Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries

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INTRODUCTION

The Supreme Court's decision in *International Shoe Co. v. Washington*[1] represented the culmination of a dramatic conceptual break in the constitutional analysis of jurisdiction. Moving away from the rigidly formalistic abstractions of the past, the new analysis focused on pragmatic considerations of decisional accuracy, fairness, and state interest.[2] To be sure, the *International Shoe* Court itself found it hard to break away completely from the analytical models of the past,[3] and one may question whether that Court fully grasped the proper constitutional grounding of its own jurisdictional doctrine.[4] But there is no doubt that the decision constituted one important part of a brief but glorious attempt by the Supreme Court to refocus jurisdictional analysis in order to reflect the common sense pragmatism normally associated with procedural due process analysis.[5]

At some point in the late 1950s, the Supreme Court took a wrong turn.[6] It was at that time that the Court abandoned the pragmatic balancing analysis traditionally associated with procedural due process and replaced it with a somewhat streamlined — but ultimately equally rigid — brand of abstract formalism in its jurisdictional analysis. This new approach focused primarily (and sometimes exclusively) on the question of whether an out-of-state defendant had "purposefully availed" herself of the benefits or privileges of the forum state.[7]

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[1] 326 U.S. 310 (1945).

[2] *See* Geoffrey Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 241; Phillip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts — From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569, 570-74 (1958).

[3] *See* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1117-18 (1981) (discussing Supreme Court's continued emphasis on federalism); *see infra* notes 66-71 and accompanying text (discussing Supreme Court's deviation from previous theory).

[4] *See* Redish, *supra* note 3, at 1117-18 (discussing continued reliance on federalism despite adoption of minimum contacts test).

[5] *See infra* notes 62-71 and accompanying text (discussing Supreme Court's adoption of pragmatic balancing approach).

[6] Hanson v. Denckla, 357 U.S. 235 (1958); *see infra* notes 128-31 and accompanying text (discussing constitutional problems caused by adoption of purposeful availment test).

[7] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see infra* notes 93-96 and accompanying text (stating that purposeful availment is essential component of constitutional assertion of jurisdiction).

Although a significant amount of doctrinal confusion continues to plague Supreme Court jurisdictional analysis,[8] the existing structure at least provides a largely workable (if theoretically unsound)[9] model in most cases that involve the classic, individualized adjudication of private rights. Even under a worst case scenario, in such situations a plaintiff will merely be forced to litigate in something less than the most convenient forum. There will always exist *some* domestic forum in which to sue a United States domiciliary.[10]

The situation becomes considerably more complicated when one attempts to apply currently accepted jurisdictional standards to the adjudication of multiple mass tort claims. As a technical matter, of course, consolidated mass tort suits can be conceptualized simply as a conglomeration of individualized adjudications. If society were willing to accept the social and legal consequences inherent in the individualized adjudication of mass tort claims, presumably we could muddle through by simply applying the current jurisdictional model to each adjudication. But accepting such individualized adjudication of mass tort claims would be the legal equivalent of committing systemic hari-kari. The burdens imposed on the judicial system by such individualized adjudication are, to say the least, enormous and could arguably be labelled prohibitive.[11]

These debilitating consequences could undoubtedly be reduced if a single judicial forum were able to impose something approaching a "global" resolution of such claims in one proceeding. Of course, if the harm resulting from a mass tort were

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[8] One leading example of doctrinal confusion is the status of the stream-of-commerce theory as a basis for establishing purposeful availment. *Compare* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (finding stream-of-commerce theory invalid) *with id.* at 117 (Brennan, J., concurring in part and concurring in judgment) (finding stream-of-commerce theory valid). Another example is the extent to which issues of procedural burden and inconvenience remain relevant to the jurisdictional due process analysis. *Compare* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (stating that courts can generally resolve procedural inconvenience by subsconstitutional means) *with Asahi*, 480 U.S. at 114 (finding procedural inconvenience still relevant, at least when alien corporation is defendant).

[9] *See infra* note 29 and accompanying text (discussing individualized adjudication model).

[10] Milliken v. Meyer, 311 U.S. 457, 464 (1940).

[11] *See infra* notes 29-46 and accompanying text (discussing damaging effects of individualized adjudication model).

to fall largely within the borders of one state, combining numerous individualized suits for purposes of adjudication would not give rise to extraordinary jurisdictional problems. The fact is, however, that most mass torts involve harm caused by nationally distributed products. Thus, in order to avoid wasteful and systemically debilitating individualized litigations, most situations would require drawing together litigants across numerous state lines. Applying the rigid limitations imposed by modern jurisdictional doctrine in such situations is akin to inserting a round peg into a square hole. Absent some form of consent by potential plaintiffs,[12] modern doctrinal standards, focusing as they do on the need for the litigant's "purposeful availment" of the forum's benefits and privileges, render extremely difficult, if not impossible, the effective resolution of multiple mass tort suits in the course of a single proceeding.[13] This is due to the simple fact that in multistate mass tort suits, it will only rarely be the case that all out-of-state plaintiffs could be said to have purposely availed themselves of any one forum's privileges and benefits.

The sad fact is that, even wholly apart from these significant negative practical consequences, the straitjacket imposed by modern jurisdictional doctrine has significant, negative constitutional consequences. Modern jurisdictional doctrine represents an impermissible extrapolation from the only true textual source of constitutional limitations on the power of states to assert personal jurisdiction over individuals and corporations: the Due Process Clause of the Fourteenth Amendment.[14] Absent grounding in this provision, constitutionally imposed limitations on the ability of states to assert jurisdiction represent illegitimate usurpations of majoritarian power by the judiciary.[15]

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[12] The Court has long accepted consent as a basis for jurisdiction. *See, e.g.*, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (holding that defendant can waive personal jurisdiction requirement by implied or express consent). The Court has also indicated that an absent plaintiff class member's failure to exercise a right to opt out could effectively manifest consent. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

[13] *See infra* notes 82-99 and accompanying text (discussing difficulties of applying purposeful availment test to mass tort claims).

[14] U.S. CONST. amend. XIV, § 1, cl. 3.

[15] *See infra* notes 129-31 and accompanying text (discussing Supreme Court's inability to ground its invalidation of state judicial jurisdiction text on Constitution).

It is debatable whether the purposeful availment factor could be deemed relevant at all to a properly refocused jurisdictional analysis that looks solely to the criteria traditionally associated with procedural due process.[16] To the extent that it is relevant, surely it would not constitute the *sine qua non* of the constitutionally valid assertion of jurisdiction over out-of-state residents that it is under current doctrine.[17] Procedural due process analysis — of which jurisdictional doctrine is properly viewed as merely a subpart[18] — has historically required use of a pragmatic, individualized calculus of competing interests and concerns.[19] Such an analysis has always been characterized by a largely fluid and accommodating nature. To be sure, if the concept of due process is not to be cynically rendered a meaningless guarantee, *some* floor of procedural protection must exist.[20] But there is absolutely no legitimate conceptual or practical reason to conclude that purposeful availment constitutes an element of that required procedural floor.[21]

This is not to suggest that abandonment of current jurisdictional standards in favor of the use of the pragmatic calculus traditionally associated with procedural due process analysis

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[16] One might attempt to justify limitations on state jurisdiction under the rubric of substantive due process rather than its procedural counterpart. We are troubled by an invocation of so oxymoronic and textually unsupportable a concept as substantive due process. Even if one were to apply accepted substantive due process standards, the standards would hardly justify the significant limitations on state authority associated with the purposeful availment test. Currently, in anything other than the area of marital or sexual privacy, the Supreme Court applies only a highly deferential unreasonableness standard of substantive due process. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (stating that reasonable regulation is due process). A state's assertion of jurisdiction could hardly be deemed unreasonable merely because the party subjected to jurisdiction has not purposely availed herself of the forum's benefits.

[17] *See infra* notes 129-33 and accompanying text (arguing that purposeful availment model does not work within traditional procedural due process framework).

[18] *See infra* notes 134-59 and accompanying text (discussing historical development of procedural due process analysis).

[19] *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (stating that procedure must be tailored to circumstances).

[20] *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472-74 (1986) (arguing need of intermediate approach between balancing approach and historical approach); *infra* notes 129-33 and accompanying text (arguing that procedural due process analysis must be grounded in text, history, or policy of Constitution).

[21] *See infra* notes 129-33 and accompanying text (arguing that purposeful availment requirement has no connection to Due Process Clause).

should be thought a panacea. Using the traditional due process analysis may not magically remove all constitutional barriers to the assertion of personal jurisdiction in the combined interstate adjudication of mass tort claims. The point, rather, is that such an analytical shift would at least refocus the constitutional inquiry to reflect the true pragmatic dilemma inherent in such situations. In conducting such an analysis, the court would be called upon to determine how best to reconcile the need to avoid systemically burdensome and possibly crippling multiple litigations with the important interests of individual litigants in obtaining a full and fair hearing. In contrast, conducting such a balancing process is effectively impossible under current jurisdictional standards.

Ironically, reliance on the purposeful availment standard — and, more importantly, the theoretical framework from which it derives[22] — potentially *reduces* the difficulties in achieving a single *federal* adjudication of multiple, multistate mass torts. It does so by authorizing congressional action to provide for single-forum adjudication of multistate mass torts in the federal courts. The "pragmatic calculus" version of due process, on the other hand, would find nothing magical in Congress's provision of nationwide federal jurisdiction in multistate mass tort suits. Instead, it would continue to insist that geographical factors not be allowed to give rise to substantial procedural unfairness.[23]

The next section of this Article is devoted to a brief description of the judicial crisis brought on by the dramatic increase in both the amount and intensity of mass tort litigation in recent years and to the need for global resolution of all or part of such claims in a single judicial proceeding.[24] The second section describes the current state of the Supreme Court's constitutional standards for the assertion of jurisdiction and their implications for the adjudication of interstate mass tort claims.[25] The

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[22] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (creating purposeful availment test); *infra* notes 81-92 and accompanying text (discussing development of purposeful availment test).

[23] *See infra* notes 133-35 and accompanying text (discussing impact of using traditional due process analysis).

[24] *See infra* notes 30-61 and accompanying text (discussing need for global resolution).

[25] *See infra* notes 62-128 and accompanying text (describing current Supreme Court constitutional standards and implications for mass tort claims).

third section focuses on the application of due process theory in the jurisdictional context. It explores both the constitutional and philosophical framework within which personal jurisdiction doctrine should be developed and the doctrinal model that derives from such theoretical underpinnings. It then contrasts that normative model with the prevailing doctrinal structure.[26] The final section examines the jurisdictional issues that arise from an attempt to combine parallel interstate mass tort litigations into a single proceeding in either state or federal court and measures them against the two conceivable jurisdictional models.[27]

After exploring these questions, we ultimately conclude that use of a pragmatic calculus due process model of jurisdictional analysis would allow combined adjudication of interstate mass tort claims when the parties' opportunity to have their day in court is not seriously threatened. In other words, interstate mass tort claims could be combined as long as no meaningful procedural inconvenience would result from the selection of the forum. Under this calculus, it should be noted, no attention is to be paid to the convenience concerns that theoretically might affect wholly absent litigants whose rights will be determined but who nevertheless have chosen not to appear in the suit.

If meaningful procedural inconvenience to one or more of the litigating parties is found to exist, the court would then conduct an inquiry dictated by the multifactor pragmatic analysis normally associated with procedural due process. Pursuant to this standard, the forum may constitutionally assert jurisdiction, despite the presence of meaningful inconvenience, when (1) the chosen forum possesses substantial contact with the pre-suit facts and/or substantial interest in the outcome of the suit; (2) no other conceivable forum either provides a noticeably more convenient location for suit or possesses a noticeably stronger connection to or interest in the suit; (3) conducting a single combined adjudication would materially reduce the systemic burdens that are likely to result absent that single adjudication; and (4) absent jurisdictional questions, the interstate consolidation would

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[26] *See infra* notes 129-59 and accompanying text (arguing for redefinition of jurisdictional due process theory).

[27] *See infra* notes 160-82 and accompanying text (discussing impact of redefined due process theory on global resolution of mass tort claims).

not give rise to any constitutional violations.[28] While our solution would not solve all of the problems associated with mass tort litigation, it would, at the very least, make more feasible the global resolution of certain types of cases. Equally important, our analysis would re-anchor jurisdictional analysis to its appropriate constitutional mooring, the Fourteenth Amendment's Due Process Clause.

I. DEALING WITH THE MASS TORT LITIGATION CRISIS

A. The Scope of the Crisis

Much of the American judicial system is premised on a single plaintiff-single defendant model of litigation where parties are placed in an adversarial context in order to resolve disputes of law and fact before a judge and/or jury. Litigation under this traditional model is conducted by both sides and their chosen representatives, and the responsibility for fully prosecuting claims and defenses falls on the parties themselves. Although this traditional model has undergone revision from time to time,[29] the individualized adjudication model has remained the primary focus of our judicial system.

Despite the venerable nature of this tradition, in certain situations serious problems with the single plaintiff-single defendant adjudicatory model have surfaced. The existence of numerous parties alleging similar sorts of harm from the same dangerously defective product or negligent conduct has transformed some ordinary tort litigation into so-called mass tort litigation. While no universally accepted definition of that category of cases exists, mass tort litigation tends to display a combination of four significant differences from common tort litigation. First, the number of persons claiming injury from a single product or act in a mass tort far exceeds anything previously encountered in the courts. One example is asbestos litigation: by 1990 more than 30,000 personal injury suits had been filed in federal courts nationwide, more than any other type of action.[30] This is by no

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[28] . *See infra* notes 143-59 and accompanying text (discussing factors in balancing test).

[29] *See, e.g.*, FED. R. CIV. P. 23 (permitting representative litigation in federal court in certain circumstances).

[30] JUDICIAL CONFERENCE OF THE UNITED STATES, AD HOC COMMITTEE ON ASBESTOS

means the limit on the number of people involved in a mass tort case. The Agent Orange litigation saw the certification of a class of 2.4 million people.[31] The sheer number of such related cases presents significant — and sometimes overwhelming — efficiency problems for the courts, including crowded dockets and increased delay in the disposition of cases.[32]

Second, these cases involve many overlapping issues of fact and law, including (1) the ability of products (or actors) to cause the alleged injuries, (2) the extent to which defendants were aware of these dangers, and (3) the amount of any punitive damages (if any) that are owed to injured parties. Courts are therefore often faced with an inordinate amount of repetitive litigation as parties seek to prove (or disprove) the same facts over and over again. In addition, the parties are faced with at least the possibility of a great disparity in outcomes among seemingly identical cases.

Third, the issues in mass tort cases are, on the whole, significantly more technical and complicated than in the average tort case. Not only is it often disputed that the product in question could possibly cause the alleged injury (sometimes an issue of scientific uncertainty), defendants typically deny that their particular product was the actual cause of a particular plaintiff's injury. Further obfuscating the question of causation is the fact that many plaintiffs' injuries do not manifest themselves until many years after the plaintiffs were exposed to the allegedly dangerous product.[33] An additional complication is the existence of satellite litigation in mass tort cases, as seen in the protracted battles between asbestos defendants and their insurers.[34]

LITIGATION 8 (1991). The number of asbestos cases pending in state courts in 1990 was estimated to be 60,000. AMERICAN LAW INSTITUTE COMPLEX LITIGATION PROJECT, ch.2, cmt. b, at 13 (1993) [hereafter COMPLEX LITIGATION].

[31] *In re* "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 756 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

[32] Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 130 ("The sheer number of claimants would make intolerable any attempt at one-at-a-time, custom-fitted justice.").

[33] Kenneth R. Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions*, 24 HOUS. L. REV. 155, 161 (1987).

[34] *See* COMPLEX LITIGATION, *supra* note 30, cmt. b, at 15-16 (discussing additional complexity caused by litigation with insurers).

Fourth, mass tort cases tend to involve substantial damage claims and are significantly more expensive to litigate than the average individualized tort case.[35] Ironically, while defendants generally face greater potential liability in mass tort cases, plaintiffs in mass tort cases usually receive less compensation per dollar of injury than plaintiffs in traditional tort cases.

It is true that none of these four factors is actually unique to mass tort litigation. Various other types of litigation may manifest one or more of the characteristics. Rarely, however, will other types of cases consistently manifest all four characteristics simultaneously. More importantly, mass tort cases are distinguishable by the sheer force of their numbers and burdens. Thus, the four factors manifest themselves to a greater degree in mass tort cases than in other types of litigation. Therefore, while it may not be possible to provide rigid or formulistic distinctions between mass tort litigation and other varieties, as a practical matter, such cases will, for the most part, be easily recognizable.[36]

All of the four factors to which we have pointed give rise to significant difficulties in resolving mass torts under the processes of the traditional adjudicatory model, leading commentators to lament the crisis plaguing the judicial system.[37] The established mechanism costs far more for the parties to use and thus has the effect of diverting substantial sums of money from victims to the lawyers and the courts.[38] Even for those willing to bear these costs, the resultant delay on both recovery (for plaintiffs) and vindication (for defendants) imposes a great burden.[39] Plaintiffs and defendants must relitigate issues that have been

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[35] *See* DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS xxvii (1985) ("Transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available.").

[36] To the extent that other varieties of litigation may properly be deemed to reflect all of the same problems as mass tort cases, our suggested jurisdictional analysis could apply in much the same manner as it does in the mass tort area.

[37] *See* Feinberg, *supra* note 33 (discussing procedural problems with mass tort cases); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983) (arguing that complex litigation has caused "a very real crisis in modern jurisprudence."). *See generally* Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990) (discussing reform of federal court jurisdiction to encompass resolution of complex litigation).

[38] Feinberg, *supra* note 33, at 157.

[39] *Id.*

litigated and resolved numerous times before, and inconsistent results are the norm.[40] Duplicative litigation may also lead to "uncoordinated scrambles for the assets of a limited fund,"[41] forcing defendants to file for bankruptcy before all legitimate claims are paid.[42] Prior to a defendant's seeking the protection of the bankruptcy laws, plaintiffs are forced into the legal equivalent of a state of nature, characterized by no moral directive other than the precept, survival of the fittest. Under this system, plaintiffs who manage to bring their claims to fruition first may well exhaust the defendant's limited resources, thereby leaving later but equally deserving plaintiffs empty handed.

It has been suggested that the availability of a defendant's resort to bankruptcy adequately protects the interests of mass tort claimants in assuring that the defendant's assets are fairly distributed[43] and that the bankruptcy laws therefore effectively preempt the need for global resolution premised on this concern. In reality, however, the bankruptcy laws provide at best only partial protection to mass tort claimants for two reasons. First, and of primary importance, in most cases it is probable that, purely as a matter of bankruptcy law, a mass tort defendant will not be required to seek the protection of the bankruptcy laws until well after a large portion of its assets has been depleted.[44] Thus, although remaining tort claimants may share equally in the bankrupt's estate, that estate may well be considerably smaller than it would have been had a global judicial resolution

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[40] *See* HENSLER ET AL., *supra* note 35, at xxvii (discussing high transaction costs of mass tort litigation). The American tort system tolerates a fair degree of inconsistency across cases due to jury trials, private settlements, and variations in state tort law. However, the substantial variation of outcomes in mass torts — even in cases involving apparently identical facts and law — raises suspicion about the fairness of using the traditional adjudicatory system in this manner.

[41] Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 15 (1986).

[42] *See* COMPLEX LITIGATION, *supra* note 30, cmt. c, at 20 (discussing costs of duplicative litigation).

[43] Keene Corp. v. Fiorelli, 14 F.3d 726, 732 (2d Cir. 1993).

[44] Involuntary petition for bankruptcy may only be instituted by claimants against a corporation that would be considered a debtor under chapter 7 or chapter 11. Additionally, the claims must not be subject to a bona fide dispute. This requirement effectively nullifies the ability of tort claimants to bring involutary petitions unless the corporation chose not to contest the claim in court. *See* 11 U.S.C. § 303 (1988 & Supp. 1994).

proceeding taken place. Second, in a bankruptcy proceeding, non-judgment holding claimants will be forced to share the bankrupt's estate with all other unsecured creditors.[45] This model of individualized adjudication also damages defendants because they are able to achieve a unified disposition of claims against them only by filing bankruptcy.[46] In sum, the traditional individual adjudicatory model fails to provide speedy and inexpensive justice to the parties, and it prevents courts from efficiently disposing of cases.[47]

B. Global Resolution as a Potential Answer

In an ideal world, the judicial inefficiencies and burdens on litigants caused by mass tort litigation could be dramatically reduced by the global resolution of such claims — that is, the adjudication in a single proceeding of all present and future tort claims concerning a particular product or event. In such a situation, both defendant manufacturers and judicial systems across the nation could avoid the obvious financial and temporal drain caused by multiple individual litigations. At the same time, plaintiffs could be assured of a fair level of recovery in relation to their fellow plaintiffs.

The world of adjudication, however, is rarely ideal. For a number of reasons, *truly* global resolution — similar to a bill of peace[48] — is unlikely to be workable in the mass tort context. First, different plaintiffs are likely to have suffered different levels of damage: Some plaintiffs may have suffered death or disabling injury, while others may have suffered only slightly. Second, defendants may have stronger defenses on the issue of causation against certain plaintiffs than against others. For exam-

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[45] All secured creditors are given first priority in distribution of property that the debtor holds. *See* 11 U.S.C. § 725 (governing disposition of certain property). If any funds remain they will be split between non-judgment creditors on a pro rata basis. *See id.* § 726 (governing distribution of property of estate); Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Creditor System: Asbestos Times, the Worst of Times*, 35 STAN. L. REV. 1045 (1984).

[46] *See, e.g., In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991) (upholding bankruptcy jurisdiction).

[47] *See* 28 U.S.C. §§ 471-482 (outlining purposes of civil justice system).

[48] *Cf.* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 535 (1967) (stating that federal interpleader is generally not designed to serve as bill of peace in mass tort cases).

ple, certain cancer victims who had been exposed to asbestos may also have been heavy smokers, or some victims of asbestos exposure may have been exposed more to one manufacturer's product than to another's. Third, absent a uniform, federally imposed substantive standard, there is a significant likelihood that different state jurisdictions would impose differing substantive principles of products liability law. While there can be little doubt that Congress possesses the constitutional power to enact a preempting federal law of products liability, it has not done so, and there is little likelihood that it will do so in the foreseeable future.[49] Fourth, in most mass tort cases — except perhaps single mass disasters — the infliction of injury on individuals will occur at various points over a long period of time. It will therefore be difficult to select an appropriate point in time at which to conduct the single litigation. Fifth, to the extent issues of causation or culpability for punitive damages may differ for different defendants, the combined adjudication of claims against multiple defendants may be problematic. Finally, absent a method of legally compelling all plaintiffs to combine their claims in a single proceeding, the possibility of global resolution turns on the plaintiffs' willingness to do so — by no means a certainty.

Several suggestions have been made to circumvent these barriers to global resolution. One controversial technique designed to avoid the burdens caused by individualized adjudication is the use of statistical "sampling."[50] Under this methodology, several individual cases are selected as representative for purposes of causation and/or damages, and the results are then statistically extrapolated to apply to the remaining plaintiffs. As to the choice-of-law issue involved in such cases, it is at least conceivable that many of the conflicts will be false because the laws of

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[49] *See* Feinberg, *supra* note 33, at 169 (arguing that due to courts' trend to grant compensation, plaintiffs' bar opposes federal substantive tort reform in Congress).

[50] *See, e.g.*, Cimino v. Raymark Indus., 751 F. Supp. 649, 662 (E.D. Tex. 1990) (discussing use of statistical sampling in torts cases). *Compare* Michael J. Sacks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (arguing that sampling leads to more accurate damage awards and satisfies due process) *with* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 650 (1993) (justifying sampling under efficiency-based theory but noting potential inaccuracies and problems from rights-based theory).

most or all jurisdictions will prove to be quite similar. To the extent the governing laws do differ, it is possible that the different jurisdictions lend themselves to grouping into a limited number of coherent subclasses. Moreover, use of "futures" class actions, designed to protect the interests of those whose claims have not yet matured, is increasing.[51]

It is doubtful that anything approaching global resolution could be achieved under currently controlling legal standards in the federal courts, even if all of these problems could somehow be avoided. As presently structured, Rule 23 of the Federal Rules of Civil Procedure, concerning class actions, does not provide for mandatory class action treatment, which is relevant to most mass tort cases. While it has been argued that where a mass tort defendant's resources are limited, a mandatory "limited fund" class action[52] would be appropriate, at least some federal courts have not been receptive to such a theory.[53] Thus, the only conceivably available form of federal class action treatment in mass tort cases is the "common question" class action established in Rule 23(b)(3),[54] in which absent class members are given the right to opt out.[55] Because plaintiffs' lawyers in mass tort cases are unlikely to be willing to share their generous fees with other plaintiffs' lawyers, the possibility of a substantial number of opt-outs is enormous in mass tort class actions, rendering global resolution unattainable.

It is conceivable, however, that *state* governments might choose to provide mandatory class action treatment for mass tort cases. Indeed, it has been suggested that for a variety of reasons,

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[51] *See* Robert F. Schuwerk, *Future Class Actions*, 39 BAYLOR L. REV. 63 (1987) (discussing cases in which it is impossible to identify absent plaintiffs because relationship to defendant or injury has not yet arisen); *see also* Elizabeth R. Kaczynski, Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397 (1985) (arguing that inclusion of future class members inconsistent with explicit requirements and theory behind Rule 23).

[52] FED. R. CIV. P. 23(b)(1)(B). A "limited fund" class action describes a situation in which claimants are awaiting claims to a fund that is likely to be exhausted before all claims could be satisfied.

[53] *See, e.g.*, Keene Corp. v. Fiorelli, 14 F.3d 726 (2d Cir. 1993) (holding that no case or controversy was presented when defendant sought declaratory judgment imposing settlement between asbestos litigants).

[54] FED. R. CIV. P. 23(b)(3).

[55] FED. R. CIV. P. 23(c)(2).

"[s]tate courts are now highly desirable forums to consolidate tort cases from other states," and that "[b]arriers to aggregation of cases in state courts have fallen; the larger states and many smaller ones have made changes in rules and practice to handle cases of extreme complexity in an effective manner."[56] Thus, other than troubling issues of constitutional limitations on the assertion of personal jurisdiction,[57] the possibility of global resolution may not be totally out of the question.[58]

Even if truly global resolution were ultimately found to be infeasible, at least some of the practical advantages still could be achieved through use of "semi-global" or "defendant-specific" global resolution. Semi-global resolution refers to the resolution either of all issues for a large portion of claimants, or of many issues for all claimants. For example, a jurisdiction could conceivably be empowered to join in a single proceeding all claims of a particular variety or evincing a particular characteristic. Alternatively, a single jurisdiction might seek to resolve in a single proceeding several important overlapping issues affecting all claimants, such as questions of causation or state-of-the-art defense.[59] Defendant-specific global resolution, as the name implies, describes the resolution in a single proceeding of all claims, present and future, against only one of the mass tort defendants.

Neither of these two alternatives, however, is likely to fare considerably better under modern standards of personal jurisdiction than does true global resolution. In addition to providing only a limited number of forums in which defendants could be amenable to jurisdiction, both semi-global and defendant-specific

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[56] Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 218 (1994).

[57] *See infra* notes 129-33 and accompanying text (discussing personal jurisdiction and procedural due process).

[58] This Article does not address the question of whether mandatory class actions are inherently violative of due process. *Cf.* Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359, 1362 (1994) (stating that minimum due process requires that absent plaintiff has opportunity to opt out of class). However, forcing a potential plaintiff to litigate her claim at a time and in a forum not of her choosing is not an uncommon facet of modern procedure, as illustrated by the widespread use of the declaratory judgment device. *See* 28 U.S.C. § 2201 (Federal Declaratory Judgment Act).

[59] *Cf.* FED. R. CIV. P. 23(d) (authorizing courts to make orders prescribing measures to prevent undue repetition).

resolution would face the virtually overwhelming problem of obtaining jurisdiction over all injured plaintiffs.

We must concede at this point that not all commentators agree that something approaching global resolution in mass tort suits is a good idea, regardless of the jurisdictional problems to which such a procedure might give rise.[60] However, this is neither the time nor the place to explore those issues in merciless detail, because this is an article principally about the constitutional boundaries of personal jurisdiction. If one, at the outset, rejects the wisdom or viability of either true or semi-global resolution procedures, then one would find our constitutional analysis of jurisdiction in such cases to be of little interest. Our point, however, is that even those courts that, on balance, favor using a global resolution process[61] will likely face insurmountable difficulties in implementing it under current jurisdictional standards. It is therefore appropriate at this point to explore the content and origins of modern personal jurisdiction standards and to examine in detail their implications for the viability of some form of global resolution of mass tort claims.

II. GLOBAL RESOLUTION AND THE "PURPOSEFUL AVAILMENT" REQUIREMENT

A. The "Purposeful Availment" Barrier to the State Judicial Alternative

1. The Development of the "Purposeful Availment" Test

The evolution of the so-called "power" theory of jurisdiction, associated primarily with the Supreme Court's 1877 decision in *Pennoyer v. Neff*,[62] into the "minimum contacts" standard of *International Shoe* in 1945 has been well documented.[63] At the risk of oversimplification, it can be said that the theoretical and doc-

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[60] *See, e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action*, WALL ST. J., Sept. 7, 1994, at A15.

[61] The leading judicial advocate of global resolution is Judge Jack Weinstein, of the Eastern District of New York. *See, e.g.*, Keene Corp. v. Fiorelli, 839 F. Supp. 211 (E. & S.D.N.Y.), *vacated, complaint dismissed*, 14 F. 3d 726 (2d Cir. 1993).

[62] 95 U.S. 714 (1877).

[63] *See supra* note 2 and accompanying text (discussing change in doctrine that accompanied *International Shoe*).

trinal development during this period proceeded through three stages: (1) use of the power theory, a rigidly formalistic and positivistic approach derived entirely from principles of international law as described in the works of continental scholars;[64] (2) *implicit* recognition of the practical and moral inadequacy of that approach in allowing states to protect their citizens in light of the rapid development of transportation and communication mechanisms; (3) the consequential sub rosa modification of the power standard under the guise of adherence to it;[65] and (4) finally, in *International Shoe,* explicit rejection of the power theory in favor of the frank and open use of a balancing process. This balancing process weighs the legitimate interests of the state in providing a convenient forum to its citizens against the interests of the out-of-state defendant in avoiding litigation in a burdensome forum with which she possessed no real connection. This pragmatic calculus was given the title "minimum contacts."

One could debate how far the *International Shoe* Court actually strayed from the precepts of the power theory that it was supposedly rejecting. To be sure, the *International Shoe* Court purported to reject a purely mechanical or quantitative approach, premised solely on the volume of in-state business conducted, to the question of an out-of-state corporation's amenability to suit.[66] The quantitative standard that the Court was apparently rejecting had quite naturally evolved out of the power theory for the special problem of out-of-state corporations,[67] and *International Shoe* is perhaps best remembered for its dramatic departure from that theory. It is also true that the *International Shoe* Court spoke of its concern for considerations of "fair play and substantial justice,"[68] implying a shift in focus to more traditional considerations of procedural due process. However, the Court also spoke of jurisdictional considerations in terms of the "needs

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[64] The "power" theory of jurisdiction postulated that a state has total jurisdictional power over everyone and everything within its borders, and absolutely no jurisdictional authority over anyone or anything beyond its borders. Harris v. Balk, 198 U.S. 215 (1905); Pennoyer v. Neff, 95 U.S. 714 (1877).

[65] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927).

[66] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

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

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

of the federal system,"[69] and, in its application of its newly fashioned criteria, appeared to revert to the purely quantitative standards of the past.[70] More importantly, the *International Shoe* Court noted that no state could assert jurisdiction over an out-of-state party with whom it lacked ties, contacts, or relations, even in cases in which the defendant would suffer no procedural inconvenience as a result of the assertion of jurisdiction.[71]

It was in its decision five years later in *Mullane v. Central Hanover Bank & Trust Co.*[72] that the Court came closest to actually applying a real due process analysis to the issue of personal jurisdiction. The case concerned the State of New York's assertion of jurisdiction over out-of-state beneficiaries to a common trust fund organized under the laws of New York. The state authorized the creation of such funds in response to the increasing costs of administering trust funds, a fact that made the handling of small- and moderate-sized trust funds uneconomical.[73] By combining numerous smaller accounts together into one fund, such trusts could operate with considerably greater levels of efficiency. The New York law called for an accounting within twelve to fifteen months after the establishment of a common fund, and every three years thereafter.[74] All claims existing at the time against the common trustee had to be raised in that proceeding or be extinguished.

The case actually presented two different due process questions. In fact, Justice Jackson's opinion for the Court is far better remembered for its thoughtful and creative discussion of the due process requirements for providing notice to absent beneficiaries[75] than for its analysis of the power of the state to bind out-of-state beneficiaries to the results of its accounting. But

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[69] *Id.* at 310.

[70] "[T]he activities carried on in behalf of appellant in the State of Washington were neither irregular, nor casual. They were systematic and continuous throughout the years in question." *Id.* at 320.

[71] *Id.* at 319.

[72] 339 U.S. 306 (1950).

[73] *Id.* at 307-08.

[74] *Id.* at 309.

[75] *See id.* at 314 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.").

while Justice Jackson asserted that the question of notice was "[q]uite different" from the issue of state power to assert jurisdiction,[76] his analysis of both issues reflected the hard-nosed, commonsense pragmatism traditionally associated with the procedural due process inquiry.

In analyzing the power question, Justice Jackson rejected the arguments of both the common trustee and the beneficiaries. The common trustee argued that the case should be viewed as an adjudication in rem because of the presence of the fund, thereby rendering unnecessary the existence of state power to assert jurisdiction over the person of any out-of-state beneficiary. The beneficiaries argued that any claims they might have against the common trustee were personal claims and that jurisdiction over their persons was absent in New York. Justice Jackson rejected the abstract formalism associated with the power theory. Instead, he favored an approach that focused on the practical implications of refusing to find jurisdiction in the New York courts:

> It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[77]

Justice Jackson then proceeded to explore the due process requirements of notice, ultimately adopting a highly flexible, commonsense type of standard that assured defendants individual notice where (and only where) it was feasible to provide it.[78]

Though the opinion did not expressly rely on the concept, *Mullane*'s conclusion that the State of New York could assert jurisdiction over the absent beneficiaries could have been justified on a principle of "jurisdiction by necessity."[79] After all, if New York could not provide a forum to resolve outstanding

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[76] *Id.* at 313.

[77] *Id.*

[78] *See supra* note 75.

[79] In a subsequent decision, the Court characterized *Mullane* as a "jurisdiction by necessity" case. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 419 (1984).

claims against the trustee, surely no other state could have; it was New York that had far and away the most significant contacts with those claims.

It is true that, as a theoretical matter, even absent resolution in a single proceeding the beneficiaries' claims against the common trustee could have been litigated separately, possibly in other forums. As a practical matter, however, it is difficult to imagine that the common trust concept could survive, absent an effective mechanism allowing the common trustee to extinguish all preexisting potential claims. Thus, denial of the state's power to bind the out-of-state beneficiaries would have been tantamount to destruction of the entire concept. Of course, in terms of its disastrous effect on society, destruction of New York's common trust fund procedure could hardly be equated with the sinking of the *Titanic*, the impact of global warming, or the Detroit Pistons's back-to-back world championships. Hence, one can view *Mullane* as a case of jurisdiction by necessity only if one is willing to define the concept of "necessity" broadly to include consequences that could be legitimately characterized as causing "significant social harm," rather than as something approaching the end of the Republic as we know it.

In the years immediately following *Mullane*, it was suggested that the Court might be moving toward a theory of "forum conveniens" in which it would apply a jurisdictional test analogous to the "center-of-gravity" approach that on occasion has been utilized to resolve choice-of-law issues.[80] Under this standard, a state could assert jurisdiction over out-of-state parties if it represented the forum with the strongest connection to that controversy. In *Mullane*, New York quite clearly filled this role: no other forum possessed as much contact with the common trust fund as did New York. Hence, if New York were unable to resolve all common trust fund claims, surely no other state could.

If this is the analysis that *Mullane* had in fact intended to adopt, however, the principle's life in Supreme Court doctrine

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[80] Under a "center of gravity" approach, the state which, on balance, had the greatest contacts with and interest in the litigation could assert jurisdiction. *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

was short-lived. In *Hanson v. Denckla*,[81] decided some eight years after *Mullane*, the Court made abundantly clear that it was categorically rejecting use of a forum conveniens analysis of jurisdiction. Instead, the Court in *Hanson* established a rule that posited as an "essential" element of jurisdiction the requirement that "there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[82]

The purposeful availment prerequisite of jurisdiction was more firmly established as the essence of the Court's constitutional test in its decision twenty-two years later in *World-Wide Volkswagen Corp. v. Woodson*.[83] In *World-Wide*, the Court faced the issue of whether a state court in Oklahoma could, consistent with due process, "exercise in personam jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendant's only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma."[84] In resolving that issue, the Court gave precious little attention to the extent of Oklahoma's possible interest in providing either governing substantive legal principles or a forum for the adjudication of claims arising out of a serious accident that had occurred within its borders. Nor did the Court give much attention to an assessment of a balance of convenience between plaintiff and defendants, or to the extent to which defendants could reasonably have foreseen the possibility of suit in a distant forum.[85] Instead, the Court focused exclusively on the fact that defendants had "avail[ed] themselves of none of the privileges and benefits of Oklahoma law."[86]

The Court therefore found Oklahoma's assertion of jurisdiction over the two out-of-state defendants who challenged jurisdiction to be unconstitutional. Under the test of *World-Wide*, unless a defendant has purposely availed itself of the benefits and privileges of the forum state, the assertion of jurisdiction violates due

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[81] 357 U.S. 235 (1958).
[82] *Id.* at 253.
[83] 444 U.S. 286 (1980).
[84] *Id.* at 287.
[85] *Id.* at 292, 294-97.
[86] *Id.* at 295.

process, despite the simultaneous presence of a strong state interest in the assertion of jurisdiction and absence of any meaningful procedural inconvenience to the defendant. Purposeful availment, then, became a necessary condition for the constitutional assertion of jurisdiction over out-of-state citizens.

The *World-Wide* Court rationalized its elevation of the purposeful availment factor by arguing that the minimum contacts test of *International Shoe* "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[87] In the Court's words:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[88]

Although one may seriously question whether federalism considerations should have any relevance to a litigant's due process right to fair procedures,[89] in subsequent decisions the Court has wavered over whether or not, as a practical matter, purposeful availment constitutes a sufficient condition, as well as a necessary condition, for the constitutional assertion of jurisdiction.[90] Such a conclusion, of course, would logically imply that considerations of true procedural fairness would have been entirely excluded from the due process analysis of jurisdiction — an Orwellian result, to say the least, in light of the text and history of the constitutional provision the Court purports to invoke.[91] Puzzlingly, in a decision a mere two years after *World-*

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[87] *Id.* at 292.

[88] *Id.* at 294 (citation omitted).

[89] *See generally* Redish, *supra* note 3, at 1114 (questioning federalism's relevance to due process).

[90] *Compare* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (stating that courts can generally resolve procedural fairness through subconstitutional means) *with* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) (finding fairness factors relevant to constitutional analysis of jurisdiction, at least when alien corporation involved).

[91] *See* Redish, *supra* note 3, at 1120-33 (discussing federalism's historic irrelevance to due process).

Wide, the Court openly disavowed any normative basis for the constitutional limit on jurisdiction other than individual liberty.[92] Though both decisions were authored by Justice White, at no point did the later decision either acknowledge the former decision's unambiguous departure from the theoretical model underlying *World-Wide*'s purposeful availment test or (more importantly) even consider the possibility that *World-Wide*'s doctrinal standard should be altered in light of the apparent rejection of that standard's underlying theoretical structure.

To suggest that the prospects for nationwide consolidation of mass tort suits into a single proceeding are less than promising under a purposeful availment standard of jurisdiction would surely be an understatement. Clearly, under this test a defendant cannot be required to defend itself in a particular forum in which it has not purposely availed itself of the state's benefits and privileges. Equally unlikely, however, — and considerably more devastating as a practical matter — is the probable need to force mass tort plaintiffs to join together in a forum to which they have not consciously chosen to connect themselves. In the next section, we examine the implications of the purposeful availment standard for the required joinder of similarly situated mass tort plaintiffs into a single forum, concluding that such a consolidation is inconceivable. In the section that follows that examination, however, we explain both why purposeful availment should play a considerably altered and reduced role in the due process analysis of jurisdiction in general, and, in any event, why it should play no role in most multistate consolidations of mass tort suits. We then proceed to examine the constitutional viability of a congressionally enacted nationwide service-of-process statute in mass tort cases.

2. The Impact of "Purposeful Availment" on the State Judicial Alternative

Under the Supreme Court's current jurisdictional doctrine, it is all but inconceivable that a single state judicial forum could provide a realistic opportunity for either global or semi-global

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[92] Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

resolution of mass tort litigation. Pursuant to the Court's decision in *World-Wide Volkswagen,* it is clear that before a state may constitutionally assert jurisdiction over a defendant, that defendant must have purposely availed itself of the privileges and benefits of that forum.[93] To be sure, some doctrinal confusion continues, both as to exactly what behavior will qualify for this label[94] and as to whether or not meeting this standard constitutes a *sufficient,* as well as a *necessary* condition for a forum's assertion of jurisdiction.[95] Nonetheless, under current law it is reasonably clear that demonstration of a defendant's purposeful availment constitutes a prerequisite to a constitutionally sound assertion of jurisdiction.[96]

Meeting this standard for mass tort defendants is unlikely to be difficult for at least certain state forums. While a defendant's contacts with a state must be more substantial and continuous to justify the assertion of *general* jurisdiction on matters unrelated to the defendant's in-state activities,[97] it is likely that at least some states will meet this standard for a corporate manufacturer, and at the very least a defendant's state of incorporation remains a potential forum. Considerably more problematic, however, is the likelihood that a single forum will possess sufficient contact with all or even most of the potential mass tort plaintiffs. Moreover, it is clear, under the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts,*[98] that a state must have minimum contacts with out-of-state plaintiffs whose rights it wishes to bind against their will.[99] Thus, since as a practical

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[93] *See supra* notes 83-88 and accompanying text (discussing *World-Wide Volkswagen*).

[94] *See, e.g., Asahi,* 480 U.S. at 102, 108-113 (discussing stream of commerce).

[95] *See supra* note 90 and accompanying text (discussing inconsistent rulings on jurisdictional matters).

[96] *See supra* text accompanying note 93 (stating that purposeful availment is prerequisite to state's jurisdiction). A possible — if unexplained — aberration from the purposeful availment requirement appeared in Calder v. Jones, 465 U.S. 783 (1985). In *Calder* the Court subjected two newspaper writers to jurisdiction in California in a defamation case without initially finding purposeful availment. *Id.* at 791. While the exact contours of this aberration from the purposeful availment requirement have never been described, it is clear that *Calder* did not signal a dramatic shift away from purposeful availment, at least where intentional torts are not involved.

[97] *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (describing sufficient contacts as continuous and systematic).

[98] 472 U.S. 797 (1985).

[99] *Id.* at 821-22. The *Phillips* Court indicated, however, that use of such interstate class

matter it will be rare that all or even most potential mass tort plaintiffs will qualify for the assertion of any one state's jurisdiction under the purposeful availment standard, assertion of global or even semi-global resolution jurisdiction in a single state judicial forum is not likely under current doctrine.

B. The Possibility of a Federal Judicial Opportunity for Global Resolution

1. Multidistrict Transfer Under § 1407

The extent to which the existing jurisdictional barriers to a state court's global or semi-global resolution of mass torts would be reduced by resort to the federal courts is not entirely clear. Congress has provided for the possibility of multidistrict transfer and consolidation into a single federal forum of existing federal suits nationwide.[100] In its present version, however, the statute authorizes such consolidation solely for purposes of the coordination of pretrial activities. If trial is ultimately to be held, each transferred case is returned to its original forum. Although proposals are currently being made to expand the scope of that consolidation,[101] it is interesting to note that even in its current version, § 1407 appears to provide to the transferee forum authority to make dispositive pretrial rulings when appropriate.[102] As already discussed,[103] however, even global resolution could not properly be expected to resolve, in the course of a single proceeding, fact-specific issues inherent in individual suits. It is therefore possible that coordinated, single forum resolution — perhaps by means of summary judgment[104] — of legal disputes that pervade the entire set of related litigations could go far towards avoiding the multiforum duplication of judicial effort

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actions was constitutionally permissible as long as class members were provided the opportunity to opt out of the class. *Id.* at 812. The Court effectively equated a class member's failure to opt out with the manifestation of consent to the forum's assertion of jurisdiction. *Id.*

[100] 28 U.S.C. § 1407(a).

[101] *See infra* notes 107-10 and accompanying text (describing American Law Institute and congressional proposals to broaden federal consolidation powers).

[102] 28 U.S.C. § 1407(e).

[103] *See supra* notes 48-49 and accompanying text (discussing practical difficulties with global resolution efforts).

[104] FED. R. CIV. P. 56.

that often characterizes modern mass tort litigation. Because much of the duplication of effort derives from individualized jury resolution of mixed law/fact questions, however, the current version of § 1407 can provide only a partial solution to the problem.

Even a legislatively expanded version of § 1407 could not effectively achieve many of the goals of global resolution because the statute applies solely to cases that are presently in federal court. It therefore can have no effect on the myriad of cases filed by mass tort plaintiffs in state court that cannot be removed to federal court by the defendants, either because they had been joined with in-state defendants (thereby destroying the complete diversity currently required in federal court)[105] or because they are themselves in-state defendants and are therefore statutorily denied the availability of removal.[106]

Proposals for expansion of federal judicial power to consolidate mass tort cases have come from both the American Law Institute (ALI) and Congress. The ALI has proposed use of a judicial panel to consolidate various forms of complex litigation, including mass tort cases.[107] The proposal includes expanded removal power to bring additional state cases into the federal courts.[108] The proposal authorizes combined trials in magnet districts, even where the cases could not all have been filed originally.[109] The House Judiciary Committee of the 101st Congress also proposed a plan to expand federal judicial authority over single-incident mass accident cases.[110]

2. Use of Diversity Jurisdiction to Achieve Global Resolution

On a number of occasions, Judge Jack Weinstein of the Eastern District of New York has attempted to utilize the federal courts' diversity jurisdiction to provide at least semi-global or

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[105] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[106] 28 U.S.C. § 1441(b).

[107] COMPLEX LITIGATION, *supra* note 30, §§ 5.01-5.03 (1994).

[108] *Id.* § 5.01, cmt. a.

[109] *Id.* § 3.06(c).

[110] Multiparty, Multiforum Jurisdiction Act of 1990, H.R. REP. NO. 515, 101st Cong., 2d Sess. 1 (1990); *see* Weber, *supra* note 55, at 222.

defendant-specific global resolution.[111] While the Second Circuit has generally been less than receptive to such a practice,[112] that court has never reached the issue of personal jurisdiction in such cases.[113]

A recent example of Judge Weinstein's effort occurred in connection with the DES litigation, where a number of pharmaceutical companies across the country were sued for the alleged side effects of the drug DES. Because DES was a generic drug, plaintiffs usually were unable to prove which brand of DES had caused their injury. This, along with the possible existence of a conspiracy among these manufacturers, led some states to adopt a market-share approach to liability for tort suits against DES manufacturers. However, since these companies had divided the national market for DES and limited their distribution to certain geographic areas, some defendants claimed that they were not subject to jurisdiction in states outside their distribution area.

In *Ashley v. Abbot Laboratories*,[114] Judge Weinstein held that the inquiry used for determining the validity of an assertion of jurisdiction against a mass tort defendant differed from the traditional personal jurisdiction analysis. After tracing the historical roots of due process restraints on personal jurisdiction and noting the irrelevance of *Pennoyer*'s sovereignty inquiry for traditional due process concerns,[115] Judge Weinstein proposed a due process analysis that examined whether (1) the forum state has an appreciable interest in the case and, if so, (2) whether forcing the defendant to mount a defense in that forum will cause it relatively substantial hardship.[116] The extent of hardship would be determined by looking at the defendant's assets, its interaction in interstate commerce, any indemnity relationship it may have, and the comparative harms both plaintiff and defendant will have to bear if forced to litigate elsewhere.[117] The court then held that a DES manufacturer who had no terri-

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[111] Keene Corp. v. Fiorelli, 839 F.Supp. 211 (E. & S.D.N.Y. 1993).

[112] Keene Corp. v. Fiorelli, 14 F.3d 776 (2d Cir. 1993).

[113] The actual grounds on which the Court of Appeals overturned Judge Weinstein's global resolution class action are beyond the scope of this Article.

[114] 789 F.Supp. 552, 587-89 (E.D.N.Y. 1992), *appeal dismissed*, 7 F.3d 20 (2d Cir. 1993).

[115] *Id.* at 577-79.

[116] *Id.* at 587.

[117] *Id.*

torial nexus with New York could still be subject to jurisdiction there because (1) the state had an interest in providing full recovery to its injured citizens[118] and (2) the defendant did not demonstrate that any burden would result from having to defend there.

Judge Weinstein in *Ashley* correctly observed that sovereignty concerns are largely irrelevant when determining whether due process has been provided to a litigant, and he implemented a more appropriate analysis for determining the propriety of personal jurisdiction. *Ashley* identified most of the relevant factors that due process should consider — albeit in a somewhat different fashion than our proposal.[119] And while Judge Weinstein noted that federalism currently plays some role in personal jurisdiction, he recognized that sovereignty and federalism should have no place in the law of due process, and he noted that they might well be removed in a more "radical" solution.[120]

The personal jurisdictional implications of the various federal judicial methods of attempting to provide at least semi-global resolution of mass torts are by no means necessarily identical to the constitutional problems faced by the state judicial counterpart.[121] The source of this possible difference in the scope of the constitutional constraints is the theoretical rationale underlying the purposeful availment limitation on personal jurisdiction. Both in its initial formulation in *Hanson v. Denckla*[122] and its subsequent elaboration in *World-Wide Volkswagen*,[123] the purposeful availment limitation was expressly derived from notions of interstate sovereignty, which the Court chose to incorporate into the Due Process Clause. The theoretical rationale of the require-

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[118] Because New York had adopted several liability for DES defendants according to their market share, the failure to obtain jurisdiction over any producer of DES could substantially reduce any recovery sought by DES plaintiffs. *Id.* at 572. Such a result would clearly conflict with New York's policy favoring full recovery. *Id.*

[119] *Compare Ashley*, 789 F. Supp. at 587 (presenting Judge Weinstein's due process analysis) *with* text accompanying *infra* notes 136-46 (outlining revised due process analysis based on *Mathews* and *Doehr* decisions).

[120] *Ashley*, 789 F. Supp. at 587.

[121] *See infra* notes 122-28 and accompanying text (discussing constitutional problems of federal global resolution efforts).

[122] 357 U.S. 235, 253 (1958).

[123] *See supra* notes 83-88 and accompanying text (discussing purposeful availment in *World-Wide Volkswagen*).

ment, then, can trace its origins to the political theory first espoused in *Pennoyer v. Neff*[124] — a political theory that expressly drew on the attempts of continental theorists of international law to fashion a workable system for governing the relations of different national sovereign powers.[125] Resort to such a structure can and should be criticized as a historically, textually, and conceptually invalid construction of the Fourteenth Amendment's Due Process Clause.[126] However, for present purposes of current doctrinal description, it is appropriate to state only that the existence of these theoretical origins may well give rise to very different jurisdictional implications for the two alternative means of providing some form of global mass tort resolution.

When Congress acts, as it did in the passage of § 1407, the federal government is of course asserting its sovereign powers. All citizens of the nation owe allegiance to that sovereign, and all citizens have, quite obviously, purposely availed themselves of the benefits and privileges afforded by that sovereign. Hence, because it is a logical outgrowth of an exclusive normative focus on concerns of sovereign power, the purposeful availment requirement is of course satisfied by an assertion by the United States of jurisdiction over its citizens, anywhere within the nation's borders.

Thus, while reliance on the purposeful availment requirement will undoubtedly preclude *state* judicial global resolution of mass tort claims, that same test may well facilitate legislative efforts to provide for the availability of the *federal* courts for global resolution. It is largely by use of this reasoning — indeed, *only* by use of this reasoning — that the nationwide service of process provided for in the Federal Interpleader Act[127] may be upheld. However, it is established as a matter of current law that such nationwide service of process applies only when Congress specifically so provides.[128] It would therefore require additional con-

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[124] 95 U.S. 714, 722 (1877).

[125] *See* Redish, *supra* note 3, at 1115-16 (describing Justice Field's use of international public law in *Pennoyer*).

[126] *Id.* at 1114.

[127] 28 U.S.C. § 1335.

[128] *See* FED. R. CIV. P. 4(k) (stating that service is effective, *inter alia*, if authorized by federal interpleader or other statutes).

gressional action to circumvent the jurisdictional problems currently affecting the assertion of state court jurisdiction. However, before we accept the conclusion that Congress could constitutionally provide for nationwide service of process in the federal adjudication of mass tort claims — and thus enable the federal courts to assert mandatory jurisdiction over all potential plaintiffs — it is advisable to reconsider the role of purposeful availment in jurisdictional theory. It is our position that such a reexamination reveals that the concept's role should be dramatically redefined and significantly reduced.

III. REDEFINING JURISDICTIONAL DUE PROCESS THEORY

A. Personal Jurisdiction, Purposeful Availment, and Procedural Due Process

The Supreme Court has traditionally paid almost ritualistic homage to the constitutional grounding of its jurisdictional doctrine in the Fourteenth Amendment's Due Process Clause. Not once, however, has the Court even attempted to explain its jurisdictional standards in terms of the traditional concerns of procedural due process.[129] Instead, the Court has developed its jurisdictional jurisprudence in a universe that is wholly distinct from the line of cases in which it has shaped the constitutional law of fair procedure.

Such a departure gives rise to serious problems of constitutional theory. The period in American constitutional jurisprudence when an unrepresentative Supreme Court could, without substantial resistance, invalidate state laws simply because of nothing more than simple normative disagreement[130] has long since passed. Yet, unless the Court is able to ground its invalidations of state judicial jurisdiction in the text, history, or policy underlying specific constitutional provisions, the Court's actions effectively amount to just such judicial usurpations of democrati-

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[129] The Court's analysis in *World-Wide* amounted to an unexplained non sequitur. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 294 (1980) ("*[T]he Due Process Clause, acting as an instrument of interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment.") (emphasis added) (citing Hanson v. Denckla, 357 U.S. 235, 254 (1958)).

[130] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

cally based power. Concerns of interstate federalism upon which the purposeful availment requirement has traditionally been premised[131] simply have no textual, historical, or theoretical connection to the Due Process Clause. Rather, the normative concept embodied in that clause represents an important element in the social contract between citizen and government.

Nor can the rationale of the purposeful availment requirement be refashioned to bring it within the Due Process Clause's traditional focus on procedural fairness. The mere fact that a litigant lacks prelitigation contacts with the forum does not automatically imply that that litigant will be unable to obtain a fair hearing. Moreover, as long as the body of substantive law which is applied to the case is one which the litigant could reasonably be expected to apply, no unfair surprise could result. Finally, properly construed, no provision of the Constitution other than the Due Process Clause may provide a grounding for the purposeful availment requirement.[132]

In sum, if the only basis on which the Supreme Court may properly invalidate a state's assertion of judicial jurisdiction is a finding that such assertion violates a provision of the Constitution, and the only provision that could conceivably be violated by such an assertion of judicial jurisdiction is the Fourteenth Amendment's Due Process Clause, then the only normative grounding for such an invalidation is a finding of the existence of procedural unfairness. The mere absence of purposeful availment by the litigants does not automatically imply the existence of such procedural unfairness. On the other hand, the mere presence of purposeful availment, in and of itself, does not necessarily imply a lack of overriding procedural unfairness. A finding of purposeful availment, then, should be neither necessary nor sufficient for concluding that the requirements of procedural due process have been met. Rather, it is merely one factor to consider when determining whether an assertion of jurisdiction would give rise to unfair surprise or meaningful procedural inconvenience.

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[131] *See supra* notes 87-89 and accompanying text (discussing federalism concerns justifying purposeful availment).

[132] *See generally* Redish, *supra* note 3.

Current Supreme Court doctrine's reliance on purposeful availment as a central element in its due process analysis, then, is constitutionally improper. Moreover, the Court has compounded the problem by employing the purposeful availment factor with a vengeance. Under existing doctrine, not only is purposeful availment one factor to be entered into the balance, but it actually serves as a prerequisite to the state's assertion of judicial jurisdiction. Thus, under current doctrinal standards, regardless of both the state's interest in providing a forum and the burdens caused to the other litigants by being forced to litigate in an alternative forum, a state may not assert jurisdiction over a litigant unless that litigant has purposely availed itself of the benefits and privileges of the forum state. Such a rigid analytical model is diametrically opposed to the flexible, common sense analysis traditionally associated with the procedural due process inquiry.[133] It is therefore time to refocus jurisdictional standards in order to reflect personal jurisdiction's proper constitutional grounding in the concept of procedural due process.

B. Restructuring Personal Jurisdiction Analysis as an Aspect of Procedural Due Process Theory

Procedural due process has traditionally focused on the need for fair procedures in determining whether a person's life, liberty, or property are to be taken away.[134] If no procedural unfairness results to a litigant, there can be no deprivation of procedural due process. If personal jurisdiction doctrine were properly refocused to reflect its legitimate constitutional grounding in principles of procedural due process, the first question a court should ask is whether the litigant over whom jurisdiction has been asserted will suffer meaningful procedural unfairness as a result. Unless the litigant will encounter significant procedural burdens because of the location of the forum, the state's assertion of jurisdiction does not violate due process.

At most, whether the litigant has purposely availed itself of the benefits and privileges of the state's laws or whether it had

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[133] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); *infra* notes 134-42 and accompanying text.

[134] *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 100 (1908) (stating that due process is equivalent to Magna Carta's "law of the land").

any previous contact with the forum would merely be considered evidence as to the existence of such burdens. The mere assertion of jurisdiction, in and of itself, does not cause such procedural unfairness, because a litigant has no right to immunity from suit. Presumably, if a defendant could not be sued in one forum, it would be subject to suit in another forum. Thus, absent some additional procedural unfairness caused by the geography of the forum, a defendant is in no worse a position because of the suit in question than if he had been sued in a forum to which he had voluntarily connected himself.

The mere fact that a litigant will suffer meaningful procedural inconvenience, however, will not necessarily imply that due process has been denied. In such an event, the reviewing court would be called upon to engage in the traditionally employed multifactor pragmatic due process analysis. In this sense, use of the traditional procedural due process analysis would differ dramatically from the rigidity of the purposeful availment analysis currently in use.[135]

The modern pragmatic approach to procedural due process received its primary exposition in the Supreme Court's decision in *Mathews v. Eldridge*.[136] The Court in *Mathews* first articulated what is now the well-known set of factors to be considered when deciding what procedures are due to one being deprived of life, liberty, or property:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[137]

By balancing these three factors, the Court has been able to determine which procedures are required by the Due Process Clause (and when they must be given) for the termination of a

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[135] *See supra* notes 82-90 and accompanying text (describing current personal jurisdiction analysis).

[136] 424 U.S. 319 (1976).

[137] *Id.* at 335.

state employee,[138] the suspension of a student from a public school,[139] and the voluntary commitment of an individual in a psychiatric hospital.[140] Rather than deriving simply from historical notions of procedure[141] or the extent of state power, procedural due process has been construed as a flexible concept, in contrast to the rigid constraints that have been incorporated into the constitutional limitations on the assertion of personal jurisdiction.[142]

To apply the Due Process Clause correctly to issues of personal jurisdiction, a forum's assertion of jurisdiction should be analyzed according to a balancing test, similar to the one outlined in *Mathews.* A possible difference between the two situations, however, is that in the classic *Mathews* situation, the government is pitted against a private party in an attempt to vindicate or enforce a preexisting governmental regulation. In the context of personal jurisdiction, on the other hand, the adversary proceeding generally pits one private litigant against another. In *Connecticut v. Doehr,*[143] the Supreme Court described the proper factors to consider when only private parties are involved in a potential deprivation of life, liberty, or property. *Doehr* concerned the issue of what procedures a state must provide before allowing a private pre-judgment seizure of property in a civil case. The Court defined the factors to be considered as: (1) the plaintiff's/defendant's interests at risk if a particular trial procedure is used, (2) the risk that an erroneous deprivation will

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[138] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572-79 (1972).

[139] Goss v. Lopez, 419 U.S. 565, 577-84 (1975).

[140] Zinermon v. Burch, 494 U.S. 113, 127-39 (1990).

[141] There admittedly have been aberrations, where the Court has focused its procedural due process analysis exclusively on historical practice. Justice Scalia's plurality opinion in Burnham v. Superior Court, 495 U.S. 604, 610-16 (1990), is the most recent example. However, as far back as 1908 the Court rejected use of a rigid historical analysis to the question of what procedures constitute due process. Twining v. New Jersey, 211 U.S. 78, 101 (1908); *see also* Redish & Marshall, *supra* note 20, at 469-70. In any event, as a jurisdiction case *Burnham* is not necessarily relevant to other aspects of procedural due process. For an attack on Justice Scalia's reasoning in *Burnham*, see Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675 (1990).

[142] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'"[d]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances'") (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

[143] 501 U.S. 1 (1991).

occur by using that procedure, (3) the value to accuracy of additional safeguards, (4) the interest of the party seeking the use of the trial procedure, and (5) any ancillary fiscal or administrative interests of the state.[144]

At first glance, it may appear that the assertion of personal jurisdiction, at least in the context of private litigation, fits under the *Doehr* model, rather than the *Mathews* framework. At least in the context of mass tort litigation, however, the state's interest in avoiding the systemic costs and burdens of multiple litigation is of such significant and pressing importance that it renders the state an interested party in the due process calculation. Moreover, perhaps uniquely in this context, a state seeking to provide a single forum for global mass tort resolution should be allowed to stand as a surrogate for other states that would serve as forums for multiple mass tort litigation absent the conduct of the global resolution in the forum state. In this sense, the forum state's relationship to other potential forums is similar to that held by a named class action plaintiff in relation to absent class members. Just as the named plaintiff may justify the use of a class action procedure on the grounds that absent class members would be prejudiced without the use of a class action,[145] so, too, should the forum state be allowed to assert the interests of other states in allowing a global resolution proceeding. While this analysis may seem unorthodox, so are the multistate systemic problems caused by mass tort litigation. Unless the forum state may assert the interests of potential forum states in avoiding burdensome mass tort litigations, there would exist no means by which this obviously important interest could ever be taken into account. Hence, in defining "state interest" for purposes of the *Mathews* due process analysis, the interests of *all* potential forum states should be examined.

If an assertion of personal jurisdiction in a global, semi-global or global/defendant-specific proceeding were to be evaluated according to a *Mathews* balancing test, the factors to be considered would be (1) the extent of the burden and inconvenience — to plaintiffs or defendants — that might accompany an asser-

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[144] *See id.* at 11 (defining relevant inquiry derived from *Mathews*).

[145] *See* FED. R. CIV. P. 23(b)(1)(B) (allowing class action where its lack would impair absent parties' abilities to protect their interests).

tion of personal jurisdiction, (2) the possibility that such inconvenience will occur because of the assertion of jurisdiction in the instant case, (3) the probable value of possible additional safeguards against inconvenience, (4) the interest of the party seeking to assert personal jurisdiction, and (5) the governmental interest in avoiding the systemic burdens that would result absent the global proceeding.[146]

The *Mathews* balancing test has been criticized for unduly truncating the proper values that underlie procedural due process. These values have generally been grouped into two categories: instrumental values and non-instrumental values.[147] It has been suggested that *Mathews* focused solely on the instrumental values, at the expense of the non-instrumental concerns.[148] Simply put, instrumental values focus on the importance of achieving accuracy in decisionmaking.[149] Any judicial system that strives to administer justice must maintain a minimum level of accuracy in its decisions. Such a requirement not only raises the adjudicatory mechanism from a game of chance to an actual means of seeking the truth, but also supports the legitimacy of such a system in the eyes of the litigants. Thus, due process does not permit the wholesale abandonment of procedures that are necessary to achieve an accurate result, such as the use of a neutral adjudicator[150] or parties' ability to introduce evidence before that adjudicator.

Non-instrumental values, on the other hand, are concerned with the legitimization of the adjudicatory system in the eyes of

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[146] *See* Redish, *supra* note 3, at 1133-39 (discussing new due process analysis); *cf.* 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, 55 (1986) (proposing four-factor test for determining when class actions need not provide opt-out). The third factor, governmental interest, should not be confused with a state's interest in having its own law apply to a particular controversy. Such an interest should be taken into account in a court's choice of law analysis and is regulated by the Full Faith and Credit Clause of the Constitution.

[147] *See* Sacks & Blanck, *supra* note 50, at 826-32 (reviewing instrumental and non-instrumental procedural values).

[148] *See* Redish & Marshall, *supra* note 20, at 472, 476 (stating that *Mathews* test looks to instrumental values and ignores others).

[149] *See id.* at 476 (stating that instrumental due process seeks most accurate decision possible); *see also* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13 (1979) (noting that primary value of Due Process Clause is "to minimize the risk of erroneous decisions").

[150] *See* Redish & Marshall, *supra* note 20, at 476-77 (stating that independent adjudicator is necessary for instrumental due process).

the participants and the furtherance of dignitarian values generally associated with precepts of liberal democracy, namely that each individual possesses the inherent right to have a say in decisions about her own life, liberty, and property. Non-instrumental values include the appearance of fairness, equality, rationality of decisionmaking, participation by the litigants in the proceedings, revelation of the decision and how it was reached, and respect for the dignity of the litigants.[151] Although non-instrumental values are not primarily concerned with producing greater accuracy in decisionmaking, they may nevertheless have a positive effect on the ability of a decisionmaker to reach the correct result.[152] For example, while participation of the parties is considered a key element of due process because of our belief in individual autonomy, participation by the interested parties is also believed to produce a more accurate result.[153] In a sense, procedures such as this satisfy both instrumental and non-instrumental values.

The *Mathews* test, as it has been applied by the courts, takes into account solely the instrumental value of accuracy, ignoring purely non-instrumental values.[154] This is because the test considers "interests" to be only those relating to the accuracy of the decision, and not the legitimate interests of the litigants and the system in *how* any particular decision is reached.[155] For example, in *Mathews* the Court rejected the argument by a Social Security disability applicant that he should be entitled to an oral hearing before termination of his benefits, because it found that such a procedure would not contribute to the accuracy of a decision concerning the fate of his benefits. Rather, because the evidence needed to make such a decision would be primarily written in nature (for example, medical records), the Court found no benefit to accuracy from allowing oral testimony.[156]

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[151] *See id.* at 482-91 (discussing non-instrumental values).

[152] *Id.* at 482.

[153] *Id.* at 487.

[154] *See* Redish & Marshall, *supra* note 20, at 472 (noting that *Mathews* completely disregards non-instrumental interests of individuals or society).

[155] *Cf.* Jerry J. Phillips, *A Comment on Mass Torts and Litigation Disasters*, 20 GA. L. REV. 455, 456 (1986) ("A litigant unwillingly forced into a depersonalized system of dispute resolution is not made any less dissatisfied simply by being told that the system is better for him or for court efficiency.").

[156] Mathews v. Eldridge, 424 U.S. 319, 343-45 (1976).

A strong argument could be fashioned that the *Mathews* analysis unduly narrows the proper measure of the interests of private litigants to be weighed in the balance. A refocused procedural due process approach could properly consider both dignitary and accuracy interests as legitimate factors in the due process balancing analysis.[157] Without changing the manner in which the test is articulated, but merely by considering as relevant those values which have always been a part of due process, a refocused due process analysis can be fashioned. This modified *Mathews* test would simply amend the test's first category[158] by expanding the concept of litigants' interests to include interests other than merely the desire for accuracy. Those procedures required by the application of this test, as well as those necessary to achieve the key instrumental and non-instrumental values, are the ones protected by the Due Process Clause against government intrusion.

Either modified or in its narrower utilitarian form, the *Mathews* balancing analysis may be applied to test the constitutionality of a state's assertion of personal jurisdiction without any greater difficulty than that encountered in the test's traditional applications. Under this analysis, the absence of a defendant's pre-litigation contacts with the forum state, in and of itself, is not dispositive, because such an absence does not necessarily imply the existence of procedural unfairness to the defendant during the course of the litigation. To be sure, the defendant would prefer not to be sued at all, but the mere fact that one state is denied power to provide a forum for the suit does not mean that no forum exists for the suit. Hence, absent a showing of procedural unfairness flowing from the geographical relationship of forum and litigant, a forum's assertion of jurisdiction over an out-of-state defendant should not be deemed to violate procedural due process protections. Even if such procedural unfairness were found to exist in a particular case, however, the due process inquiry would not end. Under the *Mathews* frame-

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[157] When dignitary and accuracy interests conflict the primary consideration must be accuracy. *See* Bone, *supra* note 50, at 637. Yet, because non-instrumental values generally lead to more accurate decisions over the long run, a direct conflict between these two sets of values will not usually occur. Rather, it is only in the context of complex litigation that instrumental values appear to conflict with dignitary values.

[158] *See supra* notes 136-37 and accompanying text (describing *Mathews* test).

work, the court would then need to balance the harm caused by this procedural inconvenience against the interests of both the other litigants in having suit in the forum and of the state in providing that forum.[159]

The focus of our analysis, it should be recalled, is on the balancing test's application to the specific context of attempted global resolution of mass tort litigation. It is therefore to an examination of that question that we now turn.

IV. THE IMPACT OF THE REDEFINED JURISDICTIONAL DUE PROCESS STANDARD ON THE FEASIBILITY OF GLOBAL RESOLUTION OF MASS TORT CLAIMS

A. State Court Jurisdiction

Assume a case in which a mass tort plaintiff seeks to invoke the jurisdiction of the courts of State A over an in-state defendant manufacturer, and either plaintiff or defendant seeks to transform the case into a defendant-specific global resolution. Assume further that (1) State A has adopted procedures providing for such treatment, (2) no constitutional problems other than personal jurisdiction exist, and (3) numerous absent plaintiff class members are from out of state, having had no prior contact with State A. In such a situation, current jurisdictional doctrine — derived from *Phillips Petroleum Co. v. Shutts*[160] — would dictate that absent out-of-state class members have the constitutional right to opt out, because such class members lack minimum contacts with State A and can therefore be subjected to the jurisdiction of its courts only through their consent. Such a requirement would effectively undermine the goal of global resolution, because numerous mass tort plaintiffs, under the influence of their attorneys, would undoubtedly choose to opt out.

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[159] Balancing the harm caused by procedural inconvenience against the interests of the other litigants in having suit in the forum and of the state in providing that forum is similar to the approach employed in the pre-*World-Wide* decision in McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[160] 472 U.S. 797, 806-14 (1985).

Under the revised jurisdictional analysis advocated here,[161] the constitutional inquiry would mirror the standards established for procedural due process in *Mathews*.[162] Thus, in ruling on the constitutionality of State A's assertion of jurisdiction over out-of-state plaintiff class members, a court would examine (1) the effect on the private interests of both plaintiffs and defendant of the assertion of jurisdiction; (2) the risk of erroneous deprivation of the litigants' interests as a result of the assertion of jurisdiction; and (3) the government's interest in the assertion of jurisdiction, "including . . . the fiscal and administrative burdens that the [inability of the state to assert jurisdiction] would entail."[163]

One should be careful in characterizing the interests of the out-of-state class members who wish to opt out of the global resolution process. The desire of those litigants (or, in reality, more likely their attorneys) to totally control their own litigations[164] is not, in and of itself, a cognizable interest for purposes of the jurisdictional due process analysis. To the extent that interest is relevant at all, it is in the making of the state's decision whether or not to provide for a mandatory global resolution mechanism in the first place, and that determination is itself jurisdictionally neutral. In other words, the concern of absent litigants in controlling their own litigations would be just as relevant, *even if all of those litigants are in-state residents.*

By deciding to provide for a global resolution procedure, the state in question has concluded that the compelling need to avoid the burdens of multiple mass tort litigation justify the deprivation of the litigants to assert total control over the conduct of their litigations. If the state does not reach this policy conclusion, or if such a choice were deemed to violate due process because it deprived litigants of such total control,[165]

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[161] *See supra* notes 146-59 and accompanying text (describing utilitarian and modified *Mathews* analyses).

[162] *See supra* notes 136-37 and accompanying text (describing *Mathews* standards).

[163] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[164] In the normal mandatory class action, absent litigants have the option of intervening as active participants in the case. Thus, they are not totally denied influence in the conduct of their cases. It is quite possible that the intervention option could be deemed required by due process.

[165] *But see supra* note 58.

the jurisdictional issue would never arise in the first place. And, as previously noted, that question turns not at all on whether the absent class members are in-state or out-of-state residents. Thus, one reaches the jurisdictional issue *only after one has successfully resolved the concern over absent class members' loss of control.* There is, then, no reason to reconsider that concern once one does reach the jurisdictional question. Once the decision to provide some form of global resolution has been made, this concern is rendered irrelevant because it has been outweighed by the benefits to be derived from global resolution. To underscore the point, it should be noted that the exact same concern could be expressed by *in-state* plaintiff class members: they, too, might wish to control their own litigations. Yet surely, that concern does not deprive the forum state of jurisdiction over its own citizens. Thus, the concern over individual litigation control is not jurisdiction-specific.

One must be careful also in characterizing the opt-out plaintiffs' interests that are, in fact, jurisdiction-specific. Under a pragmatic calculus due process model of jurisdictional analysis, it should be recalled, the only legitimate fairness concerns of the litigants are the procedural burdens and difficulties in conducting litigation caused by the geographical disparity between the forum state and the location of the plaintiffs, their witnesses, or their evidence.[166] Pre-litigation contact with the forum (or lack of it) is, in and of itself, irrelevant.[167] Thus, unless absent class members exercise their option to intervene in the active conduct of the litigation, constitutional concerns about subjecting them to jurisdiction logically become irrelevant. As purely absent class members, mass tort plaintiffs would presumably have their interests fully protected by the representative parties. Indeed, such protection is assured by the Due Process Clause itself.[168] It is, then, solely the procedural fairness interests of those active-

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[166] *See supra* notes 133-35 and accompanying text (describing elements in procedural due process theory).

[167] *See supra* notes 133-35 and accompanying text (describing elements in procedural due process theory).

[168] *See* Hansberry v. Lee, 311 U.S. 32, 43-44 (1940) (holding that absent members receive due process protection where present members are legally entitled to represent them).

ly conducting the litigation that are triggered by the procedural due process analysis.

If, under these standards, no meaningful procedural inconvenience, in terms of the costs and burdens of producing evidence and witnesses, is caused to those plaintiffs who are actually conducting the litigation, there remains no need to pursue the due process balancing process any further. The parties who are challenging the assertion of jurisdiction on due process grounds will have failed to demonstrate even a prima facie case of a due process violation. Where meaningful procedural inconvenience to the representative or intervening parties is demonstrated, the remaining elements of the balancing analysis come into play. At that point, the court would be called upon to consider the interests of both the defendant and the judicial system in obtaining global resolution.

As to the first factor, it can be forcefully argued that the mass tort defendant has a legitimate, if not compelling, interest in achieving global resolution. The costs and burdens of nationwide multiple litigation would be severe; they would financially and physically drain the company and reduce the fund ultimately available to compensate plaintiffs. The plaintiffs who do not wish to opt out also have a legitimate interest in achieving global resolution, because, absent such a procedure, they are relegated to a Darwinistic state of nature in which only the fittest survive. Plaintiffs who are unable to bring their claims against the defendant manufacturer to judgment in time to have access to the defendant's resources are relegated to no or little recovery, while plaintiffs who are closer to the front of the line may well be fully compensated. As in Thomas Hobbes' state of nature, a plaintiff's life in this situation will quite probably be nasty, brutish, and short.[169]

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[169] One might respond that the federal bankruptcy laws provide adequate protection against such unfair allocation of a defendant's resources among deserving claimants. As previously noted, however, the bankruptcy laws are substantially less than perfect as a means of avoiding the harms of an unfair allocation among deserving claimants. A mass tort defendant may not be required to file for bankruptcy until numerous plaintiff claimants have already been fully compensated. This is so because a defendant's assets may well exceed its liabilities, even though numerous judgments already have been satisfied. Moreover, not all mass tort defendants will be anxious to file for bankruptcy at the earliest possible moment, because plaintiff attorneys may well be given positions of authority in a reorganized company.

Where plaintiffs can demonstrate meaningful procedural inconvenience as a result of the forced litigation of their claims in the forum, it would be appropriate for the court to consider factors which have often been either suggested or employed in post-*International Shoe* jurisdictional analysis[170] but which, for the most part, have been ignored under current Supreme Court doctrine.[171] There is nothing inappropriate about incorporating these more traditional modes of jurisdictional analysis into a standard procedural due process approach. Indeed, they reflect the kind of pragmatic weighing of interests that has long characterized such an approach.[172]

It would be appropriate in such a case for the court to consider whether, under the totality of the circumstances, there exists another viable forum for the conduct of the global resolution process that would, on balance, either provide a more convenient opportunity for litigation or possess a noticeably stronger interest in the case. In this sense, the court would be undertaking an analysis that effectively synthesizes the jurisdiction-by-necessity approach often associated with *Mullane*[173] and the forum conveniens inquiry firmly rejected in *Hanson*.[174] The court would be determining both whether another forum had a stronger connection to the suit and whether it provided a more fair adjudicatory locus. If the answers to those inquiries are no, the court could reasonably conclude that the jurisdiction-by-necessity doctrine justifies the assertion of some level of procedural inconvenience because — as in the case of New York's common trust fund in *Mullane*[175] — if the forum in question cannot provide coherent resolution, no other forum could, either.

Of course, it might be responded that even if absolutely no forum were in a position to provide global resolution, the only

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[170] *See generally* Redish, *supra* note 3, at 1133-39 (discussing new due process analysis).

[171] *See supra* notes 85-86 and accompanying text (discussing narrowly focused analysis on *World-Wide Volkswagen*).

[172] *See supra* notes 141-42 and accompanying text (discussing flexibility of standard due process approach).

[173] *See supra* notes 72-79 and accompanying text (discussing *Mullane*).

[174] *See supra* notes 81-82 and accompanying text (discussing *Hanson*).

[175] *See supra* notes 79-80 and accompanying text (discussing forum non conveniens analysis).

consequence would be a return to the multistate, individualized litigation of mass tort claims. But it is important to recall that in *Mullane*, if New York had not been in a position to provide a common trust procedure, that result would hardly have signaled a true national disaster.[176] It would simply have meant that trusts would have had to invest their assets individually, as they had been for years. Yet this negative consequence was nevertheless sufficient for Justice Jackson in *Mullane* to conclude that New York was authorized to assert jurisdiction in order to avoid it. Similarly, the well documented harms that flow from the multistate adjudication of individualized mass tort claims[177] could well be deemed a sufficient basis on which to invoke a jurisdiction-by-necessity exception for a global resolution proceeding.

B. Federal Court Jurisdiction

Absent further congressional action, it is questionable whether one would ever need to reach the constitutional issues that surround the assertion of jurisdiction in a mass tort global resolution proceeding, because it is, at the very least, uncertain whether such a procedure is available under current federal standards. While factors of subject matter jurisdiction are not likely to bar use of such a procedure,[178] it is debatable whether, as currently structured, Rule 23 of the Federal Rules of Civil Procedure authorizes it. Were Rule 23 construed to authorize a mandatory global resolution class action, under existing standards the jurisdictional reach of the federal courts would be, for the most part, coterminous with that of the state courts.[179]

Were Congress to seek to provide a special federal mechanism for global resolution combined with a provision for nationwide

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[176] *See supra* notes 72-74 and accompanying text (discussing New York trust law in *Mullane*).

[177] *See supra* notes 48-49 and accompanying text (discussing difficulties with global resolution efforts).

[178] In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 531 (1967), the Court held that the complete diversity requirement, originally imposed in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1807), did not derive from Article III of the Constitution. Therefore if Congress so desires, it can authorize federal jurisdiction in cases of minimal diversity, as it has in the Federal Interpleader Statute, 28 U.S.C. § 1335.

[179] Fed. R. Civ. P. 4(k)(1)(A).

service of process,[180] a distinct constitutional inquiry would be required. Under a sovereignty-based purposeful availment analysis,[181] presumably such a federal statute would be found constitutional: every citizen has purposely availed herself of the benefits and privileges of the nation. However, under a revised jurisdictional analysis that is designed to reflect jurisdictional limitations' proper role as an element of procedural due process,[182] a purposeful availment analysis would have dramatically reduced relevance. Instead, the analysis would focus primarily on the level of procedural inconvenience suffered by parties forced to litigate in the forum. Pursuant to such an approach, it would matter not at all whether the government seeking to provide that forum was federal or state.

CONCLUSION

We make no claim that acceptance of our proposed jurisdictional analysis would necessarily lead to widespread use of global or even semi-global resolution proceedings in mass tort litigation. Even absent the personal jurisdictional barrier, serious constitutional issues and questions of subject matter jurisdiction would remain. Attempts to answer those questions are left for another day. The fact remains, however, that unless the jurisdictional structure adopted in *Phillips Petroleum Corp. v. Shutts*[183] for class actions is substantially modified, one cannot realistically even hope (at least short of enactment of a controversial federal statutory mechanism providing for nationwide service of process) to resolve the mass tort litigation crisis through resort to the global judicial resolution process.

To be sure, the pragmatic concern over the need for the fair and efficient adjudication of multistate mass tort cases is not, in and of itself, a sufficient basis on which to abandon an otherwise valid and principled mode of constitutional analysis. But as we have shown,[184] the Supreme Court's approach to determin-

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[180] *Cf.* 28 U.S.C. § 1335 (Interpleader Statute).

[181] *See supra* notes 125-27 and accompanying text (discussing sovereignty analysis).

[182] *See supra* notes 134-35 and accompanying text (discussing proper role of jurisdictional limitations in due process analysis).

[183] 472 U.S. 797 (1985).

[184] *See supra* notes 121-25 and accompanying text (discussing current approach).

ing the constitutional limitations on the assertion of personal jurisdiction in actuality represents a perversion of traditional procedural due process analysis. Moreover, the Due Process Clause constitutes the sole legitimate textual source for the constitutional invalidation of a state's assertion of personal jurisdiction.[185] Recognition of this important insight would return jurisdictional analysis to the proper road on which the Supreme Court began in *International Shoe* and *Mullane.*[186] The fact that it would simultaneously facilitate a state's efforts to achieve some form of mass tort global resolution is simply an immediate practical outgrowth of this theoretical correction.

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[185] *See supra* note 132 and accompanying text.

[186] *See supra* notes 63-80 and accompanying text (discussing transition from *International Shoe* to *Mullane*).