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Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test

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INTRODUCTION

The mainstream concerning state assertions of personal jurisdiction is a rather muddy current, there being little agreement regarding when personal jurisdiction can be asserted over non-residents. All jurisdictions agree that the "minimum contacts" test of International Shoe Co. v. Washington1 governs assertions of personal jurisdiction,2 but it is far from clear exactly what

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1 326 U.S. 310 (1945), in which the Court wrote: [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

2 For example, according to the Fifth Circuit, questions of personal jurisdiction are easily assessed against, "the well-established framework for assessing whether an exercise of long-arm jurisdiction would offend traditional notions of fair play and substantial justice embodied in the due process clause of the fourteenth amendment". Stuart v. Spademan, 772 F.2d 1185, 1189 (5th Cir. 1985) (emphasis added). The Spademan court failed to find personal jurisdiction over a non-resident defendant in a contract dispute, despite the fact that: partial performance was to be in the forum state, the
elements of the "minimum contacts" analysis are dispositive in a particular case. The four most recent Burger Court personal

contract was partly negotiated and/or made in the forum state, defendant had extensively communicated with plaintiff in the forum state, choice of law contract provisions indicated forum law might be applied to the litigation, and defendant had partially exploited the forum market. \textit{Id.} at 1192-96. The \textit{Spademan} decision has been relied upon extensively in a more recent Fifth Circuit Texas decision. See Colwell Realty Inv., Inc. \textit{v.} Triple T Inns of Ariz., Inc., 785 F.2d 1330 (5th Cir. 1986) (contacts between defendant as general partner of Arizona limited partnership and state of Texas insufficient for court to exercise personal jurisdiction).

Other Fifth Circuit decisions, however, have upheld jurisdiction on fairly minimal forum contacts. See, e.g., \textit{Vault Corp. v. Quaid Software, Ltd.}, 775 F.2d 638 (5th Cir. 1985) (.3% defendant software sales to Louisiana, no advertising specifically directed to Louisiana, no witnesses in Louisiana, suit involving trade practices of two foreign corporations—\textit{Held:} jurisdiction valid); \textit{Bean Dredging Corp. v. Dredge Tech. Corp.}, 744 F.2d 1081 (5th Cir. 1984) (two castings which indirectly found their way into construction project in Louisiana sufficient to validate jurisdiction for products liability suit). Perhaps the difference in the type litigation involved is sufficient to explain the divergent \textit{Spademan} and \textit{Vault Corp.} holdings. In a related context, however, the Fifth Circuit has more frankly acknowledged that "our opinions on the issue of personal jurisdiction in federal question cases, 'like a Tower of Babel . . . spoke in irreconciliable voices,' " \textit{Point Landing, Inc. v. Omni Capital Int'l}, 795 F.2d 415 (5th Cir. 1986), \textit{cert. granted sub nom.} \textit{Omni Capital Int'l v. Rudolf Wolff & Co.}, 107 S. Ct. 946 (1987) (quoting \textit{DeMelo v. Toche Marine, Inc.}, 711 F.2d 1260, 1268 (5th Cir. 1983)). \textit{Point Landing} illustrates the division within the Fifth Circuit regarding personal jurisdiction, since in this en banc decision, six of the fifteen justices dissented on the issue of how minimum contacts should be determined for an alien corporation in a federal question case.


jurisdiction concerns nearly identical; complicated formula provided for when jurisdiction appropriate; Drobak, The Federalism Theme in Personal Jurisdiction, 68 Iowa L. Rev. 1015 (1983) (state sovereignty concerns should be deemphasized); Hay, Judicial Jurisdiction Over Foreign-Country Corporate Defendants—Comments on Recent Case Law, 63 Or. L. Rev. 431 (1984) (whether alien defendant contacts should aggregate within the nation or only within forum state; whether jurisdiction by necessity is a possibility when alien defendants are involved); Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241 (minimum contacts made workable by particularization in special areas, and adding notice provisions; Pennoyer analysis should be completely abandoned); Hill, Choice of Law and Jurisdiction in the Supreme Court, 81 Colum. L. Rev. 960 (1981) (same level and type contacts constitutionally required for assertions of personal jurisdiction as for choice of law); Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Dnckla: A Review, 25 U. Chi. L. Rev. 569 (1958) (various factors must be weighed on case by case basis); Lewis, The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts, 33 Mercer L. Rev. 769 (1982) (state sovereignty concerns irrelevant to personal jurisdiction; impacts on choice of law; fairness to defendant is key); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85 (1983) (more flexible minimum contacts test needed, fairness to defendant more important than federalism; choice of law standard should be applied to personal jurisdiction; aggregation of nationwide contacts permissible if alien corporations involved); McDougal, Judicial Jurisdiction: From a Contacts to an Interest Analysis, 35 Vand. L. Rev. 1 (1982) (party convenience should be primary consideration); Posnak, A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory, 30 Emory L.J. 729 (1981) (transient presence jurisdiction should be abolished; two tier approach of contacts and determination of reasonableness advocated; first tier should not inquire into defendant's subjective intent); Redish, Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation, 75 Nw. U.L. Rev. 1112 (1981) (federalism concerns should not influence personal jurisdiction decisions; party convenience should be determinative factor); Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775 (1955) (focus upon divorce jurisdiction; extent of constitutional limits on state's ability to regulate conduct outside its boundaries; internal effect of decrees that exceed jurisdiction); Silverman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33 (1978) (whether lower level of contacts needed for quasi in rem jurisdiction; why plaintiff convenience should play a role in jurisdiction; interrelation of jurisdiction with choice of laws); Traynor, Is This Conflict Really Necessary? 37 Tex. L. Rev. 657 (1958) (non-mechanical rules needed for both personal jurisdiction and choice of laws; emphasis on legitimate state interests); von Mehren, Adjudicatory Jurisdiction: General Theories Compared and Evaluated, 63 B.U.L. Rev. 279 (1983) (acceptable jurisdictional bases for fairness vs. power theory of jurisdiction; interrelation with choice of laws); von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966) (importance of specific vs. general jurisdiction; interrelation between personal jurisdiction and choice of laws, plaintiff convenience); Weintraub, Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change, 63 Or. L. Rev. 485 (1984) (contacts abandoned in favor of sole standard of fairness to defendant); Woods, Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson, 20 Ariz. L. Rev. 861 (1978) (three part test of contacts,
been interpreted non-uniformly by commentators\textsuperscript{5} and lower courts.\textsuperscript{6} The first Rehnquist Court personal jurisdiction decision\textsuperscript{7}

\begin{quote}
convenience, and purposeful beneficial availment).

The United States Supreme Court has cited with seeming approval portions of the articles by Brilmayer, Hazard, Lilly, Traynor, and von Mehren and Trautman. See Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn. 8 & 9, 417 (1984); 433 U.S. at 199, 205.


\textsuperscript{5} See, e.g., Knudsen, Keeton, Calder, Helicopteros and Burger King—International Shoe's Most Recent Progeny, 39 U. MIAMI L. REV. 809 (1985) (cases portend increased balancing of plaintiffs' and defendants' interests, but leave much distressing old theory and language intact); Stephens, The Single Contract as Minimum Contacts: Justice Brennan "Has it His Way," 28 WM. & MARY L. REV. 89 (1986) (Burger King portends disappearance of two stage test and increased reliance on plaintiff interests); Note, Consistency in the Due Process Requirement?: Keeton v. Hustler Magazine and Calder v. Jones, 18 CREIGHTON L. REV. 125 (1984) (cases implement Shaffer test becoming sole method for determining fairness of jurisdiction); Note, Jurisdiction in Single Contract Cases: Burger King Sets the Standard, 69 MARQ. L. REV. 645 (1986) (Burger King decision clarifies that physical contact not necessary and more than single contract necessary, but Burger King test too rigid as applied and leaves too many questions unanswered); Note, Burger King Corp. v. Rudzewicz: Flexibility v. Predictability in In Personam Jurisdiction, 64 N.C. L. REV. 881 (1986) (contradictions inherent in Court's flexible standard will lead to inconsistent and unpredictable results); Note, Quest For a Bright Line Personal Jurisdiction Rule in Contract Disputes—Burger King Corp. v. Rudzewicz, 61 WASH. L. REV. 703 (1986) (decisions indicate willingness to adopt more predictable rules; author proposes rules felt consistent with Court's direction).

\textsuperscript{6} Post-Burger King Federal Courts of Appeals do not agree on how or whether the most recent U.S. Supreme Court decisions add anything new to personal jurisdiction analysis. See, e.g., Colwell Realty Investments v. Triple T Inns, 785 F.2d 1330 (5th Cir. 1986) (Burger King affirms old law; purposeful availment emphasized; See also supra note 2); Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986) (Calder and Burger King mark significant change; purposeful directing more important than purposeful availing; burden of proof re: reasonableness can shift to defendant); Chung v. NANA Dev. Corp., 783 F.2d 1124 (4th Cir. 1986) (majority: applying two stage test for reasonableness, contacts at stage one insufficient; dissent: majority misapplies general jurisdiction test to this specific jurisdiction case, stage one satisfied, defendant cannot overcome shifted burden of proof at stage two); Dalmau Rodriguez v. Hughes Aircraft Co., 781 F.2d 9 (1st Cir. 1986) (systematic and continuous contacts required for any assertion of jurisdiction); Amusement Equip., Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985) (transient presence jurisdiction upheld; see also infra notes 16-20 and accompanying text); Vault Corp. v. Quaid Software, Ltd., 775 F.2d 638 (5th Cir. 1985) (Keeton authorizes jurisdiction over corporation even if forum activities are small percentage of national sales); Henry Heide, Inc. v. WRH Products Co., 766 F.2d 105 (3rd Cir. 1985) (purposeful direction of contract activities into forum triggers specific
produced three plurality opinions which leave in doubt important issues regarding personal jurisdiction over manufacturers in product liability suits.\textsuperscript{8} To clarify the confusion, this Comment...

\textsuperscript{8} Asahi Metal Indus. v. Superior Court, 107 S. Ct. 1026 (1987).

\textsuperscript{9} Although all nine Justices agreed personal jurisdiction should be denied on the particular facts before the Court, the three opinions split over whether the stage one minimum contacts hurdle was cleared. Justice O'Connor, speaking for four Justices, ruled that minimum contacts did not exist; Justice Brennan, for four Justices, argued that the stage one minimum contacts hurdle had been cleared, but that the stage two fairness hurdle had not. Justice Stevens, for three Justices, asserted that the minimum contacts test was inapplicable, but that he would probably have found purposeful availment such as to fulfill the minimum contacts test had the issue been necessary to his decision. Since the particular suit in \textit{Asahi} was for indemnity rather than products liability, and since Justice Stevens' opinion was narrowly qualified, the \textit{Asahi} decision leaves unclear how future products liability suits should be decided. For a more detailed analysis of the \textit{Asahi} decision, emphasizing how a proper appreciation for the interrelatedness of choice of law and personal jurisdiction could have produced a less ambiguous decision, see Cox, \textit{The Interrelatedness of Personal Jurisdiction and Choice of Law:...
first analyzes these decisions and concludes that the Court is fashioning a two-stage test for personal jurisdiction that has different requirements and burdens of proof at each stage.

Because the Court's updated analysis in reality is only a more full realization of the implications of the "minimum contacts" test adopted over forty years ago, this Comment also urges courts and commentators to carry the logical implications of "minimum contacts" jurisdiction yet further and apply tests based solely on contacts. A theoretical framework is provided for discarding baggage accumulated under any theory other than "minimum contacts." The first piece of jurisdictional baggage specifically discarded under the framework is state long-arm statutes, since these statutes are not needed for assertions of personal jurisdiction, deflect from inquiry into the true bases of jurisdiction, and are sometimes unconstitutional. This Comment concludes by briefly identifying other areas where modification would be needed if thorough-going minimum contacts analysis were applied.

I. CURRENT STATUS OF THE "MINIMUM CONTACTS" TEST

A. Full Pennoyer Power vs. Limited International Shoe Interest

The International Shoe Co. v. Washington\(^9\) adoption of the "minimum contacts" test of personal jurisdiction was a complete abandonment\(^10\) of Pennoyer v. Neff's\(^11\) jurisdictional frame-
work. As *Shaffer v. Heitner* later proclaimed: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." The Court had waited thirty years to use *International Shoe*’s "minimum contacts" test to invalidate quasi-in-rem jurisdiction in *Shaffer*, and several more years may pass before the Court explicitly invalidates transient presence jurisdiction. Nevertheless, “minimum contacts” logic re-

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12 The *International Shoe* Court possibly did not realize the full sweep of its "minimum contacts" substitution. In the quotation that gave birth to the "minimum contacts" test, the Court left intact certain elements of territorial jurisdiction by including the qualifying phrase "if he be not present within the territory of the forum." 326 U.S. at 316 (emphasis added). The Court also did not distinguish clearly between specific versus general jurisdiction. See 326 U.S. at 318-20. Ehrenzweig mistakenly appeared to believe a decade after *Shoe* that the analysis was limited to corporations. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 311-312 (1956). Thus, a court or commentator may champion a new theory without realizing all the implications of abandoning one theory for another. The implications were more fully realized by later Courts, e.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) ("minimum contacts" applies to general jurisdiction) and *Shaffer* ("minimum contacts" applies to quasi-in-rem jurisdiction). This Comment argues that there are still more implications to be realized.

13 *Id.* at 212 (emphasis added). If any doubt remained that the *Shaffer* discussion and analysis would be applied outside the quasi-in-rem and corporate areas, this disappeared when the *Shaffer* test of "the relationship among the defendant, the forum, and the litigation," id. at 204, was immediately picked up by the Court and applied to other contexts. E.g., Rush v. Savchuk, 444 U.S. 320, 327 (1980). See also infra note 44 (examples from recent Court decisions). The *Shaffer* language has been used in lower courts as the appropriate specific jurisdiction test. See, e.g., Wallace v. Herron, 778 F.2d 391, 393 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986); Patterson v. Dietze, Inc., 764 F.2d 1145, 1146 (5th Cir. 1985); Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1196 n.4 (7th Cir. 1985).

14 Quasi-in-rem is here used to refer to that type of jurisdiction where the property which . . . serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff’s cause of action. Thus, although the presence of the defendant’s property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State’s jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

15 *Id.* at 209.

16 Transient presence jurisdiction is "[t]he dogma that . . . has it that in personam jurisdiction of an individual defendant can be acquired by mere physical service of process, even in a forum where neither plaintiff nor defendant resides and which has no connection with the cause of action." Ehrenzweig, *supra* note 12, at 289. One of the
quires that such "random," "fortuitous" or "attenuated" contacts not confer jurisdiction. Both pure quasi-in-rem and transient presence jurisdiction are holdovers from the discredited territorial sovereignty mentality that gave rise to the Pennoyer holding. That it took until 1977 for the former to be rejected, and that the latter still has not been condemned universally,

most famous cases validating transient presence jurisdiction is Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant served with process while flying over Arkansas airspace). In that case, as in most transient presence cases, the defendant had other contacts with the forum that was attempting to assert jurisdiction over him. Thus, discarding a theory of transient presence jurisdiction does not necessarily mean lack of jurisdiction in particular cases, only a lack of confusion as to why there is jurisdiction. As stated in Shaffer: "It appears, therefore, that jurisdiction over many types of actions which now are or might be brought in rem would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the International Shoe standard." 433 U.S. at 208. See also von Mehren & Trautman, supra note 3, at 1138. Because an improper theory can lead to results usually not inconsistent with application of the proper theory, the improper theory is allowed to live beyond its useful life.


19 E.g., Shaffer: "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." 433 U.S. at 212.

20 Recent casebooks continue to include transient presence jurisdiction as a possi-
shows that not all courts and commentators have discarded the Pennoyer framework.\textsuperscript{21}

Under the territorial framework, all assertions of personal jurisdiction were essentially plenary.\textsuperscript{22} With the defendant or his proxy validly before it, a court was free to adjudicate all the defendant's rights regarding any controversy with the plaintiff.\textsuperscript{23} A state's power over persons and property within its territorial borders was believed self-evident, and therefore no statute was required for jurisdiction.\textsuperscript{24} The only constitutional limit upon a
state's power was its duty to provide the defendant with notice. For one state to reach into a neighboring state, however, was impermissible intrusion upon the power and sovereignty of a sister state, whose authority over all persons and property within its borders was considered absolute.

"Minimum contacts" jurisdiction proceeds on a completely different basis. Jurisdictional authority is based upon the "contacts, ties or relations" a defendant has established with the adjudicating state. Such contacts may involve the defendant's prior literal presence in a state, but such literal presence is not required. As Justice Rehnquist noted in Calder v. Jones:

[A] valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.

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25 Courts originally presumed that notice must be physically delivered within the state to validate jurisdiction. See, e.g., Travelers Health Assn. v. Virginia, 339 U.S. 643, 659 (1950) (service within territorial boundary "indispensable") (Minton, J., dissenting); 95 U.S. at 722 (constructive service upon non-resident "ineffectual"). Courts later recognized that notice could be constructively served upon a non-resident defendant. See, e.g., Hess v. Pawloski, 274 U.S. 352 (1927) (service of process delivered to state-appointed agent within the state who mails notice to out-of-state defendant). Today notice is constitutionally required to apprise the defendant of the pendency of the suit rather than to physically acquire the jurisdiction via the serving of process. See, e.g., Wuchter v. Pizutti, 276 U.S. 13 (1928) (state statutory scheme must ensure reasonable notice of suit); Mullan v. Central Hannover Bank & Tr., 339 U.S. 306, 314 (1950) ("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 objections"); National Equip. Rental v. Szukhent, 375 U.S. 311 (1964) (Wuchter requirements can be waived or modified by private contract).

26 95 U.S. at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").

27 326 U.S. at 319.


29 Id. at 787. The defendants in this case were sued as natural persons rather than in their capacities as employees of the newspaper corporation. Thus, the Court in Calder specifically endorsed application of the "effects" test of the RESTATEMENT (SECOND) OF CONFlict OF LAWS § 37 (1971) to assertions of jurisdiction over private as well as commercial actors. Id. at 787 n.6. This question had been left open in Kulko v. California Superior Court, 436 U.S. 84, 96 (1978). Under current "minimum contacts" analysis it is not so much where the actor was or what type actor he was when he created contacts, ties or relations to/with the forum, but that he is "a defendant who purposefully has
Raw territorial power plays no part in present-day "minimum contacts" analysis. Instead, the forum state determines if the defendant's forum contacts make it "reasonably foreseeable" that he be "haled into court" there. The jurisdiction where a defendant currently resides has neither exclusive nor unlimited power over his person. To reach therein to make him accountable for injuries he has caused elsewhere is therefore no intrusion. Whereas jurisdiction under a territorial rationale was almost always plenary, "minimum contacts" jurisdiction is almost always limited. The court asks whether a defendant's forum "contacts, ties or relations" make it fair to institute this particular suit against him within this particular forum. The importance of this distinction is evidenced in the Court's discussion of specific versus general jurisdiction.

Most of the recent Supreme Court decisions discuss specific versus general jurisdiction. Perhaps the clearest and most direct

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directed his activities at forum residents." 471 U.S. at 477. The Burger King Court thus reinterpreted the "purposeful availment" requirement of Hanson v. Denckla, 357 U.S. 235, 253 (1958), putting emphasis on the purposeful part of the phrase and de-emphasizing whether the defendant gained any direct substantial benefit from his conduct. 471 U.S. at 474-76. This constitutes a potentially significant change from International Shoe's original justification for jurisdiction, that of activities creating benefits and protection which might also give rise to obligations. 326 U.S. at 319. The "benefit" part of the International Shoe and Hanson analysis ultimately might be seen as an unnecessary emphasis, in light of Burger King's new emphasis on purposeful direction, and given the groundwork laid in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) and in Calder. Benefit analysis might still be important, but only at a stage two level of evaluating reasonableness to the defendant. See infra notes 76-85 and accompanying text. Only a few lower courts have picked up on this potentially significant shift from purposeful benefit to purposeful direction. See, e.g., Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986); Chung v. NANA Dev. Corp., 783 F.2d 1124, 1130-31 (4th Cir. 1986) (Ervin, J., dissenting); Henry Heide, Inc. v. WRH Prod. Co., 766 F.2d 105, 108 (3d Cir. 1985); Masada Investment Corp. v. Allen, 697 S.W.2d 332, 335-37 (Tenn. 1985).

The original language is from World-Wide Volkswagen: "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection to the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297. See also 471 U.S. at 474.

Cf. Hazard, supra note 3, at 265 (exclusive jurisdiction invalid for multi-state claims).

326 U.S. at 319.

471 U.S. at 472-73 nn.14 & 15; 466 U.S. at 414 nn.8 & 9; 465 U.S. at 779-80 n.11; 465 U.S. at 787 n.6.
discussion is in *Helicopteros Nacionales de Colombia v. Hall*:

When a controversy is related to or "arises out of" a defendant's contacts with the forum [i.e., specific jurisdiction], the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam jurisdiction*.

Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State [i.e., general jurisdiction] due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.

Besides defining both types of jurisdiction, the *Helicopteros* language reveals distinguishable tests for each type. For specific jurisdiction, relations among defendant, forum, and litigation determine whether jurisdiction is foreseeable.1 For general jurisdiction, a defendant’s forum contacts can establish jurisdiction without regard to the type litigation involved. Specific jurisdiction is thus a very limited reaching out, pulling in and binding the defendant only concerning the litigation’s limited subject

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*Id.* at 414 (citations and footnotes omitted). In the two omitted footnotes, the Court explicitly stated that the two types of jurisdiction discussed were specific and general:

> It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. . . .

> When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.

*Id.* nn.8 & 9 (citations omitted). For additional discussion of the difference between specific and general jurisdiction, see Brilmayer, *supra* note 3, at 80-88; von Mehren & Trautman, *supra* note 3, at 1136-64.

Because the language of the specific jurisdiction test comes from *Shaffer*, 433 U.S. at 204 ("[T]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction."), it is apparent in retrospect that *Shaffer* was a specific jurisdiction case. In fact, the Supreme Court has had occasion to decide only two general jurisdiction cases, *Helicopteros* and *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).
As Professors von Mehren and Trautman accurately predicted some twenty years ago, specific jurisdiction has become the increasingly preferred mode. General jurisdiction is all that remains of the old plenary jurisdiction possible under Pennoyer. Nevertheless, even today's general jurisdiction is premised on the defendant's voluntary, systematic and continuous contacts, rather than on the state's exclusive power over objects within its boundaries. For both general and specific
jurisdiction then, the defendant’s actions rather than territorial power validate jurisdiction.

B. Two Stage Specific Jurisdiction Test of Threshold Contacts Plus Relative Convenience

The above arguments require that personal jurisdiction always emphasize the defendant’s actions. In *Rush v. Savchuk*, the majority stated that the proper test for specific jurisdiction was the “relationship among the defendant, the forum, and the litigation.” Justice Brennan, in his dissent, offered instead a
test based upon "minimum contacts [that] must exist 'among the parties, the contested transaction, and the forum State.'"\footnote{43} In its most recent decisions, the Court has reaffirmed the Rush majority's emphasis on defendant contacts.\footnote{44} Significantly, former dissenter Justice Brennen authored the majority opinion in \textit{Burger King Corp. v. Rudzewicz},\footnote{45} conceding that, "'[n]otwithstanding [other] considerations, the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State.'"\footnote{46}

Numerous commentators have espoused personal jurisdiction theories emphasizing \textit{relative} fairness to and convenience of the parties as the main criteria for valid in personam jurisdiction.\footnote{47} Although not endorsing Justice Brennan's particular calculus, their arguments share the frustration of his earlier \textit{World-Wide Volkswagen Corp. v. Woodson}\footnote{48} and \textit{Rush v. Savchuk}\footnote{49} dissent:

In answering the question whether or not it is fair and reasonable to allow a particular forum to hold a trial binding on a particular defendant, the interests of the forum State and

\footnote{43} 444 U.S. at 309-10 (emphasis in original). Brennan was quoting from his \textit{Shaffer} dissent, 433 U.S. at 220, and the dispute between Brennan and the majorities in \textit{Rush} and \textit{World-Wide Volkswagen} can be seen as the continuation of an earlier dispute that traces back at least as far as \textit{Hanson v. Denckla}, 357 U.S. 235. \textit{See id.} at 256-64 (Black, J., dissenting, joined by Burton and Brennan). \textit{See also} \textit{Leathers, Supreme Court Voting Patterns Related to Jurisdictional Issues, to be published 62 Was. L. Rev.} (1987).
\footnote{45} 471 U.S. 462 (1985).
\footnote{46} \textit{Id.} at 474 (emphasis added). \textit{See also id.} at 481-82 ("'[M]inimum-contacts jurisdictional analysis . . . focuses at the threshold solely on the defendant's purposeful connection to the forum.") (emphasis added).
\footnote{47} \textit{See, e.g., Lewis, supra} note 3; \textit{Lewis, supra} note 18; \textit{Lilly, supra} note 3; \textit{McDougal, supra} note 3; \textit{Redish, supra} note 3; \textit{Weintraub, supra} note 3.
\footnote{48} 444 U.S. 286 (1980).
\footnote{49} 444 U.S. 320. Justice Brennan applied the dissent to both cases, but also had a larger purpose. After analyzing the facts of each case separately under his interpretation of \textit{International Shoe's} "minimum contacts" test, 444 U.S. at 302-07 (Brennan, J., dissenting), Brennan further announced that: "It may be that affirmation of the judgments in these cases would approach the outer limits of \textit{International Shoe's} jurisdictional principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated." \textit{Id.} at 307-08. Thus the dissent was offered as groundwork for a new theory of jurisdiction that would carry the "major advance" of \textit{International Shoe} a necessary step further. \textit{Id.} at 308.
other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant. The "orderly administration of the laws" provides a firm basis for according some protection to the interests of plaintiffs and States as well as of defendants. The trouble, however, with jurisdictional theories emphasizing something other than defendant contacts is that convenience or supposed state interest can improperly outweigh legitimate defendant objections. Justice Brennan was able by the time of Burger King to accomodate himself to a jurisdictional theory emphasizing defendant contacts because false ideas about state sovereignty had been laid to rest in the interim between World-Wide Volkswagen and Burger King, and because other factors...

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50 Id. at 309 (footnote omitted). Justice Brennan's use of the "orderly administration of the laws" language taken from the World-Wide Volkswagen opinion, id. at 294, and originally appearing in International Shoe, 326 U.S. at 319, provides additional insight into the eventual modification and clarification of the "minimum contacts" test that would take place in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Brennan saw the language as indicating that factors other than defendant contacts could enter the jurisdictional calculus to determine the relative fairness of asserting jurisdiction, as long as there were any defendant contacts. "Surely International Shoe contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable." 444 U.S. at 300 (Brennan, J., dissenting). The World-Wide Volkswagen majority saw the "orderly administration" phrase both as promoting interstate federalism and as allowing the individual defendant to order his affairs in reliance upon state laws:

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State... The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Id. at 297-98 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

The Burger King opinion accommodated both the World-Wide Volkswagen majority's defendant expectation goals and Brennan's relative weighing goals by emphasizing that the requirement of "purposeful availment" was to put a defendant on notice by his actions that he might be subject to suit, 471 U.S. at 474-76, but that other factors might play a dispositive role if defendant contacts had passed a certain threshold. Id. at 476-78. This two stage contacts test is more fully explained at infra notes 76-85 and accompanying text. See also supra note 29.

51 See infra notes 54-60 and accompanying text.
52 See infra notes 61-68 and accompanying text.
were still allowed into the jurisdictional calculus at the second stage of a two stage approach to personal jurisdiction decisions.\textsuperscript{53}

A jurisdiction theory emphasizing relative fairness could become essentially a theory based on geographical convenience.\textsuperscript{54} Geographical convenience, however, simply does not correlate with the defendant's litigation related contacts and therefore risks improper choice of law. For example, in a car accident between an Evansville, Indiana native and a Shelbyville, Kentucky native, occurring in Columbus, Ohio, there would be less geographical inconvenience to the Evansville defendant if he were sued in federal court in Louisville, Kentucky than if sued in Columbus, Ohio.\textsuperscript{55} Nevertheless, the Evansville defendant might legitimately object to a Kentucky trial. Aside from the importance of jury pool selection that might give the Kentucky plaintiff a "home court" advantage,\textsuperscript{56} the defendant also might fear that choice of law rules could be applied against him.\textsuperscript{57} Although

\begin{quote}
\textsuperscript{53} See infra notes 69-86 and accompanying text.

\textsuperscript{54} The Court generally has equated inconvenience with geographical inconvenience. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ("The purpose of this test, of course, is to protect the defendant from the travail of defending in a distant forum . . .") (emphasis added); 357 U.S. at 251 ("inconvenient or distant litigation").

\textsuperscript{55} Evansville is approximately 100 miles west of Louisville; Columbus is approximately 200 miles northeast of Louisville; and Shelbyville is approximately 30 miles east of Louisville.

\textsuperscript{56} Jury pool sometimes can play a very significant role in plaintiff forum selection. One need look no further than \textit{World-Wide Volkswagen}, in which plaintiff's lawyer very deliberately selected Oklahoma as forum, because "Creek County, Oklahoma . . . is one of the best jurisdictions in the United States in which to try a plaintiff's lawsuit." Weintraub, supra note 3, at 500 n.98 (quoting from a personal letter from \textit{World-Wide} plaintiff's lawyer).

\textsuperscript{57} If significant differences between Ohio and Kentucky law existed, the Indiana defendant might expect Ohio law to be applied; because Ohio was the focus of the accident that formed the subject matter of the litigation. Besides obviously substantive issues such as comparative negligence, applicability of a seat belt defense, and absence or presence of a guest statute, statutes of limitation could also vary significantly between states. Supreme Court cases again provide examples of plaintiff forum shopping which definitely involved a hunt for favorable substantive law. See, e.g., Rush, supra note 41 (plaintiff desired non-application of an Indiana guest statute); Keeton 465 U.S. at 773 (the choice of New Hampshire as forum clearly was motivated by that state's "unusually long (6-year) limitation period for libel actions. New Hampshire was the only State where petitioner's suit would not have been time-barred when it was filed.").

If a major difference between the contacts analysis that governs personal jurisdiction and the contacts analysis that governs choice of law exists, it is that while sovereignty concerns play \textit{no} role in specific jurisdiction beyond providing law which acts as a
the defendant could personally appeal any adverse choice of law ruling, there would be no guarantee of winning on appeal. By keeping the litigation out of Kentucky entirely, the defendant would obviate any adverse choice of law concerns.\textsuperscript{58}

The problem becomes even more pronounced if the defendant stays out of the Kentucky litigation, believing he can invalidate the judgment when it is sought to be enforced against him in Indiana. Although a sister state is permitted to refuse full faith and credit to a judgment for which the rendering court lacked personal jurisdiction, choice of law decisions in the original default judgment cannot be challenged collaterally.\textsuperscript{59} If convenience became the sole test for personal jurisdiction, a defendant might be forced to accept default judgments from

jurisdictional statute (see infra notes 61-68, 91-96, 118-19 and accompanying text), sovereignty concerns may play some role in determining which of several states has a more valid interest in having its law applied to a controversy.

As personal jurisdiction theory had to recognize that more than one state can have possible jurisdiction over a claim, so the old-fashioned choice of law search for one state that had exclusive right to apply its laws to a controversy has rightly given way to a recognition that any of several states' laws can validly be applied to some controversies. \textit{See} Allstate v. Hague, 449 U.S. 302, 307-13, 308 n.11, 311 nn.15-17 (1981), and cases cited therein. \textit{Cf.} 471 U.S. at 483 n.26. Because these choice of law sovereignty concerns only directly come into play once jurisdiction over the parties has been obtained, the foreign state interested in having its law applied to the controversy has no direct way of participating in the choice of law decision process. The forum state, under principles of comity, might be willing to apply foreign law to the case before it, but can be compelled to do so only should the parties before it so demand. That choice of law sovereignty concerns must thus be mediated through individuals and foreign courts would seem to strengthen the argument that choice of law constitutional protections are designed primarily to protect individuals' rights.

\textsuperscript{58} This is akin to the indirect double counting of choice of law concerns condemned by Professor Lewis. \textit{See}, \textit{e.g.}, Lewis, \textit{supra} note 3, at 814-35. As the argument of the next paragraph of text makes clear, however, double counting may be necessary in default judgment situations under current collateral attack rules. The issue thus is not solely whether the Court will eventually put more teeth into its choice of law constitutional analysis (\textit{See}, \textit{e.g.}, Drobak, \textit{supra} note 3, at 1056 n.157), but whether legitimate choice of law concerns can be protected other than via a "minimum contacts" test for personal jurisdiction.

\textsuperscript{59} \textit{See}, \textit{e.g.}, 472 U.S. 797, 805 ("[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party."); Martin, \textit{Constitutional Limitations on Choice of Law}, 61 \textit{Cornell L. Rev.} 185, 230 & n.147 (1976) ("When a claim has been reduced to judgment, the enforcing state is allowed to inquire only as to the jurisdiction of the rendering court over the parties.").
states that had no meaningful connection to the litigation. By keeping the specific jurisdiction focus on contacts between defendant, forum, and litigation, the Shaffer test protects the defendant’s legitimate expectations regarding which forums will be allowed to apply their laws against him.

The choice of law rights indirectly protected are those of the defendant to have the proper law applied to his case. The state whose law eventually is applied has no independent right to insist that its laws be applied outside its own jurisdiction. Thus, the unequivocal phrasing of World-Wide Volkswagen was right in result but wrong in logic.

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.

A state may be prevented from exercising jurisdiction on any basis other than defendant contacts not because of interstate federalism interests, but instead because of the defendant’s per-

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60 Carried to its absurd extreme, a defendant could be subjected to suit in a forum with which he had no litigation related contacts and no expectation of suit. Thus, changing the facts of the IN/KY/OH hypothetical, assume that the KY plaintiff brings suit in St. Louis, MO or Carbondale, IL, both of which are considerably closer to defendant’s residence than Columbus, OH, but neither of which is related to the litigation involving this plaintiff and this defendant. Assume further that defendant sometimes makes trips to visit relatives in St. Louis or to visit children attending college at Carbondale. Thus, defendant’s brief trips to these non-litigation related jurisdictions arguably illustrate that it is not insurmountably inconvenient for him to travel there to defend against suit. Some commentators might even say, confusing general with specific jurisdiction, or confusing stage two with stage one analysis (see infra notes 69-86 and accompanying text), that these contacts are “countable” in the International Shoe sense. Nevertheless, would a lawyer advising a client that he could safely stay out of such litigation reasonably expect that jurisdiction could be obtained on such facts? And if default judgments could be so obtained, would not a plaintiff’s harassment power be dramatically increased? Contra McDougal, supra note 3, at 41-43 (original filing in a “disinterested” forum should be encouraged); Cf. Lewis, supra note 18, at 29-31 (non-litigation contacts should be counted to determine jurisdiction).

61 See supra note 57.

62 444 U.S. at 294 (emphasis added).
sonal liberty interests. This was eventually made clear in Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee.

Writing for the majority in Ireland, Justice White, who in World-Wide Volkswagen had insisted that sister state sovereignty demanded a “minimum contacts” approach, now admitted that the defendant’s due process rights really demanded this approach:

Our holding today does not alter the requirement that there be “minimum contacts” between the nonresident defendant and the forum State... The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

This emphasis on “individual liberty” protection received explicit endorsement in the recent Burger King and Phillips Petroleum Co. v. Shutts decisions. The “minimum contacts” requirement is a first level protection so that a defendant cannot

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63 “Personal liberty interests” is an adaptation of language from Insurance Corp. of Ireland. See infra text accompanying note 65. Before Ireland, there was considerable debate about whether state sovereignty should or should not play any direct independent role in personal jurisdiction decisions. The history and flavor of the debate is well captured by Drobak, supra note 3, at 1042-48 & nn.125-26. Professor Lewis, probably the strongest opponent of sovereignty playing any role in jurisdictional analysis, has forcefully made his case in three recent lengthy articles. See Lewis, supra note 3; Lewis, supra note 18; and Lewis, The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction, 58 NOTRE DAME L. REV. 699 (1983). See also Redish, supra note 3.
64 456 U.S. 694 (1982).
65 Id. at 702 n.10 (emphasis added).
67 Id. at 807; 471 U.S. at 471-72 & n.13.
be dragged into an unfair forum, regardless of how hypothetically convenient. 68

The most recent Supreme Court specific jurisdiction decisions, however, continue to mention factors other than defendant contacts as relevant to the personal jurisdictional inquiry. *Keeton v. Hustler Magazine* 69 asserts that New Hampshire has a jurisdictional interest in protecting its citizens from libelous reading matter. 70 *Keeton* also explains that plaintiff residence can sometimes "play an important role in determining the propriety of entertaining a suit against defendant in the forum." 71 This role was decisive in *Calder v. Jones*, 72 which held that when the plaintiff was "the focus of the activities of the defendants out of which the suit [arose]" the contacts were "so manifold as to permit jurisdiction when it would not exist in their absence." 73 In *Burger King*, Justice Brennan listed several non-contact factors that "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." 74 In a portion of the *Asahi Metal* opinion which received eight Justices' votes, Justice O'Connor explained that "[a] court must consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief . . . [plus] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantial social policies.' " 75 How can the emphases in these cases upon factors other than defendant contacts be reconciled with defendant minimum contacts as *the* basis for in personam jurisdiction? Are defendant contacts an absolute minimum designed to protect the defendant against unforeseea-

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68 For discussion whether the defendant's waiver of this protection can compel a forum to hear plaintiff's suit, see infra notes 186-95 and accompanying text.


70 *Id.* at 776.

71 *Id.* at 780.


73 *Id.* at 788.

74 471 U.S. at 477. The non-contact factors are borrowed by Brennan from the list compiled in *World-Wide Volkswagen*, 444 U.S. at 292. Cf. 471 U.S. at 473-74 (rationale for why factors in addition to defendant contacts might have relevance).

able suit, or is there some sliding scale which measures defendant contacts against "other factors"?

The confusion is lessened by realizing that the Supreme Court implicitly, and explicitly in Burger King, conducts "minimum contacts" analysis in two different steps or stages: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, [then] these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " At the first stage, "minimum contacts" are an absolute threshold beyond which the defendant must pass before any non-consensual assertion of specific jurisdiction can fulfill due process. At this first stage, the Court is seeking only to establish that forum contacts were purposeful, gave rise to or were related to the cause of action, and reasonably put the defendant on notice that he could be sued there. The second stage test is more restrictive, focusing on the defendant's practical ability to conduct suit in the forum. As the Burger King Court states:

[Minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation

76 471 U.S. at 476 (emphasis added and word inserted).
77 The consent referred to here has no relation to the fictive consent implied in jurisdictional consent statutes, but is rather the positive waiving of jurisdictional objections by defendant referred to in Ireland, 456 U.S. at 702 n.10 (see also supra text at note 65), or the truly negotiated stipulations approved in Burger King, 471 U.S. at 472 n.14.
78 The majority of Justices in the Asahi Metal decision continue to apply a two stage test as described in this Comment. Part IIA of Justice O'Connor's opinion concludes that the stage one threshold was never passed, but Part IIB shows that even had the stage one hurdle been cleared, stage two fairness concerns would be violated. See 107 S. Ct. at 1031-35. It is on this basis that Justice Brennan is able to concur. "This is one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities,' " writes Brennan, quoting from his Burger King opinion which made the two stage test explicit. Id. at 1035 (Brennan, J., concurring).
79 See 471 U.S. at 472-76.
"so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. 50

Once convenience is made comparative, plaintiff convenience becomes a standard against which defendant inconvenience can be measured. 51 These comparative convenience questions only

15 Id. at 477-78 (emphasis added, citations omitted). It is important to note that the Burger King burdens of proof are different, depending upon whether the "minimum contacts" analysis is proceeding at stage one or at stage two. At stage one the burden is upon the plaintiff to show that defendant has purposefully established litigation related contacts that put defendant on notice regarding the foreseeability of suit. But at stage two the burden shifts to the defendant: "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." Id. at 477. Stage two analysis is thus restrictive in the sense that otherwise valid stage one jurisdiction can be defeated at stage two if proven unconstitutionally inconvenient to the defendant. But once the stage one purposeful directedness threshold has been passed, non-litigation related factors can enter into the calculus against the defendant, and the defendant bears the burden of showing why it is constitutionally unreasonable for him to defend himself where his litigation related contacts occurred.

This shift in burden of proof continues to be recognized in Asahi. In the part of the opinion joined in by all Justices, Justice O'Connor wrote: "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." 107 S. Ct. at 1034. At least one lower court has also recognized this shift in burden of proof, Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1400 (9th Cir. 1986); while the two stage nature of the minimum contacts test has been recognized by most courts. E.g., Chung v. NANA Dev. Corp., 783 F.2d 1124, 1129-30, 1132 (4th Cir. 1986); Stuart v. Spademan, 772 F.2d 1185, 1191 (5th Cir. 1985).

Whether the Burger King dual stage analysis would cause reversal of prior Supreme Court jurisdictional results is unclear. Hanson and World-Wide Volkswagen both rested on the assertion that no purposeful contacts, ties, or relations existed between defendant and forum in either case. It is possible to argue, however, at least in World-Wide Volkswagen, that the Court would have been able to invalidate jurisdiction on stage two convenience grounds, even if stage one litigation related contacts were admitted. The fact that five Justices invalidated jurisdiction in Asahi on this basis indicates it could be a retrospective way to read World-Wide Volkswagen.

11 McGee v. International Life Ins. Co., 355 U.S. 220 (1957) provides the clearest example of relative plaintiff convenience outweighing defendant inconvenience. Once the McGee defendant had passed the stage one contacts threshold by directing premium collection at the California plaintiff, the convenience of the plaintiff became paramount. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. . . . Of course
become relevant, however, once the first stage "minimum contacts" hurdle is cleared. If contacts are insufficient at the first stage, inquiries about plaintiff and defendant convenience simply are irrelevant, and no amount of plaintiff need for a convenient forum can validate an assertion of specific jurisdiction.\(^8\) Defendant inconvenience, however, \(can\) make unconstitutional an assertion of jurisdiction that would otherwise be valid at stage one.\(^8\) Because the same defendant contacts often determine constitutionality at each stage,\(^8\) the \textit{World-Wide Volkswagen} "minimum contacts" rationale should be rephrased as follows:

\[\text{there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.}\]


\(^8\) The Court has left open the possibility of a doctrine of jurisdiction by necessity that \textit{would} recognize the need for a forum. \textit{See} 466 U.S. at 419 n.13; 433 U.S. at 211 n.37. Such a doctrine is probably not needed. \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306 (1950), sometimes cited as an example of jurisdiction by necessity, can be explained in specific jurisdiction terms. \textit{See} \textit{Brilmayer, supra} note 3, at 108; \textit{von Mehren & Trautman, supra} note 3, at 1159-60. \textit{Accord: U.S. Trust Co. v. Bohart}, 495 A.2d 1034, 1038-39 (Conn. 1985). If the defendant's contacts do not cross the stage one threshold, the plaintiff arguably does not have a valid cause of action upon which to sue. \textit{See infra} notes 91-106 and accompanying text. This would be true either because the actions occurred where they were not blameworthy (i.e., not tortious or contract breaking or illegal under local law) or because the actions were so diffused that they were within the reach of no particular location's laws. If a doctrine of jurisdiction by necessity eventually is recognized, it should be reserved for those rare situations in which aggregation of contacts across several forums is the only way possible to accumulate one jurisdictionally recognizable claim, and/or for those situations in which, although it usually would be unreasonable for defendant to defend, no alternative plaintiff forum exists. Such exceptions clearly would favor a plaintiff's right to sue over a defendant's right not to be sued. In another context, the Court has stated explicitly that "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." \textit{Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.}, 454 U.S. 464, 489 (1982) (quoting \textit{Schlesinger v. Reservists Comm. to Stop the War}, 418 U.S. 208, 227 (1974)).

\(^{83}\) \textit{But cf. supra} notes 80 and 81 (explaining how burden of proof shifts at stage two).

\(^{84}\) Because the Court prior to \textit{Burger King} had not recognized explicitly any two stage "minimum contacts" analysis, it is difficult to determine whether its prior findings of no jurisdiction were based on failure to satisfy stage one or stage two tests. \textit{Cf. Drobak, supra} note 3, at 1042 & n.118 (whether "minimum contacts" is the complete test or only part of a jurisdictional test). When the defendant's only contacts with the forum are his litigation related contacts, the same "minimum contacts" are evaluated by both tests. In situations, however, where the defendant has either pre or post litigation
The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable functions. It protects the defendant against the burden of litigating in a distant or inconvenient forum [i.e., stage two analysis]. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by the due process clause to haul defendants into the forum for suits unrelated to their contacts there [i.e., stage one analysis].

Exploration of the factors of stage two "minimum contacts" analysis is beyond the scope of this Comment. Furthermore, although major battles inevitably will be fought at that level, stage two fairness and convenience is based necessarily on the facts of the particular case. The remainder of this Comment focuses therefore on stage one "minimum contacts" analysis or, more accurately, on the legal authority by which states attempt to "hale defendants into their courts." In other words, if state sovereignty plays no role in protecting resident defendants from litigation in other states where they have contacts, what role does state sovereignty play in providing forums where plaintiffs can adjudicate claims?

contacts with the forum that are unrelated to the litigation, these could be evaluated to determine whether the defendant reasonably could defend in the forum. Such evaluation, however, would take place only at stage two. A dearth of other contacts with the forum should make it more difficult to meet the stage two reasonableness requirements (e.g., Kulko and World Wide Volkswagen); abundance of contacts might make the decision to grant jurisdiction more likely (e.g., Allstate v. Hague re: jurisdiction, not choice of law). See also Asahi Metal, 216 Cal. Rptr. at 395-96 (pre-litigation contacts relevant); Lewis, supra note 18, at 29-31 (post-litigation contacts relevant).

436 U.S. at 92 (original text replaced by emphasized words). The original language was "their status as coequal sovereigns in a federal system." Id.

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

436 U.S. at 92 (citations omitted) (quoting Hanson, 357 U.S. at 246; and Estin v. Estin, 334 U.S. 541, 545 (1948)).

See 472 U.S. at 807; 471 U.S. at 475; 444 U.S. at 297.

See supra notes 61-68 and accompanying text.
II. Dispelling Myths Concerning Long-Arm Statutes

A. Why a Long-Arm Statute is Not Needed for Assertions of Specific Jurisdiction

Most modern courts begin specific jurisdiction analysis by consulting the state special jurisdictional statute, or "long-arm" statute, to see what contacts will trigger forum jurisdiction. Although Supreme Court decisions seem to encourage this practice by citing the relevant state long-arm statutes before proceeding further, this Comment argues that a long-arm statute is not constitutionally mandated and that the search for an applicable long-arm statute obscures inquiry into the real bases for jurisdiction.

For specific jurisdiction, a state expresses its willingness to bring a hypothetical defendant under its control by defining objectionable conduct. This is equivalent to a stage one definition of the relationship among forum and litigation before any specific defendant or defendant contacts are thrown into the

90 E.g., Haisten v. Grass Valley Medical Reimbursement Fund, 784 F.2d 1392, 1396 (9th Cir. 1986) ("plaintiff must show, first, that the state statute of the forum confers personal jurisdiction over the non-resident defendant . . ."); Wallace v. Herron, 778 F.2d 391, 393 (7th Cir. 1985) ("We look first to Indiana's 'long-arm' statute . . ."), cert. denied, 106 S. Ct. 1642 (1986); Stuart v. Spademier, 772 F.2d 1185, 1189 (5th Cir. 1985) ("The first step of the [personal jurisdiction] inquiry is solely a matter of determining the reach of the forum state's long-arm statute."); Afrem Export Corp. v. Metallurgiki Halyps, 772 F.2d 1358, 1362 (7th Cir. 1985) ("The first question we take up is whether Wisconsin's long-arm statute . . . can be used . . . to haul Metallurgiki before a federal court in Wisconsin."); Bond Leather Co. v. Q.T. Shoe Mfg., 764 F.2d 928, 931 (1st Cir. 1985) ("[T]wo questions must be answered affirmatively in order for a Massachusetts court properly to exercise in personam jurisdiction over a nonresident defendant: '1) the assertion of jurisdiction authorized by the [Massachusetts long-arm] statute, and 2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution?'") (quoting Good Hope Indus. v. Ryder Scott Co., 389 N.E.2d 76, 79 (Mass. 1979) (emphasis and second set brackets in original)).

91 See supra notes 76-85 and accompanying text for a discussion of stage one versus stage two analysis.
calculus.\textsuperscript{92} This definition takes place via the state substantive law, not via the long-arm statute, and is the only expression of state interest concerning the litigation which should be permitted.\textsuperscript{93} In other words, the rule defining the cause of action acts

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\textsuperscript{92} In assessing "the relationship among the defendant, the forum, and the litigation," Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the relationship between the forum and the litigation has been expressed by the forum state's substantive law. The defendant's "minimum contacts" activate this law and lead to litigation. See infra text accompanying notes 93-95.

\textsuperscript{93} The Court has spoken of a special state interest in regulating certain activities as a factor to consider in granting or denying jurisdiction. \textit{E.g.}, 465 U.S. at 776-77 (special desire to obtain jurisdiction over torts occurring within state); Hanson v. Denckla, 357 U.S. 235, 252-53 (1958) (approval of cases granting jurisdiction when state had enacted "special legislation . . . [to provide] effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation"); Hess v. Pawloski, 274 U.S. 352, 356 (1927) (state has special interest in regulating conduct on its highways). It is hard to see under close analysis, however, what is exceptional about the activities thus regulated. All that really is taking place is that state substantive law is being applied to the defendant's contacts with the state. State substantive remedial and regulatory law is always in a sense exceptional, because it expresses the state's willingness to hold defendants accountable for actions that, without the law, would not be blameworthy. A state, in enacting regulatory law, or a court, in creating remedies, always looks to the state policy or special interest in providing relief to victims or inflicting punishment on wrongdoers. In \textit{Hess} and \textit{Keeton} it is hard to see that either Massachusetts or New Hampshire had any special jurisdictional goals in mind when they recognized torts involving automobile accidents occurring on their roads, or when they enacted libel statutes, respectively. Although Justice Rehnquist makes much of the fact that New Hampshire's criminal defamation statute is not restricted to defamation of New Hampshire residents, 465 U.S. at 777, it would be an odd state policy that would allow nonresidents to be negligently crashed into on state highways or libelled in in-state publications with impunity, and such a discriminatory policy probably would be suspect under the equal protection or privileges and immunities clauses of the U.S. Constitution.

By emphasizing the special need for a state to regulate such activities, courts actually rationalize why a state has power to bring nonphysically present or nonresident defendants under its judicial control. Commentators correctly have pointed out that emphasis on special state interests is a form of impermissible double counting. \textit{E.g.}, Drobak, \textit{supra} note 3, at 1016, 1051, 1056 n.157; Lewis, \textit{supra} note 3, at 771, 812-22. If litigation related defendant contacts already have been counted at stage one of the jurisdictional analysis, there should be no need to count again the state's regulatory interest at stage two.

What usually has been missed is that the forum state's interest definitely should be counted at stage one. Because jurisdictional thinking is still unduly influenced by notions of power, presence, and territoriality, the usual focus at stage one has been only upon whether the defendant had contacts. It is easy to slip into thinking of contacts as a form of substitute presence, but this is not the rationale behind International Shoe Co. v. Washington, 326 U.S. 310 (1945). \textit{International Shoe} specifically rejected any test which saw contacts in terms of "a little more or a little less" and instead focused upon "the
also as the state’s jurisdictional statute for that action. The constitutional specific jurisdiction requirement of minimum litigation-related defendant contacts prevents a state from using its substantive law to take jurisdiction of unrelated litigation.

quality and nature of defendant’s activities. Id. at 319. The contacts that are jurisdictionally significant are the contacts that are culpable according to the state substantive law. Focus upon the state’s jurisdictional statute deflects attention from where the state interest truly is reflected—in its substantive law. Jurisdictional statutes can express only indirectly the state’s tort or regulatory policies, because they necessarily must defer to the state substantive law for ultimate definitions of what activities will be jurisdictionally counted. This Comment therefore argues that state jurisdictional statutes should be ignored when determining the forum state’s jurisdictional interest and jurisdictional reach. Instead, courts should recognize that state substantive law also acts as the state’s jurisdictional statutes. Cf. Kalo, supra note 10, at 1194-95 (jurisdiction should be granted when state law is to be applied). See also infra note 196 (same constitutional principles for choice of law as for personal jurisdiction).

Although this argument is mainly an example of the classic hypothesis—i.e., assume that it is true and see if it does not explain the facts better than existing theories—some support can be extracted from diverse sources. Consider: (1) that no jurisdictional statute was ever needed for common law recognized bases of jurisdiction such as presence, consent, and appearance; see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 129-30 (2d ed. 1980); (2) that commentators have questioned whether judicial interpretations of state jurisdictional policy or defendant expectations regarding application of state law might not serve as effectively to bring defendants under state jurisdiction as a legislatively enacted statute; see E. Sceles & P. Hay, CONFLICT OF LAWS 313 (1982) (statute not required for expression of state jurisdictional policy); Lewis, supra note 3, at 842-43 (judicial interpretation effective); Silberman, supra note 3, at 66-67 (defendant expectations effective); and (3) that state jurisdictional policy sometimes seems in conflict with itself.

In this last regard, states with restrictive long-arm statutes continue to recognize some forms of jurisdiction that are not authorized by these supposedly all-inclusive long-arm statutes. This phenomenon has been identified in our own state by Leathers, Rethinking Jurisdiction and Notice in Kentucky, 71 KY. L.J. 755 (1983-84). After showing that implied jurisdiction over nonresidents is authorized by other state law outside of Kentucky’s long-arm statute for divorce, eminent domain, probate, and trust situations, id. at 765-71, Professor Leathers explains that “in choosing between the legislative directive to exercise jurisdiction in such cases . . . and the legislative restraint on jurisdiction [attached to the long-arm statute], the Court should find the directive to exercise jurisdiction is controlling.” Id. at 776. See also id. at 776-77 (perhaps unconstitutional to restrict judiciary in applying other elements of state law). This Comment carries such analysis a significant step further. If legislatures and judges have been explicit about what activity the state desires to control (i.e., the explicitness of state substantive law), then there is always implied jurisdiction in such statements of substantive law, and this implied jurisdiction should be subject only to constitutional restraints, not to any filtering through a long-arm statute.

*I.e., the International Shoe “minimum contacts” test at stage one. See supra notes 27-46, 76-85 and accompanying text.

The federal constitutional protections afforded defendants under the due process
Commentators and jurists who mistakenly believe a special long-arm statute is needed to assert jurisdiction are still under the sway of the territorial power mentality of Pennoyer v. Neff. Just as pre-International Shoe Co. v. Washington consent and “doing business” statutes fictively brought the defendant within the state’s territory to legitimize jurisdiction, today’s specific jurisdiction long-arm statutes purport to define the state’s jurisdiction over those who are not its citizens or within its borders. Such statutes, however, are not mandated constitutionally. Instead, the state shows its desire to hear a particular claim by providing substantive law under which suit can be brought. By that law, the parties who then initiate forum contacts through their conduct are on notice that the state can exercise specific jurisdiction. Thus, a specific jurisdiction statute’s only relevance is to provide notice that suit has been filed, because the clause effectively prevent a state from applying its laws to controversies with which it has no real connection. If the state cannot obtain jurisdiction over the defendant, the state will be unable to guarantee application of its law to his conduct. See supra notes 54-68, 85 and accompanying text.

* See supra note 89.
51 95 U.S. 714 (1878).
99 326 U.S. 310 (1945).
100 The fictiveness of the attempt first was exposed by Judge Learned Hand in Hutchinson v. Chase and Gilbert, 45 F.2d 139 (2d Cir. 1930). The fictive attempt was abandoned by the Supreme Court in International Shoe, 326 U.S. at 316-17, and was placed in historical perspective in Shaffer, 433 U.S. at 201-03.
101 See infra note 146.
102 Of course the state also must provide courts having subject matter jurisdiction. How and to what extent it is possible for a court created under the constitution and laws of one state to have subject matter jurisdiction to apply the laws of another state is an intriguing choice of law proposition beyond the scope of this Comment but touched on to some extent infra at notes 196-99 and accompanying text.
103 How related the contacts must be to the claim is an issue still to be decided by the court. That there may be an important distinction between claims which “arise out of” versus claims that “relate to” a defendant’s contacts with a state is hinted at in Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 415 n.10, 419-20 (1984) (majority leaves issue open; Brennan believes it makes no difference). See also supra note 82.
104 When litigation arising from the contacts is certain or nearly certain to follow, and when the defendant’s own actions make it impossible or unlikely for him to receive actual notice, it might even be possible for the original defendant contacts alone to put the defendant on notice regarding litigation. See, e.g., Dobkin v. Chapman, 236 N.E.2d 451 (N.Y. 1968) (automobile accident defendants failed to give adequate address for police report—jurisdiction upheld).
authority to hale the defendant into court is provided not by the long-arm statute, but by the forum substantive law under which plaintiff sues. In *International Shoe*, Washington’s substantive taxing statute both provided a mechanism for service of process and defined what activities were to be taxed.\(^{105}\) In most situations the particular substantive law provides no notice provisions; state procedural rules, including the long-arm statute, must be consulted to find what notice steps should be taken.\(^{106}\) The long-arm statute as a measure of jurisdictional reach, however, is irrelevant.

This analysis explains two types of inconsistencies in earlier decisions. The first inconsistency is illustrated by cases such as *Jim Fox Enterprises v. Air France*,\(^{107}\) in which a long-arm statute that on its face did not reach the defendant was nevertheless interpreted expansively to give the state jurisdiction.\(^{108}\) The decision was correct if the Texas legislature, in passing the statute, believed it needed to statutorily provide its citizens with a way of reaching absent defendants. The words of the statute were not as important as the fact that the statute was designed to reach out. As Justice Brennan in dissent wrote in *Shaffer v. Heitner*:\(^{326 U.S. at 311-12.}\)

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\(^{105}\) For cases exploring constitutional constraints on notice provisions, see *supra* note 25.

\(^{107}\) 705 F.2d 738 (5th Cir. 1983).

\(^{108}\) The *Fox* case illustrates unambiguously that the long-arm statute, objectively construed, did not reach. When the case was first appealed, the district court and the Fifth Circuit Court of Appeals construed the Texas long-arm statute as not reaching "nearly as far as Due Process would permit," because the statute required the claim to arise out of defendant's business in the state. *Jim Fox Enterprises v. Air France*, 664 F.2d 63, 63-64 (5th Cir. 1981); *rev'd on rehearing*, 705 F.2d 738 (5th Cir. 1983). See *Tex. Rev. Civ. Stat. Ann.* art. 2031b § 3 (Vernon 1964) (repealed, 1985), *quoted in* 466 U.S. 408, 413 n.7. Only after the Texas Supreme Court reconstrued the specific jurisdiction statute, in *Hall v. Helicopteros Nacionales de Colombia*, 638 S.W.2d 870 (Tex. 1982), as effectively reaching to the constitutional limits of due process, did the Fifth Circuit grant rehearing in *Fox* and defer to the Texas court’s interpretation. The U.S. Supreme Court also seemed skeptical of the state supreme court’s interpretation. *See* 466 U.S. at 412-13 & n.7. *See also infra* notes 143, 145-46 and accompanying text.

The *Fox* and *Hall* cases are not just a Texas phenomenon. Professor Lewis documents examples of similarly construed statutes from Illinois, Georgia, South Carolina, Puerto Rico, and Oklahoma. Lewis, *supra* note 3, at 843-46 & nn.406-08. Oklahoma’s statute was applied in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).
I certainly would not want to rule out the possibility that Delaware’s courts might decide that the legislature’s overriding purpose of securing the personal appearance in state courts of defendants would best be served by reinterpreting its statute to permit state jurisdiction on the basis of constitutionally permissible contacts rather than stock ownership.109

States therefore are permitted, even encouraged, to strain the facial meaning of their jurisdictional statutes so that the statutes reach to the constitutional limits of state authority.110

All this twisting of meanings is reminiscent of the way automobile and corporate consent statutes were twisted prior to International Shoe to find consent where none existed.111 Just as the reality of jurisdiction in those pre-International Shoe days did not depend on fictive consent but rather on purposeful “minimum contacts,”112 so the reality of jurisdiction under a long-arm statute does not rest on any enabling power of the long-arm statute itself but rather upon a court’s case by case determination that the defendant’s contacts and the forum’s interest in hearing the case coincide. Thus, a long-arm statute can be twisted or used as a pretext because it is irrelevant to the true bases of jurisdiction.

The second type of inconsistency is shown in cases such as Kulko v. California Superior Court113 and Shaffer. In Kulko, California’s jurisdictional statute reached to the constitutional maximum,114 yet the Court still desired, and did not find, a

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110 Some states’ statutes are mere expressions that the state will reach to the constitutional maximum. E.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); N.J. CIV. PRAC. R. 4:4-4 (repealed); R.I. GEN. LAWS § 9-5-33 (1970). When a state enacts such a statute, the “content” of the statute gives the judge applying it no direct guidance regarding the types of contacts relevant for jurisdictional purposes. Instead, the judge must look directly to state substantive law to define defendant contacts as either litigation or nonlitigation related. This Comment argues that the judge should do this regardless of the nature of the jurisdictional statute. “Constitutional maximum” statutes are hollow shells or mere forms that reveal the true nature of all jurisdictional statutes.

111 See supra notes 2, 29, and 100.

112 See supra notes 25 and 100.

113 436 U.S. 84 (1978).

114 Id. at 89 (“California Code . . . demonstrated an intent that the courts of California utilize all bases of in personam jurisdiction ‘not inconsistent with the Constitution.’ ”).
special jurisdictional statute that covered the activity involved in the case.\textsuperscript{115} Similarly, in \textit{Shaffer}, after assuming arguendo in a footnote that notice provisions of Delaware's sequestration statute would inform defendants of suit in the forum,\textsuperscript{116} the majority failed to find the necessary minimum contacts. The Court based its decision largely on Delaware's failure to enact a special jurisdictional statute making acceptance of a directorship tantamount to a waiver of jurisdictional objections when suits arise from director activities.\textsuperscript{117} The cases thus say on one hand that a generalized jurisdictional statute is either not relevant (\textit{Kulko}) or not needed (\textit{Shaffer}), and yet on the other hand that a specific jurisdictional statute very definitely is needed.

The inconsistency is resolved by accepting the theory that jurisdictional statutes \textit{per se} are never needed. Thus the Supreme Court was right to ignore California's existing long-arm statute in \textit{Kulko} and to proceed without a long-arm statute in \textit{Shaffer}. But the Court added unnecessary confusion by then seeking a special \textit{jurisdictional} statute in both cases. If denial of jurisdiction due to lack of forum interest in \textit{Kulko} and in \textit{Shaffer} was proper, the evidence of that lack of forum interest was to be found in each state's total substantive law, not just in statutes labelled jurisdictional. Perhaps this is what the Court meant by noting that California had enacted no special child support legislation but was instead a participant within the Revised Uniform Reciprocal Enforcement of Support Act (RURES).\textsuperscript{118} Similarly, perhaps Delaware did not have any substantive policy

\begin{footnotes}
\textsuperscript{115} Id. at 98 ("California has not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute.").

\textsuperscript{116} 433 U.S. 186, 213, n.40 ("[W]e will assume that the procedures followed would be sufficient to bring appellants before the Delaware courts, if minimum contacts existed."). See also id. at 220-22 & n.1 (Brennan, J., dissenting that this issue should not have been reached by the majority).

\textsuperscript{117} Id. at 214, 216.

\textsuperscript{118} The jurisdictional dispute in \textit{Kulko}, 436 U.S. 84, was very narrow. Kulko did not contest the jurisdiction of the California courts for custody purposes, but only for purposes of increasing child support obligations which had earlier been calculated in a separation agreement negotiated and signed in New York. \textit{Id.} at 87-88. Thus, the Court's emphasis on California's participation in the Revised Uniform Reciprocal Enforcement of Support Act of 1968 (RURES), \textit{id.} at 98-100, may have been unconscious affirmation that this was the controlling \textit{California} legislation, thus, according to the argument of this Comment, also the appropriate jurisdictional statute. See \textit{id.} at 99.
\end{footnotes}
that held corporate directors accountable for all activity related to their corporate decisions, and the lack of a consent statute was evidence of this.\textsuperscript{119} In any case, to determine a forum's willingness or right to assume jurisdiction on the basis of the long-arm statute is misguided, because the pure long-arm statute is in reality a fiction,\textsuperscript{120} is redundant,\textsuperscript{121} or is irrelevant.\textsuperscript{122} The long-arm statute therefore should be ignored when determining a state's jurisdictional reach.

There are, however, situations in which some might argue that a long-arm statute or its equivalent theoretically could be relevant. First, because the self-implementation of "minimum contacts" via a state's substantive law can apply only to exercises of specific jurisdiction,\textsuperscript{123} the question remains whether general

\textsuperscript{119} Alternatively, Delaware's failure to enact a consent statute arguably could be a factor taken into account at stage two of the "minimum contacts" analysis. See supra notes 80-84 and accompanying text. If corporate directors had relied upon Delaware's legislative silence as an indication that they could not be sued there for their corporate activities, then this reliance might have structured their conduct so that it would be unreasonable to later ask them to defend in Delaware, even if they had contacts litigationally related to the state. See 433 U.S. at 216.

Neither of these arguments is compelling. Heitner was suing on a shareholder's derivative suit, a form of action valid under Delaware law. Cf. id. at 222-24 (Brennan, J., dissenting) (Delaware's substantive law interests strong). Furthermore, if defendant expectations were dispositive, given the pre-Shaffer presumed constitutionality of Delaware's sequestration statute, it is likely that the corporate directors would have expected jurisdiction was possible over them. Id. at 227 nn.5 & 6. In sum, although Shaffer is probably the Court's second most important "minimum contacts" personal jurisdiction decision (behind International Shoe), and although the bulk of the opinion clarifies "minimum contacts" operation, the actual holding of the case seems either incorrect or incorrectly arrived at, and therefore part IV of the opinion largely should be ignored by the Court in future personal jurisdiction decisions.

\textsuperscript{120} Long-arm statutes are fictions because they pretend to bring the defendant within the control of the state when the defendant's contacts and state substantive law actually create the possibility for jurisdiction.

\textsuperscript{121} Long-arm statutes are redundant because they must refer to state substantive law to determine what activities will be reached.

\textsuperscript{122} Long-arm statutes are irrelevant either because in reaching to the constitutional maximum such statutes say nothing about the jurisdictional inquiry except that the state desires to engage in it, or, as will be made clear later, because in failing to reach to the constitutional maximum such statutes are unconstitutional. See infra notes 148-85 and accompanying text.

\textsuperscript{123} For discussion of the difference between specific versus general jurisdiction, see supra notes 33-41 and accompanying text. The discussion in the text refers only to contacts being self-implementing at stage one of the jurisdictional analysis. See infra note 171.
jurisdiction requires a special statute. Second, even if no special jurisdictional statute is needed for specific jurisdiction assertions, the question still remains whether a state may deliberately limit its constitutionally permitted jurisdictional reach through what might be called a short-arm statute.

B. Why General Jurisdiction Assertions Require No Special Statutes

General jurisdiction, as previously stated, should be seen primarily as an exception to the preferred mode of specific jurisdiction. Courts and commentators continue to recognize, however, that a defendant may so purposefully, systematically, and continuously avail himself of a forum's benefits that the use of general jurisdiction is appropriate to bring him into that forum to litigate causes of action generated elsewhere. As with specific jurisdiction, this Comment argues that also for general jurisdiction, the defendant's contacts, this time his generalized level and quality of contacts, provide notice that it is foreseeable for him to face suit in that forum. Just as in Pennoyer, when there was no need for special statutes to justify a state's juris-

124 See supra notes 38 and 39 and accompanying text.
125 See supra note 40.
126 See supra notes 35, 38-40 and accompanying text.
127 Of course, due process actual notice requirements would have to be met also. See supra note 25.
diction over those under its control, there is no need today for a jurisdictional statute to authorize general jurisdiction.

It is also clear, however, that the state where the defendant has systematic, continuous contacts is not constitutionally required to provide a forum for the peripatetic plaintiff who has come to track a defendant down. Since the right on which the plaintiff sues arises under the laws of a foreign jurisdiction and the contacts regarding the litigation are outside the forum state, no substantive home forum laws directly related to the litigation will trigger specific jurisdiction. The state is free, absent public policy directing otherwise, to refuse to adjudicate the dispute.

The rationales by which a state could choose to exercise jurisdiction are threefold: (1) a moral belief that it would be evil...
to provide a haven for potential wrongdoers;\textsuperscript{131} (2) a concern based on benefits analysis which recognizes that, because the state has derived substantial benefits from a defendant's contacts, it is fair to use the state's judicial resources to adjudicate charges made against him;\textsuperscript{132} and (3) a convenience rationale, which recognizes that because a defendant could be dragged elsewhere via specific jurisdiction, it is more convenient to resident defendants or those significantly present for the state to enable them to answer charges in their "home" states.\textsuperscript{133} Regardless of the rationale applied, the state, as shown by \textit{Perkins v. Benguet Consolidated Mining},\textsuperscript{134} is not compelled per se to adjudicate claims brought under a general jurisdiction theory: "Using the [\textit{International Shoe}] tests mentioned above we find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so."\textsuperscript{135}

The Supreme Court's duty is to keep constitutional watch over state assertions of general jurisdiction to insure that states do not violate a defendant's due process rights by finding jurisdiction when there is no sufficient basis and do not discriminate against parties by recognizing general jurisdiction in some cases and refusing to recognize it in other similar cases. The Court

\textsuperscript{131} Cf. Reasor-Hill Corp. v. Harrison, 249 S.W.2d 994 (Ark. 1952) (similar rationale for rejecting jurisdictional restrictions on local versus transitory actions).

\textsuperscript{132} When deciding whether the state should exercise jurisdiction which it has the power to deny, the focus should be upon why the state should expend judicial resources it otherwise might husband on causes of action unrelated to its substantive laws and for which specific jurisdiction probably could be obtained elsewhere.

\textsuperscript{133} At first it might be thought that because the defendant can waive jurisdictional objections (\textit{see supra} text accompanying note 65; \textit{see supra} note 77), the defendant does not need the state's permission to subject himself to jurisdiction in his "home" state. But if the state truly has the power to grant or withhold general jurisdiction, the state must do so non-arbitrarily by permitting jurisdiction in the same type situations for the same type contacts. The state has basically two options: (1) it may permit defendants who have a certain quality and nature of state contacts to waive jurisdictional objections should they desire, or (2) it may compel all defendants who have a certain quality and nature of state contacts to submit to jurisdiction whether or not they desire this. Only the second option is usually thought of as general jurisdiction, but general jurisdiction is involved in the first situation as well.

\textsuperscript{134} 342 U.S. 437 (1952).

\textsuperscript{135} \textit{Id.} at 446 (emphasis in original).
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has meaningfully enforced only the first requirement, which was implicated in both *Perkins* and in *Helicopteros Nacionales de Colombia v. Hall*. The question before the Court in both cases was whether, given a state desire for general jurisdiction over a non-resident defendant, the defendant’s contacts with that state were sufficient to sustain the assertion of general jurisdiction. The Court answered yes in *Perkins* and no in *Helicopteros*, implying that the level of contacts needed for general jurisdiction is high, akin to the contacts required for domiciliary or resident status. General jurisdiction thus rarely will be found for non-residents, in keeping with a theory of limited jurisdiction that prefers specific jurisdiction assertions.

Just as important, neither *Perkins* nor *Helicopteros* emphasized state jurisdictional statutes when considering whether jurisdiction was proper. The Court was not concerned with how the assertion of general jurisdiction was made so long as it was clear to the Court that the assertion could have (*Perkins*) or actually had been made (*Helicopteros*). The *Perkins* Court noted that Ohio statutes provided for notice to a non-resident corporation present within its borders, but that it was not clear to the Court how or whether Ohio’s highest court had relied on these statutes to deny jurisdiction. The *Perkins* test focused exclu-

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135. The discrimination argument was implied in *Perkins*, the plaintiff claiming that because Ohio permitted jurisdiction over nonresident natural persons, Ohio was compelled to grant jurisdiction over foreign corporations. *Id.* at 441. The Court summarily rejected this argument. *Id.* A true discrimination case would be presented when defendants are nearly identical in nature and in quality of their contacts. In determining whether quality and nature of activity in the forum in relation to fairness to the defendant would justify general jurisdiction the nature of the defendant must be taken into account. See supra note 40. Discrimination would occur only when the state granted jurisdiction over one defendant and denied it over another, both defendants appearing to be of the same type and appearing to have the same type contacts.


137. See 342 U.S. at 438; 466 U.S. at 409.

138. 342 U.S. at 438, 446, 448.

139. 466 U.S. at 418-19.

140. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 & n.11 (1984); see also supra notes 38 and 130.

141. See supra notes 38 & 39.

142. In its syllabus ... the Supreme Court of Ohio, without passing upon the sufficiency of such acts for the above statutory purpose, and without defining its use of the term, affirmed the judgment dismissing the com-
sively upon adequacy of notice, and the Court nowhere specifically sought a jurisdictional statute authorizing general jurisdiction. In *Helicopteros* the Court noted that the Texas Supreme Court had interpreted, probably incorrectly, the state specific jurisdiction long-arm statute to confer general jurisdiction, but the Court saw this matter of interpretation as under state control.

In neither *Perkins* nor *Helicopteros* did the Court find any constitutional requirement for a jurisdictional statute. Although it might be helpful for each state's legislature to decide statutorily whether to recognize general jurisdiction over certain types of defendants based on the amount and quality of defendant activity, no statute is required. State courts are capable of using common law and interpretive principles to determine whether it is state policy to assert general jurisdiction.

and assumed that what the corporation had done in Ohio constituted "doing business" to an extent sufficient to be recognized in reaching its decision.

342 U.S. at 439 n.2.

144 *Id.* at 439-40.

145 *Id.* at 412-13 & n.7. *See also supra* note 108 and text accompanying notes 107-10.

146 466 U.S. at 413 n.7. The U.S. Supreme Court is not always precluded from acting by a state's interpretation of its own laws, as proved by cases such as Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) and Indiana *ex rel.* Anderson *v.* Brand, 303 U.S. 95 (1938). *See also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* 98-99 (2d ed. 1983). When the Court feels a state is abusing its authority to be final arbiter of its own laws in order to remove an issue from valid constitutional consideration, the Court does not hesitate to interpret according to a federal standard so as to again bring the constitutional issue to the forefront.

The argument could be advanced for the necessity of a long-arm statute or general jurisdiction statute that the defendant is required by a federal standard to be put on notice by such statute that he will be subject to the state's jurisdiction. While notice via service of process is of course an important part of a defendant's due process rights (see *supra* note 25), the Court has never held that prospective notice via a jurisdictional reach statute is constitutionally required. This implies that the Court does not feel special prospective statutory notice of jurisdictional reach is required under the due process clause. If such notice were required, the Court should have invalidated interpretations of long-arm statutes that were realistically incapable of giving such federally mandated notice. The Court has not done this. *See supra* notes 108-10 and accompanying text. Instead, the Court, in deciding whether an assertion of jurisdiction is fair, looks not to the form by which the assertion is made, but only to whether there are contacts sufficient to support the jurisdiction and whether or not there is provision for notice adequate to enable the defendant to know that he must defend.

147 *Cf.* E. SCOLES & P. HAY, *CONFLICT OF LAWS* 313 (1982) (common law interpre-
C. Why Short-Arm Statutes Are Unconstitutional

_Perkins_ makes clear that a state is perfectly free not to assert general jurisdiction even if constitutionally permitted to do so. However, the _Perkins_ holding that "no requirement of federal due process . . . either prohibits [a state] from opening its courts to the cause of action _here presented_ or compels [the state] to do so" often is removed from its general jurisdiction context, in which it is entirely accurate, and is used inappropriately to support the specific jurisdiction proposition that a state court under all circumstances may close its doors to state-created causes of action involving absent or non-resident defendants.\(^4\)

This Comment argues that the equal protection clause of the fourteenth amendment sometimes does compel a state to open its courts to causes of action involving absentees and non-residents, at least for stage-one analysis.\(^5\) Courts and commentators have stated otherwise, probably because of reliance on Supreme Court statements taken out of context and because of mistaken notions of jurisdictional sovereignty.

\(^4\) 342 U.S. 437, 446 (emphasis altered).

\(^5\) See supra notes 76-79 and accompanying text (explanation of stage one analysis).
One earlier point should be re-emphasized briefly here. As Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee\(^5\) made clear, the due process clause jurisdictionally protects individuals, not states.\(^5\) Thus, no valid constitutional objection can prevent a state from reaching into a foreign state and plucking out a non-resident defendant as long as such action does not violate the defendant’s *personal* due process rights. However, the state does not have a completely free hand, because all states must conform to federal constitutional limits in choosing either to exercise or not to exercise their jurisdiction.\(^1\) One of the earliest Supreme Court decisions on a state’s power to regulate its jurisdiction illustrates this principle.

in Louisiana’s courts:

> The contention comes down to this . . . that it is a lack of due process for a state statute of procedure to fail to furnish a person, within the limits of the State, power to sue a non-resident corporation and take judgment *for a cause of action arising in another state*. Under § 2 of Article IV of the Federal Constitution, the citizens of each State are entitled to all privileges and immunities of citizens in the several States. This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State; but where the citizens of the latter State are not given a process for reaching foreign corporations, it is not apparent how non-citizens can claim it. Provision for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. *Still less is it incumbent upon a State* in furnishing such process *to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State.*

257 U.S. at 535 (emphasis added). Both the Perkins and the Clarendon Courts were confronted with situations in which the plaintiff was seeking general jurisdiction over a defendant for “actions not arising in the state.” Only in “such a case” has the Court held that states are free to take or withhold jurisdiction. Chief Justice Taft, author of the Clarendon opinion, certainly was aware that the equal protection clause can force a state to open its courts against its declared statutory policy, as shown in Truax v. Corrigan, 257 U.S. 312 (1921), a case decided the same term as Clarendon and also authored by the Chief Justice. See infra notes 181-84 and accompanying text.


\(^{154}\) The Insurance Corp. of Ireland rationale was explicitly affirmed in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). See supra notes 61-68 and accompanying text. For additional implications of state sovereignty and personal jurisdiction, see infra notes 186-95 and accompanying text.

\(^{155}\) In this regard Pennoyer v. Neff, 95 U.S. 714 (1878) remains solid and groundbreaking precedent for the principle that a judgment not entitled to full faith and credit outside the state because of lack of personal jurisdiction is also invalid within the rendering state. See, e.g., Rheinstein, *supra* note 3, at 817.
In *Missouri v. Lewis*, although the plaintiff lost his argument that Missouri deprived him of equal protection, the Court recognized that it is definitely possible to violate a plaintiff's property rights by failing to provide him with an acceptable forum.

It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of the citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.

In *Lewis*, the plaintiff lost because the Missouri courts were not closed to him or to others like him for the cause of action involved. When a state enacts a short-arm statute, however,

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155 101 U.S. 22 (1879).
156 Plaintiff Bowman argued that Missouri discriminated against him and other St. Louis area residents by failing to provide them with a right of direct appeal to the Missouri Supreme Court. St. Louis area circuit court cases were appealable to a St. Louis Court of Appeals, whose decisions were final (except in special enumerated circumstances), while circuit court cases of other counties were appealable directly to the state's highest court. Id. at 29. The United States Supreme Court noted that Mr. Bowman had not been deprived of his right to appeal, that Missouri had provided him with an appropriate forum for redress, and that no discrimination could occur as long as residents within each territorial jurisdiction were treated fairly and equally. Id. at 33.
158 See supra note 157.
159 See supra text following note 123.
it arbitrarily discriminates against certain plaintiffs by denying them access to its courts for forum created rights.

Specific jurisdiction is validated through the defendant's contacts with the forum, coinciding with the forum substantive law. No long-arm statute is needed, because the state via its substantive laws already has manifested an intention to hold the defendant accountable for his particular actions. By enacting a short-arm statute, however, the state arbitrarily decides not to exercise the full extent of its already announced jurisdiction. By recognizing a cause of action and thereby validating specific jurisdiction, and yet also enacting a short-arm statute that takes away this jurisdiction when certain defendants are involved, the state divides its plaintiffs into two types: (1) those who are "fortunate" enough to have tortious acts committed upon them or contracts broken with them by resident defendants; and (2) those who are doubly unfortunate both in being injured, and in having their injuries inflicted by those whom they may not be able to reach except by general jurisdiction, if at all.

Why a forum state would thus deliberately discriminate against its resident plaintiffs, of course, is puzzling and gives added support to this Comment's argument that short-arm statutes generally are enacted under the mistaken belief that special enabling legislation is needed. However, assuming that a state deliberately wished to deprive its plaintiffs of valid causes of action, what state interests in pursuing such a policy could outweigh the plaintiffs' deprivation of constitutionally protected property rights? The state could not argue that it should protect absent or non-resident defendants from litigation because the

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162 See supra notes 91-106 and accompanying text.
163 Id.
164 Id.
165 Id. "Tort and contract actions are used nonexhaustively throughout this Comment as examples of the type of actions for which plaintiffs seek recovery.
166 The reason plaintiffs who are stuck with short-arm statutes may not be able to reach absent defendants for forum related injuries is that general jurisdiction is at the discretion of the foreign forum. See supra notes 124-47 and accompanying text, especially note 130.
167 See supra notes 107-10 and accompanying text.
state has no primary duty to such parties. The only reasonable rationale for discriminating against plaintiffs would be that the state does not want to hear the type of cases they bring to its courts. The only valid way to prohibit such cases, however, is...
to change the substantive law defining the causes of action creating those claims.

The federal "minimum contacts" test protects against spurious claims by weeding out claims truly unrelated to defendants' contacts with the forum. Weeding out on any other basis discriminates against plaintiffs. Discrimination against plaintiffs based on the defendant's location is particularly heinous because it is an attribute beyond the plaintiffs' control. Plaintiffs injured in car accidents or by exploding machinery look much the same whether the drivers of the other cars are residents or nonresidents or whether the defective machinery was manufactured inside or outside the state. A state should not be allowed to prospectively cut off causes of action to such plaintiffs while recognizing the same causes of action for other similarly situated plaintiffs. The state should be allowed to dismiss for lack of specific jurisdiction only when the two stage test for personal jurisdiction is not satisfied.

A state which has more liberal substantive law need not fear that it would become a center for litigation with which it had no real interest. The stage one "minimum contacts" test ensures that jurisdiction can be obtained only when a defendant has litigation related contacts with the forum state. See supra text accompanying notes 77-79, supra notes 27-30 and accompanying text, and supra notes 92-93. A state without a jurisdictional reach statute would not end up with all possible litigation related claims in its forums. The claim would still have to go through both stages of the "minimum contacts" test for personal jurisdiction. At stage one the determination would be made whether defendant contacts truly were connected to the forum. See, e.g., supra note 93. At the second stage, factors of defendant convenience could lead to a denial of jurisdiction. See supra text accompanying notes 79-84. Even if both jurisdictional hurdles were cleared, the action still might be transferred to a different forum. See 471 U.S. at 477 & n.20 (change of venue possible within federal system is comparable to common law forum non conveniens doctrine); 433 U.S. at 228 n.8 (Brennan, J., dissenting) ("If a preferable forum exists elsewhere, a State that is constitutionally entitled to accept jurisdiction nonetheless remains free to arrange for the transfer of the litigation under the doctrine of forum non conveniens.").

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quoted portion of Clarendon at supra note 152 (privileges and immunities clause requires equal resort to courts). In Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984), the Court stressed that a plaintiff need have no substantial ties to the forum, as long as the defendant had sufficient litigation related contacts. Thus state policies which per se favored resident over nonresident plaintiffs would be constitutionally suspect. Plaintiff residence can become a factor in jurisdiction only if the plaintiff was the target of defendant's litigation related actions (see supra note 73 and accompanying text), or if the plaintiff's convenience becomes determinative at stage two. Either consideration could be determined only on a case by case basis rather than through any predetermined favoritism toward residents.

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Additional support for this argument against the constitutionality of short-arm statutes comes from two sources: one, a line of conflicts cases, and the other a 1920's labor decision. In *Broderick v. Rosner*,172 *Hughes v. Fetter*,173 and *First National Bank of Chicago v. United Air Lines*,174 the Supreme Court was faced with forum states attempting, by subject matter jurisdictional statutes, to close their doors to causes of action based on foreign law.175 In each case, the Supreme Court ruled that, because the local forum had in personam jurisdiction over the parties, the local court could not deny plaintiffs access unless some clearly defensible state policy justified that denial.176 Find-

Comment objects to a state foregoing this "minimum contacts" analysis by deciding beforehand that it will under no circumstances hear possibly constitutionally valid claims and basing this decision, not on the nature of the claim, but rather on the nature of the plaintiff and defendant.

172 294 U.S. 629 (1935).
175 In *Broderick*, New Jersey attempted to outlaw any in-state actions to enforce stockholder liability which arose under another state's laws. 294 U.S. at 638. *Hughes* involved a Wisconsin wrongful death statute that limited Wisconsin court jurisdiction to "a right of action only for deaths caused in that state. . . ." 341 U.S. at 610-611. *United Air Lines* was almost a repeat of *Hughes*, except the Illinois wrongful death statute provided an escape clause that allowed suit in Illinois for deaths occurring out of state if service of process could not be had on the defendant where the cause arose but could be had in Illinois. 342 U.S. at 397.
176 A "State cannot escape its constitutional obligations . . . by the simple device of denying jurisdiction in such cases to courts otherwise competent." . . . [T]he full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes. . . . But the room left for the play of conflicting policies is a narrow one. One State need not enforce the penal laws of another. . . . A State may adopt such system of courts and form of remedy as it sees fit. It may in appropriate cases apply the doctrine of *forum non conveniens*. . . . But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties.


It is . . . settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state: rather, it is for this
ing that the state policies for exclusion were unarticulated or weak, the Court in each case ruled in favor of the plaintiff's right to have his claim heard. Although differently based, the discrimination resulting from a short-arm statute is similarly impermissible. If a state can be forced to recognize that it has

Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict . . . is [between the full faith and credit clause and Wisconsin's public policy]. We hold that Wisconsin's policy must give way. 341 U.S. at 611-12 (footnotes omitted). 342 U.S. at 398 ("The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois."). 177 342 U.S. at 398 ("Illinois is willing for its courts to try some out-of-state death actions. . ."); 341 U.S. at 612 ("[Wisconsin] has no real feeling of antagonism against wrongful death suits in general."); 294 U.S. at 640-41 ("But for the statute, the action would have been entertained. . . . New Jersey has provided courts with jurisdiction of suits of like nature and procedure otherwise appropriate for their determination."). 178 342 U.S. at 398; 341 U.S. at 612, 613-14; 294 U.S. at 647 ("[Wisconsin] has no real feeling of antagonism against wrongful death suits in general."); 294 U.S. at 647-48 ("[W]here the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged policy of New Jersey could be controlling, the full faith and credit clause requires that this suit be entertained"). 179 In the conflicts cases, jurisdiction had been obtained, and the question was whether the state could discriminate by failing to recognize the cause of action. In the short-arm situation the cause of action is recognized, and the question is whether the state can discriminate by failing to grant jurisdiction.

It is worth pondering whether the Hughes situation, see supra note 175, could arise if complete "minimum contacts" analysis were practiced by the courts. One of the concerns in Hughes was that "Wisconsin's exclusionary statutes might amount to a deprivation of all opportunity to enforce valid death claims created by another state." 341 U.S. at 613. Under a territorial sovereignty mentality, such a concern was valid, because a defendant, by fleeing the territory where his litigation related contacts occurred, effectively made himself judgment proof unless there was some way for the consequences of his actions to follow him into the second state. The full faith and credit clause was thus essential to compel the second state to recognize the cause of action from the first state. Under specific jurisdiction "minimum contacts" analysis, however, it is now possible for the original state to haul the defendant back into its own courts to answer for causes of action which arose there. In a sense, specific jurisdiction and extraterritorial service of process act as a form of civil extradition to bring the civil defendant back within the control of the state for application of its civil laws.

Today, it is still possible for the original state action to be exported into the second state via full faith and credit. Cf. Posnak, Choice of Law: A Very Well-Curried Leflar Approach, 34 MERCER L. REV. 731, 738-41, 745, 751-60, 775-76 (1983) (due process or full faith and credit should compel forum to apply other states' laws when no specific forum interest is served by application of own law). The type jurisdiction thus obtained over the defendant in the second state, however, is what now would be called "general jurisdiction." If the form of jurisdiction in the second state were specific, full faith and credit would have no application, because the second state would be obtaining jurisdic-
subject matter jurisdiction over foreign actions despite statutes that claim otherwise, a state also should be forced to recognize that it must allow jurisdictional claims that its short-arm statute unequivocally purports to cut off. Both situations discriminate impermissibly against plaintiffs with potentially valid claims.

Additional support for the unconstitutionality of the short-arm statute comes from *Truax v. Corrigan*, a labor case which held that Arizona constitutionally was not permitted to deny an employer access to injunctive relief against striking workers, even though an Arizona statute expressly denied this remedy for disputes between employers and employees. In declaring the door-closing statute unconstitutional, the Supreme Court reasoned that Arizona could not create in its constitution courts capable of granting equitable relief in general and then legislatively deny access to those courts based solely on the parties'

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180 The late Professor Brainerd Currie approached the Hughes situation consistently with the main thesis of this Comment. According to Currie, the decisions in Hughes and United Air Lines were supportable not by application of the full faith and credit clause, but by application of the equal protection clause. See B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS 283-360 and 575-76 (1963). Currie believed the forum state in neither case was compelled to apply the law of the foreign state, but was free to apply its own law to the controversies. *Id.* at 283-330, 350. States in these cases were compelled to hear actions based on foreign facts because withdrawal of authority to hear the actions would have discriminated against plaintiffs in the forum state who were entitled to the benefits of forum law. *Id.* at 290-311. Whether or not Currie's views are a correct interpretation of Broderick, Hughes and United Air Lines, they apply with full force to the discrimination against forum plaintiffs inherent in a short-arm statute. For additional interpretations and applications of these three cases, see Brillmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 Va. L. Rev. 819 (1983); Leathers, *Dimensions of the Constitutional Obligation to Provide a Forum*, 62 Ky. L.J. 1 (1973-74).

181 257 U.S. 312 (1921).

182 The former workers were waging an effective campaign of libel and intimidation that was about to put the restaurant owner involved out of business. *Id.* at 325-29. The Arizona door-closing statute is described at *id.* 322.
employer-employee status.\textsuperscript{183} Such discrimination violated the fourteenth amendment's equal protection clause.

It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction.\textsuperscript{184}

States similarly should be prohibited from removing access to their courts to plaintiffs who otherwise have valid substantive law based actions. Such short-arm statutes must be deemed unconstitutional.\textsuperscript{185}

\textsuperscript{183} The necessary and resulting effect of these provisions . . . is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiff's business and property in any kind of controversy which was not a dispute between employer and former employees.\textsuperscript{Id.} at 331. This specific \textit{Truax} holding has been modified by the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101-15 (1970), which eliminates federal jurisdiction to issue an injunction in a labor dispute, \textit{id.} at § 107, until after a hearing has determined certain specific facts and need. See\textsuperscript{Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938).}

The \textit{Truax} Court saw removal of jurisdiction in this class of cases as arbitrary, because it discerned no permissible basis on which a legislature could distinguish between employers and other citizens. The \textit{Truax} decision is thus based on equal protection rationale, see infra text accompanying note 184, and that logic still applies with full force to this Comment's short-arm argument. Whereas a state today may have a defensible basis for discriminating between employers and other citizens, no legitimate state policy is furthered rationally by discriminating against plaintiffs based on defendant location. See\textit{ supra} notes 167-71 and accompanying text.

\textsuperscript{184} 257 U.S. at 334.

\textsuperscript{185} The Court has shown willingness in three recent decisions to use the equal protection clause to overturn state discrimination in nonsuspect classification areas. See\textsuperscript{Metropolitan Life Ins. v. Ward, 470 U.S. 869 (1985) (no legitimate state purpose furthered by discriminatory taxing statute); Williams v. Vermont, 472 U.S. 14 (1985) (impermisssible discrimination against non-residents who failed to receive tax credit for out-of-state use tax when later became residents); Logan v. Zimmerman Brush Co., 455 U.S. 422, 438-44 (1982) (no legitimate state purpose served by cutting off claims delayed in processing).}

\textit{Logan}'s separate and concurring opinions argued that, under an equal protection rationale, the state was forbidden to divide claimants with valid claims into two groups—
III. SOME FINAL THOUGHTS REGARDING STATE SOVEREIGNTY AND CHOICE OF LAWS

A. Sovereignty and Forum Non Conveniens

If a state is not permitted to close its doors to plaintiffs except by even-handedly adjusting its substantive law, and if the due process clause protects individual liberty interests rather than state sovereignty, how can a state prevent forum shopping within its borders? The problem is brought into focus by adjusting the facts of the former Indiana/Kentucky/Ohio hypothetical. Assume as before that an Evansville, Indiana defendant is involved in an auto accident in Columbus, Ohio with a Shelbyville, Kentucky resident. But assume this time that both parties later take a four month Hawaii vacation and desire to have their Ohio accident adjudicated in a Hawaii court. If the defendant makes no jurisdictional objection, can the two parties force Hawaii to use its judicial resources to hear a claim with which it "has no contacts, ties, or relations" and in which it has no interest?

The answer is found in modification of the forum non conveniens doctrine. The concerns of forum non conveniens

those that could recover, and those that could not—based on the length of time it took the Illinois Fair Employment Practices Commission to process their claims. *Id.* at 438-39, 443-44. This arbitrary method of "terminating potentially meritorious claims" was completely unrelated to the claims' merits. *Id.* at 439-40. This *Logan* logic could be applied to the classificatory scheme of a short-arm statute, which, to borrow Justice Blackmun's words, "converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its [claim-denying] classification." *Id.* at 442.

1 See *supra* notes 169-70 and accompanying text.
2 See *supra* notes 61-68 and accompanying text.
3 See *supra* notes 54-60 and accompanying text.
4 The Hawaii hypothetical may not seem a very credible possibility, but the procedural effect is the same when the forum, for whatever reason, has no defendant objections before it. From the forum's point of view, the same problem would be presented if defendant failed to appear or if he made jurisdictional objections late or in improper form.
explicitly include the burdens placed not only on the defendant but also on the court. Because these burdens are distinct from the burdens of inconvenience that might cause a defendant to seek forum non conveniens dismissal, someone other than the defendant should be able to assert them, i.e., the burdened state. Unlike the situation for personal jurisdiction, in the forum non conveniens theory there is a true sovereignty component which should be given valid expression. Courts should recognize a forum non conveniens doctrine that permits dismissal upon the initiative of the court, much as the court is required to dismiss for lack of subject matter jurisdiction. Such dismissal would be appropriate in situations such as the above Hawaii

192 454 U.S. at 249 ("Under Gilbert, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." (emphasis added)).

193 In Reyno, after discussing factors that would be of primary importance to the defendants in seeking forum non conveniens dismissal, [the District Court concluded that the relevant public interests also pointed strongly towards dismissal. The court determined that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania. As a result, "trial in this forum would be hopelessly complex and confusing for a jury." . . . In addition, the court noted that it was unfamiliar with Scottish law and thus would have to rely upon experts from that country. The court also found that the trial would be enormously costly and time-consuming; that it would be unfair to burden citizens with jury duty when the middle district of Pennsylvania has little connection with the controversy; and that Scotland has a substantial interest in the outcome of the litigation. 454 U.S. at 243-44 (emphasis added). See also id. at 259-61 (Court approved District Court's weighing of above public interests).

194 See supra notes 61-68 and accompanying text.

195 See Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (e.g., Jackson, J., concurring: "Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case." Id. at 6); Currie, supra note 180, at 312, 320 (freedom of a state to invoke forum non conveniens in action between nonresidents for personal injuries inflicted elsewhere), and 356-60 ("I conclude that . . . a state [is not required] to provide a forum for causes of action predicated on the law of a sister state when the refusal to do so is grounded in good faith upon a policy of promoting the efficiency of the local courts and protecting them against abuse."). Cf. von Mehren & Trautman, supra note 3, at 1132 ("Perhaps the only way in which undesirable forum-shopping could be checked would be the enactment of legislation designed to encourage refusals of jurisdiction on forum non conveniens grounds whenever the putative forum had no substantial concern with the underlying controversy.").
hypothetical in which the state has no connection to the parties or to the litigation.

B. **Personal Jurisdiction and Choice of Laws**

If the argument of this Comment concerning the use of long-arm statutes is valid, the law that confers specific jurisdiction is also the law under which a plaintiff can sue. In most cases, then, the forum legitimately applies its own law to controversies, because the controversies involve the defendant's contacts with the forum.\(^{196}\) Jurisdictional and choice of law problems arise, however, when the litigation involves not one localized controversy but a series of transactions and occurrences across several states, some of which arguably are severable from the main

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\(^{196}\) Most of the Court's pronouncements concerning the relationship between personal jurisdiction and choice of laws have not been helpful. In numerous cases, the Court has insisted that choice of law and personal jurisdiction analyses are distinct, but has failed to clarify the differences between them. *E.g.*, Kulko v. California Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958). *Cf.* Burger King v. Rudzewicz, 471 U.S. 462, 481-82 (1985) (choice of law analysis focuses on all elements of a transaction; "minimum contacts" stage one analysis focuses only on defendant).

There may be situations in which a plaintiff could gain specific jurisdiction under forum substantive law and then convince the forum to apply nonforum law to his case, but these would be limited to situations in which the non-forum law was to be applied to only part of the claim being sued on in the forum court. *Compare, e.g.*, Carroll v. Lanza, 349 U.S. 408 (1955) (forum constitutionally permitted to apply forum compensation remedy even though only state negligence law specifically implicated) *with* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (forum need not apply same state's law to both negligence and compensation parts of claim when both are adjudicated in same forum). For a more complete discussion of the complexities involved in sorting out how/whether specific jurisdiction for one aspect of a suit entitles the forum to have jurisdiction of and/or ability to apply its law to the entire litigation, see Cox, *supra* note 8. For purposes of the argument here, however, it is enough to realize that for any *single* cause of action for which the forum has specific jurisdiction, it would be almost unimaginable for the forum to apply non-forum law. If the defendant's contacts are strongly related to the litigation and to the forum state's interest in hearing the case as expressed by its substantive law, a forum rarely would not choose to apply its own law to the controversy, and an appellate court even more rarely would not be able to see clear state interest and no defendant surprise. *See also* Hill, *supra* note 3, at 987-93 (constitutional requirements similar for long-arm jurisdiction and choice of law); Martin, *Personal Jurisdiction and Choice of Law*, 78 Mich. L. Rev. 872 (1980) ("minimum contacts" test for choice of law should be nearly same as "minimum contacts" test for jurisdiction); Silberman, *supra* note 3, at 87-89 (constitutionality of jurisdiction should be premised on court's right to apply law of its state).
controversy. When the plaintiff attempts to bring the whole suit into one state’s court, the issue becomes to what extent the plaintiff is allowed to use forum state law as a method for bringing other non-state claims into court.197

In situations in which the state court is faced with severable claims based on several states’ laws, analogy to federal court pendent and ancillary jurisdiction should prove helpful. To the extent aspects of a suit are so intertwined that “considerations of judicial economy, convenience, and fairness to litigants”198 indicate that the whole case should be heard in one action, the court would be permitted to take jurisdiction of the entire case, applying foreign law to foreign claims.199 As with federal pendent

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197 Under a territorial sovereignty framework the problem was not as prominent as it should be under “minimum contacts” analysis. Since Pennoyer jurisdiction once obtained was plenary, there was no need to explore the extent of a defendant’s potential liability as a result of physical presence within the jurisdiction. Although jurisdiction could be invalidated if obtained by fraud of deception, see, e.g., Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937); Terlizzi v. Brodie, 329 N.Y.S.2d 589 (N.Y. App. Div. 1972); Tickle v. Barton, 95 S.E.2d 427 (W.Va. 1956), and although jurisdictional immunity might be granted to witnesses or parties in the interest of justice, see, e.g., Annot., 40 A.L.R. 93 (1926) (immunity of nonresident criminal defendant from service of process), these exceptions to full physical power jurisdiction were narrow. Conversely, the possibility of joinder of other parties involved in the same claim was limited by the extent to which the other parties were within the physical territory of the jurisdiction, and therefore multi-state joinder was infrequent. The threshold jurisdictional question under a territorial framework was whether the party could be brought before the court, not whether the claim involving the party could be heard.

Under a “minimum contacts” specific jurisdiction analysis, however, jurisdiction is always limited, see supra note 37 and accompanying text, and the jurisdictional inquiry is tied to the forum state’s interest in the litigation. See supra note 93. Therefore, whenever a plaintiff brings to a forum a forum substantive law based claim involving related claims for which specific jurisdiction would be obtainable under foreign state substantive law, the issue should always arise whether the forum has authority to hear the related claim. For more detailed discussion of these issues, see Cox, supra note 8.

198 United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Gibbs is the preeminent modern era Court case on pendent jurisdiction. Pendent jurisdiction involves the joinder of a state law claim to a federal question claim, while ancillary jurisdiction involves the joinder of a claim that could not independently be brought in federal court to a claim validly before the federal court. Regarding power to hear such claims, however, the issues raised by both pendent and ancillary jurisdiction are nearly identical. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) (“two species” of same problem; Gibbs standards apply to both).

199 In the federal pendent/ancillary context, although the Court has emphasized that the limited nature of federal jurisdiction precludes the taking of certain claims, the limitation appears to be statutory and policy based rather than strictly constitutional,
jurisdiction, however, when "it appears that the [foreign] state issues substantially predominate," those aspects of the case should be dismissed to the appropriate state court, or the whole action should be stayed, on the theory that the foreign jurisdiction more properly would be the place to resolve the entire controversy.\textsuperscript{201}

CONCLUSION

The most recent United States Supreme Court personal jurisdiction decisions show that the Court has more fully realized the extent to which a territorial sovereignty framework is inconsistent with jurisdiction based solely on "minimum contacts." By recognizing specific jurisdiction as the usual and preferred mode of contacts jurisdiction,\textsuperscript{202} by abandoning sovereignty as an independent counter-weight to defendants' litigation-related contacts,\textsuperscript{203} and by developing a two stage test for determining reasonableness of defense in any particular forum,\textsuperscript{204} the Burger Court established a cleaner theoretical framework in which more clear and predictable future pronouncements concerning personal jurisdiction can be made. The recent \textit{Asahi Metal} decision continues to apply the Burger (King) framework, albeit with disagreement among the Justices about what contacts satisfy \textit{Burger}

\textsuperscript{202} see 437 U.S. at 371 & n.10, 378-79, 382, with focus upon balancing interests rather than on infringement of state created rights. Even in Aldinger v. Howard, 427 U.S. 1 (1976), in which the Court refused to adopt the doctrine of pendent party jurisdiction on the facts before it, the Court was careful to point out that other situations might exist where "the argument of judicial economy and convenience" could "be coupled with the additional argument that only in a federal court may all of the claims be tried together," and that pendent party jurisdiction might be appropriate in such a case. \textit{Id.} at 18. State courts, even if they were seen as limited in their ability to hear claims which arose under another state's laws, would still be able to apply the same judicial economy interests and the same balancing analysis when normal specific jurisdiction analysis would not enable them to reach all elements of the case before them.

\textsuperscript{203} 383 U.S. at 726-27 (word inserted).

\textsuperscript{204} Cf. Hazard, \textit{Interstate Venue}, 74 Nw. U.L. Rev. 711, 716-17, 720 (1979) (jurisdictional theory should use venue rules to grant jurisdiction of complicated multistate cases rather than allow litigation to be handled piecemeal).

\textsuperscript{205} See supra notes 32-39 and accompanying text.

\textsuperscript{206} See supra notes 41-68 and accompanying text.

\textsuperscript{207} See supra notes 69-85 and accompanying text.
King’s stage one threshold. If this Comment’s argument concerning long-arm statutes is valid, however, the Rehnquist Court must houseclean still further before the Hubbardish clutter of Pennoyer yields completely to the sleek simplicity of International Shoe. And as the brief speculations of Part III further indicate, for the International Shoe “minimum contacts” test to completely take hold will require adjustments in other closely related areas of the law. A jurisdictional theory based solely on contacts will force commentators, courts, and states to reanswer very basic questions regarding the basis under which states adjudicate within a federal system.

Stanley E. Cox

205 See infra note 8 and accompanying text. The Asahi case is given full treatment in the article there cited. The author’s primary argument is that the Court, if it had focused on choice of law and personal jurisdiction questions simultaneously, could have produced a less divided and confused decision. While the Asahi holding, denial of jurisdiction, was correct, the decision was an opportunity missed to clarify personal jurisdiction’s interrelatedness to choice of law.