 1989); Oxmans' Erwin Meat Co. v. Blacketer, 273 N.W.2d 285, 287 (Wis. 1979).

[312] 273 S.E.2d 22 (Ga. 1980).

[313] *Id.* at 24 (emphasis added). The colloquy between Justices Scalia and Brennan in *Burnham* on the application of minimum contacts analysis to the case before the Court suggest that the line-drawing problem is real. *Compare Burnham*, 495 U.S. at 623-24 (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J.) (questioning Justice Brennan's conclusion that it was fair to subject Dennis Burnham to jurisdiction in California courts to decide divorce, community property, and child custody issues, based on three day visit to state) *with id.* at 637-39 (Brennan, concurring in judgment) (finding that exercise of jurisdiction was fair).

[314] *See* LLEWELLYN, *supra* note 25, at 62-120 (analyzing the "leeways of precedent"); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567-76 (1983) (criticizing objectivist and formalist legal thought).

[315] *See, e.g., Burnham*, 495 U.S. at 626 (Scalia, J., joined by Rehnquist, C.J. and Kennedy,

tion *especially when the issue being litigated is believed to have a strong impact on the outcome of the case.*[316] In the case of personal jurisdiction, the current doctrinal uncertainty almost mandates competent attorneys to litigate the issue when a defendant is sued far from home.[317]

Clarity, of course, is not an end in and of itself. *Pennoyer* illustrates how clear rules do not necessarily provide satisfactory results. Indeed, the perceived unfairness of the rigid rules resulting in so many exceptions, and so much doctrinal uncertainty, caused its slow demise and *Shoe*'s birth.[318] At the other extreme, the perceived excesses of a clear "rule" from the 1950s to

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J.) (criticizing proposed abandonment of "traditional territorial rules" of transient jurisdiction because of concern with the "uncertainty and litigation over the preliminary issue of the forum's competence"). As said in the context of federal subject matter jurisdiction but equally applicable to personal jurisdiction, "[i]t is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Commentary to § 1302, at 72 (official draft 1965).

[316] *See supra* text accompanying note 269.

[317] Professor Chemerinsky, in suggesting that jurisdictional doctrine is not all that uncertain, see Chemerinsky, *supra* note 33, at 866, ignores the fact that the mere existence of a large volume of litigation in and of itself is potent evidence of doctrinal uncertainty. *See supra* note 11 (citing authority documenting wealth of jurisdiction litigation). He would do well to consider the arguments articulated in the other contributions to the Symposium on the question, as well as to carefully address the arguments that we actually made. Though perhaps motivated by his general endorsement of an activist judiciary, see *infra* text accompanying note 339, Professor Chemerinsky fails to respond to our suggestion that, if courts limit review of assertions of jurisdiction, decisions on questions other than jurisdiction, such as choice of law decisions, may be deserving of increased judicial scrutiny. See *infra* text accompanying notes 337-38.

Professor Chemerinsky further contends that our empirical work does not establish the need for greater certainty in jurisdictional doctrine. *See* Chemerinsky, *supra* note 33, at 865-68. In so doing, he completely fails to respond to the qualitative observations of our study or the tortuous journeys of some of the cases resulting in serious unfairness, a consideration to which he alleges primary concern. Our basic point, never squarely addressed by Professor Chemerinsky, is that uncertain jurisdictional doctrine, *in combination with the perception (supported by the quantitative evidence uncovered by our study) that the jurisdictional determination may well affect the outcome of the case,* is likely to result in litigation. *See* supra text accompanying notes 269, 315-17.

For a person claiming such devotion to fairness, it is odd that Professor Chemerinsky completely ignores the patent unfairness resulting from the absence of clear jurisdictional rules in cases such as *Burger King, Helicopteros,* and *World-Wide Volkswagen.* A thoughtful and careful analysis would need to consider these examples. Though he admits that the law of personal jurisdiction is not perfect and can be improved, Professor Chemerinsky fails to offer even a single suggestion for improvement.

[318] *See supra* text accompanying notes 34-59.

the 1970s — that the exercise of jurisdiction by a state court over a non-resident defendant is presumptively valid—ultimately provoked a judicial reaction.[319] Nonetheless, efforts to offer clear rules in commonplace cases should be strived for, at least to minimize wasteful litigation over a preliminary matter and the injustice that it brings.

2. Possible Alternatives

All of this does not necessarily mean that, to use Linda Loman's words, *International Shoe* should "fall into [its] grave like an old dog." Though complaints about the minimum contacts test run rampant, consensus has yet to form on an alternative.

At least in the short-term, more extreme calls for reform seem unlikely to come to pass.[320] Limited reform, however, might reach similar ends. One modest way of limiting the uncertainty in jurisdictional doctrine would be for the courts to take a more deferential stance toward legislative judgments, an approach common to the Supreme Court's general due process jurisprudence.[321] Since *Lochner*'s demise,[322] the Court in its constitutional decisions has generally refused to interfere with

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[319] *See supra* text accompanying notes 247-48.

[320] The Supreme Court, for example, seems unlikely to de-couple personal jurisdiction analysis from the due process clause. *See* Borchers, *supra* note 7, at 87-105; Juenger, *supra* note 8, at 20-23.

[321] *See generally* TRIBE, *supra* note 32, §§ 10-10 to 10-11, at 694-706 (summarizing Supreme Court decisions limiting procedural due process protections).

[322] *See id.* §§ 8-5 to 8-6, at 574-81 (analyzing demise of Court's willingness to invalidate social and economic regulation under Lochner v. New York, 198 U.S. 45 (1905), which held that law setting maximum hours of employment for bakery employees violated Constitution). Commentators have criticized the Court's toothless due process jurisprudence. *See, e.g.*, Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); *see also* TRIBE, *supra* note 32, § 9-7, at 581-86 (referring to "judicial abdication after collapse of *Lochner*").

Interestingly, Justice Field, the author of *Pennoyer v. Neff*, which tied personal jurisdiction to the Due Process Clause of the Fourteenth Amendment, also embraced substantive due process a la *Lochner*. *See* Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 503-08 (1987). Not reflecting similar doctrinal consistency, Chief Justice Stone wrote United States v. Carolene Prods. Co., 304 U.S. 144 (1938), one of the most famous cases marking the end of rigorous judicial review of economic regulation under *Lochner*, as well as *International Shoe*, which in effect endorses active judicial review of jurisdictional assertions.

state economic regulation bearing a rational relationship to a legitimate governmental interest.[323] It is not so different to defer in the same manner to state legislative judgments reflected in long arm statutes and their application. Indeed, ample precedent exists for deference to the judgment of the states in the Supreme Court's personal jurisdiction decisions.[324]

Such deference may be warranted because of the nature of the interest implicated. Although the Court has suggested that the defendant in a personal jurisdiction dispute has a liberty interest at stake,[325] what really is involved in many cases are

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[323] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976) (upholding ordinance forbidding new business in French Quarter in New Orleans, Louisiana in order to bolster local economy by enhancing city's "tourist-oriented charm"); Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (upholding against constitutional challenge statute regulating optometry).

[324] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasizing state interest at stake and deferring to state's judgment that it could lawfully decide property interests of nonresidents); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (upholding Iowa's assertion of jurisdiction over nonresident selling securities in Iowa); Hess v. Pawlowski, 274 U.S. 352 (1927) (upholding law passed by Massachusetts legislature finding that nonresident operating motor vehicle in state impliedly consented to jurisdiction in Massachusetts courts); *see also* Shaffer v. Heitner, 433 U.S. 186, 225-26 (1977) (Brennan, J., concurring in part, dissenting in part) ("[W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.").

Other contributors to the Symposium also favor deference to state assertion of jurisdiction. *See* Borchers, *supra* note 192; Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 995-97 (1995).

[325] *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). True, the subject matter of some cases may implicate a liberty interest. *See, e.g., Burnham*, 495 U.S. at 604 (divorce). Conceivably, if inconvenience of suit were so great as to make it impossible to litigate a case implicating such issues, then deference to a state legislative judgment would have a tangible impact on liberty interests. Those cases, however, are the exception rather than the rule and jurisdictional doctrine should not be predicated upon them. Quick to disagree, Professor Chemerinsky incorrectly alleges that we claim "that personal jurisdiction *only* concerns property rights." Chemerinsky, *supra* note 33, at 869 (emphasis added) (footnote omitted). Once again, he distorts our argument. Rather, we contend that, in the ordinary case, the rights affected by the assertion of personal jurisdiction sound more of a property than of a liberty interest, though the rare case may directly implicate liberty interests. Moreover, Professor Chemerinsky's suggestion that compelling a defendant to travel to a distant forum as necessarily implicating a liberty interest demonstrates a fundamental misunderstanding about how the civil litigation system works in the United States. Most civil cases are settled before trial, ordinary witnesses generally are deposed near home, and the main inconvenience of defending a suit away from

the costs and inconvenience of litigating in a forum away from home,[326] which sounds of a property interest. In effect, regulation of forum choice is economic regulation based on an "estimate of the inconveniences" to the parties.[327] It is curious to apply minimum rationality review to one type of economic regulation affecting a property interest while applying more rigorous scrutiny of the application of state long arm statutes with similar, if not less intrusive, consequences on the same sort of interest. Put simply, the unexplained disjunction between the Court's personal jurisdiction and general due process jurisprudence needs reconsideration.

Another argument for deference to legislative judgments relates to the institutional limits on the judiciary that may constrain the ability of courts to establish firm jurisdictional rules. A brief comparison of venue and personal jurisdiction is illustrative. Unlike the judicially-created, ever-changing law of personal jurisdiction, Congress has enacted specific venue rules that tend to minimize litigation.[328] Rather than having venue become increasingly reliant on jurisdiction doctrine,[329] a more sensible approach might be for the jurisdictional rules to mirror the federal venue statute, or the state law equivalents. Courts, however, lack the institutional capacity to fashion rules akin to the detailed provisions of the venue statute.[330] As an alternative, so long as the requirements of the particular venue statute are satisfied, courts as a general rule might defer to the judgments of states in the exercise of personal jurisdiction.

Deference to legislative judgments with respect to territorial jurisdiction raises at least one serious practical concern. The

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home is cost.

[326] There is, however, a very small set of cases in which a defendant would, as a practical matter, be unable to do anything but default. *See* Borchers, *supra* note 7, at 95-99.

[327] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

[328] *See* 28 U.S.C. § 1391 (1988 & Supp. IV 1992); *supra* text accompanying note 15. Though offering some certainty, ambiguities in the venue statute at times have spurred litigation. *See* Oakley, *supra* note 15, at 769-70 (describing flaws in venue statute resulting in litigation before recent amendments).

[329] *See supra* text accompanying note 15 (explaining how this has developed).

[330] Similar concerns surrounding the fashioning of federal common law to fill in gaps in laws passed by Congress are analyzed in Kevin R. Johnson, *Bridging the Gap: Some Thoughts About Interstitial Lawmaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879, 928-35 (1991).

long-arm statutes of a few states unfortunately do not reflect legislative judgments of any sort. Instead, they simply state that its courts may exercise jurisdiction to the extent permitted by the due process clause.[331] Similarly, some states interpret long arm statutes that appear to be limited in scope as extending to the constitutional limits.[332] Deference to a state legislative judgment in these instances is not possible.[333] Such long-arm statutes, however, are in the minority.[334] Though the certainty gains to the litigants are diminished, it is always possible to defer to the state's application of a broad long arm statute. Furthermore, in response to an era of judicial deference to reasoned jurisdictional judgments, some states might endeavor to establish more meaningful long arm statutes.[335]

It might strike the reader as incongruous that, although the study finds that jurisdiction decisions may affect the outcome of disputes, we suggest that deference to the judgment of the state to exercise jurisdiction is appropriate. The obvious counter is

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[331] *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1995) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States."); R.I. GEN. LAWS ANN. § 9-5-33(a) (1994) (providing that nonresidents may be subject to jurisdiction "in every case not contrary to the provisions of the constitution or laws of the United States"). In contrast, other states have enacted detailed long arm statutes attempting to outline with precision the instances in which the courts may exercise jurisdiction over non-resident defendants. *See, e.g.*, N.C. GEN. STATS. §§ 1-75.2 to 1-75.8 (1994); N.Y. CIV. PRAC. L. & R. 302(a) (McKinney 1994); *see also* David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233 (1990) (analyzing and categorizing various state long arm statutes).

[332] *See, e.g.*, Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 872 (Tex. 1982), *rev'd*, 466 U.S. 408 (1984); Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 763 (Ill. 1961).

[333] *See* Taylor v. Portland Paramount Corp., 383 F.2d 634, 640 (9th Cir. 1967) (criticizing courts that have interpreted state long arm statutes with detailed provisions as permitting assertion of jurisdiction to constitutional limits and stating that "[i]n effect, what these courts have done is to abdicate their duty to construe the statutes of their own states and to turn it over to the Supreme Court of the United States").

[334] *See* Welkowitz, *supra* note 331, at 237-40 (listing six states — California, Oklahoma, New Jersey, Rhode Island, Vermont, and Wyoming — with long arm statutes that, as of 1990, expressly permitted exercise of jurisdiction on any basis consistent with U.S. Constitution).

[335] *See* Borchers, *supra* note 7, at 103-04.

Professor Chemerinsky expresses deep suspicion of the states in this endeavor. *See* Chemerinsky, *supra* note 33, at 868-69. Under our scheme, although a strong presumption of deference to the states would tend to minimize jurisdictional litigation, while favoring the assertion of jurisdiction, a grossly unfair assertion still would violate due process. Thus, the courts would not abdicate their responsibility.

that, if jurisdictional decisions are so important, then closer judicial scrutiny of those decisions is all the more necessary. However, history strongly suggests that the costs of judicial intervention outweigh any benefits. There simply is no viable alternative to deference on jurisdiction. There seem to be few benefits to the system as a whole from close judicial scrutiny of the exercise of jurisdiction. Any impact on the outcome of a case due to forum choice results from factors that judicial intervention on the question of jurisdiction generally cannot correct.

To the extent that one is concerned with the fairness of the exercise of jurisdiction in a particular case, this may be regulated through means other than constitutional intervention. If the court exercises jurisdiction, there are alternative procedural mechanisms (*e.g.*, transfer, forum non conveniens) that may ameliorate any harshness to the defendant.[336] Indeed, it is doubtful that, with the current jurisdictional doctrine in place, the courts ensure any modicum of fairness in their policing of jurisdiction decisions. To the contrary, judicial second-guessing of state judgments at times has resulted in serious injustice to the unfortunate plaintiff with the primary beneficiary being the fortunate defendant able to elude jurisdiction in plaintiff's chosen forum, often only after considerable cost and expense to both parties.

One alternative is for more careful review of decisions other than jurisdiction that may affect the disposition of a lawsuit in a particular forum. Put differently, if judicial scrutiny of jurisdiction decreased, review of other decisions might increase. A decision likely to have an important impact on the outcome of a lawsuit is the law to be applied by the forum.[337] Choice of law principles might well be a more appropriate way for courts to police the impact of forum selection on the outcome of the lawsuit. Presently, a state's conflict of law principles, parochial as they might be, are virtually immune from meaningful judicial review.[338] We do not attempt to exhaustively consider this or any other possibilities in this Article. Rather, we only suggest

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[336] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985) (suggesting choice of law and transfer of case as possible ways of minimizing inconvenience).

[337] *See supra* text accompanying notes 26-27.

[338] *See supra* note 26.

that rigorous review of the exercise of jurisdiction is not the optimal way to police the potential impact that forum choice may have on the outcome of a case.

Professor Chemerinsky, a proponent of an active role for the judiciary in constitutional matters,[339] objects to arguments of deference and suggests that the Supreme Court should be ready and willing to regulate overreaching assertions of jurisdiction by the states. There is some truth to the argument that, to ensure fairness, some doctrinal uncertainty is necessary.[340] We tend to agree with this proposition with respect to the review of substantive outcomes of cases. Jurisdiction, however, is not the place for any unnecessary uncertainty. For that reason, we suggest that courts explore avenues besides jurisdiction to ensure fairness in the outcome of a case.[341]

CONCLUSION

This Article demonstrates that the uncertainty that resulted in the jurisdictional revolution reigned in by *International Shoe Company v. Washington* have resurfaced in the fifty years since the Court handed down the decision. This uncertainty has important substantive impacts because forum selection and the ability of a court to exercise personal jurisdiction over nonresident defendants affects the ultimate disposition of a lawsuit. To minimize the needless costs of jurisdictional uncertainty, courts should examine the possibilities for clarifying jurisdictional doctrine, if only because of the need to reduce the litigation over this threshold question. A modest possibility is increased deference to states' exercise of jurisdiction over nonresidents.

Our study also offers some empirical support for the idea that jurisdictional theory is in need of repair. At a more general level, the study offers evidence of another example of how pro-

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[339] *See, e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989) (proposing development of "new approach" to constitutional law "recogniz[ing] the inevitability and desirability of judicial value choices in deciding constitutional cases").

[340] *See* Chemerinsky, *supra* note 33, at 866-67. Professor Cruz Reynoso, at a luncheon speech at the Symposium, made a similar point.

[341] We want to emphasize that our endorsement of deference extends no further than to the threshold question of jurisdiction.

cedural rules may have substantive impacts on cases.[342] These substantive impacts, while perhaps not militating in favor of increased judicial regulation of jurisdiction, may suggest the need for heightened judicial review of other decisions affecting the outcome of a case.

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[342] Even Professor Chemerinsky agrees with this fundamental conclusion. *See* Chemerinsky, supra note 33, at 863 ("I . . . certainly agree that procedural issues, such as personal jurisdiction, have a strong relationship to the substantive outcome of cases.").

APPENDIX I

Supreme Court In Personam And Quasi In Rem Jurisdiction Cases: 1945 to June 1995

1. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
2. Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950).
3. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
4. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
5. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
6. Hanson v. Denckla, 357 U.S. 235 (1958).
7. Shaffer v. Heitner, 433 U.S. 186 (1977).
8. Kulko v. Superior Court, 436 U.S. 84 (1978).
9. Rush v. Savchuk, 444 U.S. 320 (1980).
10. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
11. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).
12. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).
13. Calder v. Jones, 465 U.S. 783 (1984).
14. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

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

16. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

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

18. Burnham v. Superior Court, 495 U.S. 604 (1990).

19. Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

20. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992).

APPENDIX II

Subsequent Histories of International Shoe and Progeny: 1945 to June 1995

International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Subsequent History: The Supreme Court affirmed the Washington Supreme Court's finding that International Shoe must contribute to state unemployment compensation funds. *See* 326 U.S. at 321. Although International Shoe presumably made these contributions, Interco, International Shoe's successor, was unable to verify that fact. *See* Chipperfield Letter, *supra* note 115.

Jurisdiction: Yes

Jurisdiction Victor: Washington

Merits Victor: Washington

Law Applied to Dispute: Washington

Notes: Interestingly, Interco's General Counsel stated that "[a]lthough *International Shoe* has come to be known as a civil procedure case, as I reread it it was apparent to me that to us it was primarily a tax case — we did not want to pay unemployment taxes to the State of Washington." Chipperfield Letter, *supra* note 115.

Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950).

Subsequent History: In rejecting the jurisdictional challenge, the Court affirmed a cease and desist order entered by the Virginia courts based on the state securities laws. *See* 339 U.S. at 647.

Jurisdiction: Yes

Jurisdiction Victor: Corporation Commission

Merits Victor: Corporation Commission

Law Applied to Dispute: Virginia

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).

Subsequent History: The jurisdictional question before the Court was whether the New York state court lacked jurisdiction over common trust fund beneficiaries who resided outside the state. *See* 339 U.S. at 311. The Court found that the exercise of jurisdiction was proper, but reversed and remanded on the grounds that notice by publication to known trust fund beneficiaries as permitted by the New York statute violated due process. *See id.* at 312. On remand, the trustee's petition to settle the accounts was ultimately dismissed. *See In re* Central Hanover Bank & Trust Co., 99 N.E.2d 10 (N.Y. 1951) (per curiam). We were unable to determine the outcome of any further proceedings.

Jurisdiction: Yes

Jurisdiction Victor: Central Hanover Bank & Trust

Merits Victor: Central Hanover Bank & Trust

Law Applied to Dispute: New York

Notes: Although the court dismissed the petition to settle the judicial accounts, we classified this case as a merits victory for the trust company because, after it was given clear notice rules by the Court, the account in all likelihood was settled with proper notice given.

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

Subsequent History: The Supreme Court held that the Ohio state courts might constitutionally exercise jurisdiction over the foreign defendant. On remand, the Ohio courts asserted jurisdiction over the dispute. *See* Perkins v. Benguet Consol. Mining Co., 107 N.E.2d 203 (Ohio 1952). We were unable to determine the ultimate disposition of the case in the Ohio courts. *See* Castro Letter, *supra* note 235; Schnabel Letter, *supra* note 235.

Jurisdiction: Yes

Jurisdiction Victor: Perkins

Merits Victor: Unable to Determine

Law Applied to Dispute: Unable to Determine

Notes: Plaintiff's claim is not clear about the law on which it is based. *See* Petition in Perkins v. Benguet Consol. Mining Co., Court of Common Pleas of Clermont County, Ohio, No. 22185 (April 4, 1947). We do not speculate in light of the fact that the shareholder's complaint sought dividends from a foreign business entity.

A letter and documents provided by Benguet Corp. indicated that the Perkins family brought a number of securities-related actions against Benguet. *See* Castro Letter, *supra* note 235; *see also Perkins*, 342 U.S. at 438-39 n.1 (collecting citations to other pieces of litigation between parties including cases in the Philippines, New York, and California).

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

Subsequent History: In this case, a California court had entered a default judgment for McGee, which the Texas courts refused to enforce on the grounds that it was void for lack of jurisdiction over defendant. *See* 355 U.S. at 221. The Supreme Court found that the California court's exercise of jurisdiction was proper and remanded for further proceedings not inconsistent with the opinion. *See id.* at 224. The case subsequently settled. *See* Ravkind Letter, *supra* note 235.

Jurisdiction: Yes

Jurisdiction Victor: McGee

Merits Victor: McGee

Law Applied to Dispute: California

Notes: The record to the proceedings in the Supreme Court, including the complaint filed in the California court, did not expressly mention the law on which McGee was bringing her claim. *See* McGee v. International Life Ins. Co., Complaint for Breach of Contract of Insurance, Superior Court for the State of California in and for the City and County of San Francisco, No. 408054, filed June 15, 1951. Because the fact that judgment in the case was entered by a California court without any suggestion that the law of any other state was being applied, we have treated the case as applying California law.

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

Subsequent History: Under the peculiar facts of this case, a Florida court had found a disputed appointment of trust beneficiaries void under Florida law, while the Delaware courts found it valid under Delaware law. *See* 357 U.S. at 242. The jurisdictional issue squarely addressed by the Supreme

Court was the validity of a Florida court's exercise of jurisdiction over the Delaware trustee. *See id.* at 238. The Court reversed a finding by the Florida Supreme Court that Florida could exercise in personam jurisdiction over the trustee. After the Court remanded the case, the Florida Supreme Court remanded to the state court of appeals for further proceedings to determine whether the Delaware trustee was an indispensable party. *See* Hanson v. Denckla, 106 So.2d 549, 550 (Fla. 1958) (per curiam). Florida law apparently was well-settled that a trustee is an indispensable party to the dispute at issue. *See* 357 U.S. at 254-55. The case in Florida presumably was dismissed but we were unable to verify this fact. In any event, because the Supreme Court affirmed the Delaware court's judgment, the Florida courts seemingly would be required to afford it full faith and credit. *See id.* at 261 (Black, J., dissenting).

Jurisdiction: No

Jurisdiction Victor: Hanson

Merits Victor: Hanson

Law Applied to Dispute: Delaware (law applied in Delaware court's enforceable judgment)

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

Subsequent History: This was a quasi in rem case involving sequestration of shares of a Delaware corporation, Greyhound Corp. As provided by Delaware law, a shareholder sought to force the corporation's officers and directors to enter a general appearance and subject themselves to personal jurisdiction in a shareholder derivative action in Delaware. *See* 433 U.S. at 193-95, 195 n.12, 209 & n.33. The Court held that Delaware's exercise of jurisdiction violated the due process clause. *See id.* at 216. Plaintiff Heitner did not pursue the litigation in any other forum. *See* Maschio Interview, *supra* note 236; Reese Interview, *supra* note 236. Plaintiff's counsel stated that costs prohibited pursuit of litigation elsewhere. Maschio Interview, *supra* note 236.

Jurisdiction: No

Jurisdiction Victor: Officer and director defendants

Merits Victor: Officer and director defendants

Law Applied to Dispute: None

Notes: Within two weeks of the Court's decision, the Delaware legislature amended its laws to provide that nonresident officers and directors of a Delaware corporation shall be deemed to have consented to the appointment of the corporation's registered agent in Delaware or, if there is not one, of the Secretary of State, as their agent for acceptance of service of process in actions based on an alleged violation of duties owed to the corporation. *See* DEL. CODE ANN., tit. 10, § 3114 (Supp. 1992); Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980) (upholding constitutionality of section); *see also* Susan Stuckert, Note, *A Constitutional Analysis of the New Delaware Director-Consent-to-Service Statute*, 70 GEO. L.J. 1209, 1212-13 (1983) (discussing reasons offered by Delaware legislature for enacting statute). In response, the Greyhound Corporation reincorporated in Arizona. *See* David L. Ratner & Donald E. Schwartz, *The Impact of* Shaffer v. Heitner *on the Substantive Law of Corporations*, 45 BROOK. L. REV. 641, 653-54 (1979).

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

Subsequent Developments: After the Supreme Court held that the California courts lacked personal jurisdiction over Ezra Kulko in a child support action, Sharon Kulko Horn did not pursue litigation elsewhere. *See* Stotter November 1993 Interview, *supra* note 236.

Jurisdiction: No

Jurisdiction Victor: Ezra Kulko

Merits Victor: Ezra Kulko

Law Applied to Dispute: None

Notes: Horn did not pursue a child support modification action even though both California (her state of residence) and New York (Ezra Kulko's state of residence) had laws in place that might have allowed her to do so without leaving the state. *See Kulko*, 436 U.S. at 98-100 & nn.13-15. *But cf.* Bruch, *supra* note 254, at 1053-54 (criticizing *Kulko*, including Court's reliance on "inadequate" state law devices as alternative to assertion of jurisdiction over nonresident father). Horn made a tactical judgment not to proceed under either of those laws, in part because of her desire to have the dispute resolved in a California forum. *See* Stotter May 1994 Interview, *supra* note 237.

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

Subsequent History: This case involved the exercise of quasi in rem jurisdiction over a nonresident defendant through attachment of an insurance policy of an insurer licensed to do business in the state. *See* 444 U.S. at 322. The dispute concerned an accident in Indiana between two Indiana residents; plaintiff Savchuk later moved with his family to Minnesota, where he filed suit. *See id.* Under Indiana law, Savchuk could not sue in the Indiana courts. *See id.* at 322 n.2. After the Supreme Court held that the exercise of quasi in rem jurisdiction over the policy was improper, the Minnesota courts dismissed the case. *See* Savchuk v. Rush, 290 N.W.2d 633 (Minn. 1980) (per curiam). Savchuk recovered nothing for his injuries. *See* Borkon Interview, *supra* note 236.

Jurisdiction: No

Jurisdiction Victor: Rush

Merits Victor: Rush

Law Applied to Dispute: None

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

Subsequent History: "This case has a protracted history which we need not detail other than to say that the plaintiffs have been unsuccessful in obtaining relief for injuries suffered in a tragic automobile accident." Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1370 (10th Cir. 1991) (citations omitted); *see also* Winton D. Woods, Carnival Cruise Lines v. Shute: *An Amicus Inquiry into the Future of "Purposeful Availment"*, 36 WAYNE L. REV. 1393, 1400 n.30 (1990) (quoting Harry Robinson: "'We had a rear end collision in Tulsa and when we ended up in Washington D.C. I knew something had gone wrong with the case.'").

The Robinsons, who at the time were domiciled in New York, had filed the case in the Oklahoma state court in Creek County, which was renowned for juries "friendly" to personal injury plaintiffs. *See* Greer Interview, *supra* note 236; LOWENFELD, *supra* note 292, § 7.04, at 565; *see also* Woods Interview, *supra* note 236 (opining that, if case had been tried in Creek County, Robinsons would have recovered substantial judgment). By including two non-diverse New York defendants, Seaway Volkswagen, Inc. and World-Wide Volkswagen Corp., the Robinsons were able to prevent the case from being removed on diversity of citizenship grounds to the federal court, which reputedly had juries less "friendly" to

plaintiffs than Creek County did. *See* Weintraub, *supra* note 292, at 500 n.98. After the Supreme Court held that the two New York defendants could not be sued in Oklahoma state courts, the two remaining defendants, Audi-NSU Auto Union of Germany and Volkswagen of America, a New Jersey corporation, removed the case to federal court. *See* LOWENFELD, *supra* note 292, § 7.04, at 565. The jury returned a verdict for the defendants. *See id.* The court of appeals reversed the verdict in favor of the importer, Volkswagen on evidentiary grounds. *See* Robinson v. Audi NSU Auto Union Aktiengesellschaft, 739 F.2d 1481 (10th Cir. 1984). On remand, the district court granted summary judgment for Volkswagen, and the court of appeals affirmed. *See* Robinson v. Volkswagen of America, Inc., 803 F.2d 572 (10th Cir. 1986).

The Robinsons apparently never pursued claims against the New York defendants, Seaway and World-Wide. They, however, subsequently brought a separate action that, among other things, included claims against their trial counsel for malpractice and against defendants' counsel and Volkswagenwerk AG (a German entity not sued in the original action but allegedly related to Audi) for fraudulent concealment of the true relationship between Volkswagenwerk and Audi, which resulted in the Robinsons' decision not to sue Volkswagenwerk. The court of appeals allowed these claims to proceed. *See* Robinson v. Volkswagenwerk AG, 940 F.2d 1369 (10th Cir. 1991) (refusing to reverse denial of summary judgment for law firm and one defendant). Some of the claims are still being litigated. *See* Greer Interview, *supra* note 236; Woods Interview, *supra* note 236.

Although the Robinsons, particularly Kay, were severely burned, they have yet to recover. Medical insurance coverage was minimal and the potential recovery on the malpractice claim against their original attorneys is limited to a $100,000 insurance policy. *See* Woods April 1994 Interview, *supra* note 237.

Jurisdiction: No

Jurisdiction Victor: World-Wide, Seaway

Merits Victor: World-Wide, Seaway

Law Applied to Dispute: None to Defendants Who Could not Be Sued in Oklahoma (Seaway and World-Wide); Oklahoma Law Applied to Dispute with Remaining Defendants on Remand (Audi and Volkswagen)

Notes: Indirect victors in this case were Audi and Volkswagen, neither which challenged personal jurisdiction in the Oklahoma courts. *See World-Wide Volkswagen*, 444 U.S. at 288 n.3. These defendants paid the attorneys' fees for the appeal by World-Wide Volkswagen and Seaway to the Supreme Court. *See* Adams, *supra* note 292, at 1135. After the New York defendants were dismissed, Audi and Volkswagen, after removal of the action to federal court, prevailed entirely on the merits.

For a detailed account of the factual intricacies of the case, including the battle over the choice of forum, see Adams, *supra* note 292.

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

Subsequent History: On remand from the Supreme Court, the district court granted defendants' motion for summary judgment, see Compagnie des Bauxites de Guinee v. Insurance Corp. of N. Am., 554 F. Supp. 1080, 1082 (W.D. Pa. 1983), which the Court of Appeals for the Third Circuit reversed, see 724 F.2d 369, 374-75 (3rd Cir. 1983). Ultimately, "defendants obtained a dismissal on the ground that the plaintiffs had not given the insurance carriers timely notice of its claim. . . . [T]he primary carriers may have paid or settled, or obtained judgment in their favor on some other ground." Trent Letter, *supra* note 235.

Another action was brought against three defendants dismissed from the original action. Although the district court dismissed on res judicata grounds, the court of appeals reversed. *See* Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances, 723 F.2d 357, 360 (3d Cir. 1983). We were unable to determine the ultimate disposition of this action.

Jurisdiction: Yes

Jurisdiction Victor: Compagnie des Bauxites de Guinee

Merits Victor: Insurance Companies

Law Applied to Dispute: Pennsylvania

Notes: This diversity action was brought in a district court in Pennsylvania and the court applied Pennsylvania law.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

Subsequent History: After the Supreme Court held that the exercise of personal jurisdiction over Hustler by the New

Hampshire courts was proper, the case went to trial and Keeton received a jury verdict of $2 million. *See* Keeton v. Hustler Magazine, Inc., 815 F.2d 857, 858 (2d Cir. 1987) (describing litigation). On appeal, the court of appeals, sitting in diversity, certified two questions of state law to the New Hampshire Supreme Court, one being whether the New Hampshire statute of limitations applied. *See* Keeton v. Hustler Magazine, Inc., 828 F.2d 64, 67 (1st Cir. 1987). The New Hampshire Supreme Court responded that the New Hampshire six-year limitations period indeed applied. *See* Keeton v. Hustler Magazine, Inc., 549 A.2d 1187 (N.H. 1988).

Keeton brought a separate action to enforce the $2 million judgment in New York state court, which Hustler removed to federal court. The district court denied Hustler's motion to set aside the judgment, and the court of appeals affirmed. *See Keeton*, 815 F.2d at 857.

Keeton presumably collected on the judgment, although Hustler's attorney declined to comment on this and the matter may have been settled. *See* Holmes Interview, *supra* note 236.

Jurisdiction: Yes

Jurisdiction Victor: Keeton

Merits Victor: Keeton

Law Applied to Dispute: New Hampshire

Notes: In suing in New Hampshire, Keeton clearly was forum shopping. Keeton's claims brought previously in Ohio had been held to be time-barred. *See Keeton*, 465 U.S. at 772 n.1. New Hampshire had a six-year limitations period for libel actions and was the only state where suit was not time-barred. *See id.*

The case also was memorable because the publisher of Hustler, Larry Flynt, was arrested for disrupting oral argument in the Supreme Court with obscenities because of the Court's refusal to allow him to argue the case himself. *See* Kathleen Sylvester, *In — and Out — Like Flynt; "Take That Man Into Custody"*, NAT'L L.J., Nov. 21, 1983, at 5.

Calder v. Jones, 465 U.S. 783 (1984).

Subsequent History: After the Supreme Court upheld the California state court's exercise of jurisdiction over the defendants, the case was "subsequently dismissed by agreement of the parties." Kester Letter, *supra* note 235. Shirley Jones and her husband reportedly "celebrat[ed the settlement] by buy-

ing a fancy new speedboat and naming it the National Enquirer." Jay Maeder, *The Jay Maeder Column*, MIAMI HERALD, Apr. 29, 1984, at 2A. The settlement included an unspecified money amount and a published retraction by the Enquirer. According to Jones' husband, Marty Ingels, the retraction "was better than a victory in court because in court you just get money. You don't get a retraction." *See* Aljean Harmetz, *National Enquirer Agrees to Settle with Shirley Jones in Libel Suit*, N.Y. TIMES, Apr. 27, 1984, at A17.

Jurisdiction: Yes

Jurisdiction Victor: Jones

Merits Victor: Jones

Law Applied to Dispute: California

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

Subsequent History: After the Supreme Court held that the exercise of jurisdiction over Helicopteros was improper, the case ended. The lawyer for the plaintiff Hall wrote: "what happened was that the survivors did not collect any additional damages from any source, anywhere, anytime!" Pletcher Letter, *supra* note 235. Counsel for Hall believed that the maximum recovery for wrongful death in Colombia, the residence of Helicopteros Nacionales de Colombia (Helicol), and Peru, the place of the accident, was $2500. *Id.*; *see also* Weinberg, *supra* note 286, at 932-34 (noting other possible procedural difficulties in suing in Peru and Colombia). Helicol's attorney confirmed that plaintiffs did not recover any damages from defendants. *See* Whalen Letter, *supra* note 235 (stating that "to my knowledge, the plaintiffs . . . ultimately obtained no recovery by settlement or by judgment inside or outside the United States.").

Jurisdiction: No

Jurisdiction Victor: Helicol

Merits Victor: Helicol

Law Applied to Dispute: None

Notes: An *amicus curiae* brief filed by the United States expressed fear over the trade consequences if purchases of

equipment and related training of employees of foreign corporations, without more, might give rise to jurisdiction over a foreign business in the U.S. courts. *See* Brief for the United States as Amicus Curiae, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *see also* Weinberg, *supra* note 286, at 929 (noting that brief may have influenced Court). Counsel for Helicol had urged the United States Trade Representative to file the brief and believed that, in reaching its decision, the Court was troubled by the potential negative trade consequences if it upheld jurisdiction. *See* Whalen Letter, *supra* note 235.

Hall's attorney considered this case "a long and frustrating ordeal spanning over 8 years of my life. It was the only time I have personally appeared in the United States Supreme Court and, like being in the service, it was an experience I shall long treasure but have absolutely no desire to ever do again." Pletcher Letter, *supra* note 235.

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

Subsequent History: In the initial suit, the district court found that it had personal jurisdiction and awarded Burger King over $228,000 in contract damages. *See* 471 U.S. at 469. After the Supreme Court upheld the exercise of jurisdiction, the parties settled for $75,000. Oehmke Interview, *supra* note 236. Rudzewicz also paid nearly $500,000 in attorneys' fees and costs and lost the restaurant, including $40,000 in franchise fees and $250,000 in improvements. *See id.*

Rudzewicz's attorney estimated that it was three or four times more expensive for Rudzewicz to defend in Florida than Michigan. *See id.* Because of cost considerations, Rudzewicz did not pursue appeal of the merits on remand. *See id.*; *see also* Burger King Corp. v. MacShara, 724 F.2d 1505, 1508 (11th Cir. 1984) (mentioning substantive grounds for appeal that were not ruled upon by the court because it found exercise of jurisdiction unconstitutional), *rev'd sub nom.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

Jurisdiction: Yes

Jurisdiction Victor: Burger King

Merits Victor: Burger King

Law Applied to Dispute: Florida

Notes: Rudzewicz's attorney believed that Burger King had brought a number of other franchise agreement cases in the Florida courts. *See* Oehmke Interview, *supra* note 236; *cf.*

Scheck v. Burger King Corp., 756 F. Supp. 543, 545 (S.D. Fla. 1991) (summarizing procedural history of suit against Burger King by franchisor in Massachusetts, which was transferred to Florida pursuant to forum selection clause in franchise agreement).

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

Subsequent Developments: The Supreme Court upheld the exercise of jurisdiction over the plaintiffs, but reversed the finding that Kansas law applied to claims of class members completely unrelated to the state. *See* 472 U.S. at 821-23. On remand, the Kansas courts concluded that there was no conflict between the relevant laws of Kansas and any of the other implicated states with respect to *pre*-judgment interest. *See* Shutts v. Phillips Petroleum Co., 732 P.2d 1286 (Kan. 1987), *cert. denied*, 497 U.S. 1223 (1988). With respect to *post*-judgment interest, the court found conflicts between the rates of the different states and directed that interest be determined by the law of the state in which the natural resources that were the subject matter of the lease was physically located. *See* 732 P.2d at 1314.

According to the attorney for the class, the class recovered the judgment in full. *See* Greenleaf Interview, *supra* note 236.

Jurisdiction: Yes

Jurisdiction Victor: Shutts

Merits Victor: Shutts

Law Applied to Dispute: Kansas

Notes: We concluded that, because the Kansas Supreme Court applied Kansas law to the largest financial amount at issue concerning pre-judgment interest, the case could properly be classified as applying Kansas law, even though the law of other states was applied to the determination of post-judgment interest on the claims of some class members.

This case is peculiar in the sense that the defendant alleged that the Kansas state courts lacked jurisdiction over *nonresident class members*, not the defendant. *See Shutts*, 472 U.S. at 806-14 (analyzing lawfulness of forum state's assertion of jurisdiction over absent class members).

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

Subsequent History: Plaintiff, Gary Zurcher, settled his claims against the various defendants before the Supreme Court decided the case. *See* 480 U.S. at 106. We were unable to

determine the amount of the settlement. The issue before the Court was whether it had jurisdiction over Asahi Metal Industry Co., a Japanese corporation sued in a cross complaint by defendant Cheng Shin Rubber Industrial Co., a Taiwanese corporation *See id.*

While the action was pending in the California courts, Cheng Shin had sued Asahi in Japan. *See* Staring Letter, *supra* note 235. After the Supreme Court held that Asahi could not be sued in California consistent with due process, the matter was settled for $20,000, an amount characterized by Asahi as minimal in light of the costs of litigation. *See id.*; Staring Interview, *supra* note 236.

Jurisdiction: No

Jurisdiction Victor: Asahi

Merits Victor: Asahi

Law Applied to Dispute: None

Notes: The Cheng Shin tire tube at issue in the case may not have even included an Asahi valve, which was the basis for the claim. The case had moved rapidly in the California courts on the jurisdictional question without a decision on the merits. *See* 480 U.S. at 107-08 (describing procedural history of case). In the words of Asahi's counsel in the Supreme Court:

> Tire valves look very much alike, and, at least in some cases, are identifiable only by a very small manufacturer's logo. By such a means, the Plaintiffs had identified the manufacturer of the valve in this case. By the time I argued the case in the Supreme Court, however, an engineer from Asahi in Japan had come to the United States, inspected the valve, and identified it not as Asahi's product but as the product of another manufacturer whose logo was very similar. In the Supreme Court, therefore, we were arguing a case that was probably against the wrong defendant and might, at that point, be considered hypothetical.

Staring Letter, *supra* note 235.

Burnham v. Superior Court, 495 U.S. 604 (1990).

Subsequent History: After the Supreme Court's decision, the California court held that the marriage settlement agreement entered into in New Jersey was invalid and divorced the

Burnhams under California law. *See* Sherman Interview, *supra* note 236. Dennis Burnham, who before being served in California had filed for divorce in New Jersey, feared that a California court would treat a business that he owned as marital property even though it was treated as separate property under the New Jersey settlement agreement; the California court ultimately held that the business was separate property. *See* Burnham Interview, *supra* note 236. Dennis Burnham moved to California and has represented himself in *pro per* on some child visitation matters. *See id.*

Jurisdiction: Yes

Jurisdiction Victor: Ms. Burnham

Merits Victor: Ms. Burnham

Law Applied to Dispute: California

Notes: Dennis Burnham had arrived in California on business and when he called his office was told that divorce papers had been sent by his wife. *See id.* Thus, the service upon him later that week was not a complete surprise.

This case posed difficulty in determining the merits victor. Although Mr. Burnham won the major community property issue, he was forced to pay the costs of litigating in California and later moved there. He paid approximately $90,000 to appeal the jurisdictional ruling alone. When asked "who won and who lost," Dennis Burnham replied, "[t]here's no winners or losers — only the lawyers won." *Id.* He added that both sides spent more money than the major property in dispute was worth. *See id.* Still, Mr. Burnham moved to California and suffered the uncertainty of the application of California law, even though he prevailed on the issue that had concerned him.

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

Subsequent History: Although the Supreme Court held that the exercise of jurisdiction over Quill was proper, *see* 112 S. Ct. at 1909-11, it held that North Dakota's enforcement of the tax in question placed an undue burden on interstate commerce, *see id.* at 1911-13. On remand, the North Dakota Supreme Court vacated its opinion and affirmed the trial court's judgment in favor of Quill. *See* State v. Quill Corp., 487 N.W.2d 598, 599 (N.D. 1992); *see also* State v. Quill Corp., 500

N.W.2d 196, 201-03 (N.D. 1993) (holding that Quill's federal civil rights counterclaim was properly dismissed and that Quill therefore was not entitled to recovery of attorneys' fees).

Jurisdiction: Yes

Jurisdiction Victor: North Dakota

Merits Victor: Quill

Law Applied to Dispute: North Dakota

Notes: This case, like *International Shoe*, might be more about the payment of taxes than about personal jurisdiction.

Republic of Argentina v. Weltover, 112 S. Ct. 2160 (1992).

Subsequent History: On remand, the district court applying New York law ruled in favor of plaintiff bondholders and awarded them $1.8 million in damages. *See* Cutler 1994-95 Interviews, *supra* note 237. As of November 7, 1994, settlement discussions were ongoing as an appeal to the Court of Appeals for the Second Circuit was pending. *See id.* As of January 10, 1995, plaintiff's counsel stated that it was likely that the case would be "discontinued." *Id.*

Jurisdiction: Yes

Jurisdiction Victor: Bondholders

Merits Victor: Bondholders

Law Applied to Dispute: New York

Notes: The personal jurisdiction issues were discussed only briefly by the Court, *see* 112 S. Ct. at 2167-69, and were not mentioned in the court of appeals' opinion. *See* Weltover v. Republic of Argentina, 941 F.2d 145 (2d Cir. 1991). The primary issue analyzed was the amenability of the Republic of Argentina to suit under the Foreign Sovereign Immunities Act.